[Skip to main content](https://archive.org/stream/challisslawofrea00chaliala/challisslawofrea00chaliala_djvu.txt" \l "maincontent)

[Upload](https://archive.org/create)

[Sign up](https://archive.org/account/signup) | [Log in](https://archive.org/account/login)

[Books](https://archive.org/details/texts) [Video](https://archive.org/details/movies) [Audio](https://archive.org/details/audio) [Software](https://archive.org/details/software)

[Images](https://archive.org/details/image)

* [Sign up for free](https://archive.org/account/signup)
* [Log in](https://archive.org/account/login)

Search metadata Search text contents Search TV news captions Search radio transcripts Search archived web sites [Advanced Search](https://archive.org/advancedsearch.php)

* [About](https://archive.org/about/)
* [Blog](https://blog.archive.org/)
* [Projects](https://archive.org/projects/)
* [Help](https://archive.org/about/faqs.php)
* [Donate](https://archive.org/donate?origin=iawww-TopNavDonateButton)

* [Contact](https://archive.org/about/contact.php)
* [Jobs](https://archive.org/about/jobs.php)
* [Volunteer](https://archive.org/about/volunteerpositions.php)
* [People](https://archive.org/about/bios.php)

# Full text of "[Challis's Law of real property: chiefly in relation to conveyancing](https://archive.org/details/challisslawofrea00chaliala)"

## [See other formats](https://archive.org/details/challisslawofrea00chaliala)

^i'rhri-r^ft¥lfl-/M.'y>'/r\*AVftrt>-'n't'iir^n': \

U^U

From Cal. Law Book Ex

130 McAhister St., S.F,

T

.A

THE LIBRARY

OF

THE UNIVERSITY

OF CALIFORNIA

LOS ANGELES

SCHOOL OF LAW

Vij,^ ^u3l

Q^

/«

Digitized by the Internet Archive

in 2007 with funding from

IVIicrosoft Corporation

http://www.archive.org/details/challisslawofreaOOchaliala

THE

LAW OF REAL PEOPERTY.

BUTTERWORTHS'

STANDARD LAW BOOK SERIES.

No. 1. — Chaster^s Law Relating to Public OflBcers

Haviii); Executive Authority. By A. W. Chaster, LL.B. (Loud.). Barrister-

•t-Law. Iloyal 8vo, 900 paged. Price 37\*. Gd. ; for cash, i)0»t free, 30». 'd. 1909

" It is a work tiiat will at once take its place as a standard book of

reference." — Law Notes.

No. 2. — Hamilton's Company Law.

Tliird edition. By W. F. IIamilto.v, K.C, LL.D. (Lond.). Royal Svo,

790 iiages. Price 21s. ; for cash, post free, 17». lit. 1010

The aim of the Author has been to comprise within a reasonable

compa.ss the whole of the law relating to companies.

No. 3.— Grant's Bankers and Banking Companies,

Including Notes and Cases decided in the Canadian Courts, and an Appendix

containing the most imi>ortant English and Canadian iitatutes in force

relating thereto. Sixth edition. By A. M. Lanodon, K.C, M.A., B.C.L.,

and Herbkkt Jacobs, B.A., Barrister-at-Law ; assisted by A. C. Forstkk

BovLTiiN, Barrister-at-Law. With a Chapter on Goods and Documents of

Title to Gootls, by David C. Leck, Barrister-at-Law ; and Canadian Notes,

by A. C. FoRSTER Boui.ton, of the Canadian Bar. Royal Svo. Pages 105 +

915 + 62. Price 35s. ; for cash, post free, 28\*. 7rf. 1910

No. i. — Fisher's Law of Mortgage.

The l,aw of Morf gag<- and oilier Securities upon Projwrty. By W. H. Fisher,

of Lincoln's Inn, Barrister-at-I^iw. Sixth edition by Artiuk Unukriiili.,

M.A., LL.D., of Lincoln's Inn, one of the Coiiveyancin^t Counsel of the

Court. Royal Svo. Pages 188 + 1028 + lt>2. In two editions, on thick or

thin i»aper. Price 52ji. (k/. ; for cash, iK»st free, 4i>. ikl. 1910

No. 5.— Challis's Real Property. ion

No. 6.— Combe's Law of Light.

Being a Comprelieiisive treatment of the Law relating to Light. By R. G.

Nicholson Combe, Barrister-at-Law. Royal Svo. Price 25». ; for cash, post

free, 20s. Od, 1911

BUTTERWORTH & Co., 11 & 12, Bell Yard. Temple Bar.

CHALLIS'S

LAW OF HEAL PROPEnY:

CHIEFLY IN RELATION TO CONVEYANCING.

THIRD EDITION

BY

CHARLES S WEET.

OF LINCOLN'S INN, BARRISTER-AT-LAW.

LONDON :

BUTTEEWOETH & CO., 11 & 12, Bell Yard, Temple Bar.

Xavv publisbcrs.

Sydney :

BUTTEKWORTH & Co. (Australia), Ltd.,

76, Elizabeth Street.

Calcutta :

BUTTERWOBTH & Co. (India), Ltd.,

8/2, llastiugs Street.

1911.

EDITOK OF PREYIOUS EDITIONS.

First Edition by H. W, Challis, Barri^ter-at-Law.

Second „ „ v

T

[DBDICATION PREFIXED TO THE SECOND EDITION.]

TO

Walter Blackett Treyelyan, Esq,

BABBISTEB-AT-LAW,

ONE OF THE MASTERS OF THE BENCH OF THE HONOURABLE

SOCIETY OF THE MIDDLE TEMPLE.

My dear Mr. Trevelyan,

To you I dedicate thu edition, in admiration of thai

incomjjarahle learning, which is always at tlie sei'rice of your

friends. My hook could meet ivith no more formidable

critic : it mil assuredly meet with none mor^ candid and

considerate.

With the greatest respect, and most affectionate regard,

I remain.

Sincerely yours,

II. W. CHALLIS.

6Sil'

EDITOR'S PREFACE TO THE THIRD

EDITION.

In this Edition Mr. Challis's text and notes have been reprinted

verbatim from the Second Edition. Such additions and comments

as the Editor has thought it desirable to make are enclosed in

square brackets. Mr. Challis occasionally used square brackets

to mark additions or corrections made by him in passages cited

from judgments or text-books, but the reader will have no

difficulty in distinguishing these from the additions made by

the Editor.

Following Mr. Challis's example, the Editor has abstained

from overloading the book with modern authorities, and has

only referred to the opinions of text-writers or to judicial

decisions in cases where questions of principle seemed to be

involved.

It will be seen that in some instances the Editor has ventured

to express dissent from the views held by Mr. Challis, especially

with reference to the true nature of incorporeal hereditaments,

easements, New Eiver shares, and titles of honour ; with refer-

ence to the origin of the rule in Whitby v. Mitchell ; with

reference to the point decided in the Squatter's Case (Agency

Company v. Short) ; and with reference to the question whether

the lands of a corporation revert to the donor on its dissolution

— a point not without practical importance, as is shown by the

case of Hastings Corporation v. Letton. This decision cannot, as

the Editor ventures to think, be supported on the grounds given

for it (see p. 468). What rule of law was applicable to the case

it is perhaps not easy to say, having regard to the fact that the

lease was an onerous one, and that the Crown made no claim to it.

Since the publication of the second edition, the views expressed

by Mr. Challis on the question whether the Eule against

Perpetuities applies to certain common law interests which were

VIU EDITOR B PREFACE TO THE THIRD EDITION.

recognised as valid long before the Rule was invented, have been

dissented from in two elaborate judgments — that of Byrne, J., in

Re Ilollis Hospital and Ilaf/iir, where the Rule was held to apply

to a right of entry for condition broken ; and that of Farwell, J.,

in Re Ashforth, where the Rule was held to apj^ly to a legal

contingent remainder, or what was assumed to be a legal con-

tingent remainder. In default of a better champion, the Editor

has ventured to defend Mr. Challis's contentions, and although,

in the face of the two decisions above referred to, this may seem

a difficult, not to say a hopeless, undertaking, the Editor has

the consolation of knowing that if he is wrong he errs in good

company, for the Real Property Commisbioners were of the

same opinion on both points, and with respect to the question

of contingent remainders, the view held by Mr. Challis is

supported not only by the opinion of the Real Property Commis-

sioners, but by that of almost all the most eminent real property

lawyers of the last two generations, including Mr. Fearne, Lord

St. Leonards, and Mr. Joshua Williams. The Editor has also

endeavoured to support Mr. Challis's opinion that the decision

of Chitty, J., in Re Rivett-Carnac's Will, is erroneous (see p. 471).

Lincoln's Inn,

January, 1911.

AUTHOK'S PEEFACE TO THE SECOND

EDITION.

The present Edition is somewhat more worthy of the

kind reception which was accorded to the first, and the

Author ventures to hope that it will be found a trust-

worthy guide to the fundamental principles of Keal

Property Law. His very sincere thanks are due to his

friend Mr. H. A. Colmore Dunn, of Lincoln's Inn, who

has taken upon himself the greater part of the labour

of seeing it through the Press.

Since the publication of the First Edition, several

cases have occurred to illustrate Lord Coke's remark,

that no point of learning is incapable of affording

practical assistance.

But a distinction in this respect is to be drawn

between things that are truly obsolete and things that

are merely not generally known. In the following

pages, though some brief allusion is made to matters,

such as frank-marriage, which never occur in modern

practice, and to others, such as the law of warranty,

which serve only to illustrate the historical basis of

some branch of law, yet it is believed that little will

be found which is not capable, in Lord Coke's words,

of standing our student in stead at one time or another.

11, Stone Buildings, Lincoln's Inn,

February, 1892.

PKEFACE

TO THE FIRST EDITION.

In its earliest shape this work was prefixed to a work on the

Conveyancing and Settled Land Acts, published by the Author

in conjunction with his friend Mr. H. J. Hood. Though it has

been so greatly enlarged that it might almost seem to be a new

work, its original plan has been retained ; and much of the matter

contained in the newly-added chapters, is an expanded and

completed version of detached remarks upon the same subjects

contained in the last edition. The following chapters are entirely

novel : — Chapter XL on the Rules of Limitation at Common

Law ; Chapter XIII. on the Rule in Shelley's Case ; Chapter XVI.

on the Descent of a Fee Simple ; and Chapter XXV. on Con-

current Ownership.

The Author is indebted to his friend Mr. W. R. Sheldon, of

Lincoln's Inn, for the General Index at the end of the work.\*

A good many additional references, chiefly to the serial reports,

will be found in the Table of Cases. The new series of the Law

Journal Reports and Law Times Reports are cited without any

addition. The new series of the Jurist is indicated by the addition

of " N. S."

It is hoped that the Report of the case of Witham v. Vane,

before the House of Lords, which is given in the Appendix, will

be found of interest to the profession.

To the attention of any reader who may be inclined to think

that these pages are cumbered with an overdose of archaic learn-

ing, the Author would commend the lesson to be learned from

\* Mr. Sheldon is in no way responsible for any defects which may be found in

the General Index to the Second Edition. [The Editor is responsible for the Index

to the present Edition.]

Xll PBBFACB TO THE FIRST EDITION.

the case of Blake v. Hynes, referred to at p. 227\* of this work.

That the recondite question there discussed should, after some

centuries of oblivion, have emerged into practical importance in

the year 1884, affords as striking a confirmation as could be

desired of the truth of Lord Coke's remark : — " There is no

"knowledge, case, or point in law, seeme it of never so little

" account, but will stand our student in stead at one time or

"other, and therefore in reading nothing to be pretermitted."

(Co. Litt. 9 a.)

In the Preface to his Essay on Estates, Preston speaks of the

" inconceivable labour " which that work had cost him. If the

present writer had never attempted to grapple with kindred sub-

jects, he would never have understood the significance of those

words. He will, therefore, have the less right to complain, if his

readers should skim lightly over his sentences with small thought

of the pains it cost to frame them.

2, Stoke Buildings, Lincoln's Inn,

Igt February, 1885.

• [Now p. 284.]

( xiii )

TABLE OF CONTENTS,

— ♦

PAGE

Dedication v

Editor's Preface to the Third Edition ----- vii

Author's Preface to the Second Edition - . - . ix

Preface to the First Edition xi

Table of Contents - . - xiii

Table op Statutes - xix

Table op Cases xxiii

List op Text-Books cited xxxix

Addenda et Corrigenda. - - x\v

— ♦ —

INTRODUCTORY REMARKS 1

Part I.-ON TENURE.

Chapter I.

Tenure by the Common Law 4—17

Chapter II.

The Statute of Quia Emptores 18 — 22

Chapter III.

The Statute 12 Car. 2, c. 24 - - - - - - 23—24

Chapter IV.

Tenure by Custom of the Manor (Copyhold Tenure) - - 25 — 28

XIV TABLE OF CONTENTS.

Chapter V.

PAGE

Copyhold Tenure by the Custom of Ancient Demesne

(CusToM.vnY FnEEHoi.m) 29 — 32

Chapter VI.

Escheat 33—40

Forfeiture for High Treason ...--. 37

The relation of Escheat to Incorporeal Hereditaments

and Equitable Estates - - - - - - 37

Part II.-ON ESTATES IN GENERAL.

Chapter VII.

Of the Subjects in which Estates may Subsist - - - 41 — 58

Note on Corporeal and Incorporeal Hereditaments by the

Editor 48—58

Chapter VTII.

Of Estates at the Common Law - 59 — 66

Chapter IX.

On the Derivation AND Succession OF Estates - - - 67 — 85

Original Estates and Derivative Estates . . . . 68

On the Terms Vested, Contingent, and Executory - - 74

Remainders and Reveraions ...... 77

Possibility of Reverter - - . . . . . 82

Chapter X.

Merger 86 — 97

Estates ni autre droit - - - - . 92

Of Estates Tail and Rase Fees 93

The Modem Law of Merger, and Merger in Equity - - 94

TABLE OF CONTENTS. XV

Chapter XI.

PAGE

Rules OP Limitation AT Common Law - - - - 98 — 118

Chapter XII.

Contingent Remainders 119 — 151

First Class of Contingent Remainders - - - - 126

Second Class of Contingent Remainders - - - - 127

Third Class of Contingent Remainders - - - - 128

Exception from the Third Class - - - - - 129

Fourth Class of Contingent Remainders - - - - 131

Exceptions from the Fourth Class - - - - - 132

Further Remarks on the Liability to Destruction - - 135

Trustees to Preserve Contingent Remainders - - - 142

Chapter XIII.

The Rule IN Shelley's- Case 152 — 167

TheStatement ofthe Rule 162

Chapter XIV.

Executory Limitations 168 — 217

The Rule against Perpetuities - - - - - - 180

Restrictions upon Trusts, or Directions, for Accumulation

of Income (the Thellusson Act) ----- 200

Notes by the Editor :

I. The Rule against Perpetuities - - - 205 — 207

II. Re IloUis' Hospital and Hague - - - - 207 — 213

III. He Ashforth 213—217

Part III.-THE NATURE AND QUANTUM OP

ESTATES.

Chapter XV.

Of a Fee Simple 218—229

XVI TABLE OP CONTENTS.

Chapter XVI.

PAGE

The Descent of a Fee Simi'le 230 — 250

Oh the Distinction between Seisin in Deed and Seisin in

Law 232

The Kules of Descent 237—250

Chapter XVII.

Determixable Fees 251 — 262

Examples of Determinable Fees 255

;Chapter XVIII.

Conditional Fees 263 — 268

Chapter XIX.

QuAUFiBD Fees Simple 269 — 286

Chapter XX.

Fees Tail, or Estates Tail 287—301

Classification of Estates Tail 290

Tenant in Tail after Possibility of Issue Extinct - - 291

The Limitation of Estates Tail 292

Chapter XXI.

The Alienation of Fees Tail 302 — 324

The Protector of the Settlement under the Fines and

Recoveries Act - - - - - - - - 316

Assurances not operating under the Act, and Assurances

by way of Mortgage 321

Modem Statutory Powers 323

Chapter XXIL

Base Fees 325—338

List of Base Fees 326

Enlargement of Base Fees 335

TABLE OF CONTENTS. XVll

Chapter XXIII.

PAGE

An Estate for the Life of the Tenant - - - 339 — 355

Curtesy 342

Dower 345

Statutory Powers 348

Chapter XXIV.

Estates pur Autre Vie - - - - - - 356 — 363

Chapter XXV.

Of Concurrent Ownership 364 — 379

(1) Joint Tenancy -------- 365

(2) Tenancy in Common ..-.-- 368

(3) Coparcenary - - - - - - -. - 373

(4) Tenancy by Entireties 376

— »

Part IV -ON ASSURANCES.

Chapter XXVI.

Assurances in General ------- 380

Chapter XXVII.

Of Fines and Recoveries 393

Chapter XXVIII.

Of a Feoffment 397

Chapter XXIX.

Of a Release 409

Chapter XXX.

Of A Statutory Grant 41 1

Note by the Editor on the Operation of Sect. 2 of the Real

Property Act, 1845 415

C.R.P. ^

Xviil TAIH.E OF CONTENTS.

Chapter XXXI.

PAOB

Op Assubancbs by Way of Usb without Transmutation of

Possession 419

APPENDICES.

Appendix I.— Are Leaseholds Tenements 1 - - - - 42 1

II. — On Remainders after Conditional Fees - - 428

III.— The Squatter's Case 433

IV. — Determinable Fees 437

V. — With am v. Vane 440

VI. — Additional Notes by the Editor :

Elscheat upon the Dissolution of a Corporation 467

Dignities and Titles of Honour - - - 468

Rule against Perpetuities - - - - 472

Effect of Modern Legislation on the Law of

Curtesy 474

Seisin 475

GENERAL INDEX - - 477

( xix )

TABLE OF STATUTES.

PAGE

9 Hen. 3, c. 31. {Magna Carta) . . .... 4, 19, 20, 21

52 Hen. 3, c. 6. (Statute of Marlebridge) 167

6 Edw. 1. (Statute of Gloucester) ... 7, 19, 64, 98, 425, 426

13 Edw. 1. (Statute of Westminster 2) —

c. 1. iDe Bonis CondUionalihus) . 13, 27, 43, 47, 49, 60, 72, 84, 85,

89, 90, 93, 99, 196, 205, 263, 266,

281,287-289,299,300,301,304,

307, 327, 365,425, 429, 469, 470

c. 21. (^Cessavit) 19

c. 24. (Writs of Eutry) 90

c. 32. (Mortmain) 6

c. 35. (Wards) 34

18 Edw. 1. {Quia Emptores) . . . 3, 6, 11, 18-22, 33, 230, 251,

416, 437, 438

17 Edw, 2 St. 1. CJDe Prwrogaiiva Regis) 17, 21, 35

St. 2. {De Teni^ Templarlorum) 36

34 Edw. 3, c. 15 21

c. 16. (Statute of Non-Claim) 305, 306

15 Ric. 2, c. 5. 385

8 Hen. 6, c. 7. 43

I Ric. 3, c. 1. 386

c. 7. 305

4 Hen. 7, c. 24. (First Statute of Fines) . . . 178, 304, 305, 393, 396

II Hen. 7, c. 20. . 314

21 Hen. 8, c. 15 7, 64, 98

26 Hen. 8, c. 13 37, 47, 328, 470

27 Hen. 8, c. 10. (Statute of Uses) . . 70, 102, 120, 121, 168-171, 347, 369,

380, 38;;-392, 408, 409, 410, 417, 420-422, 475

27 Hen. 8, c. 16. (Statute of Inrolments) 417, 418, 421

31 Hen. 8, c. 1. 368

c. 3 15

32 Hen. 8, c. 1. l^gt^tutesof Wills) \ ^' 1"' ^^' 2^' 2^' ^^> 1^^' ^^^^ !«»'

34 & 35 Hen. 8, c. 5. / ^ ^ I 205, 227, 232, 383, 387

32 Hen. 8, c. 24 36

c. 28 72

c. 84. xlv., 81, 261

c. 32 '. . 368

c. 36. (Second Statute of Fines) . . . . 178,304,393,396

34 k 35 Hen. 8, c. 5. (Statute of Wills) ; see above under 32 Hen. 8, c. 1.

C.20 315,328

34 & 35 Hen. 8, c. 22 396

23 Eliz. c. 12. 16

43 Eliz. c. 4. . 304

21 Jac. 1, c. 19. 327

62

XX TABLE OF STATUTES.

PAGE

3CRr. l,c. iv. (Private Act) 5

12 Car. 2, c. 24. :,', .s, it, lu, lA, If,, 17, 21. 23-24, 28, 66,

219, 227, 376, 469

29 Car. 2, c. 3. (Statute of Frauds) . 79, 107, 357-362, 397, 398, 404

10 Will. 3, c. 20, or ( 140 196

lo&ii wni.3,c.i6. 1

4 Ann. c. 16 415

9 Geo. 1, c. 29. 401

9 Geo. 2, c. 36, 38, 212, 304

14 Geo. 2, c. 20 310, 313, 320, 340, 362

31 Geo. 2, c. 14 31

39 & 40 Geo. 3,0. 98. (Accumulations Act, 180<.0 200-204

54Geo. 3,c. 145 37

56 Geo. 3, c. 136 468

6 Geo. 4, c. 16. 327

11 Geo. 4 & 1 Will 4, c. 60 36

c. 65 401

3 & 4 Will. 4, c. 27. (Real Property Limitation Act, 1833) . 64, 150, 308, 337,

393, 407, 433-436

c. 74. (Fines and Recoveries Act, 1833) . 64, 69, 71, 72, 94, 139,

146, 148, 178, 304, 308, 313, 314, 315-323, 326,

327, 332, 333, 334-.336, 391

c. 105. (Dower Act, 1833) 150, 344, 345-348

c.106, (Inheritance Act, 1833) . . 175,232,238-245,270,279,

280, 282, 283, 375, 376

4&5Will.4,c.23 36

C.92. (Fines and Recoveries (Ireland) Act, 1834) ... 309

7 Will 4, & 1 Vict.

c. 26. (Wills Act, 1837) ...76, 85, 172, 176, 203, 214, 228, 317, 843, 362

4&5Vict. c. 21 381,382

c. 35. (Copyhold Act, 1841) 350

c. 38. (School Sites Act, 1841) 36,212

7&8Vict. c. 76 138,141,381,382

8 & 9 Vict, c 106. (Real Property Act, 1845), s. 1 141

s. 2 48, 51, 102, 107, 381, 382, 387, 392, 411, 413, 415-418

8.3 79,375,398,401,402,404

8. 4 139, 150, 402, 405

s. 6 77, 104, 109, 176

8. 8 ... 101, 110, 136, 138, 142-144, 147, 149

c. 119 384

c. 124 384

11 &; 12 Vict. c. 36. (Entail Amendment Act, 1848) 204

13 & 14 Vict. c. 21. (Lord Brougham's Act) . . . . .41,427

c. 60 36

14 & 15 Vict. c. 83 ' 319

15 & 16 Vict. c. 51. (Copyhold Act, 1852) 350

c. 87 319

16il7Vict.c. 137. (Charitable Trusts Act, 1853) 321

19&20Vict. c. 120 73

22 & 23 Vict. c. 35. (Law of Property Amendment Act, 1859) . 81, 238, 243,

247, 249, 270, 271, 279, 282-284

23 k 24 Vict. c. 145 383

24 Vict. c. 9. 212

31 k 32 Vict. c. 40. (Partition Act, 1868) 368

33 4:31 Vict. c. 14. (Naturalization Act, 1870) 329

TABLE OF STATUTES. XXI

PAGE

33 & 34 Vict. c. 23. (Forfeiture Act, 1870) . . .35, 37, 289, 328, 357, 469

36 & 37 Vict. c. 66. (Supreme Court of Judicature Act, 1873) . 45, 57, 59, 92,

94, 319

37 & 38 Vict. c. 57. (Real Property Limitation Act, 1874) . . . 337, 433

c. 78. (Vendor and I'urcliaser Act, 1874) .

38 k 39 Vict. c. 77. (Supreme Court of Judicature Act, 1875)

c. 87. (Land Transfer Act, 1875).

39 & 40 Vict. c. 17. (Partition Act, 1876) ....

40 & 41 Vict. c. 18. (Settled Estates Act, 1877)

c. 33. (Contingent Remainders Act, 1877) .

. 321

. 45, 59, 94

xlv., 31, 321, 384

. 368

. 323, 348

101, 110, 122, 141,

149, 199

44 & 45 Vict. c. 41. (Conveyancing and Law of Property Act, 1881) . 3,32,36,

71, 81, 179, 221, 223, 224, 261, 287, 297, 325, 333,

342, 365, 373, 382, 383, 384, 471-472

45 & 46 Vict. c. 38. (Settled Land Act, 1882) . 55, 56, 70, 73, 113, 146, 194, 224,

262, 314, 323, 324, 345, 348-355, 356

c. 39. (Conveyancing Act, 1882) . . 71, 178, 179, 224, 333

c. 75. (Married Women's Property Act, 1882) . 319, 344, 366, 378,

379, 474

46 & 47 Vict. c. 52. (Bankruptcy Act, 1883) 337

47 & 48 Vict. c. 18. (Settled Land Act, 1884) 345, 348, 349

c. 61. (Supreme Court of Judicature Act, 1884) . . . .338

c. 71. (Intestates Estates Act, 1884) .... 37-40, 48

51 & 52 Vict. c. 42. (Mortmain and Charitable Uses Act, 1888) . . 38, 212

52 & 53 Vict. c. 63. (Interpretation Act, 1889) 42, 427

53 Vict. c. 5. (Lunacy Act, 1890) 319

53 & 54 Vict. c. 29. (Intestates' Estates Act, 1890) 238

c. 69. (Settled Land Act, 1890) ' 349-353

54 & 55 Vict. c. 73. (Mortmain and Charitable Uses Act, 1891) ... 38

55 & 56 Vict. c. 58. (Accumulations Act, 1892) 205

57 & 58 Vict. c. 46. (Copyhold Act, 1894) 350

60 & 61 Vict. c. 65. (Land Transfer Act, 1897) . . xlv., 101, 238, 384, 475

62 & 63 Vict. c. 20. (Bodies Corporate (Joint Tenancy) Act, 1899) . . .365

4 Edw. 7, c. xlviii. (New River Company's Act, 1904) 58

( xxiii )

TABLE OF CASES.

A.

PAGE

Abbiss v. Burney, Re Finch, 17 Cli. D. 211 ; 50 L. J. Ch. 318 ; 29 W. R. 449 ;

44 L. T. 267 122, 141

Ackroyd v. Smith, 10 C. B. 164 55

Adams v. Angell. 5 Ch. D. 634 ; 46 L. J. Ch. 352 ; 36 L. T. 3.34 96

V. Savage, 2 Salk. 679 ; Ld. Raym. 854 172

Agency Co. v. Short, 13 App. Cas. 793 ; 58 L. J. P. C. 4 ; 59 L. T. 677 ; 37

W. R.433 91, 433

Ailesbury (Marquis of) and Lord Iveagh, Re, [1893] 2 Ch. 345 ; 62 L. J. Ch.

713 ; 69 L. T. 101 ; 41 W. R. 644 354

Aiuslie, Re, Ainslie v. Ainslie, 33 W. R. 148 317

Allen V. Allen, 2 Dr. k War. 307 ; 4 Jr. Eq. Rep. 472 363

Altham (Lord) v. Lord Anglesea, 11 Mod. 210 ; 2 Salk. 676 ; Gilb. 16 395

Anon., 2 Mod. 7 261

Appleby, Re, Walker v. Lever, [1903] 1 Ch. 565 ; 72 L. J. Ch. 332 ; 88 L. T.

219 ; 51 W. R. 455 192

Archer's Case, or Baldwin v. Smith, 1 Rep. 66 ; Cro. Eliz. 453 ; 2 Anders. 37... 139

Ashforth, Re, Sibley v. Ashforth, [1905] 1 Ch. 535 ; 74 L. J. Ch. 361 ; 92 L. T.

534 ; 53 W. R. 328 200, 213 seq., 356

Astley V. Micklethwait, 15 Ch. D. 59 ; 28 W. R. 811 ; 43 L. T. 58 122

Atcheson v. Atcheson, 11 Beav. 485 377

Atkins V. Mountague, 1 Ch. Ca. 214 ; Case of St. Katherine's Hospital, 1 Vent.

149 ; and see Thos. Jon. 176 ; 2 Keb. 808 113, 114

Atkinson v. Baker, 4 T. R. 229 359

Atkyns v. Horde. See Doe v. Hojde.

Att.-Gen. v. Brentwood School, 3 B. & Ad. 59 ; 1 L. J. K. B. 57 46

V. Cummins, [1906] 1 Ir. R. 406 213, 258, 439

V. Heydon. See Heydon's Case.

V. Pouldcn, 3 Ha. 555 203

V. Rye, 2 Vern. 453 304

V. Shadwell, [1910] 1 Ch. 92 ; 79 L. J. Ch. 113 ; 101 L. T. 630 ; 54

S. J. 180 36, 212

Att.-Gen. of Ontario r. Mercer, 8 App. Cas. 767 : 52 L. J. C. P. 84 ; 49 L. T.

312 7

Aubin V. Daly, 4 B. & Aid. 59 47

Aveline v. Whisson, 4 Man. & G. 801 ; 12 L. J. C. P. 58 404

Aylesford, Re, 32 Ch. D. 162 472

B.

Baddeley v. Leppingweil, 3 Burr. 1533 397

Bagshaw r. Spencer, 1 Ves. sen. 142 259

Baker v. Wall, Ld. Raym. 185 „ \ 264

XXIV TABLE OF CASES.

PAGE

Baker r. Willis, Cro. Car. 476; or Dixie p. Beaumont, W.Jo. 393 332

Baldwin's Case, or Baldwin r. MarUm, 2 Uep. 23 ; Anders. 223 -113

Baldwin r. Smith. See Archer's Case.

Bankcs r. 1/5 Despenscr, 11 Sim. 508 : 318, 320

r. Small, 36 Ch. D. 716 ; 56 L. J. Ch. 832 ; 35 W. R. 765 ; 57 L. T.

292 336,338

Barber's Settled Estates, Re, 18 Ch. D. 624 ; 50 L. J. Ch. 769 ; 29 W, R. 909 ;

45 L. T. 433 178

Barton r. Tvcvcr, Cro. Eliz. 388 335

Barwick's w Berwick's Case, 5 Rep. 93 ; Serj. Moore's Rep. 393 104, 111

Basset r. Clapham, 1 P.Wms. 358 144

Bath's (Earl of) Case, Carter, 96 260

Beale r. Symonds, 16 Beav. 406 38

Beard v. Westcott, 5 B. k Aid. 801; 5 Taunt. 393 ; T. & R. 25 192

Bearpark r. Hutchinson, 7 Bing. 178 ; 4 M. & P. 818 361

Beaumont and Long. See Darbison v. Beaumont.

Beaumont's Case, 9 Rep. 138 ; 2 Inst. 681 332

Beckley v. Newland, 2 P. Wms. 182 77

Bedford's (Earl of) Case, 7 Rep. 7 113

Bell r. Holtby, L. R. 15 Eq. 178 ; 42 L. J. Ch. 266 ; 21 W.R.321 ; 28 L.T.9... 318

Bengough r. Edridge, 1 Sim. 173 181

Bennet r. Davis, 2 P. Wms. 316 344

Benson r. Scott, or Scot, 4 Mod. 251 ; Carth. 275 ; 3 Lev. 385 27

Beresford's Case, or Beresford v. Beresford, 7 Rep. 41 293

Berkeley Peerage Case, 8 H. L. C. 21 5, 469

Berry r. Berry, 7 Ch. D. 657 ; 47 L. J. Ch. 182 ; 26 W. R. 327 ; 38 L. T. 474... 122

Beverley r. Beverley, 2 Vem. 131 130

Bickley v. Bickley, L. R. 4 Eq. 216 16

Birkbeck r. Paget, 31 Beav. 403 46

Birmingham Canal Co. r. Cartwright, 11 Ch. D. 421 ; 48 L. J. Ch. 552 ; 27

W. R. 597 ; 40 L. T. 784 183, 185

Bishop of Winchester's Case, or Wright r. Wright, 2 Rep. 43 ; Serj. Moore's

Rep. 425 43

Bishop V. Fountaine, 3 Lev. 427 176

Blagrave r. Clunn, 2 Vern. 576 259

Blake v. Hynes, L. R. Ir. 11 Eq. 417 ; 11 L. R. Ir. 284 269, 283, 284

V. Peters, 1 De G. J. & S. 345 224

Blight r. HartnoU, 19 Ch. D. 294 ; 51 L. J. Ch. 162 ; 30 W. R. 513 ; 45 L. T.

524 191

Boddington v. Robinson, L. R. 10 Fxch. 270 ; 44 L. J. Ex. 223 ; 23 W. R. 925 •

33 L. T. 364 104, 108, 342, 412

Boraston's Ca.se, or Hynde t. Ambrye, 3 Rep. 19 100, 104, 130, 175

Bowen r. Lewis, 9 App. Cas. 890 164

Bowles's (Lewis) Cjise, or Bowles v. Bury, 11 Rep. 79 ; 1 Roll. Rep. 177 138

Boyce v. Manning, 2 C. & J. 334 194

Bracken's Settled Estates, Re, [1903] 1 Ch, 265 ; 72 L. J. Ch. 101 ; 87 L T

7^3 : 350

Brackenbury r. Gibbons, 2 Ch. D. 417 110 125

Brandlyn r. Ord, 1 Atk. 571 395

Brandon r. Brandon, 31 L. J. Ch. 47 ; 9 W. R. 825 ; 5 L. T. 339 97

Brewster r. Kitchin, Comb. 425 303

Brook r. Ward, Dy. 310 b, pi. 81 34

Brooke, Re, Brooke r. Brooke, [1894] 1 Ch. 43 ; 63 L. J. Ch. 159 ; 70 L. T. 71 ;

42 W. R. 186 122

TABLE OF CASES. XXV

PAGE

Brookman v. Smith, L. R. 6 Exch. 291 ; L. R. 7 Exch. 271 221

Brotlierton, Re, or Re Brotlierton and Maikham's Settled Estates, 97 L. T.

880; 98 L. T. 547; 77 L. J. Ch. 58, 373; [1907] W. N. 230; [1908]

W. N. 56 56, 350

Brown and Silby's Contract, Re, 3 Ch. D. 156 193

Brown r. Rawlins, 7 East, 409 31

Browner. Stoughton. 14 Sim. 369 ., 192

Bruce r. Marquis of Ailesbury, [1892] A. C. 356; 62 L. J. Ch. 95; 67 L. T.

490 ; 41 W. R. 318 349, 472

Brudenell r. Elwes, 1 East, 442 115

Bruerton's Case, 6 Rep. 1 20

Bryan, Re. See Godfrey v. Bryan.

Buckeridge v. Ingram, 2 Ves. 652 46

Buckhurst Peerage Case, 2 A. C. 1 470

Buckler's Case, or Buckler v. Harris, 2 Rep. 55 ; Serj. Moore's Rep. 423 ; Cro.

Eliz. 450, 585 ; 2 Anders. 29 104, 111, 341, 412

Burchett v. Durdant, 2 Vent. 311 ; Carth. 154 ; sub nom. James r. Richardson,

2 Lev. 232 132

Burgess v. Wheate, 1 W. Bl. 123 ; 1 Eden, 177 .38, 211

Burrell r. Dodd, 3 Bos. & P. 378 31

Bushby r. Dixon, 3 B. & C. 298 236

Butler V. Duckmanton, Cro. Jac. 169 409

Byng's Settled Estates, Re, [1892] 2 Ch. 219 ; 61 L. J. Ch. 511 ; 66 L. T. 754 ;

40 W. R. 457 355

C.

Cadell V. Palmer, 1 CI. & F. 372 ; 10 Bing. 140 181, 182

Cameron, Re. See Nixon v. Cameron.

Campbell r. Sandys, 1 Sch. & Lef. 281 359, 363

Capel's Case, 1 Rep. 61 ; Serj. Moore's Rep. 154 ; Gouldsb. 5 314

Capital and Counties Bank v. Rhodes, [1903] 1 Ch. 631 ; 72 L. J. Ch. 336 ; 88

L. T.255 ; 51 W. R. 470 97, 384

Cardigan (Earl of) v. Armitage, 2 B. & C. 197; 3 D. & R. 414 58

Carter v. Madgwick, 3 Lev. 339 411

Casborne or Casburne i: Scarfe, 1 Atk. 603 ; 2 Jac. & W. 194 ; 2 Eq. Ca. Ab.

728 344

Case of Perpetuities, The. See Chudleigh's Case.

Cattlin r. Brown, 11 Ha. 372 199

Chamberlayne r. Brockett, L. R. 8 Ch. 206 195

Chambers v. Kingham, 10 Ch. D. 743 ; 48 L. J. Ch. 169 ; 27 W. R. 289 ; 39

L. T. 472 92, 95

V. Taylor, 2 My. & Cr. 376 287, 291

Chaplin v. Chaplin, 3 P. Wms. 229 ; 2 Eq. Ca. Ab. 384 346

Chapman v. Pendleton. See Talbot's Case.

Chatham (Earl of) r. Tothill, 7 Bro. P. C. 4.53 192

Cheek or Clarke r. Day, or Davy, Serj. Moore's Rep. 593 ; 1 Roll. Abr. 832 ;

2 Roll. Abr. 417 222

Cherry r. Heming, 4 Exch. 631 ; 19 L. J. Ex. 63 ; 14 L. T. (0. S.) 274 404

Chester v. Willan, 2 Wms. Saund. 96 369, 382

Chesterfield's (Earl of) Case, Hard. 409 324

Chomley's Case, or Chomley v. Hanmer, 2 Rep. 50 ; Serj. Moore's Rep. 342 116

Christie v. Ovington, 1 Ch. D. 279 ; 24 W. R. 204 321

Christ's Hospital r. Grainger, 1 Mac. &;G.460. 195

XXVI TABLE OF CA8BS.

PAGE

Chudleigh's Case, ar Dillon r. Freine, or Fraine, or The Caae of Perpetuities,

1 Rep. 120; Poph. 70 ; 1 Anders. 309 52, 294

Clark r. Manning. See Matthew Manning's Case.

Clarke r. Chamberlin, 16 Ch. D. 176; 29 W.R. 415 318

r. Dayes. See Cheek r. Day.

Clayton's Case, or Clayton r. Preseuham, 5 Rep. 1 107

Clere's Case, or Parker r. Clere, 6 Rep. 17 ; Serj. Moore's Rep. 567 ; aflf. Cro.

Eliz. 877 ; Cro. Jac. 31 260

Coape r. Arnokl, 4 De G. M. & G. 574 165

Cocket f. Sheldon, Serj. Moore's Rep. 15 255, 259

Cohen r. Bayley-Worthington, [1908] A. C. 97 ; 77 L. J. Ch. 363 ; 98 L. T. 461... 318

Coler. Levingston, 1 Vent. 224 372

r.Sewell, 4 Dr. & W. 1 ; in Dom. Proc. 2 H. L. C. 186 103, 181, 199, 217

Collard r. Collanl, Poph. 47 ; tub /torn. Callard r. Callaid, Serj. Moore's Rep.

687; 2 Roll. Abr. 788 ; sub mm. Tallarde r. Tallarde, 2 Anders. 64 420

Collier v. Walters, L. R. 17 Eq. 252 214, 259

Compton (Lonl) v. Oxenden, 2 Ves. 261 96

Cooch r. Goodman, 2 Q. B. 580 404

Cook r. Gerrard, 1 Wms. Saund. 170 373

Cooper V. France, 19 L. J. Ch. 313 ; 14 Jur. 214.? 376

r. Kynoch, L. R. 7 Ch. 398 ; 41 L. J. Ch. 296 ; 20 W. R. 503 ; 26 L. T.

566 388

n Laroche, 17 Ch. D. 368 ; 29 W. R.438 191, 192

r. Macdonald, 7 Ch. D. 288 ; 47 L. J. Ch. 373 ; 26 W. R. 377 ; 38 L. T.

191 344

r. Stuart, 14 A. C. 286 ; 58 L. J. P. C. 93 ; 60 L. T. 875 189

Cope r. Earl De la Warr. L. R. 8 Ch. 982 ; 42 L. J. Ch. 870 : 29 L. T. 565 ; 22

W. R.8 471

Copestake r. Hoper, [1907] 1 Ch. 366 ; [1908] 2 Ch. 10 ; 76 L. J. Ch. 232 ; 96

L. T. 322 ilGseq.

Corbet's Case, or Corbet r. Corbet, 1 Rep. 83 ; Serj. Moore's Rep. 601 ; 2

Anders. 134 112,303

Cornish r. Cawsy, Aleyn, 75 107

Coull's Settled Estates, Re, [1905] 1 Ch. 712 ; 74 L. J. Ch. 378 ; 92 L. T. 616 ;

53 W. R. 504 355

Coventry (Mayor of) v. Att.-Gen., 7 Bro. P. C. 235 389

Cowley r. Cowley, [1901] A. C. 450 ; 70 L. J. P. 83 ; 85 L. T. 254 ; 50 W. R. 81 . 469

Cox r. Parker, 22 Beav. 168 38

Crawley r. Crawley, 7 Sim. 427 203

Crofts r. Middleton, 8 De G. M. & G. 192 ; 4 W. R. 439 ; 27 L. T. (0. S.) 114 ;

2 Jur. (N. S.) 528 77

Crowther r. Oldfield, Ld. Raym. 1225 ; Salk. 364 ; Holt, 146 30

CunliflFe r. Brancker, 3 Ch. D. 393 ; 46 L. J. Ch. 128 ; 35 L. T. 578,. .110, 122, 141, 188

Cunningham r. Moody, 1 Ves. sen. 174 344

and Frayling, Re, [1891] 2 Ch. 567 ; 60 L. J. Ch. .591 ; 64 L. T.

558 ; 39 W. R. 469 321

Cunynghame's Settlement, Re, L. R. 11 E-j. 324 ; 40 L. J. Ch. 247 ; 19 W. R.

381 ; 24 L. T. 124 193

Curtis V. Lukin, 5 Beav. 147 183, 193

D.

Dale's Case. See Utty Dale's Case.

Damerell r. Protheroe, 16 L. J. Q. B. 170 17

Danby c. Danby, Rep. temp. Finch, 220 1)5

TABLE OF CASES. XXVI

PAOE

Darbison v. Beaumont, 1 P. Wms. 229 ; 2 W. Jo. 99 ; sub noin. Beaumont and

Long, 1 Eq. Ca. Ab. 214 ; in Dom. Proc. 3 Bro. P. C. 60 132

Davall V. New River Co., 3 De G. & Sm. 394 ; 38

Davies and Kent, Re, [1910] 2 Ch. 35 ; 102 L, T. 621 224, 354

Dawkins v. Lord Penrhyn, 4 App. Cas. 51 304

Dawson, Re. See Johnson v. Hill.

V. Robins, 2 C. P. D. 38 ; 46 L. J. C. P. 62 ; 25 W. R. 212 ; 35 L. T. 599... 43

Dean v. Dean, [1891] 3 Ch. 150 125

De Grey v. Richardson, 3 Atk. 469 237

Delacherois v. Delacherois, 11 H. L. C. 62 ; 10 Jur. (N. S.) 886 ; 10 L. T. 884... 21

Denn v. Gillot, 2 T. R. 431 296

Dillon V. Dillon, 1 Ball & B. 77 363

V. Freine. See Chudleigh's Case.

Dixie r. Beaumont. See Beaumont's Case.

Dixon, Re, Byram v. Tull, 42 Ch. D. 306 ; 61 L. T. 718 377, 379

Dgcwra, Re, 29 Ch. D. 693 ; 54 L. J. Ch. 1121 ; 53 L. T. 288 ; 33 W. R. 574... 321

Dodds V. Thompson, L. R. 1 C. P. 133 43

Doe i: Buinsall, 6 T. R. 30 81

r. Cafe, 7 Exch. 675 ; 21 L. J. Ex. 219 ; 19 L. T. (0. S.) 144 214

t: Clark, 5 B. & Aid. 458 300

r. Danvers, 7 East, 299 31

V. Davies, 1 Q. B. 430 ; 10 L. J. Q. B. 1G9 214

V. Dixon, 5 Ad. & E. 834 375

r. Dorvell, 5 T. R. 518 373

r. Goddard, 1 B. & C. 522 359

V. Horde, 1 Burr. 60 ; 6 Bro. P. C. 633 ; 2 Cowp. 689 405

V. Huntington, 4 East, 271 :..9, 31

v. Keen, 7 T. R. 386 234, 236

r. Luxton, 6 T. R. 289 359, 363

V. Martin, 4 T. R. 39 123

V. , 2 W. Bl. 1148 359

c. Martyn, 8 B. & C. 497 77

i: Oliver, 10 B. & C. 181 77

V. Parratt, 5 T. R. 652 .• 377

V. Passingham, 6 B. & C. 305 389, 390

V. Rivers, 7 T. R. 276 322

V. Shilson. See Goodright v. Mead.

r. Simpson d. Simpson. See Simpson v. Simpson.

V. d. White, 5 East, 162 214

r. Taylor, 5 B. & Ad. 575; 2 N. & M. 508 399

v. Thomas, 3 Man. &; Gr. 815 238

V. Wainewright, 5 T. R. 427 373

V. Whichelo, 8 T. R. 211 234, 236, 244, 322

Don's Estate, Re, 4 Drew. 194 231

Dormer c. Fortescue. See Dormer v. Parkhurst.

V. Parkhurst, 3 Atk. 135 ; 6 Bro. P. C. 351 ; Willes, 327 ; 18 Vin. Abr.

413, pi. 8 143, 144, 148

Douglas, Re. See Wood v. Douglas.

Dowman's Case, 9 Rep. 7 ; 1 Anders. 125 ; Serj. Moore's Rep. 191 395

Drybutter r. Bartholomew, 2 P. Wms. 127 46, 67

Dubber v. Trollop, Ambl. 453 ; on app. Cas. temp. Hardw. 160 222, 292

Dudson'a Contract, Re, 8 Ch. D. 628 ; 47 L. J. Ch. 680 ; 27 W. R. 179 ; 39

L. T. 182 317

XXVIU TABLE OP CASES.

PAGE

Dunn r. Flood, 25 Ch. D. 629 ; 58 L. J. Ch. 537 ; 32 W. H. 197 ; 49 L. T. 670 ;

on app. 28 Ch. D. 586 ; 54 L. J. Ch. 370 ; 33 W. K. 315 ; 52 L. T. 699 190

Dutton, Re, 4 Exch. D. 54 195

£.

Eager r Furnivall, 17 Ch. D. 115; 50 L. J. Ch. 5.37; 29 W. R. 649; 44

L. T. 464 343

Jldmontls r. Edmonds (Re Flower), 55 L. .1. Ch.200 193

Ellis r. Maxwell, 3 Bcav. 587 203

Elsam, Re, 3 B. & C. 597 303

Estwick's Case, 12 Rep. 135 4

Ethel and Mitchell's and Butler's Contract, Re, [1901] 1 Ch. 945 ; 70 L. J.Ch.

498 ; 80 L. T. 459 223

Eustace r. Scawen, Cro. Jac. 697 369

F.

Fermor's Case, or Fermor r. Smith, 3 Rep. 77 ; Jenk. 253 ; 2 Anders. 176 395

Ferrers' (Earl) Case, 2 Eden, 373 45

Festing i: Allen, 12 M. & W. 279 ; S. C. in Ch. 5 Ha. 573 125

Finch, Re. See Abbiss r. Burney.

Fitch r. Weber, 6 Ha. 145 172

Flower, Re. See Edmonds r. Edmonds.

r. Hartopp, 6 Beav. 476 189

Forbes v. Moffatt, 18 Ves. 384 96

Formby r. Barker. [1903] 2 Ch. 539; 72 L. J. Ch. 716; 89 L. T. 249 ; 51

W. R. 646 185

Forsbrook v. Forsbrook, L. R. 3 Ch. 93 ; 16 W. R. 290 115

Foye r. Hynde, 5 Vin. Abr. 63. pi. 12 82

Freeman r. West, 2 Wils. 165 108

Freke r. Lord Carbery, L. R. 16 Eq. 461 ; 21 W. R. 835 205

Freme, Re, Freme v. Logan, [1891] 3 Ch. 167 122

French's Case, 4 Rep. 31 28

Frost, Re, Frost r. Frost, 43 OJi. D. 246 117, 200, 217

Fulmerston v. Steward, Plowd. 102 ■. 389

G.

Gage r. Acton, 1 Salk. 325 92

Gallard r. Hawkins, 27 Ch. D. 298 ; 33 W. R. 31 38

Gardner r. Sheldon, Vaugh. 259 256

Garland r. Brown, 10 L. T. 292 213

Gerard r. Gerard, 1 Salk. 2.53 ; 13 Vin. Abr. 209 5

Germain in- Jerman r. Orchard, 1 Salk. 346 ; 3 Salk. 222 ; Skin. 528 ; Holt, 331 ;

12 Mod. 11 ; Freem. 500 411

Gilbertson r. Richards, 4 H. & N. 277 ; 5 H. & N. 4.53 ; 29 L. J. Ex. 213 ; 6

Jur. N. 6. 673 387

Gillard r. Cheshire Lines Committee, 32 W. R. 943 473

Glyn r. Howell, [1909] 1 Ch. 666; 78 L. J. Ch. 391 ; 100 L. T. 324; 53 S. J.

269 54

Godfrey r. Bryan, Re Bryan, 14 Ch. D. 516 ; 49 L. J. Ch. 604 ; 28 W. R. 761 ;

42 L. T. 682 377

Godwin r. Winsmore, 2 Atk. .525 346

Goodhill r. Brigham, 1 Bos. & P. 192 390

TABLE OP CASES. XXIX

PAGE

Goodier t'. Edmunds, [1893] 3 Ch. 455 ; 62 L. J. Ch.649 192

V. Johnson, 18 Ch. 1). 4il ; 51 L. J. Ch. 309 ; 30 W. K. 449 ; 45 L. T.

515 192

Goodman v. Mayor of Saltasli, 7 App. Cas. 633 ; 52 L. J. Q. B. 193 ; 31 W. R.

293 ; 48 L. T. 239 195

Goodright r. Cornish, 1 Salk. 226 ; 12 Mod. 52 ; Ld. Raym. 3 ; Holt, 227 ;

Comb. 254 119, 121

V. Mead (sometimes cited as Doe v. Shilson), 3 Burr. 1703 322

V. White, 2 W. Bl. 1010 .' 133

Goodtitle v. Burtenshaw, Fearne, Cont. Rem. App. 1 158, 287

V. Gibbs, 5 B. & C. 709 ; 4 L. J. (0. S.) K. B. 284 411

Gravenor, Re, 1 De G. & Sm. 700 320

Great Northern 'Railway r. Inland Rev. Comm., [1901] 1 Q. B, 416 ; 70 L. J.

Q. B. 336; 84 L. T. 183 185

Great Western Railway r. Swindon Railway, 22 Ch. D. 677 ; 9 App. Cas. 787 ;

53 L. J. Ch. 1075 ; 51 L. T. 798 ; .S2 W. R. 957 .56

Greet v. Greet, 5 Beav. 12:5 193

Grey t: Mannock, 2 Eden, 339 ; also cited G T. R. at p. 292 362

Griffiths V. Vere, 9 Ves. 127 203

Grute i: Locroft, Cro. Eliz. 287 377

H.

Hadfield's Case, L. R. 8 C. P. 306 ; 42 L. J. C. P. 146 ; 28 L. T. 901 ; 21 W. R.

637 476

Haggerston v. Hanbury, 5 B. & C. 101 ; 7 D. & R. 723 382

Haley r. Bannister, 4 Madd. 275 203

Hanbury t: Jenkins, [1901] 2 Ch. 401 ; 70 L. J. Ch. 730 ; 49 W. R. 615 xlv

Hanly v. Carroll, [1907] 1 Ir. R. 166 387

Hannaford r. Hannaford, L. R. 7 Q. B. 116 ; 41 L. J. Q. B. 62 ; 20 W. R. 292 ;

25 L. T. 820 373

Harris v. Jay, 4 Rep. 30 45

Haslewood v. Pope, 3 P. Wms. 322 41

Hastings Corporation v. Letton, [1908] 1 K. B. 378 ; 77 L. J, K. B. 149 ; 97

L. T. 582 36, 226, 468

Hastings (Lord) v. North Eastern Railway, [1898] 2 Ch. 674 ; [1899] 1 Ch.

656 ; [1900] App. Cas. 260 ; 68 L. J. Ch. 315 ; 80 L. T. 217 ; 69 L. J. Ch.

516 ; 82 L. T. 429 56

Hatter r. Ashe, 3 Lev. 4.38 ; Ld. Raym. 34 108

Hay V. Earl of Coventry, 3 T. R. 83 115

Haywood r. Brunswick Permanent Benetit Building Society, 8 Q. B. D. 403 ;

51 L. J. Ch. 73 ; 30 W. R. 299 ; 45 L. T. 699 185

Heasman v. Pearse, L. R. 7 Ch. 275 ; 20 W. R. 271 ; 26 L. T. 299 180

Heathersall r. Mildmay. See Mildmay's Case.

Heelis v. Blain, 18 C. B. N. S. 90 ; H. & P. 189 ; 34 L. J. C. P. 88 ; 11 L. T.

480 ; 13 W. R. 262 ; 11 Jur. (N. S.) 18 476

Hemingway r. Femandes, 13 Sim. 228 ; 12 L. J. Ch. 130 ; 7 Jur. 888 451

Heydon's Case, or Att.-Gen. v. Heydon, 3 Rep. 7 ; Serj. Moore's Rep. 128 27,

299, 300, 301

Heywood r. Smith. See Seymor's Case.

Hiatt V. Hillman, 19 W. R. 694 ; 25 L. T. 55 383

Hill V. Midland Railwav, 21 Ch. D. 143 ; 51 L. J. Ch. 774 ; 47 L. T. 225 ; 30

W. R. 774 '. 56

Hindeand Lyon, 3 Leon. 61 1^0

XXX TABLE OP CASES.

PAGE

Hopg V. Cross, Cro. Eliz. 254 104, 412

Holcroft's (Liuly) Case, 4 Rop. 3(t 45

Holdernesse (Lady) r. Maniuis of Carmarthen, 1 Bro. C. C. 377 47

Holland r. Boins or Bonis, 2 Leon. 121 ; 3 Leon. 176 389

Hollis' Hospital and Hague, Re. [1899] 2 Ch. 540; 68 L. J, Ch. 673 ; 81 L. T.

90; 47 W. R. 691 190, 207 »«fy.

Hooper r. Clark, L. R. 2 Q. B. 200 ; 8 B. & S. 150 ; 36 L. J. Q. B. 79 ; 15

W. R. 347 ; 16 L. T. 152 [Hooper v. Lane] 46

Hope r. Hope, [1892] 2 Ch. 336 ; 61 L. J. Ch. 441 ; 66 L. T. 522 ; 40 W. R.

522 345, 474

HoQgham r. Sandys, 2 Sim. 95 333

Hounsell .'. Dunning, [1902] 1 Ch. 612 ; 71 L. J. Ch. 259; 86 L. 'i^ 382 16

Howard v. Duke of Norfolk, 2 Swanst. 454 2.57

Howgate and Osborn, Re, [1902] 1 Ch. 451 ; 71 L. J. Ch. 279 ; 86 L. T. 180... 321

Hudson r. Hudson, 20 Ch. D. 406 ; 51 L. J. Ch. 455 ; 30 W. R. 487 ; 46 L. T.

93 373

Hughs r. Harrys, Cro. Car. 229 30

Humberston r. Humberston, 1 P. W. 332 ; Gilb. 128 .206

Hunt r. Bishop, 8 Exch. 675 77

r. Remnant, 9 Exch. 635 77

Hynde r. Ambrye. See Boraston's Case.

I.

Idle V. Cook, Coke or Cooke, 1 P. Wms. 70 ; 2 Salk. 620 ; Ld. Raym. 1144 ; 11

Mod. 57; Holt, 164 256

Irwin, Re, Irwin v. Parkes, [1904] 2 Ch. 752 ; 73 L. J. Ch. 832 ; 53 W. R. 200... 222

Ischam V. Morrice, Cro. Car. 109 410

J.

Jackson's Settled Estates, Re, [1902] 1 Ch. 258; 71 L. J. Ch. 154 ; 85 L. T.

625 ; 50 W. R. 235 353

Jagger r. Jagger, 25 Ch. D. 729 202

James r. Richardson. See Burchett v. Durdaut.

Jee V. Audley, 1 Cox, 324 191, 211

Jenkins v. Jones. 9 Q. B. D. 128 77

Jerman v. Orchard. See Germain v. Orchard.

John Talbot's Case. See Talbot's Case.

John r. John, [1898] 2 Ch. 573 ; 67 L. J. Ch. 616 ; 79 L. T. 362 ; 47 W. R. 52... 101

Johnston v. Hill (Re Dawson), 39 Ch. D. 155 191

Johnstone r. Hamilton, 5 GiflE. 30 38

Jones V. Davies, 7 H. & N. .507 ; 31 L. J. Exch. 116 ; 10 W. R. 464 ; 6 L. T.

442; 8 Jur. (N.S.) 592 93

V. Maggs, 9 Ha. 605 203

V. Roe, 3 T. R. 88 t/, 176

r. Watts, 43 Ch. D. 574 ; 62 L. T. 471 ; 38 W. R. 725 56

Josselyn r. Jossclyn, 9 Sim. 63 193

Jupp, Re, Jupp r. Buckwell, 39 Ch. D. 148 ; 57 L. J. Ch. 774 ; S6 W. R. 712 ;

69 L. T. 129 378, 379

K.

Keenr. Kirby, 1 Mod. 199 30

Kemp V. Westbrook, 1 Ves. sen. 278 394

TABLE OF CASES. XXXI

PAGE

Keppell V. Bailey, 2 My. k K, 517 184, 185

Keysc v. Powell, 2 E. & B. 132 ; 22 L. J. Q. B. 305 ; 17 Jur. 1052 58

King V. Dillistou, 1 Show. K. B. 83 ^ 27

Knovvles' Settled Estates, Re 27 Ch. D. 707 354

Lampet's Case, w Lampet r. Starkey, 10 Rep. 46 ; 2 Brownl. 172 77, 171

Lashmar, Re. See Moody r. Peiifold.

Lantsbery v. Collier, 2 K. & J. 709 194

Lea V. Thursby, [1904] 2 Ch. 57 ; 73 L. J. Ch. 518 ; 90 L. T. 667 97

Leach v. Jay, 9 Ch. D. 42 ; 47 L. J. Ch. 876 ; 27 W. R. 99 ; 39 L. T. 242 64, 91

Leake v. Robinson, 2 Mer. 363 191, 203

Lechmere and Lloyd, Re, 18 Ch. D. 524 ; 45 L. T. 551 110, 125

Lee's (Vincent) Case, 3 Leon. 110 92

LethieiiUier or LethcuUier v. Tracy, w Tracey, 3 Atk. 774 ; Ambl. 204 259

Lewis Bowles's Case, w Bowles v. Bury, 11 Rep. 79 ; 1 Roll, Rep. 177 138

Lewis r. Rees, 3 K. & J. 132 143

Lilford (Lord) v. Att.-Gen., L. R. 2 H. L. 63 314

Lilley v. Whitney, Dy. 272 a, pi. 30 411

Lloyd V. Carew, 1 Show. P. C. 137 181

Loddington v. Kime, 1 Salk. 224 ; Ld. Raym. 203 81

London and South Western Railway v. Gomm, 20 Ch. D. 562 ; 51 L. J. Ch. 530 ;

30 W. R. 620 ; 46 L. T. 449 183, 184, 185, 186, 187, 189, 209, 472

Long V. Beaumont. See Darbison v. Beaumont.

t: Blackall. 7 T. R. 100 182, 206, 211, 217

Longdon v. Simson, 12 Ves. 295 203

Lovell V. Lovell, 3 Atk. 11 30

Low V. Burron, 3 P. Wms. 262 358

Low Moor Co. v. Stanley Co., 33 L. T. 445; 34 L. T. 186 58

Lusher v. Banbong, Dy. 290a 260

Luttrel's Case, 4 Rep. 86 6

M.

Machil or Machell v. Clark, Clarke, or Clerk, 2 Salk. 619 ; 2 Ld. Raym. 778 ;

7 Motl. 18 322

Machu, Re, 21 Ch. D. 838 ; 30 W. R. 88? 261

Mackenzie v. Childers, 43 Ch. D. 265; 59 L. J. Ch. 188; 38 W. R. 243; 62

L. T. 98 187

Macleay, Re, L. R. 20 Eq, 186 ; 44 L. J. Ch. 441 189, 200, 209

McManus v. Cooke, 35 Ch. D. 681 ; 56 L. J. Ch. 662 ; 56 L. T. 900 ; 35 W. R.

754 56

Mallory's Case, 5 Rep. Ill 221

Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608 ; 70 L. J. Ch. 814 ; 72

L. T. 347 67

Mander v. Harris, Re March, 24 Ch. D. 222 ; 52 L. J. Ch. 680 ; 31 W. R. 885 ;

49 L. T. 168 ; on app. 27 Ch. D. 166; 32 W. R. 941 378

Mandeville's Case, Co. Litt. 26 b 298

Manning's Case. See Matthew Manning's Ca.se.

Mansell r. Mansell, 2 P. Wms. 678 ..121, 144

XXXll TABLE OF CASES.

PAGB

Marcli, Re. Sec Mandcr r. Hftrris,

Marlborough (Duke of) r. Karl (Jodolpliin, 1 Eden, 404 183

Marlborouj,'h's (I)ukc of) Blenlieim Estates, Re, 8 T. L. R, 582 324

Marquis of Winchester's Case, 3 Rep. 1 84

Marshnll r. Gingcll, 21 Ch. D. 790 ; 51 L. J. Ch. 818 ; 47 1,. T. 159 122

r. Holloway, 2 Swanst. 432 203

Martin r. Mowlin, 2 Burr. 9f,9 377

V. Strachan, Willes, 444 312

Mary Portington's Case, or Portington r. Rogers, 10 Rep. S-j ; 2 Brownl. 65,

138 — 303

Maskell and (Joldfincli's Contract, Re, [1895] 2 Ch. 525 ; 64 L. J. Ch. 678 ; 72

L. T. 836 ; 43 W. R. 620 402

Matson, Re, James r. Dickinson, [1897] 2 Ch. 509 ; 66 L. J. Ch. 695 ; 77 L.T.

69 1 376

Matthew Manning's Case, or Clark r. Manning, 8 Rep. 94 113, 171, 211

Maynard r. Cors, 20 Vin. Abr. 241, pi. 12 17

Mayne v. Cross, Y. B. 14 Hen. IV., fo. 2 '. 17

Merttens r. Hill, [1901] 1 Ch. 842 ; 70 L. J. Ch. 489 ; 84 L. T. 260 ; 49 W. R.

408 31

Mettcforde's Case, Dy. 362 b, pi. 20 399

Meyler r. Meyler, 11 L. R. Ir. 522 222

Michell, Re, Moore v. Moore, [1892] 2 Ch. 87 ; 61 L. J. Ch. 326 ; 66 L.T. 366 ;

40 W. R. 375 347, 358, 360, 363

Mildmay's Case, or Hethersall r. Miidmay, 6 Rep. 40 ; Serj. Moore's Rep. 632... 303

Miles r. Jarvis, 24 Ch. D. 633 125

Mogg r. Mogg, 1 Mer. 6.54 363

Monson's (Lord) Settled Estates, [1898] 1 Ch. 427 ; 67 L. J. Ch. 176 ; 78 L. T.

225 ; 46 W. R. 330 .' 354, 355

Monypenny v. Dering, 2 De G. M. & G. 145 115

Moody r. Penfold, Re Lashmar, [1891] 1 Ch. 2.58 40

Moore, Re, Moore r. Bigg, [1906] 1 Ch. 789 ; 75 L. J. Ch. 342; 95 L. T. 521 ;

54 W. R. 434 355

r. Simkin, 31 Ch. D. 95 282

r. Webster, L. R. 3 Eq. 267 ; 36 L. J. Ch. 429 ; 15 W. R. 167 ; 16 L. T.

460 344

Morgan v. Morgan, 4 De G. & Sm. 164 204

V. Swansea Urban Sanitary Authority, 9 Ch. D. 582 ; 27 W. K. 283 ... 321

Mortimer, Re, Gray r. Gray, [1905] 2 Ch. 502 ; 74 L. J. Ch. 745 ; 93 L. T.

459 116

Moselcy's Trusts, Re. See Pearks v. Moseley.

Muggleton r. Barnett, 2 H. & N. 653 240

Mundy and Roper's Contract, Re, [1899] 1 Ch. 275 ; 68 L. J. Ch. 135 ; 79 L. T.

583 ; 47 W. R. 226 349, 354, 472

Mundy's Settled Estates, Re, [1891] 1 Ch. 399; 60 L. J. Ch, 273 ; 63 L. T.

311 ; 64 L. T. 29 ; 39 W. R. 209 3.54, 355

Murthwaite r. Jenkinson, 2 B. & C. 357 259

N.

Nash, Re, Cook r. Frederick, [1909] 2 Ch. 450 ; [1910] 1 Ch. 1 ; 79 L. J. Ch. 1 ;

101 L. T. 837 ; 64 S. J. 48 116, 118, 200, 206, 215

Nevil's Case, 7 Rep. 33 45, 470

NicoUs r. Sheffield, 2 Bro. C. C. 215 180

Nisbet and Potts' Contract, Re, [1906] 1 Ch. 386 ; 75 L. J. Ch. 238 ; 94 L. T.

297; 54W. R. 286 185

TABLE OF CASES. XXXlll

PAGE

Nixon V. Cameron, Re Cameron, 26 Ch. D. 19 172

Norfolk's (Duke of) Case, 3 Ch. Ca. 1 ; PoUexf. 223 117, 181, 211, 215, 257

Northern v. Carnegie, 4 Drew. 587 359, 361

Nurse v. Yerworth, 3 Swanst. 608 93, 95

O.

O'Keefe r. Jones, 13 Ves. 413 222

Oldham v. Pickering, 2 Salk. 464 ; Carth. 376 361, 362

Oliver's Settlement, Re, Evered v. Leigh, [1905] 1 Ch. 191 222

O'Neill t'. Lucas, 2 Keen, 313 203

Onslow V. Wallis, 1 Mac. & G. 506 40-

Ontario, Att.-Gen. of, r. Mercer, 8 App. Cas. 767 ; 52 L, J. P. C. 84 ; 49 L. T.

312 '6

Orme's Case, L. R. 8 C. P. 281 389

Ottley's Estate, Re, [1910] 1 Ir. R. 1 315

Owen V. Gibbons, [1902] 1 Ch. 636 239, 376

P.

Page V. Hayward, 2 Salk. 570 296

V. Moulton, Dy. 296 a, pi. 22 420

Paine's Case, or Paine v. Sammes, 8 Rep. 34 ; 1 Anders. 184 ; 1 Leon. 167 ;

Gouldsb. 81, pi. 22 267

Palmer v. Rich, [1^97] 1 Ch. 134 ; 66 L. J. Ch. 69 ; 75 L. T. 484 ; 45 W. R.

205 342

Papillon V. Voice, 2 P. Wms. 471 166

Parfitt V. Hember, L. R. 4 Eq. 443 115

Parker v. Clere. See Clere's Case.

Parry and Daggs, Re, 31 Ch. D. 130 ; 55 L. J. Ch. 237 ; 54 L. T. 229 ; 34

W. R. 353 209

Passingham r. Pitty, 17 C. B. 299 ; 25 L. J. C. P. 4 ; 4 W. R. 122 ; 2 Jur. (N. S.)

837 31

Paterson v. Mills, 19 L. J. Ch. 310 ; 15 Jur. 1 376

Peachy i'. Duke of Somerset, 1 Stra. 447 36

Peacock v. Eastland, L. R. 10 Eq. 17 ; 39 L. J. Ch, 534 ; 18 W. R. 856 ; 22

L. T. 706 ; 316

Pearks v. Moseley, 5 App. Cas. 714 ; 50 L. J. Ch. 57 ; 43 L. T. 449 •.. 191

Pelham Clinton v. Duke of Newcastle, [1903] A. C. Ill ; 72 L. J. Ch. 424 ; 88

L. T. 273; 51 W. R. 608 296

Pells V. Brown, Cro. Jac. 590 168, 177, 205, 220

Pemberton v. Barnes, [1899] 1 Ch. 544 ; 68 L. J. Ch. 192 ; 80 L. T. 181 ; 47

W. R. 444 85, 228

Pendred v. Griffith, 1 Bro. P. C. 314 186

Perpetuities, The Case of. ' See Chudleigh's Case.

Phillimore's Estate, Re, Phillimore r, Milnes, [1904] 2 Ch. 460 ; 73 L. J. Ch.

671 ; 91 L. T. 2.56 ; 52 W. R. 682 354

Pimb's Case, Serj. Moore's Rep. 196 37

Plomley i: Fulton, 14 App. Cas. 61 323

Poad V. Watson, 6 E. & B. 606 ; 25 L, J. Q. B. 396 214

Poole r. Nedham, Yelv. 149 256

Portington's Case. See Mary Portington's Case.

Powdrell v. Jones, 2 Sm. & GiflE. 407 ; 24 L. J. Ch. 123 ; 3 W. R. 32 ; 24 L. T.

(0. S.) 88 ; 3 Eq. Rep. 63 ; 18 Jur. 1111 348

Powell r. Bull, Comb. 265 42

r. Howells, L. R. 3 Q. B. 654 373

C.R.P. C

XXXIV TABLE OF CASES.

PAGE

Prince's Cft-<c, The, 8 Rep. 14 112

Prior of Spalding's Case, Y. B. 7 Edw. IV. 10—12 467

Pryse, In bonis, [1904] P. IWl ; 73 L. J. P. 84 ; 90 L. T. 747 101

PuUen r. Lonl Middleton, 9 Mod. 483 300

R.

Radbum r. Jervis, 3 Beav. 450 47

Rawley r. Holland, 22 Vin. Abr. 189 ; 2 Eq. Ca. Abr. 753 172

Ray r. Pung, 5 Madd. 310 ; 5 B. & Aid. 561 347

Reading r. Rawsterne or Royston, Ld. Raym. 829 ; Salk. 242 ; Comb. 123 ;

Prec. Ch. 222 2.32

Reeve or Reve r. Long, 1 Salk. 227 ; 3 Lev. 408 ; 4 Mod. 282 ; 12 Mod. 53 140

Rex r. Bishop of Chester, 2 Stra. 797 113

r. Coggan, 6 East, 431 38

V. Ellis, 3 Eag. k Y. 776 ; 3 Price 323 43

V. Kempe, Ld. Raym. 49 ; Salk. 465 ; 4 Mod. 275 ; 12 Mod. 77 ; Comb.

334; Holt, 419; Carth. 3.50 ; Skin. 446, 580 113

1-. KnoUys or Knowles, Ld. Raym. 10 ; Salk. 509 ; 3 Salk. 242 ; Comb.

273 ; Skin. 517 ; 12 Mod. 55 45, 470

r. Shingle, 1 Eag. & Y. 738 ; 1 Stra. 100 43

Rhodes r. Whitehead, 2 Dr. & Sm. 632 125

Richards r. Lady Bergavenny, 2 Vern. 324 292

Richardson, Re, Parry r. Holmes, [1904] 1 Ch. 332 ; 73 L. J. Cfl. 153 ; 91 L. T.

169; 52 W. R. 119 115

Ridge's Trusts, Re, L. R. 7Ch.665 373

Ring r. Hardwick, 2 Beav. 352 192

Ripley c. Waterworth, 7 Ves. 425 359, 361

Rivett-Carnac's Will, Re, 30 Ch. D. 136 ; 33 W. R. 837 ; 54 L. J. Ch. 1074 ; 53

L. T. 81 45, 471

Robinson v. Gee, 1 Ves. sen. 251 335

r. Litton, 3 Atk. 209 223

Roer. Briggs, 16 East, 406..... 14, 123

r. Galliers, 2 T. R. 133 186

r. Jones, 1 H. Bl. 30 77, 176

r. Quartley, 1 T. R. 630 370

— .- p. Tranmarror Tranmer, Willes, 682 ; 2 Wils. 75 106, 422

V. Vernon, 5 East, 51 31

Ross (Earl of) r. Worsop, 1 Bro. P. C. 281 186

Rosslyns (Lady) Trust, Re, 16 Sim. 391 203

Rous r. Jackson, 29 Ch. D. 521 193

Rowden r. Maltster, Cro. Car. 42 299, 300

Rowlet's Case, Dy. 188 a 46

S.

Saint Katherine's Hospital, Case of. See Atkins r. Mountague.

Salter r. Butler, or Salter's Case, YelV. 9 ; Cro. Eliz. 901 ; Noy, 46 361

Saunders r. Vautier, 4 Beav. 115 ; S. C. 1 Cr. & Ph. 240 193

Savill Brothers, Ltd. r. Bethell, [1902] 2 Ch, 523 ; 71 L. J. Ch. 652 ; 87 L. T.

191 ; 50 W. R. 580 102, .389

Sayer's Trusts, Re, L. R. 6 Eq. 319 191

Selby r. Alston, 3 Ves. 339 97

Senhouse v. Christian, 1 T. R. 560 55

TABLE OF CASES. XXXV

PAGE

Seyraor's Case, or Heywood r. Smith, 10 Rep. 95 ; 1 Bulst. 162 359

Sliarp's Case, or Sharp c. Swan, 6 Rep. 2G ; Cro. Eliz. 482 ; Serj. Moore's Rep..

458 400

Shelley's Case, 1 Rep. 93; Serj. Moore's Rep. 136 ; 1 Anders. 69 ; Dy. 373 b,

pi. 15 ; Jenk. Cent. 6, c. 40 152, 164

Sherwood v. Winchcombe, Cro. Eliz. 293 43

Shields i: Atkins, 3 Atk. 560 259

Shove V. Pincke, 5 T. R. 124 382

Simpson /•. Simpson, 4 Bing. N. C. 333 300

Slark r. Dakyns, L. R. 10 Ch. 35 ; 44 L. J. Ch. 205 ; 23 "W. R. 118 ; 31 L.T.

712 „. 193

Smart, Re, Smart v. Smart, 18 Ch. D. 165 "... 16

Smith r. Adams, 5 De G. M. & G. 712 ; 24 L. J. Ch. 258 ; 2 W. R. 698 ; 23

L. T. (0. S.) 323 348

1\ Day, 2 M. & W. 684 ; M. & H. 135 ; 6 L. J. Ex. 219 186

V. Pybus, 9 Ves. 566 47

d. Dormer r. Parkhurst. See Dormer v. Parkhurst.

Suowe r. Cuttler, 1 Lev. 135 , 120

Solomon and Meagher's Contract, Re, 40 Ch. D. 508 ; 58 L. J. Ch, 339 ; 37

W. R. 331; 60 L. T. 487 383

South Eastern Railway i\ Associated Portland Cement Manufacturers (1900),

Ld. [1910] 1 Ch. 12 ; 79 L. J. Ch. 150 ; 101 L, T. 865 ; 54 S. J. 80. ..184,

440

Southampton (Lord) v. Marquis of Hertford, 2 Ves. & B. 54 203

Spearman Settled Estates, Re, [1906] 2 Ch. 502 ; 75 L. J. Ch. 829 ; 95 L. T.

605 354

Spencer r. Chase, 10 Yin. Abr. 203 ; 9 Mod. 28 259

Sperling i: Rochfort, Re Van Hagan. 16 Ch. D. 18 ; 50 L. J. Ch. 1 ; 29 W. R.

84; 44 L. T. 161 40

Spicer r, Martin, 14 A. C. 12 ; 58 L, J. Ch. 309 ; 60 L. T. 546 ; 37 W. R. 689... 185

Stafford (Earl of) v. Buckley, 2 Ves. sen. 170 .■ 47, 62, 84

Stafford's (Lord) Settlement, Re, Gerard i: Stafford, [1904] 2 Ch. 72 ;' 73 L. J.

Ch. 560; 91 L. T. 229 ; 52 W. R. 536 355

Stansfield v. Habergham, 10 Ves. 273 223

Stapilton v. Stapilton, 1 Atk. 2 322

Stephenson v. Hill, 3 Burr. 1273 31

Stone r. Newman, Cro. Car. 427 322, 329, 407

Styant v. Staker, 2 Vern. 2.50 350

Surtees v. Surtees, L. R. 12 Bq. 400 ; 19 W. R. 1043 373

Sutherland. Duke of v. Heathcote, [1892] 1 Ch. 475 ; 61 L. J. Ch. 248 ; 66

L. T. 210 68

Sutton's Hospital, Case of, 10 Rep. 23 112, 389

Sweet v. Anderson, 2 Bro. P. C. 2.56 186

Sweetapple i\ Bindon, 2 Vern. .536 344

Swyft V. Eyres, Cro. Car. 546 Ill

Sym's Case, Cro. Eliz. 33 367

T.

Talbot's Case, or Chapman r. Pendleton, 8 Rep. 104 ; 2 Brownl. 293 20

Taltarum's Case, M., 12 Edw. 4, pL 25, f. 19 a 303, 309

Taunton r. Pepler, Madd. & Geld. 160 404

Taylor v. Frobisher, 5 De G. & Sm. 191 192

V. Haygarth, 14 Sim. 8 38

V. Horde. See Doe v. Horde.

c2

XXXVl TABLE OF CA8ES.

PAGE

Tavlor r. Parry, 1 Sc. N. R. 576 ; 1 Man. k G. 604 ; 9 L. J. C. P. 298 ; 4 Jur.

967 58

Tcngues Settlement, Re, L. R. 10 Eq. 564 ; 18 W. R. 752 ; 22 L. T. 742 193

Thellusson v. Woodford, 4 Vcs. 227; in Dom. Proc., 11 Vcs. 112 182, 201

Thomas r. Kemeys, 2 Vern. 348 96

Thomasin r. Mackworth, Carter, 75 259

Thompson, Re, Thompson r. Thompson, [1906] 2 Ch. 199 ; 75 L. J. Ch. 599 ;

95L. T. 97; 54 W. R. 613 193

r. Hardinge, 1 C. B. 940 ; 14 L. J. C. P. 268 ; 9 Jur. 927 31

Thomson r. Shakespear, 1 De G. F. & J. 399 195

Thorn r. Newman, 3 Swanst. 603 9.3, 95

Thornle:^ r. Thornley, [1893] 2 Ch. 229 ; 62 h. J. Ch. 370 ; 68 L. T. 199 ; 41

W. R. 541 379

Thorpe r. Bnimfitt, L. R. 8 Ch. 650 .55

Throgmorton r. Tracey, Dy. 124 b, pi. 40 414

Took r. Glascock, 1 Saund. 260 .322

Toulmin r. Steere, 3 Mer. 210 96

Townsend r. Ash, 3 Atk. 336 57, 401

Townsend's Contract. Re, [1895] 1 Ch. 716 ; 64 L. J. Ch. 334 ; 72 L. T. 321 ;

43 W. R. 392 214

Trevor r. Trevor, 1 P. Wms. 622 ; 1 Eq. Ca. Ab. 387 166

Tringham's Trusts, Re, Tringham r. Greenhill, [1904] 2 Ch. 487 ; 73 L. J. Ch.

693 ; 91 L. T. 370 •. 222

Trustees, Executors and Agency Co. r. Short. See Agency Co. r. Short.

Tulk r. Moxhay, 2 Ph. 774 ; 18 L. J. Ch. 83 ; 13 .Jur. 89 185. 187

Turner r. Turner, Ambl. 776 ; 1 Bio. C. C. 316 46

r. Wright, 2 De G. F. & J. 2.34 224

Turvin r. Newcome, 3 K. & J. 16 192

Tyler, Re, Tyler r. Tyler, [1891] 3 Ch. 252 195

U.

Utty Dale's Case, Cro. Eliz. 182 , 362

V.

VanGrutten r. Foxwell, [1897] A. C. 659 167,209

Van Hagan, Re. See Sperling r. Rochfort.

Venables v. Morris, 7 T. R. 342 163, 165

Vincent Lee's Case, 3 Leon. 110 92

W.

Wadmore r. Toller, 6 T. L. R. 58 31

Wainewright, Re, 1 Phill. 258 .320

Wallis r. Freestone, 10 Sim. 225 194

Walsh r. Lonsdale, 21 Ch. D. 608 ; 52 L. J. Ch. 2 ; 46 L. T. 858 ; 31 W. R. 109. 57

r. Secretary of State for India, 10 H. L. C. 367 ; 32 L. J. Ch. 585 ; 11

W. R. 823 ; 9 Jur. N. S. 757 452

Walsingham's Case, Plowd. 547 .329

Ward r. Ward, 14 Ch. D. 506 ; 49 L. J. Ch. 409 ; 28 W. R. 943 ; 42 L. T. 523... 377

Ware r. Polhill, 11 Ves. 2.57 194

Waring r. Coventry, 1 My.& K.249 194

Warrington v. Warrington, 2 Ha. 54 ; 6 Jur. 872 377, 379

Weale r. Lower, Pollexf. 54 77

TABLE OF CASES. XXXVU

PAOK

Weatherall r. Thornburgh, 8 Ch. D. 201 ; 47 L. J. Ch. 658 ; 26 W. R. 593 ;

39 L. T.9 203

Webb r. Webb, 2 Beav. 493 202

Webber r. Lee, 9 Q. B. D. 315 ; 51 L. J. Q. B.485 ; 30 W.R. 866 ; 47 L. T.215... 46

Wellington v. Wellington, 1 W. Bl. 645 ; 4 Burr. 2165 259

Westfaling v. Westfaling, 3 Atk. 460 41

Whaley r. Tankard or Tancred, 2 Lev. 52 ; 1 Vent. 241 395

Wheelwright v. Walker, 23 Ch. D. 752 354

Whiston's Settlement, Re, Lovatt r. Williamson, [1894] 1 Ch. 661 ; 63 L. J. Ch,

273; 70L. T. 681; 42 W. R. 327 222

Whitby V. Mitchell, 44 Ch. U. 85 116, 117, 118, 197, 206, 21.5, 217

r. Van Luedecke, [1906] 1 Ch. 783 ; 75 L. J. Ch. 359 ; 94 L. T. 423 ;

54 W. R. 415 200

White and Hindle's Contract, Re, 7 Ch. D. 201 ; 47 L. J. Ch. 85 ; 26 W. R.

124 81, 165, 166

r. Summers, [1908] 2 Ch. 256 ; 77 L. J. Ch. 506 ; 98 L. T. 845 125

V. Thornburgh, 2 Vern. 702 , 166

Wilkinson r. Proud, 11 M. & W. 33 ; 12 L. J, Ex. 227 ; 7 Jur. 284 58

Williams v. Lord Lonsdale, 3 Ves. 752 38

ij. Williams, 15 Ves. 419 ; S, C. 12 East, 209 292

Willion v. Berkeley, Plowd. 223 83, 298

Wills V. Palmer, 2 W. Bl. 687 ; 5 Burr. 2615 : 158

Wilmer, Re, Re Wilraer's Trusts, Moore i: Wingfield, [1903] 1 Ch. 874 ; 2 Ch,

411 ; 72 L. J: Ch. 670 ; 89 L. T. 148 ; 51 W. R. 609 182

Wilson V. Wilson, 1 Sim. N. S. 288 201, 202

Wiltes Claim of Peerage, L. R. 4 H. L. 126 470

Wimborne (Lord) and Browne's Contract, Re, [1904] 1 Ch. 537 ; 73 L. J. Ch.

270 ; 90 L, T. 540 ; 52 W, R. 334 354

Winchester's (Bishop of) Case, or Wright r. Wright, 2 Rep. 43 ; Serj. Moore's

Rep. 425 43

Winchester's (Marquis of) Case, 3 Rep. 1 84

Windham's Case, 5 Rep. 7 ; Serj, Moore's Rep. 191 370

Wiscot's Case, 2 Rep. 60 93

Witham r. Vane, Appendix V., p. 440, iw/ra 184

Wood r. Douglas (Re Douglas), 28 Ch. D. .327 97

, Re, Att.-Gen. r. Anderson, [1896] 2 Ch. 596 ; 65 L. J. Ch. 814 ; 75 L. T.

28 ; 44 W. R. 685 40

, Re, TuUett v. Colville, [1894] 2 Ch, 310 ; 3 Ch. 381 ; 63 L. J, Ch. 790 ;

71 L, T. 413 191

Woodall V. Clifton, [1905] 2 Ch, 257 ; 74 L, J. Ch, 555 ; 93 L. T. 257 ; 54

W. R. 7 xlv, 472

Worthing Corporation r. Heather, [1906J 2 Ch, 532 ; 75 L, J. Ch. 761 ; 95 L,T,

718 472

Wright r. Vernon, 2 Dr. 439 ; aff. 7 H. L. C. 35 293

r. Wright. See Bishop of Winchester's Case.

-^ r. Wright, 1 Ves. sen. 409 77, 221

Wrightson, Re, Battle- Wrightson v. Thomas, [1904] 2 Ch. 95 125

Y,

Ycap Cheah Neo v. Ong Cheng Neo, L, R. 6 P. C. 381 194

Z

Zetland (Earl of) v. Lord Advocate, 3 App. Cas. 505 287

Zouch r. Forse, 7 East. 186 359

( xxxix )

LIST OF TEXT-BOOKS CITED.

\*,\* In the absence of special mention,, numbers preceding t/ie name refer to volumes,

and numbers following t/te name refer to pages.

\\_Te,rt-boolts, the n'lmes of which are enclosed In square braeltets, are referred to only

in the editor's Jiotes.J

[Anson, Law and Custom of the Constitution.

The Law and Custom of the Constitution, by Sir William R. Anson,

(Part L) 1909.]

[Austin, Juhispr.

Lectures on Jurisprudence, by John Austin. 3rd ed. by Robert

Campbell. 2 vols. 1869.]

[Azo.

Azonis Summa (m secundum librum Institutionuvi) : 1563.]

Bacon, Uses.

Lord Bacon's Reading upon the Statute of Uses ; ed. by Rowe,

1806. The references are to the marginal pages. The correc-

tions of the text in this edition are important, and the explana-

tory notes are valuable, though frightfully prolix.

Bl. Com.

Blackstone's Commentaries; 15th ed. by Christian, 4 vols. 1809.

Bl. Law Tr.

Blackstone's Law Tracts. 2 vols. 8vo. Oxford. 1762.

Booth, Real Actions.

2ud ed. 1811 ; with Serjeant Hill's notes.

Bro. Abr.

Brooke's Abridgment, 2 vols. fol. Tottell, 1573. The pagination

is not preserved in Tottell's quarto edition of 1576.

[Burton, Comp.

An Elementary Compendium of the Law of Real Property. By

Walter Henry Burton; 7th ed. by E. P. Cooper, 1850.J

[Byth. Conv.

Bythewood and Jarman's Selection of Precedents in Conveyancing.

3rd ed. by George Sweet, 1839—61.]

[Carson, Real Prop. Statutes.

Caraon's Real Property Statutes. 2nd ed. by Thomas H. Carsou, K.C.,

and Harold B. Bompas, 1910.]

xi list of text-books cited.

Chance on Powers,

With Supplement, 2 vols, 1841. This able work appears to have

met with undeserved neglect. The present writer's copy ob-

viously belongs to an edition of 1831, with a vamped-up title

dated ten years later to match the Supplement.

[Clode, Tenement Houses, «fec.

The Law relating to Tenement Houses and Flats. By Walter Clode,

1889.]

Co. Cop.

Lord Coke's Conjpleat Copyholder. See his Law Tracts.

Co. Law Tn.

Three Law Tracts : (1) The Compleat Copyholder ; (2) A Reading

on the Statute De finibus levatis ; (3) A Treatise of Bail and

Mainprize. Ed. by Serj. Hawkins. 1764.

•

Co. LiTT.

Lord Coke's Commentary upon Littleton's Tenures ; forming the

First Part of his Institutes of the Laws of England; 19th ed.

1832; with notes by Francis Hargrave and Charles Butler;

among which are inserted the MS. notes of Lord Hale and Lord

Nottingham. Hargrave's notes extend from the beginning to

the end of p. 190 b, and Butler's notes from the beginning of

p. 191a to the end. This edition is a reprint of the 18th, pub-

lished in 1823, with some additions to the notes. The former

numbering of the notes is preserved, and the additions made

thereto are distinguished ; but there is nothing to show to which

of the annotators each particular addition is due. Mistakes and

misprints occurring in the 18th edition, are for the most part

reproduced in the 19th.

Com. Dig.

Digest of the Laws of England ; by Sir John Comyns, Lord Chief

Baron; 5th ed. by Hammond ; 8 vols. 8vo. 1822. This edition

contains much valuable additional matter ; but it is very incon-

venient for reference, and some of the titles are displaced.

References are to this edition.

Cruise, Fines and Reg.

Cruise on Fines and Recoveries; 3rd ed. 2 vols. 1794. Cruise

made great alterations in the successive editions of this work.

DocT. & Stu.

Doctor and Student, or dialogues between a doctor of divinity and

a student in the laws of England. 17th ed. by Wm. Muchall,

gent. 1787.

Fearne, Cont. Rem.

Feame's Essay on Contingent Remainders and Executory Devises ;

10th ed. 1844 ; with Butler's notes. To this edition was added

a second volume upon Executory Interests by Mr. Josiah W.

Smith. The latter is cited as Sviith on Executwy Interests.

The earliest edition of Fearne, edited by Butler, was the Gth.

The paging of the 5th ed. is preserved in all the subsequent

editions.

LIST OF TEXT-BOOKS CITED. xli

Fearne, Posth. Works.

Fearne's Posthumous Works, 1797; edited by T. M. Shadwell,

■who had been one of his pupils ; see Butl. Pref. to Fearne, Cont.

Rem. This contains (1) a reading on the Statute of Inrolments,

27 Hen. 8, c. 16 ; (2) two arguments, one for each side, in the

case of General Stanwix, composed as an amusement, and never

delivered or intended to be delivered ; and (3) numerous Cases

with Fearne's Opinions thereon.

Finch, Law.

Law, or a discourse thereof, in four books ; by Sir Henry Finch ;

edited by Danby Pickering, 1759. This is a work of consider-

able authority, now little read. It fell into disuse after the

publication of Blackstone's Commentaries. (Butler's Reminis-

cences, p. 131.)

FiTZH. N. B.

The New Natura Brevium, of Mr. Justice Anthony Fitzherbert.

8th ed. 4to. 1755. Translated from the law French of the

text, and the law Latin of the writs, into English. With

Lord Hale's Commentary. The references are to the marginal

pages, and to the sections into which they are divided by capital

letters.

[GOODEVE, R. P.

The modern Law of Real Property, by Lewis Arthur Goodeve,

1st ed. 1883.]

[Gray on Perpetuities.

Tlie Rule against Perpetuities. By John Chipman Gray. 2nd ed.

Boston, U.S.A., 1906.]

[Hale. Analysis of the Law.

An Analysis of the Civil Part of the Law ; by Sir Matthew Hale.

5th ed. (1794).]

2 Inst.

The Second Part of Lord Coke's Institutes of the Laws of England ;

2 vols. 1 809. A commentary upon certain statutes, from Magna

Carta, 9 Hen. 3, to 25 Hen. 8, c. 15. This is commonly called

the best edition ; but the editing, so far as there is any, is

beneath contempt. The same remark applies to the third and

fourth parts. This pretended edition of 1809 really consists of

the unsold copies of the edition of 1797, furnished with a

vamped-up title-page.

3- Inst.

The Third Part of Lord Coke's Institutes. 1809. On pleas of the

Crown and criminal offences.

4 Inst.

The Fourth Part of Lord Coke's Institutes. 1809 On the juris-

diction of courts.

Jarm. Wills.

Jarman on Wills, 4th ed. 2 vols. 1881. [6th ed., 1910.]

Xlii LIST OP TEXT-BOOKS CITED.

KiTCHiN, Jurisdictions.

Jurisdictions, or the Lawful Aiithority of Courts Leet, »fec. By

John Kitchin, doul)le reader in (Jray's Inn. 5th ed. 1675. On

the readers to tlic Inns of Court, see the Preface to the Third

Part of Lord Coke's lleports, p. x.\xv of ed. 1826.

[Lewis on Peri'etuitiks.

A Practical Treatise on the Law of Perpetuity. By William David

Lewis. 1843. Supplement, 1849.]

[MacSwinney on Mines.

The Law of Mines, Quarries, and Minerals. By Robert Forster

MacSwinney. .3rd ed. 1907.]

Mad. Bar. Anoi..

Madox, Baronia Anglica ; fol. 1741. An exhaustive account, as

the title page imports, of Honours, land-baronies, and tenure

in capite.

[May, Const. Hist.

The Constitutional History of England. By Thomas Erskine

May. 1861.]

[Palmer, Peerage Law.

Peerage Law in England. By Francis Beaufort Palmer. 1907.]

Perk.

Perkins' Profitable Book; 15th ed., by Greening, 1827. This is

the best edition. The references are to the sections.

[Pollock and Maitland.

The History of English Law before the time of Edward I. By

Sir Frederick Pollock and Frederick William Maitland. 2nd ed.,

1898.]

Prest. A est.

Preston on Abstracts of Title ; 2nd ed. 3 vols. 1823. The present

writer chanced once to buy a copy of this work containing

numerous MS. notes in the margin, all apparently in the same

hand, some signed "R. P." and others "W. S. P." while many

have no signature. It is obvious to connect the signed notes

with Richard Preston and his son, William Scott Preston. (See

Vol. 3, p. V.) Many MS. alterations have also been made in the

text, which are evident improvements. On the title-page is

written "Jeff. Jno. Edwards, 29 Octr. 1827." This writing

resembles the writing of the notes, except in being much lai'ger.

Edwards was probably one of Preston's pupils. (Since these

remarks were written, the writer had the good fortune to make

the acquaintance of a cousin of Mr. Edwards, who confirmed

this conjecture, but was unable to give any inlbrmation about

the origin of the notes.) The notes (some of which appear to

have been transcribed from a MS. which the transcriber in

places could not decipher) are full of tantalising references to

" MS. op." and " MSS." with dates, many of the dates being

considerably earlier than 1827, which may not improbably

refer to Preston's own manuscripts. If any such manuscripts

are in existence, it is a great pity that no use should be made

of them.

LIST OF TEXT-BOOKS CITED. xUii

Prest. Conv.

Preston's Treatise on Conveyancing ; 3rd ed. 3 vols. 1819, 1825,

and 1821, respective!}'. The third volume treats of the law of

merger, and is the only systematic treatise upon that subject

known to the present writer.

Prest. Est.

Preston's Essay on Jlstates ; 2nd ed. 2 vols. 1820, 1827. No

third volume was published, but the work has no index and

seems in other respects to be incomplete.

[The first edition, published in 1791, is complete, but it is a

juvenile production and seldom referred to. It is, however,

interesting for the reason that in it the author expressed

a doubt whether, on the grant of an estate pur auter vie, cestui

que vie must be in existence at the time of the grant. The

passage is cited in an article by the editor of the present work,

49 Solicitors' Journal, 793.]

Prest. Shbp. T.

The .additions made by Preston to Sheppard's text, in Itis edition

of the Touchstone, 2 vols. 1820. The pages cited in the refer-

ences, are the pages of the Touchstone. Where the text itself

of the latter work is cited, it is referred to as " Shep. T."

Rob. Gav.

Robinson on Gavelkind and Borough English ; 3rd ed. by Wilson.

1822. This is the most masterly treatise ever published upon a

detached and limited subject. It exhausts not only the printed

authorities, but the unpublished records of gavelkind cases.

Sand. Uses.

Sanders on Uses and Trusts ; 5th ed. 2 vols. 1844.

Shep. T.

See Prest. Shkp. T.

Smith on Executory Interests.

An Original View of Executory Interests, by Josiah W. Smith.

1844. Added as vol. 2, to the 10th ed. of Fearne, Cont. Rem.

The references are to the pages.

[Stubb's Const. Hist.

The Constitutional History of England, by William Stubbs,

1874—8.]

SUGD. POW.

Sugden on Powers, 8th ed. [1861.]

ViN. Abr.

General Abridgment of Law and Equity ; by Charles Viner ; 23

vols, folio. 1742—1753. Viner died in 1756. See Pref. to

Bl. Com. On this work, Hargrave expresses the following

opinion : — " It is indeed a most useful compilUion, and would

have been infinitely more so, if the author had been less singular

and more nice in his arrangement and method, and more studious

in avoiding repetitions. These faults, in great measure, pro-

ceeded from the author's eiTor of judgment, in attempting to

engraft his own very extensive Abridgment on that of Mr.

Xliv LIST OP TEXT -BOOKS CITED.

Serjeant RoUe, whose work, though most excellent in its kind

and in point of method, succinctness, legal precision, and many

other res[ ects, fit to be proposed as an example for other abridg-

ments of law, was by no means calcidated for the excessive

enlargement from 2 vols, to 23 vols, in folio. It is not to be

wondered at, that an incorporation of works so widely different

in }irop<yrt{on as well as in execution, should produce much con-

fusion and disorder in the effect. Mr. Viner's labours would

probably have advanced his reputation as a compiler much

higher, if he had not attempted an union so unnatural."

(Harg. n. 3 on Co. Litt. 9 a.)

Watk. Cop.

Watkins on Copyholds ; 4th ed. by Coventry. 2 vols. 1825.

This is incomparably the best book on copyholds ever written,

and deserves a new edition. The references are to the pages of

this edition.

Watk. Desc.

Watkins on Descents; 3rd ed. by Vidal. 1819. The refer-

ences are to the pages of this edition.

[Williams on Commons.

llights of Common and other Prescriptive Rights, by Joshua

Williams. 1880.]

[Williams, R. P.

Principles of the Law of Real Property, by the late Joshua

Williams; 21st ed. ; re-arranged and partly re-written by his

son, T. Cyprian Williams. 1910.

In some cases, where Mr. T. C. Williains dissents from Mr. Joshua

Williams's views, reference is made (in the present work)

to the earlier editions, published during Mr. Joshua Williams's

lifetime.]

( xlv )

ADDENDA ET COERIGENDA.

P. 36, note (\*). As to the decision in Hastings Corporation v. Letton,

see pp. 467, 468.

P. 45, note (f). As to the decision in He Eivetf-Gamac's Will, see

pp. 468 et seq.

P. 50, last line. For "analagous" read "analogous."

P. 52. That an advowson appendant is not an incorporeal hereditament,

appears clearly from the rule that if a married woman is entitled

to an advowson appendant to a manor, and dies intestate before

entry into the manor, her husband is not tenant by the curtesy

of the advowson, the reason being that she might have obtained

seisin in deed by entering into the manor. To entitle a husband

to curtesy of an advowson in gross, or of a rent-charge, seisin in

deed is not required, because they are incorporeal hereditaments

(Co. Litt. 29a and note).

As to the exceptions to the rule that a thing incorporeal

cannot be appendant or appurtenant to a thing incorporeal, see

Hanhury v. Jenkins, [1901] 2 Ch. 401.

P. 55, line 14. For '^ Ackroyd v. Smithson" read '■^ Ackroyd v. Smith."

P. 69. Tiie statement that an estate cannot be created de novo, except

by the authority of an Act of Parliament, refers only to estates

in land. When an incorporeal hereditament, such as a rent-

charge, is created de novo, the estate for which it is granted is

necessarily created de novo also (see pp. 54, 112, 327, 328).

Pp. 71, 72. To the instances of estates created de novo, given by

Mr. Challis, may be added the estate created by a registered

transfer under the Land Transfer Acts (see p. 384).

P. 171, line 26. Insert "a" before "legal estate."

P. 183. As to the application of the principle laid down in London and

South Western Railway v. Gomm to an option of purchase cou-

■ tained in a lease, see p. 472.

P. 186. As to reversionary terms of years, see pp. 472, 473.

Pp. 208, 209. ' On the question whether there is a general principle or

rule against perpetuities at common law, see pp. 473, 474.

P. 217, note (f). Mr. Hargrave and Mr. Butler also agree with Lord

Kenyou : notes to Co. Litt. 20a (5) ; 271 b (1 V.).

P. 226, note (\*). As to the decision in Hastings Corporation v. Letton^

see p. 468.

P. 233. As to acquiring seisin in deed of a rent-charge by a con-

veyance operating under the Statute of Uses, see p. 475.

P. 261. As to the operation of the Statute 32 Hen. 8, c. 34, see the

judgment of the Court of Appeal in Woodall v. Clifton^ [1905}

2 Ch. 257.

THE

LAW OF KEAL PKOPEKTY:

CHIEFLY IN EELATION TO CONYEYANCING.

INTEODUCTORY REMARKS.

The Real Property Law of England had its origin at a time

when land and its rents and profits constituted nearly the

whole tangible wealth of the country. The vast increase in

modern times of kinds of property called personal has lessened

in a corresponding degree the importance of rules and principles

■which are applicable to real property alone ; and the tendency

of legislation has long been to assimilate real property law to

the law of personal property. But, in spite of the numerous

changes which have been effected during the last sixty years,

the bulk of the law peculiar to real property is still large, and

it still contains not a few intricate and abstruse technicalities,

which are undoubted law, and would certainly be recognized as

such by the Courts. Of these technicalities some, being little

used in the common practice, only emerge at rare intervals and

under extraordinary circumstances from their normal obscurity.

But others are of more frequent occurrence, and some are in

constant use ; nor can the practice of conveyancing be exercised

with prudence and safety, or the recent legislation relating to

conveyancing and real property law be completely understood,

without a thorough knowledge of the whole.

In the absence of express mention, the following remarks will

be restricted, so far as they refer to estates, to legal estates of

freehold in land, and, so far as they refer to assurances or

conveyances, to assurances, other than testamentary dis-

positions, by which legal estates of freehold in land can be

created or transferred.

C.R.P. B

INTRODUCTORY REMARKS.

It is obviously impossible, within the i)resent limits, to enter

upon the details of practical conveyancing ; but the bulk of

the information which is here collected together, has a special

bearing upon the work of the conveyancer, as distinguished

from that of the pleader and advocate.

Notwithstanding the present decayed state of its general

application and importance, some knowledge of the essential

characteristics of tenure is necessary to the adequate treatment

of the other parts of the subject ; nor without such knowledge

is a clear apprehension possible of some distinctions which are

still of practical importance ; such as the distinctions between

(1) Rent which is incident to tenure ; (2) Eent which is not

incident to tenure, but is a tenement, and is capable of being

the subject of estates limited by analogy to estates in land ;

and (3) Rent incident to a reversion.

The whole social and political organization of the kingdom

rested upon tenure as its foundation for about four centuries

after the Norman Conquest. Its political importance had

declined to a shadow of its former self at the end of the reign of

Henry VII. ; but for another century and a half it continued

to flourish in full vigour, as an acknowledged source of legal

rights, at all events as between the crown and the tenants of

the crown in capite, until its operation was interrupted by the

abeyance of the royal authority in 1645, followed by the

abolition in 1660, by the statute 12 Car. 2, c. 24, of the burden-

some incidents attached to tenure in capite. The abolition

by that statute of the rights enjoyed by the crown in respect to

its freehold tenants, is probably the chief cause why the evidence

of freehold tenure, in respect to lands holden of private persons,

has for a long time been much less carefully preserved than the

evidence of copyhold tenure ; because thenceforward there was

no strong inducement to rebut claims of the crown, arising by

presumption in the absence of express evidence. Though the

growing importance of the political franchise subsequently gave

to freehold tenure, which carried with it the right to vote at the

election of knights of the shire, a new political importance,

this was in a great measure lost by the passing of the Reforni

Act of 1832 ; and even previously to that time the political

INTRODUCTORY REMARKS.

privileges attached to freehold tenure did not much favour the

careful preservation of the express evidence relating to it,

because all tenure is presumed to be freehold unless proved to

be copyhold. The decreased practical importance of freehold

tenure has led to something like oblivion of its existence ; and

the word tenure is often used in reference, not to the tenure

properly so called, but to the quantum of the estate or interest

of the tenant.

The practical consequences of tenure, in the proper sense of

the word, are now almost confined to (1) rights by escheat,

which are seldom claimed, in respect to freeholds, except by the

crown ; partly because freehold tenure holden of private persons

is comparatively rare, and partly because its existence, even

when it exists, is difficult to prove ; (2) rights of the lord in

respect to copyholds of the manor ; and (3) rights of the lord

on the one hand, and of the commoners on the other, in respect

to the waste lands of the manor. The importance of manorial

rights, whether of lord or tenant, as distinguished from pro-

prietary rights, has been greatly reduced by the enfranchisement

of copyholds and the enclosure of wastes ; though some check

has been recently imposed upon the latter process. Ancient

quit-rents which affect freehold lands held for a fee simple and

are undoubted incidents of their tenure, still exist; but in

practice these must be at least as old as the year 1290, in

which year the statute of Quia Emptorcs made it thenceforward

impossible for a subject, under ordinary circumstances, to

reserve a rent as incident to tenure only. They are, therefore,

comparatively rare, and the change in the value of money makes

them now of little importance, unless as evidence to support a

title by escheat. These also will tend to be extinguished by

the operation of sect. 45 of the Conveyancing Act of 1881,

which provides, among other things, for the compulsory

redemption of quit-rents, at the instance of any person

interested in the land.\*

\* [The question of tenure may arise in connection with claims to heriots. See

infra, p. 416.]

B 2

( 4 )

PARTI. ON TENURE.

CHAPTER I.

TENURE BY THE COMMON LAW.

All land is By the doctrine of the common law, all the land in England is

mediately OT either in the hands of the king himself, or is held of him by his

immediately tenants ill cavite.\* The king is therefore styled, kct' efoY^f,

of the king. ^ "

• For some purposes it is necessary to distinguish between tenants of the king

lit de corond and ut de honore. The former held by direct grant from the king.

The latter held of the king only by reason that the land-barony, or Honour, of

which they held, had come to the king's hand by forfeiture or escheat. They

held of the king by the same services as of the barony before it came to the

king's hand. See Mag. Cart. (9 Hen. 3) cap. 31. These tenures are both

properly styled tenure in capite ; because that phrase only imports that there is

no mesne lord between the king and the tenant ; and this is as much the fact

in the one case as in the other.

Lord Coke uses the phrase "tenure of the king in cajnte," to denote what is

. more properly expressed by the phrase, " tenure of the king ut de corond " ; and

uses the phrase, "tenure of the king not in capite," to denote what is more

properly expressed by the phrase, " tenure of the king nt de honore." See, for

example, his summary of the Statutes of Wills, 32 Hen. 8, c. 1, and 3-t & 35

Hen. 8, c. 5, in Co. Litt. Ill b, which is cited at p. 227, infra. In order to

denote tenure ut rfe cm'ond, he also uses the phrase, " ut de i)ersona " ; on which

phrases, see Harg. n. 1, on Co. liitt, 77 a, and notes 2, 3, on 108 a. He even

has a further phrase, holding " of the person of the king and not in capite " ; of

which he gives as an example the case where the seignory of lands, held in gross

of a common person, passed to the king from such person by escheat or forfeiture

for treason ; in which case the tenure passed from such person to the king,

but was not ut de corona, or, as Lord Coke calls it, in capite, because the

original tenure was not created by the king, but by the common person afore-

said. (Co. Litt. 108 a.)

If a tenant of the king by knight-service, who held ut de corond, died leaving

his heir under age, the king, by virtue of his prerogative, had the wardship

both of the lands held of himself and also of any other lands which the tenant

held of inferior loixis ; but if the tenure was nt de honore, the king had in

general the wardship only of the lands holden of him. (Co. Litt. 77 a.) The

duchies of Lancaster and of Cornwall, and some other Honours, were exceptions

from this rule. See EstwicVt Case, 12 Rep. 135, at p. 136 ; which refers to the

Honours of Rawleigh, Hagent, and Peverel, and states that the doctrine applied

to the ancient Honours generally. It is clear that, to Lord Coke's mind, the

chief practical distinction between the two kinds of tenure in capite lay in the

TENUEE BY THE COMMON LAW. 5

the Lord Paramount ; as being the " sovereigne lord, or lord

paramount, either mediate or immediate, of all and every parcell

of land within the realme." (Co. Litt. 65 a.) To this rule

there is no exception ; but Hargrave seems to surmise that

allodial lands may still exist in Scotland. In case of a failure

of heirs of the person entitled, it would be impossible for a

person in possession of land in England to withstand a claim by

escheat of the crown, upon a plea that the land was allodial or

not held of any lord. The tenants of the crown in capite are Immediately

. ,, 1 ii 1 by the tenants

commonly referred to as " the tenants m capite ; and that in capUe.

phrase usually imports, in the absence of any addition, tenure

holden immediately of , the crown ; but the phrase \*\* tenure iii

capite " only imports that the land to which it refers is held

immediately of the grantor, instead of being held of him

mediately through another person, of whom the tenant holds it

immediately ; and therefore tenure in capite, in its wide sense,

question, whether the king's wardship extended to all the infant's lands, or only

to the lands held of himself.

As to Honours in general, the curious reader may consult Mad. Bar. Angl.

Book I., passim. An Honour was the aggregate of a number of manors, usually,

and by ancient custom, granted out together under that title by the crown to a

great baron ; and so long as the English nobility remained of the true feudal

type, the tenants for the time being of the principal Honours in the gift of the

crown were the ciiief nobles of the kingdom. Upon the decadence of the feudal

system, nobility became a matter of mere titles, unconnected with the tenure

of the land, and the meaning of the word " Honour " was almost forgotten.

Madox ridicules Henry VIII. for his absurd conduct in passing Acts of Parlia-

ment to turn the manors of Ampthill, Hampton Court, and Grafton, into

" Honours," at a time when the word no longer retained any of the significance

of its original meaning. (Mad. Bar. Angl. 8, 9.)

The king could, of course, if he chose, instead of granting out in its entirety

an Honour of which he had obtained possession, subdivide it into aliquot parts,

or separate from it some of its manors, or some parcel of its demesne lands ; and

this was sometimes done even in early times, though not to a great extent,

because the practice, if common, would then have disarranged both the political

and the military organization of the kingdom. Some early examples are

collected in Mad. Bar. Angl. 44 — 60. At a later period, when it was no longer

attended by the same public inconvenience, the practice became more common.

" Thus," says Madox, at p. .59, " land-baronies were divided and subdivided,

till at length they were brought to nought." Perhaps the only Honour now

held bj' a subject is the Honour of Arundel, which gives to the Duke of Norfolk

his title as Earl of Arundel. The fact is so stated, and apparently agreed, in

Gerard v. Gerard, 1 Salk. 253, 13 Vin. Abr. 20!), suh tit. Feudall Honour. For

some further mention of this Honour, see Mad. Bar. Angl. 63, 71. The right to

the title of Arundel is now regulated by a private Act of Parliament, 3 Car. 1,

c. iv. See Berkeley Peerage Case, 8 H. L. C. 21, at pp. 101, 137.

6

ON TENURE.

is a phrase which may without any impropriety be applied to a

subject.\* (Co. Litt. 73 a ; and see Dy. 277 a, pi. 57, where the

learned editor in a note boggles over the mention of a tenant in

capite to the Bishop of Durham ; Mad. Bar. Angl. 166.) But,

as has above been remarked, the phrase is usually restricted to

Mediately, by the tenants of the crown. Under the tenants in capite came

mesne lords, others who held of them ; and until the statute of Quia, Eniptores,

18 Edw. 1, forbade the practice of subinfeudation, the tenants

of the tenants in capite might, by the common law, convey lands

in fee simple to tenants of their own to be held of themselves,

and these again to others under them, and so on theoretically

ad infinitum,^ though in practice the successive links could not

be very numerous. After the last-mentioned statute, though

successive feoffments in fee might be made, yet the feoffee did

not hold under the feoffment of the feoffor, but, under the

statute, of the chief lord of the fee.

Meaning of

common law

tenure.

The tenure by which this system was held together, because

it existed by force of the common law, is often styled tenure by

the common law or common law tenure. Since the decadence

of the feudal system, which has deprived the true doctrine of

tenures of nearly all its practical importance, the word tenure

has often been confused with terms referring to the quantum of

\* There is much important difference between the mere tenure in gross, which,

before the statute of Quia Emptores, coull be created by any person seised in fee

simple of a plot of land, and tenure of a lord of a manor " as of his manor."

On this point, see LuttreVs Case, 4 Rep. 8G, at p. 88 b. Of course lands could not

be grantetl to be held " as of a manor," unless they were in fact parcel of the

manor at the time of the grant. Since the statute of Quia Eniptores, it has been

unlawful for a subject to grant lands in fee simple to be held of himself ; nor

can the lord of a manor grant any parcel of his manor to be held of him as of

his manor.

f A»is shown by the Statute of Westminster 2, 13 Edw. 1, c. 32 ; which, in

order to prevent evasion of the Statutes of Mortmain by means of feigned

recoveries, enacted that the hona fides of default made by the defendant in

actions of recovery brought by ecclesiastical persons should be inquired by a

jury ; and that, if it should be found that the demandant had a good title, he

should have judgment ; but if it should be found that he had no right, " the

land shall accrue to the next lord of the fee, if he demand it within a year from

the time of the inquest taken ; and if he do not demand it within the year, it

shall accrue to the next lord above, if he do demand it within half a year after

the same year ; and so erery lord after the next lord (^yuilihet dombms post

proximuvi dominuiii) shall have the space of half a year to demand it successively,

until it come to the king, to whom at length, through default of other lords, the

lands shall accrue." (2 Inst. 428.)

TENURE BY THE COMMON LAW. '

the tenant's estate : a confusion which is chiefly due to the fact,

further referred to in the next following paragraph, that

common law tenure is found only in connection with estates

having a certain quantum, not being less than an estate for the

life of the tenant himself, or for the life of some other person.

But the word properly denotes the specific feudal relation subsist-

ing between the lord and the tenant. (See A tt. Gen. of Ontario

V. Mercer, 8 App. Cas. 767, at p. 772.) It refers only to those Does not

relations which were comprised within the feudal organization terms of

of the realm, and does not properly include the relation between ^®^''^"

a reversioner and a termor for years. Until the Statute of

Gloucester (6 Edw. 1) gave a partial, and the 21 Hen. 8, c. 15,

gave a complete, remedy, the reversioner, as common law tenant

of the freehold, had power to destroy the term of years at his

own will and pleasure, by suffering a collusive recovery. (Co.

Litt. 46 a ; and see further, as to the origin of terms of years,

regarded as legal estates, p. 63, infra. As to the practice of

using the word tenure in connection with terms of years, see

p. 65, infra.)

There is not necessarily or in the nature of things any definite Connection

DGtWGGIl

relation between the nature of the tenure by which the tenant common law

holds, and the quantum of the estate held by the tenant ; but an freehold"

invariable custom did, in fact, establish such a definite relation, estates.

and also went a considerable way towards maintaining a definite

relation between the nature of the tenure and the political status

of the tenant. Thus it is the fact (1) that common law tenure

was always associated with estates not falling below a certain

conventional quantum ; and (2) that such tenure was so far

associated with the status of a free man, that the grant to a

villein by his lord of an estate to be held thereby, or (which is

the same thing) the grant of an estate not falling below the

standard quantum, would operate as an enfranchisement. (Litt.

sect. 206.) From its connection with political status, the

common law tenure acquired the name of free or frank tenure^

and the common law estates were styled estates of freehold.

These estates remain, in point of quantum, the same now as in

the days of Littleton ; but the practical importance of the dis-

tinction between estates of freehold and estates not of freehold,

ON TENURE.

The connec-

lion between

frank tenure

and free

status not

absolute.

Divisions of

common law,

or frank,

tenure.

Tenure in

chivalry.

has been much lessened. Moreover, certain important die-

tinctions have been enacted and established by statute, between

estates of mere freehold arising under a settlement, and estates

of mere freehold taken under a lease granted at a rent.

Both the nomenclature and the history of tenures\* shows

that, so long as the feudal system retained its practical import-

ance, a strong connection existed, both in public opinion and

in common practice, between free status and free tenure, and

between villein status and villein tenure. It is probable that,

during the early period after the Norman conquest, the division

between free and villein tenure accurately corresponded with the

division of the population in regard to status ; but the connection

between tenure and status, at all events after the earliest days

of the feudal system, was not absolute. (1) A free man did not

lose his freedom by accepting lands to be held by villein tenure.

(Litt. sects. 172, 174.) (2) Not only the grant of an estate of

freehold, but also the grant of a term of years, or any fixed

interest whatever, greater than a tenancy at will, by the lord to

the villein, operated as an enfranchisement ; as also did the

grant of an annuity, or the giving of a bond, or anything

whereby the. villein acquired the right to maintain an action

against the lord. (Ibkl. sects. 205, 208 ; and Lord Coke's

comment.) The existence of these breaks in the connection

between tenure and status is sufficiently explained by the leaning

infavorem libertatis, which has from very early times been a

marked feature of English law. {Anglice jura in onini casu

libertati dant favorem. Co. Litt. 124 b.)

All free or common law tenure (other than spiritual tenure)

was either in chivalry or in socage. (Litt. sect. 118.) It is

necessary to restrict Littleton's words, which are general, to lay

tenure; ior frankalmoigne is indubitably entitled to rank as a

distinct third kind of common law tenure. (Co. Litt. 86 a.)

(I) Tenure in chivalry comprised, until its abolition in the

year 1660 (which took effect as from 1645) by the statute 12

Car. 2, c. 24, the following species : —

1. Grand Serjeanty. (Litt. sects. 153 — 158, and Lord Coke's

[As to which, see Pollock and Maitland, Hist. Eng. Law, i., pp. 232 seg.]

TENURE BY THE COMMON LAW.

comment.) This tenure could be of none but the king.

(Litt. sect. 161.) Its distinguishing characteristic is the

nature of the services to be performed by the tenant.

These were always of an honourable and dignified kind,

closely connected with the person or the special service of

the king ; and they were services to be performed by the

tenant himself in person, such as, \*' to carry the banner

" of the king, or his lance, or to lead his army, or to be

" his marshall, or to carry his sword before him at his

" coronation, or to be his sewer at his coronation, or his

\*\* carver, or his butler, or to be one of his chamberlaines

" of the receipt of his exchequer, or to do other like

" services." (Litt. sect. 153. See also Lord Coke's

comment thereon ; and Mad. Bar. Angl. 247.) The

office of Usher of the Exchequer was held by grand

serjeanty. (Dy. 213 b, pi. 42. See also ihiiL 285 b,

pi. 39.) It will be observed that the services might be

either of a useful kind, or merely ornamental. On the

performance of the service by deputy, when the tenant

was unable to perform it in person, see Lord Coke's

comment on Litt. sect. 157. Language has been some-

times used which would seem to import that this tenure

has not been destroyed, as a separate species, by 12 Car. 2,

c. 24. (For an instance of this, see Lord Ellenborough

in Doe v. Huntington, 4 East, 271, at p. 288.) But the

language of the statute better supports the view, that

grand serjeanty has thereby been converted into free

and common socage, retaining nevertheless its honorary

incidents.

2. Homage Ancestral, on which some remarks will be made

shortly. {Vide infra, p. 18.)

3. Knight-service, commonly so called, of which escuage,

cornage, castle-guard, &c., were incidental services. The

term escuage is sometimes used by metonymy to denote

the tenure of which it was a prominent incident ; for

example, in Litt. sect. 99. Escuage certain, i.e., payable

to a fixed amount, is sometimes used to denote socage ; of

whichjixity inthe extent ofthesennces lawfully demandable

is the most salient characteristic. (Co. Litt. 87 a.) But

10 ON TENURE.

when the term is used without any specific addition, it

refers to knight-service.

It is unnecessary for the present purpose to make any

particular mention of the burdensome incidents of knight-

service, which were abolished, together with that tenure,

by the statute 12 Car. 2, c. 24.

Tenure in (II) Tenure in socage, also styled free and common socage,

socage.

\* comprises : —

1. Petite Serjeanty. (Litt. sects. 159, 160.) This tenure

also can be of none but the king. {Ibid. sect. 161.)

Sundry incidents of this tenure have been abolished by

the statute 12 Car. 2, c. 24, but its name seems to remain.

(Harg. n. 1 on Co. Litt. 108 b.) On the distinction

between grand and petite serjeanty, see Co. Litt. 108 a.

The services appertaining to petite serjeanty were not

to be performed by the tenant in person, but consisted

in furnishing for the king's use some small article

; relating to war; " as a bow, a sword, a dagger, a knife,

a launce, a pair of gantlets of iron, or shafts, and such

like." (Ibid.)

2. Homage Ancestral in Socage. (See Litt. sect. 152.) This

tenure may be said to have been converted into mere

fealty ancestral by the abolition of homage ; but the

conditions under which homage ancestral, whether in

chivalry or in socage, existed, make it very improbable

that any specimens survived in practice till the Resto-

ration.

3. Peculiar species of socage, distinguished by the association

with them of peculiar customs ; as for Q\Skm^\&, Burgage

Tenure (Litt. sect. 162), distinguished by its frequent

connection with the custom of borough-english, and also

with a custom to devise by will lands so held, before the

first Statute of Wills, 32 Hen. 8, c. 1 ; also Gavelkind,

when the word is used to denote the tenure and not the

attendant customs. Other species might perhaps be

discriminated, which have not acquired distinct names

by reason of their rarity and comparative unimportance.

But the practice of distinguishing between species of

TENURE BY THE COMMON LAW. 11

socage or other tenures, by their connection with pecuUar

customs of inheritance, is of doubtful propriety ; because

an alteration in the tenure does not effect any alteration

in the associated custom. (Vide infra, -p. 14:.) This fact

is expressed by saying, that the custom inheres in the

land and is not associated with the tenure. There can

therefore be little propriety in regarding the custom as

a differentia for the purpose of distinguishing between

species of tenure.

4. Common Socage, so styled generally, in the absence of any

special characteristic.

(Ill) Frankalmoigne is a species of tenure to which the Tenure in

following conditions are necessary : — (1) that the tenant be an soigne."

ecclesiastical corporation, whether aggregate or sole; (2) thatthe

grant be made by the words in liberam (or puram) eleemosinavi,

or the Norman or English equivalents.\* (Co. Litt. 94 b.) But

no gift to be held by this tenure can be made, since the statute

of Q^iia Emptor es, except by the crown. (Litt. sect. 140.)

Even a corporation sole, which in an ordinary grant would not

take a fee simple without the addition in the limitation of words

of succession, would take a fee simple by the use of the word

frankalmoigne without words of succession. (Co. Litt. 9 b ;

ibid. 94 b.) Fealty was not due to the lord. (Litt. sect. 135.)

But if by escheat the lordship passed to a superior lord {Ibid.

sect. 141), or if by alienation the lands passed to a new tenant

{Ibid. sect. 139), fealty became due, and the tenure was con-

verted into socage, even though the new tenant were an ecclesi-

astical person, for the tenure of frankalmoigne could only

subsist between donor and donee. (Litt. sect. 141 ; 2 Inst. 502.)

No definite or specified services could be reserved to the lord

on a gift in frankalmoigne, but a general obligation was implied

\* Mad. Form. Angl. p. 240, No. 398, gives a charter ascribed to about the year

1135, where the form is in perpetuam elemosinam, which is his usual spelling of

the last word. No. 400 has only in elemosiiuim. Afterwards the forms, in

puram et perpetuam elemoifinam, in liberam et perpetuam elemosinam, and even

(No. 420) in jmram et liberam ac jterpetuam elemosinam, are found. Sometimes

the expression used is not with the preposition, but the word elemosina is put in

apposition to the subject of the gift itself. In No. 402 the gift is styled,

elenwsituim istam et concessionem. In No. 403 it is styled, elemosinam vieam ei

oblationem. In No. 408 it is styled, sicuti puram elemosinam liberam et

perpetuam.

12 ON TENURE.

to say prayers and masses for the souls of him and his heirs.

If any definite or specified ecclesiastical service was annexed to

the gift, the tenure was not properly frankalmoigne, but by

Divine Service. (Litt. sect. 137.) Therefore it would be the

more strictly correct method to treat frankalmoigne as being

only one species or sub-division oisjnritiial tenure, as Lord Coke

says the old books did. (Co. Litt. 97 a.) A reservation of a

secular service, such as a rent, was void, as being repugnant to

the nature of a grant purporting to be made in frankalmoigne.

{Ibid.)

•

Estates in Frankmarviage (sometimes vaguely coupled with frankal-

riage. moigne, and sometimes erroneously styled a tenure) is the

name, not of a species of tenure, but of a species of estate ;

namely, an estate in special tail given to a man and his wife

and the heirs of their two bodies, in consideration of the

marriage and of a near blood relationship between the donor

and one of the parties to the marriage ; which estate has some

peculiar characteristics distinguishing it from an estate in

special tail not limited upon those particular considerations.

(See Co. Litt. 21 b.) Land may be given in frankmarriage as

well after the marriage as before. (Dy. 272 b, pi. 32.)

Frankmarriage is a word of limitation sufficient (when the

postulated state of the facts actually exists) to confer such an

estate in special tail without the word heirs. The fact that old

precedents of deeds, or charters, relating to feoffments pur-

porting to be made in frankmarriage, often contain words of

express limitation, may be explained, without supposing that

the persons who made the deeds had any doubt as to the

sufficiency of the word frankmarriage alone.\* Their motive

may have been, to avoid the necessity for actual proof of the

relationship between the parties, in case the deed should be

required as evidence of the estate.

\* The examples of charters of gift in frankmarriage to be found in Madox,

Formvlare Anglicatmm, are only three, No. 145, p. 79, No, 146, p. 80, and

No. 148, p. 81 ; and they all contain words of express limitation. In the first,

the limitation is in special tail, illi et h<eredibus qui de predicts. Jilia med

exihunt. In the other two, the limitation is in the form of a fee simple, sihi

(or ?7/i) et hceredilmt suis. The expressions in maritagio, in lihenim maritagium,

and j« libera maritagio, are used in the three forms respectively.

TENURE BY THE COMMON LAW. 13

At common law, before the statute De Doni» had given to

conditional fees the peculiar characteristics which have caused

them to be distinguished as fees tail or estates tail, the estate

created by a gift in frankmarriage was a conditional fee.

(1 Bro. Abr. 359 b, pi. 8 = Franke marriage, &c., pi. 8.)

Homage and Fealty were not themselves tenures, but incidents Homage and

of tenure. Homage was due only in respect of estates of inheri- ^^ ^\*

tance (Litt. sect. 90) ; and was almost confined to tenure in

chivalry, though it was sometimes found .as a rare incident of

socage tenure. {Ibid. sect. 117.) Fealty not only pertained

equally to chivalry and to socage, but by custom also to copy-

hold and customary tenure, and even to a reversion (Co. Litt.

93 a) ; and it was due in respect of every estate and interest in

land, except a common law tenancy at will ; that is, a tenancy

at will other than the customary tenancy upon which copyhold

tenure depended. But (as has above been remarked) fealty was

not due in respect of lands held in frankalmoigne. It sometimes Tenure by

happened that homage, or fealty, was the sole obligation which ancestral,

the tenant was bound to discharge ; of which the best known

example is the case of lands held by homage ancestral, where the

tenant and his ancestors had held the land, either of the same

lord and his ancestors or of the same corporation, time out of

memory, by homage alone. (Litt. sect. 143 ; Co. Litt. 102 b.)

This tenure tends by its nature rapidly to become extinguished ;

since it generally requires for its validity a double prescription,

one on the side of the lord and the other on the side of the

tenant ; and Lord Coke doubted whether any examples of it

were still in being at his day. (Co. Litt. 100 b.) It is some-

times mentioned as though it had been a special tenure ; but

may more properly be regarded as knight-service (in some rare

cases, socage) which had never been subject to any other

services, or perhaps, in some cases, had practically lost the

liability to such services by long disuse. Tenure in frankal-

moigne (as has above been remarked) might be converted into

socage, with no service incident to it except fealty, either by

alienation of the lands or by escheat of the seignory.

Homage was abolished by 12 Car. 2, c. 24. But fealty remains Homage now

due, if demanded ; though long neglect would, in many cases, but fealty

remains.

14

ON TENURE.

make the title, where it exists in inferior lords, difficult to prove

in respect of freehold tenure. In the absence of proof that the

tenure is of an inferior lord, the tenure is presumed to be of the

crown, which presumption carries with it the right to the lands

upon an escheat. On admittances to copyholds, where the lord's

right to fealty is generally indisputable, it is usual expressly to

respite the tenant's fealty. But by the custom of some manors,

the copyholders are not bound to do fealty. (Litt. sect. 84.)

On gavelkind

and borough-

english.

Costoms of

inheritance do

not depend

npon the

tenure.

Gavelkind (in its usual sense) and horough-english are not

tenures, but customary modes of descent affecting lands in

particular places, by virtue of which the inheritance of them

descends differently from the course of descent prescribed by the

common law, although the tenure is socage, and the words of

limitation used to create the estate are those used to create

common law fees. The word gavelkind is used, or confused,

in three different senses : — (1) To denote the tenure, which is a

species of socage having certain peculiar customs connected with

it ; (2) to denote the several particulars which together make

up the custom of Kent ; and (3) to denote only the custom of

equal partition among males upon a descent. (Rob. Gav. 9.)

But it is conceived that the word is not properly used to denote

the tenure ; for the custom " runs with the land and not with

the tenure " {Ihid. p. 80 ; and see pp. 87, 90) ; and the descent

of copyholds subject to the custom is not altered by enfranchise-

ment. {Ihid. 92.) It was the better opinion that a fine

(improperly) levied at common law of gavelkind lands in

ancient demesne, did not alter the course of descent, though

remaining unreversed. (Dy. 72 b, pi. 4.) Some later writers

seem to use the word gavelkind, in conjunction with the word

tenure, to denote the custom — a highly inappropriate com-

bination. In relation to borough-english, the name of the

tenure is burgage tenure. The custom of borough-english,

however, is not confined to boroughs, but may exist in manors.

(See Roe v. Briggs, 16 East, 406.)

Gavelkind. Gavelkind is found as a custom most commonly, but not

exclusively, in Kent. (Litt. sect. 210, and Lord Coke's

comment.) In that county, though the extent of the custom

TENUKB BY THE COMMON LAW. 15

has been curtailed by 31 Hen. 8, c. 3, and other private Acta

passed for the disgavelling of particular lands, all lands are

still presumed to be gavelkind until the contrary is shown.

(Bob. Gav. 54.) The tendency of this rule is gradually to

undo the effect of the disgavelling Acts, because lapse of time

makes it difficult to prove that specified lands are included in

a specified Act.

It seems that the word gavelkind is not properly used of Properly

refers odIv to

lands affected by the custom outside Kent, such extended usage the custom of

of the word having been introduced only by the disgavelling ^^°'^'

Acts of Hen. 8. (Rob. Gav. 8, note.) The custom of Kent

must, at all events, from its importance, be regarded as the

normal standard of gavelkind, and all variations from it as

being separate and peculiar customs. By this custom, the How it affects

descent is among all the sons equally, and, in default of sons, ^^\*'®° '

to all the daughters equally, and, in default of children, to all

the brothers equally ; the issue of a deceased son, daughter, or

brother, who, if living, would have been entitled to partake,

being also entitled per stirpes to the share of their deceased

parent. (76R 112, 115.)

The custom affects lands subject to it in respect to some other How it other

things besides descent ; namely, dower, curtesy, alienation by lands.

infants, and escheat, together with other less important points,

some of which are now obsolete; and the effect of the dis-

gavelling Acts above referred to is confined to descent alone,

so that the custom still applies in all other respects. (Rob.

Gav. 96.) The peculiar advantage of immunity from escheat

upon attainder of felony, which was formerly possessed by

gavelkind lands under the custom of Kent, has disappeared

with the generarabolition of escheat upon attainder of felony

by 33 & 34 Vict. c. 23.

Borough-english is a custom chiefly found in connection Borough-

with lands held by burgage tenure within certain ancient °

boroughs (Litt. sect. 165) ; which species of socage does not

seem to be affected by 12 Car. 2, c. 24. (Harg. n. 1 on Co.

Litt. 116 a.) The descent is here to the youngest son, to the

exclusion of all the other children. (Litt. sect. 211.) Various

species or modifications of the custom, including its extension

16 ON TENURE.

to females, and also to collateral descents, are also found.

The custom also obtains in certain manors. (Bob. Gav.

891, 393.)

Peculiar customs of descent, for the reasons which are stated

at p. 230, i7if)'a, are much more commonly found in connection

with copyholds than with freehold lands. Such customs are

not extended to collateral descents, merely on proof of the

custom with regard to direct descents ; but it is necessary to

prove that, in the particular manor, the custom extends to the

particular kind of collateral descent under which the claimant

prefers his claim. (Re Smart, Smart v. Smart, 18 Ch. D. 165.)

Other peculiar Other customs affecting the descent of lands, resembling

descent in those above mentioned, are found in considerable variety

^°^se. scattered about the kingdom. It is said, for example, that in

the borough of Wareham in Dorsetshire, and in Taunton Dean

in Somersetshire, lands descend by custom to both males and

females by equal partition. (Rob. Gav. 45.)\* The same

custom held good of lands within the city of Exeter, until, by

a private (or rather, local) Act, 23 Eliz. c. 12, lands within

that city were made inheritable as lands at the common law.

(Ibid). These customs appear to refer to freehold lands.

Lord Coke also mentions " the mannor of B. in the county of

Berks," in which, if there be no son, and more than one

daughter, the eldest daughter inherits, to the exclusion of her

sisters, t (Co. Litt. 140 b.) The tenure of freehold lands

\* [As to descent to a surviving wife or husband by the custom of the manor of

Taunton Deane, see Elton, Copyholds, 122 ; Hounssll v. Dunning^ (1902) 1 Ch.

512.]

f Lord Coke's testimony as to the eldest daughter is clear. He then continues

— "and if he [the deceased tenant] have no daughters, but sisters, the eldest

sister by the custome shall inherit, and sometimes the youngest." These words

are obscure. They probably mean, that in the same manor the eldest sister

inherits, provided that there are no brothere ; and that in some otlier manors

there is a similar custom in favour of the youngest daughter and the youngest

sister, in default of sons and brothers respectively. The manor referred to by

Lord Coke is no doubt the Manor of Bray ; see 2 Watk. Cop. 480 ; where a

presentment, dated the 19th of October, 1770, and entered upon the Court Rolls

of this manor, is printed ; which states the custom of descent in similar terms to

those used by Lord Coke. The language of the presentment is somewhat vague

but it seems to refer to freeholds. For a curious customary descent of copyholds

within the manor of Sedgley in the county of StafEord, see Bickley v. BicMey^

L. B. 1 £q. 216. In this case the word descent was held to signify a link in the

TENURE BY THE COMMON LAW. 17

within such boroughs and manors may be regarded as

forming distinct species of socage, which have never acquired

special names by reason of their rare occurrence ; but it is

the usual practice to regard such peculiarities of local custom

as being modifications of gavelkind, if they are associated with

a custom of equal partition, and as modifications of borough-

english, if they are associated with a custom of descent to the

youngest child. The above-mentioned custom of the manor

in Berkshire cannot be brought under either denomination.

Customs like these, including the custom to devise lands before How far such

custoros Q.vf\*

the passing of the Statutes of Wills, which are in derogation good,

from the common law, may be alleged to exist in counties,

honours, cities, boroughs, hundreds, and manors, but not in

less important places, such as hamlets, and towns other than

boroughs. (Co. Litt. 110 b, and Harg. n. 2 thereon.) This last

remark does not apply to customs favoured by the law, such as a

custom to make bye-laws for repairing a church, or for the well-

ordering of common lands. (Ibid.) The restriction upon the

legality of local customs is founded upon the consideration that,

if every trifling locality were indulged in the use of special cus-

toms, the common law, which is only the general custom of the

realm (Co. Litt. 115 b), would practically cease to exist. For an

example of a custom (besides the custom of Kent) peculiar to a

county, see the custom of the county of Gloucester, referred to

in the statute De Prcewgativd llegis, cited infray p. 35.\*

pedigree, without reference to the question, whether it had, or had not, been

the cause of an actual devolution by heirship.

\* In the Year 15ook, 14 Hen. 4, fo. 5, B., customs peculiar to several counties

are mentioned :— (1) In the county of Cornwall, que chescun jmrchasor doit

payer relief ; wliich seems to mean, that every purchaser of lands paid a fine to

the Duke, under the name of a relief, upon taking possession. (2) In the county

of Chester, the Prince Palatine had a fine for every alienation ; which also was

probably paid by the purchaser. (.3) The same custom obtained in the county

of Durham, in favour of the bishop. These statements occur in the case of

Mayne v. Cross, ibid. fo. 2, in which the custom of the Honour of Gloucester is

expressly laid down, that a fine is payable to the lord on the alienation of a

freehold. S. C. iuh ?um. Maynard v. Cors, 20 Vin. Abr, 241 = Tenure (B, a),

pi. 12 ; cited, Damerell v. Protheroe, IG L. J. Q. B. 170, in which case a heriot

due upon the death of the tenant of freeliold lands held of the manor of South

Tawton, otherwise Itton, in the county of Devon, was recovered. These fines

are probably the " fines for alienation due by particular customs of particular

manors and places," referred to in the statute 12 Car. 2, c. 24, s. 6. But see

7 Vin. Abr. lyo, pi. 8 = Customs, I, pi. 8.

C.R.P. O

18

ON TENURE.

CHAPTER II.

EfiFects of

alienation

upon the

feudal polity.

THE STATUTE OF QUIA BMPTORES.

By the common law, ever since the time when it assumed the

form of a tolerably uniform and settled scheme,\* lands held in

fee simple could be alienated, and upon alienation a tenure

could, if the parties chose, be created between the feoffor and

feofifee. (2 Inst. 65.) Unless the alienation extended to the

whole of the lands in the same tenure, the feoffee could not,

by the mere act of the parties, be made to hold of the chief

lord ; because the tenant had no right to divide the lord's

seignory without his consent. (Co. Litt. 43 a.) The creation

of a sub-tenure in lands held for a fee simple is commonly

styled sub-infeudation ; and this was the form under which

alienation was usually effected during the early stages of the

feudal polity. For several genera.tions such alienations were

common ; and though some restriction was placed upon

alienation by Magna Carta, further referred to in the next

following paragraph, it is evident from the complaints made

by the superior lords, that the practice of creating sub-tenancies

and mesne lordships was not seriously checked. We gather

from the preamble to the statute of Quia Emptores, 18 Edw. 1,

that this alienation by the creation of a sub-tenure might

deprive the chief lords of the \*\* escheats, maiTiagcs and ward-

ships of lands and tenements belonging to their fees." The

explanation! of the lord's complaint is possibly as follows : —

Though the lord might always at common law distrain upon

• Various strange things are cited by Lord Coke out of what he calls the

" ancient law of England." See, for example, the restrictions on alienation

cited out of Glanvile, in 6 Rep. at p. 17 d. Also the notion that leases might not

be granted for a longer term than forty years. (Co. Litt. 45 b, ad Jin., referred

to, p. 63, infra.') These things probably had a historical basis. (Reeve, 1 Hist.

Eng. Law, pp. 42, 43.) But they stand out of all relation, not only to the

modern law, but to the foundations upon which the modern law rests.

t Blackstone says that the wardships, &c., fell into the hands of the mesne

lords. (2 Bl. Com. 91.) There seems to be here some confusion. "What the

superior lord was entitled to was the wardship of his own tenant, the mesne

lord, not of the mesne lord's tenant ; and the wardship of the mesne lord could

not possibly fall into the mesne lord's hand.

THE STATUTE OF QUIA EMPTORES. 19

the whole land for his services in arrear (2 Inst. 65), and also,

under the Statutes of Gloucester and Westminster 2, might

recover the lands by writ of cessavit, yet he would lose the

benefit of escheats, marriages, and tvardships, if his own tenant,

having infeoflfed a sub-tenant, should simply disappear, so that

the happening of the occasions upon which those benefits

arose would not be known ; or if, on occasion of the feoffment,

no valuable services had been reserved, so that the wardship

of the tenant was the unlucrative wardship of a person entitled

to nothing but a bare seignory.

Notwithstanding the lord's right at common law to distrain Eemedy at-

for the services, the latest version \* of Magna Carta, 9 Hen. 3, Magrui cL-ta.

c. 32, provided an additional protection for him, by forbidding

the tenant to alienate more than would leave enough to answer

the services. This enactment was probably due to the same

motives which afterwards prompted the enactment of Quia

Eviptoi'es. (2 Inst. 66.) The remedy afforded by a common

law right of distress, under which chattels might be seized but

could not be sold, was very imperfect. The mischief specified Quia

in the preamble to Quia Emptores, since it sprang rather from

the method of sub-infeudation than from the mere passing of

the lands into the hands of a new tenant, was appropriately

met by removing all restraint from alienation, and at the same

time absolutely forbidding the practice of sub-infeudation.

The statute (cap. 1) enacts, " That from henceforth it shall

be lawful to every free man to sell at his own pleasure his lands

and tenements, or part of them, so that the feoffee shall hold

the same lands or tenements of the chief lord of the same fee

by such service and customs as his feo^or held before." Here

the word customs means the same as services. (2 Inst. 502.)

The statute (cap. 2) provides for apportionment of the services Apportion-

on alienation of a part only of the lands. But this applies only services on

to services which are in their nature divisible. Of services alienation,

which do not admit of apportionment, some are due, after

alienation, from each tenant ; some are due from one only ;

\* Confirmed by charter of Inspeximus by Edw. 1, in the 25th year of his

reign ; and therefore printed under 25 Edw. 1 in Stat. Rev. at Vol. I., p. 84,

c 2

B/uj/foi-es,

20

ON TENURE.

and some are, and some are not, extinguished on the purchase

of a portion of the land by the lord. (Bruerton's Case, 6 Rep. 1 »

Talbot's Case, 8 Rep. 104.) The apportionment is to be made

according to the value {j^ro particula secundum quantitateni

raloris), and not according to the quantity of the land. (2 Inst.

503, 504.)

The statute (cap. 3) extends only to lands held in fee

simple.

The statute

does not bind

the crown.

This statute did not exempt the tenants of the crown in

capite from the necessity of procuring the king's licence to

alienate, because the king's rights, he not being specially named,

are not affected by the statute. (Co. Litt. 43 b.) Therefore\*

(1) if the tenant in capite aliened without licence, the crown

could distrain for a fine upon the land (Fitzh. N. B. 175 A) ;

and, (2) upon such unlicensed alienation, the services were not

apportioned, but the crown could distrain upon any of the

tenants for the whole services. (Ibid. 235 A.) The king's

right to the fine seems to have been derived from Mag. Cart.

cap. 32. (Co. Litt. 43 b.)

But it seems

to bind the

tenants in

capite.

Blackstone seems to have thought that the statute did not

extend to the tenants of the crown in capite, in the sense that

they might subsequently create de novo a tenure in fee simple

to be holden of themselves. (2 Bl. Com. 91.) But it is perhaps

uncertain whether he adverted to the distinction between the

different senses which the words " extend to " may bear. The

statute has two aspects, one in so far as it enables the tenant to

alienate, the other in so far as it disables him from creating de

novo a tenure in fee simple to be held of himself. The statute

did not enable the tenants in capite to alienate as against the

crown ; and in this sense it may be said that the statute did not

\*\* extend to" the tenants in capite, though it would be more

strictly correct to say, that the statute did not extend to the

crown. This proposition is, in fact, the import of the passages

cited in the last preceding paragraph from Fitzherbert. But

it does not follow that the statute did not extend to the tenants

in capite, meaning thereby that it failed to restrain them from

creating de novo a tenure in fee simple. The question seems to

THE STATUTE OF QUIA EMPTORES. 21

be at this day of no practical importance ; for Blackstone held

that in any case the effect of the statutes 17 Edw. 2,\* De Prce-

rofjativd Regis, c. 6, and 34 Edw. 3, c. 15, is to invalidate all

sub-infeudations by the tenants in capite of later date than the

commencement of the reign of Edward I.

The inference may, perhaps, be too hasty, that " all manors How far

existing at this day must have existed as early as King Edward ™erteds?nce

the first." (2 Bl. Com. 92.) Charters have been granted by the the statute.

crown, and confirmed by parliament, empowering subjects to

create manors since that date ; of which an example is to be

found in the case of Delacherois v. Delacherois, 11 H. L. C. 62.

In that case the land to which the charter had reference was in

Ireland, and the confirmation was of course by the Irish parlia-

ment. There can be no doubt that, if aided by the confirma-

tion of the English or British parliament, a charter authorizing

the creation de novo of manors in England would be valid.

Nor is it at all clear, that such confirmation is necessary.

Lord Coke expressly affirms, that the statute may be dispensed

with, by consent of the crown and all the mesne lords. (Co.

Litt. 98 b ; 2 Inst. SOl.t)

The practical result of the partial restraint upon alienation Alienation,

imposed by Marj. Cart. cap. 32, was, that lords exacted a fine ^^Zh^^e^^

upon alienation as the price of their consent, without which statute.

their tenants could not make a safe title. The right to such

fines was abolished, so far as the tenants of common persons

are concerned, by the statute of Quia Emptores. But, as above

mentioned, the tenants of the crown in capite acquired by the

statute of Quia Emptores no rights as against the crown ; and

therefore fines upon alienation continued to be due from the

tenants in capite, until expressly abolished by 12 Car. 2, c. 24.

One effect of the introduction of common recoveries into

\* This statntx) is of uncertain date. (1 Stat. Rev. 131.) The passage referred

to by Blackstone is not printed in Stat. Rev. It seems to be cap, 7, as given in

Raithby, ed. by Tomlins, 1811, Vol. 1, p. 374. The 34 Edw. 3, c. 15, is printed,

1 Stat. Rev. 204.

t See also Bro. Abr. Tenures, pi. 2. '\* Car ceo [gtatute] fvyt fait in advantage

de eux, et ideo ilx poient digpenser ove ceo." Also Fitzh. N. B. 211, 1 ; where the

same reason is given.

h

22

ON TENUBE.

general practice, was, that the king's tenants in cajnte acquired

power to alienate their lands, under pretence of a paramount

title in the demandant, without compounding with the crown

for fines on alienation. The statute 32 Hen. 8, c. 1, s. 15,

accordingly enacted, that fines for alienation should be paid

upon obtaining writs of entry for suffering common recoveries.

(Cruise, 2 Fines & Rec. 17.)

Effect of the

statute.

It is the general effect of the statute of Quia Emptores, so

often as a mesne tenure for a fee simple is extinguished by

union of the land and the lordship in the same hands, to pre-

vent the mesne tenure from being ever again revived by any

act of the parties. Thus, by the gradual extinction of the

mesne tenures, the seignory of all freehold lands held for a fee

simple tends to become concentrated in the crown.

A tenure can

still bo

created,

accompanied

by a rever-

sion.

A tenure can still be created between donor and donee of

lands to be held in tail, or for any less estate of freehold. On

a gift in tail, the reversion in fee remaining in the donor, the

tenure is necessarily between donor and donee, and cannot,

even by express tenendum, be created between the donee and

the superior lord of the donor. But if on a settlement the

tvhole fee passes out of the settlor, the tenure, even as regards

particular estates carved out of the fee, is executed by the

statute in the superior lord. (2 Inst. 505. See also Litt.

sect. 215 ; Perk. sect. 637. To this effect also is the decision

in £>y. 362 b, pi. 19.)

( 23 )

CHAPTER III.

THE STATUTE 12 CAR. 2, C. 24.

This loosely-drawn statute, like the Statute of Frauds, is

plausibly ascribed to Lord Hale — a report which Hargrave

would willingly discredit. (Harg. n. 1 on Co. Litt. 108 a.)

Its language is marked by an iteration, always inept and some-

times perversely maladroit, which is a surprising feature of

such authorship. By it (1) the Court of Wards and Liveries Burdensome

is abolished, and the burdensome incidents of knight-service incidents of

' \_ ... tenure in

and of socage ,i;i capite, including fines for alienations, are dis- chivalry and

charged as from 24th February, 1645, since which date the abolished.

Court of Wards and Liveries had ceased to hold sittings ; (2) all

tenures, whether of the king or of any person or corporation,

are turned into free and common socage as from the same day ;

(3) all conveyances and devises of any hereditaments made

since the same day are to be expounded as if the same heredita-

ments had been then held in free and common socage ; (4) certain

statutes passed for the establishment and regulation of the

abolished court are repealed ; (5) all tenures thenceforward to

be created are to be and to be adjudged free and common

socage only. (Sects. 1 — 4.)

The savings out of the Act require more particular mention. Savings.

1. The Act does not take away rents certain, heriots or suits

of court belonging or incident to any former tenure now

taken away or altered by virtue of this Act, or other

services incident to tenure in common socage, or the

fealty and distresses incident thereunto. (Sect. 5.)

2. The Act does not take away fines for alienation due by

particular customs of particular manors and places,

other than fines for alienation of lands or tenements

holden immediately of the king in capite. (Sect. 6.)

3. The Act does not take away tenures in frankalmoigne, or

subject them to any greater or other services than they

24 ON TENURE.

then were subject to \*; nor does it alter or change any

tenure by copy of court-roll or any services incident

thereunto ; nor does it take away the honorary services

of grand serjeanty. (Sect. 7.) But there is no saving

of the last-mentioned tenure.

4. Nothing in the Act is to infringe or hurt any title of

honour, feudal or other, by which any person hath or

may have right to sit in the Lords' House of Parliament,

as to his or their title of honour or sitting in parliament,

and the privilege belonging to them as peers. (Sect. 10.)

Effect of the By the conversion of all lay frank-tenements into socage

right^to\*^" tenements, it followed that every freehold tenant acquired the

devise, right to devise all lands held by him for a fee simple, which

right had been given by the Statutes of Wills, 32 Hen. 8, c. 1,

and 34 & 35 Hen. 8, c. 5, only partially to tenants by knight-

service, but completely to tenants in socage.

It seems clear that, since the passing of this statute, no lay

frank-tenure other than socage can be created, even by the

crown, without the assent and confirmation of parliament.

( 25 )

CHAPTER IV.

TENURE BY CUSTOM OF THE MANOR (cOPYHOLD TENURE).

Customary tenure may be said to exist by virtue of the common Origin of

law, in a sense which is applicable to all matters which the tenure.^'^^

common law does not forbid to exist;\* but this merely per-

missive sense is evidently opposed to the active sense in which

common law tenure is said to exist by virtue of the common

law. The analogous active cause of the existence of customary

tenure is local custom ; and particularly those local customs

which regulated the terms upon which villein tenants were

permitted to hold land. Thus Littleton says, that " tenure in

villenage is most properly, when a villeine holdeth of his lord,

to whom he is a villeine, certaine lands or tenements according

to the custome of the manner, or otherwise, at the will of his

lord, and to doe to his lord villeine service." (Litt. sect. 172.)

It does, indeed, also appear from Littleton's language, that

lands not parcel of any manor belonging to the lord of whom

they were held, might be held in something called villenage ;

and by a tenant who was not the lord's villein, or not a villein

at all, but a free man. But for all practical purposes copyhold

tenure not only does now, but probably always did, exhaust

the whole extent of villein tenure or tenure in villenage ; and

originally the villein tenants throughout the kingdom were

probably conterminous with the villeins by status.! Villein

\* " Whatever is not by statute, nor against law, may be said to be at the

con>mon law." Bacon, Uses, 22.

7 It is a remarkable circumstance, which seems to have passcil without

remark, that in his commentary on Litt. sect. 73, Lord Coke cites the words

" certaine ^e«e/He«<\*," as though they were the words of Littleton. Littleton's

words, as translated by Lord Coke, are, "certaine tenant!.'''' What follows

shows plainly that the substitution was not due to a clerical error. Littleton

connects the tenure with status. To Lord Coke this idea was so unfamiliar, that

he unconsciously substitutes a phrase which connects it with the jyarticular

lands habitually demised by the custom ; and he proceeds, accordingly, to

discuss what things are so demiseable. This fact, perhaps, points to a change ia

26 ON TENURE.

tenure, if it was ever accepted by free men of lands not parcel

of the manor, would differ from villein tenure by custom of

the manor in two important respects : (1) that the grant was

not made or evidenced by copy of court roll ; (2) that there

existed no custom to prevent the lord from asserting his right

at common law to eject the tenant, who was only his tenant

at will, whenever he would. So far as such a relation between

lord and tenantfever existed, it could have been nothing more

than a contract for hiring, determinable at the will of either

party (the tenant by hypothesis not being the villein of the

lord) which can be termed a tenure only by vague analogy to

the true villein tenure by custom of the manor, with which it

shared two prominent characteristics : — (1) that the estate, or

interest, to which it related was only a tenancy at will ; and

(2) that the services due in respect thereof were of a kind con-

ventionally reputed to be below the dignity of a free man.

But from early times it has been no unknown thing for free

men to accept a tenancy of copyholds ; and no notion of

villein status has for several centuries been attached to this

tenure.

Its character- Copyhold tenure is distinguished by the following charac-

\*^'\*^- teristics:—

1. The estates to which it relates are legal estates, i.e., the

custom of the manor is, and for centuries has been,

recognized by the courts, even of law, as conferring a

right, though the tenure is not by the common law, and

the estate is not freehold. The recognition of the fixity

of the tenure may be traced very high in the history

of England. (See Litt. sect. 77, and Lord Colie's

comment ; Eeeves, 3 Hist. Eng. Law, 312, 313.)

2. The quantum and mode of devolution of the tenant's estate

are governed by the custom of the particular manor of

which the lands are parcel ; but generally the custom

follows the common law ; so that (1) the utmost quantum

of the estate is generally equal in quantum to a fee

the way of viewing this kind of tenure. Originally, copyholds may have been

any lands held by the villeins ; and afterwards the characteristics of the tenure

became attached to the particular lands which were usually so held.

TBNURE5 BY CUSTOM OF THE MANOR (cOPYHOLD TENURE). 27

simple, and it admits, to the same extent as a fee

simple, of being cut up into 'particular estates followed

by remainders ; and (2) the customary heir is generally

identical with the heir-at-law.\* In spite of the difficulty,

or impossibility, of seeing how, when the law presumes

every custom to have been in existence at the beginning

of the reign of Eichard I., a custom to intail copyholds Entails of

can have sprung up since the statute De Do7iis,^ it is

settled law that a custom to intail copyholds may exist

and is a good custom. Entails of copyholds of manors

in which there is no custom to intail, give rise to

customary conditional fees, which are analogous to

conditional fees at common law.

3. The legal estate is acquired by admittance ; the title to

admittance being acquired by surrender according to the

custom (generally into the lord's hands) to the use of

the surrenderee. But an admittance made upon and

subsequently to a valid surrender, relates back to the

time of the surrender, and displaces all estates created or

attempted to be created by the surrenderor subsequently

to the surrender. {Benson v. Scott, 4 Mod. 251, Carth.

275, 3 Lev. 385.)

4. Copyholds held for a customary fee simple, escheat to the

lord on a failure of heirs of the tenant, in a manner

analogous to the escheat of common law lands. And

curtesy and dower are commonly allowed by the custom

to the surviving husband and wife respectively ; but

frequently with a variation from the common law custom

as regards the quantity of land assigned and the con-

ditions on which it is held. Dower out of customary

inheritances is usually ^iyl^di free-bench.

5. If copyholds come to the lord's hands by forfeiture or

escheat, he may keep them in hand for any length of

time without prejudice to his power of granting them

\* " A copyhold shall descend according to the common rules of the law, unless

particular custom alter and order it otherwise." Per Eyres, J., in Kitig v.

Billiston, 1 Show, K. B. 83, at p. 84.

t See the argument of Sir Roger Manwood, in HeijdoiCs Case, 3 Rep. 7, at

p. 8 b, referred to in the chapter on fees tail, infra, p. 300.

28 ON TENURE.

by copy. (Co. Litt. 58 b.) But if he should once grant

them by any other kind of assurance, the copyhold

tenure is for ever destroyed and incapable of being

restored. {French's Case, 4 Rep. 31.) This is usually

expressed by saying that the \*\* demiseable quality " of

the lands is destroyed. But such a grant, if made by

a lord having a less estate than a fee simple, is not an

absolute destruction of the demiseable quality ; but only

suspends the demiseable quality during the time of the

lord's ownership. (1 Scriv. Cop. 15, 16.)

As we have seen, this tenure and all services incident thereto

are expressly saved by the 12 Car. 2, c. 24.

( 29 )

CHAPTER V.

copyhold tenure by the custom of ancient demesne

(customary freeholds).

In some manors, chiefly, though it seems not exclusively, onginofthe

those of ancient demesne (de antiquo dominico), copyhold ^"^'^°™-

tenure is found under a peculiar form : some of the tenants

holding only by copy of the court-roll, and being expressed to

hold by the custom of the manor, but not at the will of the

lord. The manors so styled are those mentioned n Domes-

day as being in the hands of Edward the Confessor, or William

the Conqueror (2 Inst. 542 ; 4 Inst. 269) ; and they are

reputed by the law to be ancient patrimonial possessions of

the crown, which were properly kept in the king's own hands,

to provide a revenue for maintaining the royal dignity, while

other manors and honours, when by escheat or forfeiture they

came to the crown, were usually after no long time granted

out to a new tenant. The omission from these grants of the

declaration, usual in grants of copyholds, that their tenancy is

at the will of the lord, gives to the customary inheritances

arising under such grants an air of greater dignity, though

not of greater security, than is possessed by ordinary copy-

holds. The lands are usually styled customary freeholds, and

the interest of the tenant is often f!,iy\%di tenant right. Lord The tenure is

Coke seems to have thought that they were actually freeholds. c?pyho1df

(Co. Cop. sect. 32 = Co. Law Tr. p. 58 ; and see also Co. Litt.

49 a ; ibid. 59 b ; 5 Rep. 84 b.) Of course, in a place like

England, which affords an endless variety of circumstances

relating to the tenancy of lands, cases occur of a doubtful

complexion ; in which it is impossible to predict with certainty

the decision at which the courts would arrive. For example,

it cannot be laid down as being free from doubt, that the mere

fact of the tenants being accustomed to accept admittance,

would, in the absence of holding by copy of court-roll accord-

ing to the custom of the manor, suffice to prove the tenure to

80 ON TENURE.

be copyhold. But where the three things are found together,

(1) holding by copy, (2) according to the custom, and

(3) admittance by the lord, the lands so held appear to share

with ordinary copyholds all the most essential characteristics

of copyhold tenure.

As previously shown, no land in England, not being in the

king's hands, can be without a common law tenant of the

freehold. It is almost superfluous to say that, in the case of

ordinary copyholds, the common law tenant is the lord, and

the common law seisin is in him. (See Litt. sect. 81 ; the

second resolution in Keen v. Kirby, 1 Mod. 199 ; also Lovell v.

And the LovcU, 3 Atk. 11, at p. 12.) Besides Lord Coke, several of the

seisin is in older writers have doubted, or denied, the application of the

the lord. game doctrine to customary freeholds. (See Kitchin, Juris-

dictions, 5th ed. p. 161 ; 2 Vent. 144 ; Carth. 432 ; Ambl. 301 ;

1 Atk. 474 ; Hughs v. Harrys, Cro. Car. 229 ; Crowther v.

Oldfield, Ld. Raym. 1225, Salk. 364, Holt, 146.) But it seems

now to be settled beyond doubt, that, in cases where the

tenancy is by copy of the court-roll, and is expressed to be

according to the custom of the manor, and admittance is

required in order to complete the title to the legal estate,

these so-called customary freeholds are essentially copyholds,

and that of them the seisin is in the lord. It then follows, as

in the case of other copyholds, that, unless a special custom

can be proved in favour of the tenant, the timber and minerals

belong to the lord.

The observation of Lord Coke, which occurs in the passage

above cited from the Compleat Copyholder, that " these kind of

copyholders have the frank-tenure in them, and it is not in

their lords, as in case of copyholds in base-tenure," is explained

by Blackstone (somewhat disingenuously, for there can be no

reasonable doubt that Lord Coke meant simply what he said,

and would have repudiated Blackstone's explanation) as refer-

ring to the interest of the tenant in the land, and not to the

tenure. (1 Bl. Law Tracts, 146 = 3rd ed. 228.) He adds the

following arguments, urged with much force and ingenuity, to

show that the tenure is essentially copyhold : — (a) That the

modes of alienation in use with regard to these lands are

inappropriate to freeholds; {h) that the tenants can only sue

BY CUSTOM OF ANCIENT DEMESNE (CUSTOMARY FREEHOLDS). 31

in the court baron by writ of right close ;' (c) that the lands are

liable to forfeiture for causes and in a manner incompatible

with freehold tenure ; (d) that the tenants are not members of

the county court, and were exempted from contributing

towards the expenses of the knights of the shire ; and (e) that

the tenure in question, since it undoubtedly continues to exist,

must be one of the three following : free and common socage,

frankalmoigne, or copyhold ; all others having been destroyed

by the 12 Car. 2, c. 24 ; while the difficulty of supposing it to

be either of the two first-mentioned tenures is obvious; {Ibid.

159 = 3rd ed. 236 ; and see on the subject generally, Stephen-

son V. Hill, 3 Burr. 1273 ; Burrell v. Dodd, 3 Bos. & P. 378 ;

Doe V. Huntington, 4 East, 271 ; Boe v. Veimon, 5 East, 51 ;

Doe V. Danvers, 7 East, 299 ; Brown v. Rauiins, 7 East, 409 ;

iPassingham v. Pitti/, 17 C. B. 299, and authorities there

cited ; Wadmore v. Toller, 6 T. L. E. 58 ; Merttens v. Hill,

(1901) 1 Ch. 842].)

The publication of Blackstone's tract was shortly followed

by the passing of the statute 31 Geo. 2, c. 14, which gave

practical effect to his conclusions, by enacting that no person

holding by copy of court-roll should be entitled to vote at the

election of knights of the shire. In a postscript added to the

first collected edition of the" Tracts, Blackstone refers to this

circumstance with much complacency.

The true criterion between copyhold and freehold perhaps

lies in the necessity for admittance by the lord in order to gain

the legal estate. {Thompson v. Hardinge, 1 C. B. 940 ; and

the cases there cited. See also 11 H. L. C. at p. 83.) The

cases above cited seem at least to establish the proposition

above laid down, that the concurrence of tenancy by copy of

court-roll according to the custom with the necessity for

admittance, is sufficient to prove the tenure to be copyhold,

and to saddle the lands in the tenant's hands with the usual

incidents of copyhold tenure.\*

The question is not without practical interest to the con-

veyancer, because, if the customary freeholder's estate is not

\* [Customary freeholds, in any case in which an admission or any act by the

lord is necessary to perfect the title of a purchaser, are excepted from the Land

Transfer Act, 1875 (s. 2).]

82

ON TENURE.

Freehold

tenants in

ancient

demesne.

" freeliold " within the meaning of sect. G2 of the Convey-

ancing Act of 1881, he cannot create easements by way of use

under that section. The Act contains nothing to make such

lands freehold by statute, if hey are not freehold by the

common law.

The manors forming the ancient demesnes of the crown

occupy a position, relatively to the king and the kingdom,

closely resembling the position of the demesne lands of an

ordinary manor, relatively to the lord and his manor. As the

former were the part of the kingdom usually kept, or presumed

by the law to be usually kept, by the king in his own hands

for the support (among other sources of revenue) of his royal

state and dignity, so the demesnes of an ordinary manor were

the part of the manor usually kept in the lord's own hands for

his own support, in addition to the rents, heriots, and other

profits derived from his freehold and copyhold tenants. The

manors of ancient demesne of course, had freehold tenants, like

other manors, as well as copyhold tenants. In the old books,

the phrase " tenants in ancient demesne " usually refers to the

genuine freehold tenants, and not to the " customary free-

holders " who were essentially copyholders. The freeholders

properly so called had several special privileges and immuni-

ties, now obsolete ; as to which, see 4 Inst. cap. 58, p. 269. The

most important of these privileges was the right to have all suits

and actions relating to their lands of ancient demesne heard

and determined in the Court Baron of their own manor, and

not in the king's ordinary public courts of justice ; and accord-

ingly, the plea of " ancient demesne " was a good plea in abate-

ment to a writ sued out in the king's courts. (2 Inst. 543 ;

4 Inst. 269.) The privileges were retained by the tenants in

full force and validity, even though the manor by the king's

grant came to the hands of a subject. (Ibid.) If a fine was

in fact, though improperly, levied, or a recovery suffered, in

the Court of Common Pleas at Westminster, of lands in ancient

demesne, the manorial court no longer had conusance of pleas

relating to those lands, until the fine or recovery had been

reversed by a writ of deceit. (4 Inst. 270.) \*

\* [See further as to ancient demesne, Pollock and Maitland, i., 383 seq.]

( 33 )

CHAPTEK VI.

ESCHEAT.

A FEE simple, the greatest estate known to the law, absolutely is peculiar to

exhausts the whole possible interest which anybody can have, \* ^^^ simple.

by way of estate, in the lands, so as to leave no residue (nor

even a mere j^ossibility of reverter, such as may subsist at

common law upon other fees) subsisting in anybody else, or

susceptible of enlargement, or of a change from expectancy

into possession, by the determination of the fee simple. The

lord is the only person with whom the tenant, as such, has any

connection ; and the only connection between them is the

tenure.

This link confers on the lord a peculiar right or title, said to

be by escheat, upon a failure (whether actual' or by construc-

tion of law) of the heirs of the tenant ; upon the happening

of which event, he becomes entitled to the land as his escheat.

The word escheat has long been restricted to denote this

reverter of lands held for a fee simple to the next superior

lord propter defectum tenentis.

The fact that all tenures in fee simple created by private

persons must be older than Quia Emptores,\* and the general

negligence in preserving evidence of freehold tenure, make the

proof of the title in private persons difficult at the present day.

In the absence of proof of title in any other claimant, the

title is of course in the crown.

Escheats were either by attainder or without attainder. (Co.

Litt. 13 a ; ihid. 92 b.) Escheats by attainder are often also

styled forfeitures ; but the use of this appellation is incon-

venient, since it tends to confuse escheats properly so called with

\* This is of course without prejudice to the opinion above expressed, that a

tenure in fee simple to be held of the grantor may, with the assent of the crown

and all the mesne lords, lawfully be created at the present day. But in practice

such cases do not occur.

« C..P.

34 ON TENURE.

forfeitures properly so called, which latter were for high

treason.

Escheat by Escheat bv attainder was a consequence of the corruption

of t Ai ndcr

of blood caused by the attainder, which caused a constructive

failure of heirs. These escheats are subdivided as follows: —

(1) Quia siisjycnsus est per collutn, or by judgment of death

(which took effect by attainder before and irrespective

of the execution) for felony. The writ of escheat con-

tained the words even when the sentence had not in

fact been executed. (Fitzh. N. B. 144 H.) This cause

of escheat was abolished by 33 & 34 Vict. c. 23, s, 1.

It never applied to gavelkind lands subject to the

custom of Kent.\* The exemption was not restricted

to cases where the heir was the son. (See Eob. Gav.

291.) Nor was it absolutely restricted to gavelkind

lands in Kent, though it seems to have been very rarely

found elsewhere.

The judgment required to cause escheat was a regular judg-

ment at common law : judgment of death passed by martial

law during a rebellion caused no escheat. (Co. Litt. 13 a.)

(2) Quia abjuravit regnum ; this abjuration was a privilege

allowed upon a claim of sanctuary, to escape conviction,

which implied a confession of felony,! and had the same

effect, so far as escheat is concerned, as judgment upon

conviction. (3 Inst. 217.) This kind of abjuration has

long since been abolished. (4 Bl. Com. 333.)

(3) Quia utlegatus est ; or by judgment of outlawry upon an

indictment of (capital) felony, which had the same

effect, in all respects, as judgment nipon conviction.

• "For their custom is, 'The father to the huvgh, the gan to the plough.'"

(1 Doct. & Stu. c. 10 ; Brook v. Ward, Dy. 310 b, pi. 81.)

t Abjuration might be imposed by statute for something less than felony, as

by Stat. Westm. 2, c. 35, for carrying off a ward in chivalry and procuring him

or her to be married within age, in prejudice of the rights of the lord as

gnardian, and failing to satisfy the lord in damages : for which offence, says the

statute, abjuret regnum rel habeat jycrpetuam prisonam ; which, says Lord Coke,

did not give the defendant a right to elect, but gave the court a discretion to

award either punishment ; and he continues, " albeit the party that is by judg-

ment abjured return again, yet shall he not be hanged, because he was not

abjured for felony, but he may be punished for his contempt, and remaunded."

(2 Inst. 439.)

ESCHEAT. 35

(3 Inst. 212.) If the outlawry was reversed, the tenant

might re-enter upon the escheated lands. Escheat as

a consequence of outlawry seems not to be affected by

33 & 34 Vict., c. 23.

The right of the lord on an escheat by attainder was subject Ann jour et

to the crown's right to hold the lands for a year and a day, ''^'^\* '

committing waste ; or, according to some opinions, receiving

the rents and profits for a year and a day, in lieu of a right at

common law to enter and commit waste. (1 Com. Dig. 618 ;

22 Vin. Abr. 550 = Year, Dmj, and Waste ; 2 Inst. 36 ; 3 Inst.

Ill ; 4 Bl. Com. 385, 386.) For many centuries the right,

whatever it was, was always compounded for by the lord with

the crown ; and its precise details are now immaterial. It

appears by the statute De Prarogativd Regis, 17 Edw. 2, st. 1, Custom of

c. 16, that by the custom of the county of Gloucester, the king

had his year and day, but that there was no escheat to the

lord, and the lands descended to the felon's heir upon the

expiration of the year and day. By the custom of Kent there

was neither the year and day nor, as above mentioned, any

escheat upon attainder of felony ; but the custom was construed

strictly, and did not apply either to abjuration or outlawry.

(Bob. Gav. 289, 290.)

Escheats without attainder are : —

(4) By death without leaving an heir : that is, when the heir Escheat for

cannot be discovered; or when, on the death without of hdi-s.^' "'^'^

issue of a bastard (who can only have taken by

purchase) the heir is known not to exist.

If a tenant in fee simple dies without an heir, but leaving

his wife enceinte, the lord may enter for an escheat ; but the

subsequent birth of an heir will defeat the lord's claim.

(Watk. Desc. 212.) The lord is entitled to the mesne profits.

Since lands held for a fee simple have been deviseable, this

right by escheat has been liable to be defeated by devise.

The right by escheat arises only upon a failure of heirs. If No escheat

• a corporation holding lands in fee simple is dissolved, there is "wn^of 'cor-""

no escheat to the lord, but a reverter to the donor. (6 Vin. poration.

Abr. 279 = Corporation, pi. 6, 7 ; 10 ibid. 139 = Escheat, A. pi.

D 2

36 ON TENURE.

2, 8, 4 ; 16 ibid. i61= Possibility, A. pi. 3 ; Co. Litt. 13 b.

But see also Harg. n. 2 thereon.) The question is not at this

day of much practical importance ; because the only dissolu-

tions of corporations which frequently occur, are due to the

winding up of joint stock companies formed under the Com-

panies Acts, and in such cases the destination of their property

is regulated by the Acts.\* The reader will also remember

that, upon the dissolution of the monasteries and clerical

colleges in the reign of Henry VIII., their lands were vested

in the crown by statute, where they had not previously been

surrendered.!

Trusts ana Until 27th June, 1834, the date of the passing of 4 & 5

redemption Will. 4, c. 23, ^ lands held upon trust or mortgage would have

formerly escheated upon the attainder or death without heirs of a sole

destroyed by ^

escheat of the trustee or mortgagee seised in fee simple ; and, according to

the better opinion, the lord coming in by escheat would not

have been bound by the trust. (1 Prest. Abst. 147 ; Peachy v.

Duke oj Somerset^ 1 Stra. 447, at p. 454.)

This inconvenience was remedied by the last-mentioned

statute, which was repealed by the Trustee Act, 1850,

13 & 14 Vict. c. 60, s. 1 ; but re-enacted with variations by

ss. 15, 46.

Now, by virtue of sect. 30 of the Conveyancing Act of 1881,

lands, of which a trustee is solely seised in fee simple, upon

his death, notwithstanding any testamentary disposition,

become vested in his personal representatives.

• [In Hastings Corporation v. Letton, (1908) 1 K. B. 378, it was held that a

lease to a corporation for a term of years determines if the corporation is dis-

solved without having assigned the lease, and that the reversion is accelerated.

Another instance of reverter by statute occurs in the case of land granted under

the School Sites Act, 1841 ; if the land ceases to be used for such of the purposes

of the Act as are specified in the deed of grant, it reverts to the estate of the

donor : Att.-Geii. v. Shadwell, (1910) 1 Ch. 92.]

f On the dissolution of the Order of Knights Templars, their lands were

vested in the Knights Hospitallers of St. John of Jerusalem by the statute, Be

Teri'is Templariorum, 17 Edw. 2, st. 3. Upon this statute, see Roll. Rep. 167,

168 ; W. Jo. 191. The lands of the Hospitallers were vested in the crown by

32 Hen. 8. c. 24.

J By 11 Geo. 4 & 1 Will. 4, c. 60, s. 8, the Court of Chancery was em-

powered to appoint a person to convey trust estates, if upon the death of a sole

trustee his heir was not known.

ESCHEAT. S7

Forfeiture for High Treason.

Escheat must not be confused with forfeiture to the crown Distinguished

for high treason. Of lands held for any common law fee, such "» esc ea .

forfeiture was by the common law (3 Inst. 18, 19) ; and in the

case of a conditional fee, after birth of issue of the kind

prescribed in the limitation, the forfeiture was absolute and

barred the lord of his reverter. The forfeiture related back

to the time when the offence had been committed. (Pimh's

Case, Serj. Moore's Kep. 196.) Forfeiture for high treason

extended to gavelkind lands. (Rob. Gav. 293.) After the

statute De Bonis, by which conditional fees were turned to fees

tail, the forfeiture incurred by the high treason of a tenant in

tail, was only during the lifetime of the attainted traitor. (Co.

Litt. 392 b; 2 Bl. Com. 116.) The 26 Hen. 8, c. 13, s. 5,

partly restored the rights possessed by the crown, before the

statute De Bonis, in respect of lands held for a conditional fee,

after the birth of issue of the kind prescribed in the limita-

tion. Thereby it was enacted that every offender lawfully

convicted of high treason should forfeit to the king all lands,

tenements, and hereditaments, which such offender should have

of any estate of inheritance, in use or possession. It was held

that the words in italics include fees tail ; and that the crown

took, by virtue of the statute, a base fee, which endured so

long as any issue was in existence which might have inherited

under the entail. Forfeiture for high treason was restricted

to the lifetime of the attainted traitor, by 54 Geo. 3, c. 145,

and was altogether abolished by 33 & 34 Vict. c. 23, s. 1.

2'he Relation of Escheat to Incorporeal Hereditaments and

Equitable Estates.

An attempt has recently been made by the Intestates

Estates Act, 1884, 47 & 48 Vict. c. 71, to extend the applica-

tion of the rules of escheat to incorporeal hereditaments and

equitable estates. Some remarks upon this enactment, which

is expressed' to refer only to persons dying intestate after

14th August, 1884, will be found below. Its meaning does

not seem to be so clear as to render superfluous all statement

of the previous law, to which the following remarks must be

understood to refer.

88

ON TENURE.

EqiiitAble

heredita-

ments.

ix!gai iiere- Hereditaments which may be held for a fee simple^but are

which are not not strictly suhjects of tenure, such as fairs, markets, commons

tenure'\* °^ in gross, rents-charge, rents seek, and the like, by the common

law do not escheat, but become extinct upon a failure of heirs

of the tenant. (3 Inst. 21.)

If a trustee were seised in fee simple upon trust for another

person in fee simple, who died intestate and witl;out heirs,

there was no escheat of the equitable estate, but the trustee

held the lands to his own use. (Burgess v. IVheate, 1 W. Bl.

123, 1 Eden, 177 ; Cox v. Parker, 22 Beav. 168 ; Johnstone v.

Hamilton, 5 Giff. 30.) The rule was the same for copyholds as

for freeholds. {Taylor v. Haijgarth, 14 Sim. 8.) Also for

realty created by statute, such as New Kiver shares.\* {Davall

V. New River Co. 3 De G. & Sm. 394.) In the case of copy-

holds, if the trustee had not been admitted, a court of equity

would not interfere to compel the lord to admit him. (Williams

V. Lord Lonsdale, 3 Ves. 752.) But the trustee had a right to

a mandamus at law; and there was no equity to interfere with

his legal right. (Rex v. Coggan, 6 East, 431 ; ^ Gallard v.

Haukins, 27 Ch. D. 298.) In Gallard v. Hawkins, the deceased

cestui que trust was entitled only for life; but the trusts

subsequent to the life estate were void under the Charitable

Trusts Act, 9 Geo. 2, c. 36, t and the deceased settlor had left

no heir to take advantage of the resulting trust in his favour.

And similarly, upon a failure of heirs of a mortgagor who

had parted with the fee simple by way of mortgage, the equity

of redemption was extinguished in the legal estate for the

benefit of the mortgagee; but subject to payment of the

mortgagor's debts. (Bcale v. Symonds, 16 Beav. 406.)

The material sections of the Intestates Estates Act, 1884,

47 & 48 Vict. c. 71, which received the royal assent on 14th

August, 1884, are as follows : —

4. From and after the passing of this Act, where a person

dies without an heir and intestate in respect of any

\* [They were created by charter or letters-patent ; infra, p. 57.]

t Now repealed, but substantially re-enacted by the Mortmain and Charitable

Uses Act, 1888, 51 & 52 Vict. c. 42. See also 54 & 55 Vict. c. 73.

Equities of

redemption.

47 & 48 Vict,

c. 71, s. 4.

fiSCHEAT. 39

real estate consisting of any estate or interest whether

legal or equitable in any incorporeal hereditament, or

of any equitable estate or interest in any corporeal

hereditament, whether devised or not devised to trustees

by the will of such person, the law of escheat shall

apply in the same manner as if the estate or interest

above mentioned were a legal estate in corporeal

hereditaments.

7. Where any beneficial interest in the real estate of any 47 & 48 Vict.

deceased person, whether the estate or interest of such ^' ^''^' ^•

deceased person therein was legal or equitable, is,

owing to the failure of the objects of the devise, or

other circumstances happening before or after the

death of such person, in whole or in part not effectually

disposed of, such person shall be deemed, for the

purposes of this Act, to have died intestate in respect

of such part of the said beneficial interest as is

ineffectually disposed of.

The intention of this enactment seems to have been two- Remarks

fold : — (1) to provide, that upon the death of any person above-cTted

intestate and without leaving an heir, entitled to any incorpo- enactment,

real hereditament or to any equitable estate of inheritance, such ,

hereditament or estate shall escheat in the same manner as

if it had been a legal estate in corporeal hereditaments ; and

(2) to provide that upon the death of any such person without

leaving an heir, not intestate, but having devised the heredita-

ment or estate in question to trustees upon trusts which do not

admit of being executed, there shall be the same operation of

escheat as the fourth section has attempted to describe in the

case of an intestacy.

"With regard to the first branch of this intention, the enact-

ment is founded upon a very superficial view of the law of

escheat, and a complete misapprehension of its relation to

tenure. A corporeal hereditament, when it is the subject of

escheat, escheats to the lord of whom it is holden. But in

relation to the incorporeal hereditaments and equitable estates

contemplated by the enactment, there exists no such person ;

40 ON TENTJRB.

and therefore the hereditaments or estates in question cannot

escheat to him. The law of escheat, therefore, cannot " apply

in the same manner ; " and the question must arise, in what

other manner, if any, it shall apply. In the case of incorporeal

hereditaments, such as a rent-charge, which may issue out of

lands holden of a mesne lord, a contest may not improbably

arise between the mesne lord, if any, and the crown.

With regard to the second branch of the apparent intention

of the enactment, the following remarks must be premised. It

was held, in the case of Onslow v. Wallis, 1 Mac. & G. 506, that

the trustees of a will, to whom an equitable fee simple had been

devised, had a right to call upon the existing trustee to convey

the legal estate ; and that the latter could not refuse to convey

it, merely upon the ground that the trusts of the will were

incapable of being executed, and that the testator had left no

heir. (Compare Sperling v. Rochfort, 16 Ch. D. 18.)

In the recent case of Re Lashmar, Moody v. Pen/old, (1891) 1

Ch. 258, the case of Onslow v. Wallis was distinguished, upon

the ground that there, although the trusts failed, the trustee

had duties to perform ; and it was held that a trustee, who had

no duties to perform, could not demand a conveyance of the

legal estate from the trustee in whom it happened to be vested.

In that case, the intestate had died before the coming into

operation of the Intestates Estates Act, 1884 ; and upon that

ground the Treasury made no claim. From this it may be

inferred that in like cases in the future, a claim will be made ;

and such claims will probably be held good,\* upon the ground

that the Act must be taken to have meant something, and that

its only possible meaning is to vest a prima facie claim in the

crown, unless such claim can be displaced by proof of tenure of

a mesne lord ; which is of course impossible, seeing that there is

no tenure at all of the things with which the Act is concerned.

\* [In Ife Wood, (1896) 2 Ch. 596, a testatrix dietl without an heir, having

devised real estate upon trust for sale, without effectually disposing of the

proceeds ; it was held that they escheated to the crown under sect. 7.]

( 41 )

PART 11. ON ESTATES IN GENERAL.

CHAPTER VII. .

OF THE SUBJECTS IN WHICH ESTATES MAY SUBSIST.

The subjects in which estates may subsist are commonly sub- Division into

divided into lands, tenements, and herecUtameiits ; which is a cross ^ents and'

division, of which the sub-classes are by no means mutually heiedita-

"' '' ments.

exclusive. Lands are treated as a separate class, by reason of

their prominent importance and peculiar physical character-

istics. Tenements require special mention, because they alone

are intailable. Hereditaments is a convenient class-name for

uniting together everything which may be the subject of estates

of inheritance.

Land includes whatever is parcel of the terrestrial globe, or Land,

is permanently affixed to any such parcel. (Co. Litt. 4 a — 6 a.)

This is the meaning of the word in ordinary legal speech,

and in this sense propositions respecting lands are generally to

be understood. (See Co. Litt. 4 a.) For the present purpose,

which is only concerned with classification, and is only con-

cerned with that in order to clearness, there is no need to

inquire into the more extensive meanings which, in a deed or

testament, the word may derive from the context.\* But it is

to be observed that, by virtue of Lord Brougham's Act,

13 & 14 Vict. c. 21, s. 4, in Acts of Parliament the word " land"

now includes " messuages, tenements, and hereditaments,

\* Even in a will, the word "lands" will not include an advowson in gros.s.

(^Westfaling v. WestfaUtuj, 3 Atk. 460.) And it is doubtful whether the word

will include a manor, when the testator has other lands, not parcel of the manor,

which can pass by the devise. QIadewood v. Pope, 3 P. Wms. 322.) But of

course a testator may, by express declaration, or by the use of language whicli

suggests a clear inference, import into the word "land," or into any other

word, any meaning which he may think proper.

42 ON ESTATES IN GENERAL.

houses and buildings, of any tenure, unless where there are

words to exclude houses and buildings, or to restrict the

meaning to tenements of some particular tenure." This Act

has been repealed by the Interpretation Act, 1889, 52 & 53 Vict,

c. 63; but sect 3 enacts {inte}- alia) that in every Act passed

after the year 1850, " unless the contrary intention appears,

. . . the expression land shall include messuages, tenements,

and hereditaments, houses and buildings of any tenure."

Sundry curious meanings have also been afl&xed to the word

"land" by special interj)retation clauses contained in par-

ticular Acts ; but these meanings are confined to the particular

Acts which they serve to illustrate or obscure.

Estates in land, though not the only estates known to the

law, were tlie earliest in origin, have always been the most

common, and have supplied the model for all the rest, which

. otherwise would never have existed. The tenure of the earliest

incorporeal hereditaments, namely, baronies and seignories of

manors, as distinguished from seignories in gross, was for

several generations inseparably connected with the tenure of

land.

Tenements Tenement is properly defined to include whatever can be the

subject of common law tenure. (" Wherein a man hath any

frank- tenement, and whereof he is seised utde libero tenemento.'"

Co. Litt. 6 a.) In this sense, the word is not restricted to what

is held by some service, but includes also what is held in

frankalmoigne. {Poicell v. Bull, Comb. 265.) That case was

a decision upon the meaning of a statute ; but the reasoning

refers only to the meaning in law of the word tenement, not to

the language of the statute.

The meaning which the word actually bears is wider than

that strictly contained in this definition. (Co. Litt. 19 b, 20 a ;

ibid. 154 a.) The definition would strictly include only lands,

such incorporeal hereditaments (seignories, peerages and

dignities held by grand serjeanty) as are undoubtedly subjects

of common law tenure, advowsons in gross,\* and perhaps chief

• An advowson in gross might be held by knight service ; see Co. Litt. 85 a ;

see also Plowd. 498 a ; the advowson is in lieu of the land upon which the

church is built, and is therefore a subject of tenure, and may be held either

mediately or immediately of the king.

OF THE SUBJECTS IN WHICH ESTATES MAY SUBSIST. 43

rents, or rents reserved as incident to tenure in fee simple, and

therefore created before the statute of Quia Emptoi^es. But

the word " tenement " is in practice, with less obvious pro-

priety, extended to include also rents-charge, rents seek,

commons in gross, estovers and other profits a prendre, owing

to their close connection with the land ; also offices annexed to

or exerciseable within or over any lands or tenements, as the

office of steward or bailiff of a manor, or ranger of a forest. It

was also extended to include tithes in the hands of lay impro-

priators (see Rex v. Shingle, 1 Eag. & Y. 738, 1 Stra. 100 ;

Rex V. Ellis, 3 Eag. & Y. 776, 3 Price, 323) ; though by the

common law these could not be in the hands of a lay person.

(Bishop of Winchester's Case, 2 Eep. 43 ; Sherwood v.

Winchcomhe, Cro. Eliz. 293.) And it is the general rule, that

all hereditaments which savour of the landor realty, are so far

accounted tenements in law as to be intailable by virtue of the

statute De Bonis.\*

It is material to observe that a thing may be a tenement for a thing may

one purpose, and not a tenement for another purpose ; for f^ one'^p^r!'^'

example, a rent-charge is undoubtedly a tenement for the pur- pose and not

pose of entail, but it is not, by the common law, a tenement

for the purpose of escheat. {Vide supra, p. 38.) As to what

are tenements within the meaning of 8 Hen. 6, c. 7, relating to

the qualification of county voters, see Dodds v. TJiompson,

L. R. 1 C. P. 133 ; Dawson v. Robins, 2 C. P. D. 38.

Hereditament includes whatever upon the death of the owner Heredita-

passes (apart from testamentary disposition) to the heir by ™^" ^'

hereditary succession. (Co. Litt. 6 a.) The word hereditai-y

excludes special occupancy.

Land regarded as a hereditament stands in a peculiar posi-

tion, because its existence is wholly independent of the manner

in which estates in it are limited, while other hereditaments

can only by a metaphor be said to have any existence apart

\* Such tenements were also within the meaning of a custom to devise lands

and tencmnitg. (Litt. sect. r>85.) But after disseisin of a rent-charge, a descent

cast by the disseisor did not, at common law, affect the title of the disseisee.

(Co. Litt. 237 b.) As to the tolling of a right of entry by a descent cast after a

disseisin, see p. 407, infra.

44 ON ESTATES IN GENERAL.

from their limitation for estates of inheritance. The

word hereditament, when used in relation to land, sometimes

denotes the land itself as a physical object, and sometimes the

estate in the land. The use of a single name to denote two

such disparate ideas, is not without inconvenience ; but the

practice is now inveterate.

Thus, with some degree of confusion, it is commonly said

that land is both a tenement and a hereditament. Here it is

evident that the word tenement is not used in exactly the same

sense in which it is used when a legal estate for Hfe is styled

a tenement ; and that the word hereditament is not used in

exactly the same sense, in which it is used when a rent-charge

in fee simple is styled a hereditament. In the case of land,

the estate contemplated is the legal fee simple ; and since this

exhausts the whole possible interest, by way of estate, in the

land, and since, for most purposes, it matters little whether

we speak of the land itself, or of the utmost possible interest

in the land, some degree of obscurity is often permitted to

exist as to which precisely of these two things is meant to be

the subject of reference. The word has, to some extent, a

double meaning. In other cases of the use of words denoting

hereditaments, where the thing has no real existence apart

from the estate in the thing, the words used have only a single

meaning.

It will easily be perceived that some tenements are not

hereditaments. For example, a legal estate for life, or pur

autre vie, since it is held by common law tenure, is a

tenement ; but, since it is not capable of descending to the

heir, it is not a hereditament. Some hereditaments, also, are

not tenements, as will shortly appear.

Division of Hereditaments are commonly divided (1) into real, mixed and

heredita-

ments, personal ; and (2) into corporeal and incorporeal\*

The phrase hereditaments real (or real hereditaments) is

commonly used to denote lands regarded as a physical object,

and legal estates of inheritance in lands, whether in possession,

remainder or reversion.

\* [As to these divisions, see infra, p. 48.]

OP THE SUBJECTS IN WHICH ESTATES MAY SUBSIST. 45

The phrase hereditaments mixed (or mixed hereditaments)

includes all estates of inheritance which, as the phrase goes,

savour of the realty, being —

(1) Equitable\* estates of inheritance in land ; with which

may also be classed equities of redemption of estates of

inheritance, whether legal or equitable ;

(2) Territorial baronies, or peerages titular of a place ;t with

which may also perhaps be classed seignories of manors

and seignories in gross ; but perhaps these are more

properly classed with hereditaments real ;

(3) Estates of inheritance in offices t of trust or dignity to be

\* It is conceived that now, since the Judicature Acts, equitable estates arc

hereditaments to all intents and purposes. Previously they could not be called

hereditaments at law. (1 Rep. 121 b ; see also 3 Rep. 2 b, 3 a.) The same

remark seems also to apply to equities of redemption of estates in fee. Being

hereditaments, they seem to savour of the realty. The equity of redemption of

an estate of inheritance, whether legal or equitable, can be intailed in equity.

[The question whether equitable estates and interests in land can properly be

classified as incorporeal hereditaments, is discussed Infra, p. 57.]

f " When the king created an earl of such a county or other place, to hold

that dignity to him and his heires, this dignity is personall, and also concerneth

lands and tenements." (Co. Litt. 2 a.) And, therefore, such dignities may be

intailed ; though only by the act of the crown. (^Ihid. 20 a.) If a baronetcy is

created, not being titular of some place, it is not intailable ; and a limitation (by

the crown) of such a baronetcy to a man and the heirs male of his body, does

not create an estate tail but a conditional fee at the common law. (12 Rep. 81,

sub tit. " Honours and Dignities." The resolution there reported was dissented

from in a curious judgment by Chitty, J., in lie Rivett-Carnac's Will, 30 Ch.

D. 136.) Earldoms stand in this respect in a peculiar position ; because, even

though not expressed to be titular of a place, the office of an earl in contempla-

tion of the law relates to the whole kingdom, in a sense which is sufficient to

make it intailable. See Earl Ferrers' Case, 2 Eden, 373 ; Rex v. Kmllys or

Kiwwles, Ld. Raym. 10, 12 Mod. 55, where particularly see Ld. Raym. p. 12,

ad Jin., the observations of Holt, C. J. ; and 12 Mod. p. 60, ad init., where it

is said that " the earldom is not confined to the place, but extends through

the whole kingdom." Compare what is said in NeviVs Case, 7 Rep. 33,

at p. 34 a, that earls "are created to two purposes: 1. Ad consulend' Regi

temp' pacis ; 2. Ad defendend' Regem et patr' temp' belli," See also 12 Rep.

96, sub fin.

X It must not be assumed, because these kinds of offices may exist, that

therefore anybody can create them or transfer them when created, or that new

kinds of a sort unknown to the law can be invented at pleasure. " An ancient

office must be granted, as it hath been accustomed." (4 Inst. 87 ; see also Co.

Litt. 233 a et seq.) A steward of a manor may be appointed by parol. (Dy.

248 a, pi. 79 ; Harris v. Jay, 4 Rep. 30 ; Ladi/ Hulcro/t's Case, ibid.) On the

grant of an office for life, there is no reversion in the grantor ; but, on the death

of the grantee, the office is determined, until a fresh grant. (17 Vin. Abr. 146,

pi. II — Prerogative o/ the Xing, I. c, pi. 11 ; ibid. 147, pi. 2 = Prerogative of

46 ON ESTATES IN GENERAL.

exercised within or in relation to lands, such as the

stewardship of a manor, or the rangership of a forest ;

with which may also jjerhaps be classed advowsons in

gross, though they seem to be not less properly classed

among real hereditaments ;

(4) Royal franchises of such a nature as to be connected with

lands, and yet capable of being held in gross ; such as

forest, chase, free warren, free fishery, fairs and markets.

Franchises which cannot be held in gross, must be re-

garded as mere appurtenants of the lands with which

they are held, and not as being substantive heredita-

ments ;

(5) Rents-charge, commons in gross, and profits a jtrendre,

which imply some participation in the land or its

profits ;

(6) Impropriate tithes, which are made hereditaments by

32 Hen. 8, c. 7 ;

(7) New River shares (see Dnjhuiter v. Bartholomeiv, 2 P.

Wms. 127) ; River Avon shares (see Biickeridge v.

Ingram, 2 Ves, 652) ; and the shares in some other

similar undertakings.\*

The phrase hereditaments personal (or personal hereditaments)

includes certain inheritable rights, either having no connection

with lands, such as a personal annuity (not issuing out of, or

secured upon, lands) granted or devised for an estate of inherit-

ance (see Turner v. Turner, Ambl. 776, 1 Bro. C. C. 316 ; and

the King, I. c. 2, pi. 2.) [As to offices created by letters patent, see Ait. -Gen.

v. Brentwood School, 3 B. & Ad. 59. ]

\* [As to shares in the undertakings above referred to, see infra, p. 57.] The

right to bring a writ of error upon a judgment in a real action was a mixed

hereditament. (Co. Litt. 20 a; and see Itowlet'g Cane, Dy. 188 a. there

referred to, which incidentally explains his meaning.) The possibility of

reverter upon a breach of a condition annexed to an estate of inheritance is a

hereditament (3 Rep. 2 b) ; and must be mixed for the same reason as writs of

error. It seems also, that the right to kill game on land, if (we may presume)

limited to a grantee and his heirs, is an incorporeal hereditament. (See Uooprr

V. Clark, L. R. 2 Q. B. 200 ; and compare Webber v. Lee, 9 Q. B. D. 315.)

This would seem to savour of the realty quite as much as some other things

which have always been held to do so. But the idea of intailing a right of

sporting, regarded as a tenement in gross, is somewhat startling to the imagina-

tion. For aji example of a lease of a right of sporting, see Birkbcch v. Paget,

31 Beav. 403. [A right of way in gross, granted to a man and his heirs, also

appears to be a mixed or incorporeal hereditament : see infra, p. 55.]

OF THE SUBJECTS IN WHICH ESTATES MAY SUBSIST. 47

Smith V. Pyhus, 9 Ves. 566, at p. 574) ; or having some connec-

tion which implies no participation either in the land or its

profits ; also annuities granted in fee by the crown out of

mercantile dues or duties payable by colonies or dependencies

of the crown, such as the Barbados duties (see Earl of Stafford v.

Bucklei), 2 Ves. Sen. 170) ; and certain other annuities charged

upon public revenue (see Lady Holdernesse v. Marquis oj

Carmarthen, 1 Bro. C. C. 377 ; Radhurn v. Jervis, 3 Beav. 450) ;

and the term also includes certain offices of dignity or trust

which admit of being granted in inheritance, but have no

reference to lands, being concerned with duties or functions to

be fulfilled in relation to some superior dignitary, or to be

exercised only in respect to chattels, as a mastership of

hounds.\*

Personal hereditaments will pass under a general bequest

in a will of personalty. (Auhin v. Daly, 4 B. & Aid. 59.)

There is some variety of usage, and room for difference of

opinion, in respect to the precise place where the line of sub-

division is to be drawn between real and mixed hereditaments.

But this gives rise to no practical inconvenience ; because

they are both intailable by virtue of the statute De Donis. But

personal hereditaments are not intailable ; and any limitation

which, in the case of a tenement, would create an estate tail,

will, in the case of a personal hereditament, create a conditional

fee at the common law. The single word hereditaments, when

used in its largest sense, includes the whole of the particulars

enumerated under the three classes above described.

Corporeal hereditaments are fixed as to their definition by the Corporeal and

legal maxim, that at common law they lie in livery, and not in h°red^ta-^\*

grant. The phrase therefore includes only lands regarded as ™cnts.

a physical object, and legal estates of inheritance in possession.

The only conveyance in pais — that is, made between party and

\* Villeins in gross were personal hereditaments. (Finch Law, p. 159.) Also

corrodies of office. (Ihid. p. 161.) And see the grant of privilege by Edw. I.,

mentioned in Co. Litt. 1 b, 2 a. As to a personal annuity, which arose when

one covenanted for himself and his heirs to pay an annuity to another and his

heirs, see 7 Rep. 34 b, where " it was resolved that an annuity of inheritance

shall be forfeited by force of this Act (26 Hen. 8, c 13), by attainder of treason ;

for that is an hereditament."

48

ON ESTATES IN GENERAL.

party, and not matter of record, as a fine or recovery — by

which these could at common law be conveyed to a stranger,

was a feoffment, and the essence of a feoffment is the livery

of the seisin. All other hereditments, to which ai^plies the

description, tangi nonjwssunt nee videri, are included under the

term incorporeal hereditaments. This phrase, therefore, includes

all the particulars above enumerated, except legal estates of

inheritance of lands in possession.\* It also includes legal

estates of inheritance in lands in remainder or in reversion.

Incorporeal hereditaments are said at the common law to lie

in grant ; because they would pass by the mere delivery of a

deed purporting to convey them, and the word grant was the

most appropriate (though not the only) word of conveyance

for the purpose.

The importance of the distinction between corporeal and

incorporeal hereditaments has been diminished by 8 & 9 Vict,

c. 106, s. 2 ; which enacts that after Ist October, 1845, all

corporeal tenements and hereditaments shall, as regards the

conveyance of the immediate freehold thereof, be deemed to

lie in grant as well as in livery. t A similar remark may be

made with regard to the Intestates Estates Act, 1884, sects. 4, 7 ;

in so far as those sections render the law of escheat applicable

to incorporeal hereditaments.

NOTE ON CORPOREAL AND INCORPOREAL

HEREDITAMENTS.

(BV THE EDITOR.)

I.

Varieties [It would be wrong to infer, from Mr. Challis's treatment of

of here- ^Jjq subject, that great importance attaches to the division of

1 amen . hereditaments into real, personal and mixed. Lord Coke

occasionally refers to this classification of hereditaments (Co.

Litt. lb.), but the only respect in which it is of importance

seems to be that a hereditament is entailable under the statute

\* [As to what rights are properly included in the class of incorporeal heredita-

ments, see the Editor's note, infra, p. 51.]

t [As to the operation of this section, see infra, p. 415 aeq.']

OF THE SUBJECTS IN WHICH ESTATES MAY SUBSIST. 49

[De Bonis if it is real or mixed, but not if it is a purely

personal hereditament, such as an annuity. (Co. Litt.

19 b, 20 a.)

II.

[The most important division of hereditaments is into incorporeal

corporeal and incorporeal. Unless this division is properly things.

understood it is confusing. Mr. Challis says that " the word

liereditament, when used in relation to land, sometimes denotes

the land itself as a physical object, and sometimes the estate \*

in the land " ; and that when it is said that land is a

hereditament, " the word hereditament is not used in exactly

the same sense, in which it is used when a rent-charge in fee

simple is styled a hereditament." Austin makes a similar

complaint. After alludiog to the use of the expressions res

corpovales and res incorporales in Roman Law, he goes on to

say (Jurispr. i. 372) : " With us, all rights and obligations are

not incorporeal tilings ; but certain rights are styled incorporeal

hereditaments, and are opposed by that name to hereditaments

corporeal. That is to say, rights of a certain species, or rather

of numerous and very different species, are absurdly opposed

to the things (strictly so called) which are the subjects or

matter of rights of another species. The word hereditaments

is evidently taken in two senses, in the two phrases which

stand to denote the species of hereditaments. A corporeal

hereditament is the thing itself which is the subject of the

right ; an incorporeal hereditament is not the subject of the

right, but the right itself."

[We may, perhaps, admit that the Eoman law is open to the

charge which Austin brings against it, but it does not follow

that the English law is absurd in dividing hereditaments into

corporeal and incorporeal. If we examine the division we may

find that it is both rational and convenient.

[Let us start from the proposition that persons are the

objects of rights, and that things are the subjects of rights.

As it is for many purposes convenient to say that a fictitious

or incorporeal entity, such as a corporation, may be the object

of rights, and therefore a person, so it is sometimes con-

venient to say that a fictitious or incorporeal entity may be

the subject of rights, and therefore a thing. Convenience is

the test. In this respect, oddly enough, the English law is

more logical than the Roman law. Gaius says that incorporeal Gaius.

things are ea qiice in jure consistant, and he gives as examples

hereditas, ususfructus, obligationes, and servitutes. It is difficult

to see on what principle Gaius puts these together in the same

class.\* Azo did not make the matter any clearer by his azo.

addition of actiones to the class of incorporeal things, or by

\* [Hereditas is a particularly unfortunate example, for while Gaius classes it

as a species of res, the civilians say that the hereditas jacens is a persona,']

C.R.P. B

60

b'a ESTATEB IN GENERAL.

Bracton.

English

law.

[his quaint dissertation on certain corporeal and incorporeal

things which lie outside the province of law. Bracton copied

most of Azo's remarks on this suhject, including his list of

incorporeal things, to which Bracton added, on his own

account, advocaiiones ecclesiarum. It cannot be denied that

Bracton's list {Juereditas, ususfi'uctus, advocationes eccU'siarum,

obligationes, actiones, ct hujusmodi) is open to Austin's charge of

including rights of numerous and very different species, but

we must not take this preliminary matter too seriously. The

idea which was in Bracton's mind when he added advocatimies

ecclesiarum to Azo's list is made manifest by his subsequent

treatment of the subject, for when he comes to deal with these

various things in detail, he groups together (in Chap. 23 of his

second book) advocationes and servitutes (which include ease-

ments, rights of common, and rights in respect of watercourses)

as incorporeal things capable of ownership (dominiiim),

relegating ohlifjationes and actiovcs to a later chapter. Lord

Coke and Blackstone followed the same principle of classifi-

cation.

[In English law, therefore, an incorporeal thing is a right,

or bundle of rights, which is capable of an ownership

resembling in many respects the ownership of corporeal things.

[It should be mentioned that all the incorporeal things

specified by Coke and Blackstone are inheritable rights, that

is, rights which on the death of the owner intestate pass to his

heir. In Bracton's time, such kinds of incorporeal personal

property as stocks, shares, patents and copyright did not exist.

When they became of importance in law, the only place which

could be found for them was under the head of choses in

action : not a very happy nomenclature, seeing that a chose

in action, in the proper sense of the term, is essentially

temporary, while incorporeal personal property is always more

or less permanent (Law Quart. R. x. 303, xi. 238. See further

as to the distinction between corporeal and incorporeal things

in English law, Pollock and Maitland, vol. ii., pp. 124 seq).

Natare of an

incorporeal

hereditament.

III.

[Bearing in mind the distinction between corporeal and

incorporeal things, as explained above, and bearing in mind

also the fact that land in England cannot in theory be the

subject of ownership, the student will have no difficulty in

grasping the analogy between a corporeal hereditament, such

as a piece of land, and an incorporeal hereditament, such as a

rent-charge in fee. The rent-charge can be bought and sold ;

it can be devised by will ; on the death of the owner intestate

it passes to his heir (subject to the provisions of the Land

Transfer Act, 1897, when applicable), and it can be the

subject of estates analagous to those for which land can be

OP THE SUBJECTS IN WHICH ESTATES MAY SUBSIST.

51

[held — as for life or in tail, in possession, or in remainder,

can also be the subject of seisin {infra, pp. 233, 236).

It

IV.

[What rights connected with land are incorporeal heredita- wiiat are

ments is a question which can only be answered by reference to i"corporeal

the doctrines of the common law, although these doctrines are ments.

no longer in force, having been altered by the Ileal Property

Act, 1845. The subject is extremely obscure, and even Mr.

Challis has fallen into error in dealing with it. He states

that " incorporeal hereditaments are said at the common law

to lie in grant ; because they would pass by the mere delivery

of a deed purporting to convey them." Tried by this test,

rent-charges, reversions, and remainders are excluded from

the class of incorporeal hereditaments, for at common law they

did not necessarily pass by the mere delivery of a deed of

grant. It is true that a reversion or remainder could be con-

veyed by deed alone to the particular tenant ; but this was

for a special reason, namely, that livery of seisin could not be

made to him (Perkins, sect. 205). On the other hand, if a

reversion or remainder, or a rent-charge, was conveyed by

deed of grant to a stranger, it did not pass until the particular

tenant attorned ; if the grantor died before attornment, the

reversion, remainder, or rent-charge descended to his heir.

(Co. Litt. 309 a.) No doubt attornment became in time a

mere formality, and the necessity for it was abolished in

Queen Anne's reign, but in early days it was a matter of

importance, because if it had not been required a man might

have been compelled to do fealty and services to his personal

enemy (Bracton, fo. 81). Accordingly, in his description of

the different kinds of conveyances. Lord Coke distinguishes

between a deed of grant, release, or confirmation, which takes

effect by the mere delivery of the deed, and the " grant of a

reversion or remainder with attornment of the particular

tenant." (Co. Litt. 10 a.) This distinction, however, does

not seem to be decisive on the question whether a particular

right is an incorporeal hereditament, for a rent-charge could

not be conveyed by grant unless the tenant attorned, and yet

it is clearly an incorporeal hereditament. (Co. Litt. 49 a.)

[The true rule seems to be this : that at common law a Suggested

corporeal hereditament could be conveyed by livery, with or test,

without deed, but could not be conveyed by deed alone, or by

deed with attornment, while an incorporeal hereditament

could not be conveyed by livery, but only by deed, followed

in certain cases by attornment. (Co. Litt. 9 a.)

[Let us apply this test to certain rights which are sometimes

classed as incorporeal hereditaments.

[A. Easements, at common law, were clearly not incorporeal Easements,

hereditaments. Being appurtenant to land, they passed with

E 2

52

ON ESTATES IN GENERAL.

Hights appen-

dant or

appurtenant.

Reversions

and

remainders.

[it, by the appropriate mode of conveyance, so that if the

estate in the land was one of freehold in possession, any ease-

ment annexed to it passed without deed, by livery of the land.

(Co. Litt. 121 b ; Williams, 11. P. 146, 427 ; Law Quarterly

Eeview, xxiv. 259.) At the present day, however, ease-

ments are considered to be incorporeal hereditaments {infra,

p. 55).

[B. Advowsons appendant, and rights of common appendant

or appurtenant, and rents or services incident to a manor, or

the like. These also are clearly not incorp9real hereditaments

at common law, and for the same reason (Co. Litt. 121 b ;

Perkins, sects. 112, 116 ; Shepp. Touch. 239 ; Cruise, iii. 8.)

There is a passage in Coke's report of Chudleigh's Case (1 Co.

122 b) in which reference is made to "commons, advowsons

and other hereditaments annexed to the possession of the land."

This may possibly mean that such rights are hereditaments

because they pass to the heir with the land to which they are

annexed. It cannot mean that advowsons and commons,

appendant or appurtenant, are incorporeal hereditaments, for

at common law such rights could be conveyed by livery with-

out deed. In some passages Lord Coke says by implication

that advowsons and commons, appendant or appurtenant, are

not incorporeal hereditaments (Co. Litt. 237 b ; 332 a ; see

also Perkins, sect. 61).\*

[C. Reversions and remainders in land are classed by

Mr. Joshua Williams and Mr. Challis among incorporeal

hereditaments, but I cannot find that Lord Coke ever mentions

them when he gives examples of incorporeal hereditaments.

It is true that in some passages he refers to remainders and

reversions as things that lie in grant (Co. Litt. 251 b, 332 a),

but this is not with reference to the point now under discus-

sion : in these passages he is distinguishing between the

operation of a feoffment, which at common law was a tortious

conveyance, and the operation of a deed of grant, " which

worketh no wrong." So far as this doctrine is . concerned, a

reversion or remainder clearly lay in grant.

[There are several rules of the common law which are

unintelligible if remainders and reversions are incorporeal

hereditaments.

[For example, in discussing things appendant and appur-

tenant, Lord Coke tells us that '\* a thing corporeall cannot

properly be appendant to a thing corporeall, nor a thing

incorporeall to a thing incorporeall" (Co. Litt. 121 b). Yet

an advowson can clearly be appendant to a reversion or

remainder in land.

• [In referring to these passages the student must remember that in the old

books " grant" is often used in a large sense to denote any kind of conveyance ;

thus, land could at common law be granted without deed : that is, by livery of

seisin (Perkins, sect, 60).]

OF THE SUBJECTS IN WHICH ESTATES MAY SUBSIST. 53

[Another difference between a reversion or remainder and an

incorporeal hereditament is that the former could at common

law be created by livery without deed (Litt. sect. 59) ; but an

incorporeal hereditament, such as a rent-charge, could only be

created by deed. (Litt. sects. 217, 218; Wilhams, R. P.,

430).

[Again, in discussing the subject of rents, Lord Coke tells

us that " a rent cannot be reserved by a common person [that

is, by anyone except the king] out of any incorporeall inheri-

tance, as advowsons, commons, offices, corodie, mulcture of

a mill, tythes, fayres, markets, liberties, priviledges, franchises,

and the like " ; but that " a reversion or a remainder of lands

or tenements may be granted reserving a rent, for the

apparent possibility that it may come in possession." (Co.

Litt. 47 a.)

[Lastly, there were cases in which a reversion or remainder

lay in livery, and could therefore be conveyed without deed.

Thus a reversion or remainder preceded only by a term of years,

could at common law be conveyed by livery without deed, if

the particular'tenant assented, or was not in actual possession.

(Co. Litt. 48 b.) It is obvious that such a reversion or

remainder is not an incorporeal hereditament.

[The conclusion to be drawn from the doctrines above

referred to is confirmed by the fact that when Lord Coke gives

examples of incorporeal hereditaments he never, so far as the

present writer is aware, mentions reversions or remainders.

" Advowsons, commons, &c." (Co. Litt. 9 a); " advowsons,

rents, commons, estovers, &c." (Co. Litt. 49 a, 169 a), are his

typical examples. (See also the passage quoted above from Co.

Litt. 47 a.)

[We arrive at the same conclusion if we start from first

principles, for an incorporeal hereditament is the subject of

estates, while a reversion or remainder in land is itself an

estate. It is inaccurate and confusing to put reversions and

remainders in the same class with such rights as advowsons

in gross and rent- charges, for a man may have a reversion or

remainder in an advowson or a rent-charge.

[The proper mode of classifying reversions and remainders

is to divide estates, whether in corporeal or in incorporeal

hereditaments, into estates in possession (or particular estates),

and estates in remainder or reversion. This is the classifica-

tion adopted by Blackstone, Cruise, and Burton.

V.

[It may be useful to draw attention to a difference between incorporeal

corporeal and incorporeal hereditaments, which is sometimes iieredita-

of practical importance. The essential quality of a corporeal aStructible

64

ON ESTATES IN GENERAL.

Anomalous

case of

minerals,

and buildings.

[hereditament is that it is indestructible, while an incorporeal

hereditament is merely a creation of the law, and may there-

fore cease to exist. " Nothing can be properly appendant or

appurtenant to any thing, unless the principall or superior

thing be of perpetuall subsistance and continuance. For

example, an advowson that is said to be appendant to a mannor,

is in rei veritate appendant to the demesnes of the mannor,

which are of perpetuall subsistance and continuance, and not

to rents or services, which are subject to extinguishment and

destruction." (Co. Litt. 122 a.)

[The artificial nature of an incorporeal hereditament is

shown by the effect of barring the entail in a rent-charge

limited de novo to a man and the heirs of his body {inji'a,

pp. 327 seq).

[Objection may perhaps be taken to the statement that

corporeal hereditaments are indestructible, as being too wide.

A seam of coal is a corporeal hereditament, and yet it can bo

taken away and burnt. This exception to the general

principle arises from the anomalous doctrine which allows a

stratum to be dealt with as a separate hereditament ; infra,

p. 58 ; Glyn v. Howell, (1909) 1 Ch. 666, and cases there

cited.

[In the case of buildings there is a similar difficulty, due

to the fact that a heresy has found its way into the common

law. The original common law regarded a building as a

mere adjunct to the land on which it was built; the site was

the important thing ; and therefore if a man conveys a piece

of land the buildings on it pass (Co. Litt. 4 a), and if he

conveys a house, the ground on which it stands passes

(Shepp. Touch. 90.) Consequently when, in the reign of

Henry VI., it was suggested that a man might have a freehold

in an upper chamber of a building, the answer was made

that an upper chamber in a house is no frank-tenement, as

it cannot continue, for if the foundation fails, the chamber is

gone. (Cruise's Dig. i. 58, citing Brooke's Abr., Demand, pi. 20.)

However, in Lord Coke's time it was settled that a man might

have an inheritance in an upper chamber, and that it could

be conveyed by feoffment. (Co. Litt. 48 b ; Shepp. Touch. 206.)

It seems clear on principle that if the house is burnt down

or otherwise destroyed, the rights of the owner of the upper

chamber cease, but the point does not appear to have been

decided. (See Clode, Tenement Houses, &c., 7.)

VI.

Ways. [Mr. Challis does not refer to ways, although a way in

gross, if granted to a man and his heirs, is undoubtedly an

incorporeal hereditament. Such rights, however, have never

been of frequent occurrence, and are now rarely, if ever,

OF THE SUBJECTS IN WHICH ESTATES MAY SUBSIST.

55

[met with. If I grant to a man the right of passing over my

land to go to church, to market, or the like, without more,

this is a way in gross, but it is merely a personal privilege,

and not a hereditament ; it dies with the grantee, and cannot

be assigned. (Bl. Comm. ii. 35 ; Finch Law, 17, 31.) If

I grant to a man and his heirs the right of passing from

his land over mine, this is prima facie appurtenant to his

land, and, although perpetual in its duration, can only be

conveyed, devised, or inherited as an incident to the land.

Such a right is an easement, and therefore not, at common

law, an incorporeal hereditament. The presumption is that

every perpetual right of way created by grant is appurtenant

to the land of the grantee, although the grant is not so

expressed {Thorpe v. Briimjitt, L. E. 8 Ch. 650, where Ackroyd

v. Smithson, 10 C. B. 164, is explained). But it is possible

to create a perpetual way in gross by grant, if the deed is

clearly expressed and proper words of limitation are used.

(Termes de la Ley, s.v. Chimin; per Dodridge J., W. Jones,

127 ; Gilbert's Uses, 281 ; Senhouse v. Christian, 1 T. R. 560 ;

Willes's note to Gale on Easements.)

VII.

[Mr. Challis does not refer to easements, but they are

impliedly excluded from his list of incorporeal hereditaments,

because they " must be regarded as mere appurtenants of

the lands with which they are held and not as substantive

hereditaments " {supra, p. 46). This is no doubt in accordance

with the doctrines of Lord Coke, for at common law, as we

have seen {supra, p. 52), whenever land was conveyed by

livery without deed, any easement appurtenant to it passed

by the livery, and nothing which could be conveyed without

deed was an incorporeal hereditament. But Mr. Challis went

further than this : commenting on sect. 2 of the Settled Land

Act, 1882, which interprets "land " as including incorporeal

hereditaments, Mr. Challis says : "Easements are not incor-

poreal hereditaments, but rights appurtenant to corporeal

hereditaments." (Hood k Challis, 5th ed. p. 197.) This

statement entirely ignores the fact that for over a century

easements have been treated as incorporeal hereditaments by

text- writers of authority, and that their view has been adopted

by the courts. The heresy appears to have originated with

Blackstone (1765). In dealing with ways, which he says

are a species of incorporeal hereditaments, he includes rights

of way appurtenant, which are really easements. The classifi-

cation, however, is convenient, and it has been adopted by

most modern text-writers. (Burton, Comp, sect. 1165 ; Joshua

Williams, Real Property, 3rd ed. p. 265 ; Davids.\* Prec.

Vol. II., pt. i. p. 458 ; Leake, Prop, in Land, 1st ed. 53 ;

Goodeve, R. P., 1st ed. p. 351; Encycl. Forms and Prec.

Easements

were not

incorporeal

heredita-

ments at

common law.

66 ON ESTATES IN GENERAL.

But are [Vol. V,, pp. 459 seq.) The view that easements are incor-

now so poreal hereditaments has been accepted as correct by the

considered. courts. (Hill V. Midland Ry., 21 Ch. D. 143 ; Great Western

Ihj. V. Sicindon Ry., 22 Ch. D. 677 ; 9 A. C. 787 ; McManus

■ V. Cooke, 35 Ch. D. 681 ; Jones v. Watts, 43 Ch. D. 574 ;

Lord Hastings v. North Eastern Ry., (1898) 2 Ch. 674;

(1899) 1 Ch. 656 ; (1900) A. C. 260.)

[If the foregoing conclusions are accurate, it follows that,

although Mr. Challis was perfectly correct in stating, as

a matter of history, that easements were not regarded as

incorporeal hereditaments in Lord Coke's time, yet he was

not justified in stating, as a matter of modern law, that

easements are not incorporeal hereditaments within the

meaning of the Settled Land Act, 1882. His expression of

opinion is largely responsible for the decision of Joyce, J., in

Re Brotherton, 97 L. T. 880 ; 98 L. T. 547. (See further as

to this decision an article by the present editor in the Law

Quarterly Review, xxiv. p. 259). The point is of practical

importance, for it is impossible to understand the provisions

of the Settled Land Acts unless the student bears in mind

the difference between dealing with an existing easement

appurtenant to land included in a settlement, and creating an

easement de novo ; the former is an incorporeal hereditament,

and can be sold, leased, or exchanged like any other part of

the settled property. But these general powers of sale, lease,

and exchange would not authorize a tenant for life to create

easements de novo ; hence the necessity for the exi^ress

powers given to a tenant for life to sell or grant easements.

(Settled Land Act, 1882, ss. 3, 17, 20; Settled Land Act,

1890, s. 5.)

[It may be added that the contrivance suggested by the

Court of Appeal for getting over the difficulty (or rather the

supposed difficulty) in Re Brotherton, when the case came

before them, is not satisfactory. It seems that each tenant

for life professed to sell his easement to the other for some

arbitrary sum (the amount is immaterial, for no money really

passed), and these so-called sales were sanctioned as being

within the power conferred on tenants for life by sect. 3, sub-

sect, i., of the Settled Land Act, 1882. Apart from the

objection that the sub-section was obviously intended only

to empower the creation de novo of easements over or in

relation to the settled land (for a tenant for life cannot

sell an existing easement over the settled land), the transaction

was not, it is submitted, within the power of sale given

to tenants for life ; the true consideration for each " sale "

was not the fictitious sum stated as the consideration, but

the release by the other tenant for life of his easement over

the " vendor's " settled estate. The transaction was, in

substance, a release by the tenant for life of estate A of his

easement over estate B, in consideration of a release by the

OP THE SUBJECTS IN WHICIT ESTATES MAY SUBSIST.

67

[tenant for life of estate B of his easement over estate A. It

was therefore an exchange, and was, it is submitted, perfectly

valid, flot because it took the form of two sham sales, but

because the Act authorizes an exchange of incorporeal here-

ditaments, and easements are incorporeal hereditaments.

YIII.

[In the class of incorporeal hereditaments Mr. Challis

includes equitable estates and interests of inheritance in

land and the shares in certain companies. It may be doubted

whether this classification is accurate.

[(A) It is unusual and unnecessary to classify equitable E(iuitabie

estates, &c.

of inherit-

ance.

estates and interests in land as incorporeal hereditaments

An equitable estate of inheritance in land is no more incor-

poreal than a similar estate at law. Mr. Challis seems to

suggest that the Judicature Act has altered the nature of

equitable estates, but this is not so. Since the Judicature

Act, courts of law are bound to recognize and protect equitable

rights, but the Act has not abolished the distinction between

legal and equitable estates, as Mr. Challis himself elsewhere

tells us {infra, p. 59). Some modern text-writers do indeed

contend that since the Judicature Act an equitable lease is

for all purposes equivalent to a legal lease, but this view is

based on a misconception of the decision in Walsli v. Lonsdale,

21 Ch. D. 608 : see Manchester Breicerij Co. v. Coombs,

(1901) 2 Ch. 609.

[(B) With regard to what may be called old New Eiver New River

shares, the question of their true nature has ceased to be of shares, &c.

importance, as they have been converted into shares in a new

company, and these are personal property. But shares in

the other companies referred to by Mr. Challis appear still

to exist, and as they resemble shares in the old New Kiver

Company, the nature of those shares has some practical

interest.

[In Drybutter v. Bartholomeiv (2 P. W. 127) the question

was whether a man and his wife could mortgage a New River

share for a long term of years. Jekyll, M.li., said that such

a share was an incorporeal thing, out of which rent could

not well be reserved. On the other hand, in Toivnscnd v. Ash

(3 Atk. 336), Lord Hardwicke said that a New River share

was a legal estate, and a corporeal inheritance, the legal

estate in the property being in the proprietors, that is, the

shareholders. There cannot be any doubt that in the

eighteenth century each shareholder in the New River Com-

pany and similar companies was looked upon as part owner

of the company's property, and not merely as entitled to a

chose in action. This clearly appears from the letters-patent

incorporating the New River Company, which provide that on

58

ON ESTATES IN GENERAL.

[the death of a shareholder the \*' heire or person unto whom

the inheritance of" his share shall come, shall be elected a

member of the Company.\* It is, therefore, clear thEtt Lord

Hardwicke's view is the correct one, and that a share in the

New River Company, before its reconstilution under the

recent statute (New Eiver Company's Act, 1904, stat. 4

Edw. 7, c. xlviii.), was a corporeal hereditament. With

regard to the River Avon Navigation, it does not appear that

the proprietors were incorporated ; they were, therefore,

merely tenants in common of the lands purchased by them.

Dnopened

Growing

trees.

IX.

[It is sometimes said that an unopened " mine," or stratum

of minerals, is an incorporeal hereditament, but this view

appears to be inaccurate. Livery of seisin cannot be made of

an unopened mine, and it seems to follow that at common

law an unopened mine could not be conveyed apart from the

surface, except possibly by release to a tenant in possession

of the surface (compare the case of a lessee, Keysc v. Pouell,

2 E. & B. 132) ; all that could be conveyed, at common law,

was a power to dig for the minerals, the freehold in which,

until dug, remained in the grantor (Prest. Shepp. T. 06).

Such a right is an incorporeal hereditament (Co. Litt. 164 b ;

Burton, Comp. 364 ; Byth. Conv. by Sweet, iv. 663 ; Davids.

Conv. vol. ii., pt. i., p. 485 n.), but the mine itself is not. It seems

clear that an unopened mine, being a corporeal hereditament,

may be conveyed by bargain and sale enrolled, or by lease

and release, or by statutory deed of grant. See, on the

points above referred to. Earl of Cardigan v. Armitaqe, 2

B. & C. 197 ; Low Moor Co. v. Stanle^j Co., 33 L. T. 445 ; 34

L. T. 186 ; Wilkinson v. Proud, 11 M. & W. 33 ; Taylor v.

Parry, 1 Sc. N. R. 576; Dnlte of Sutherland v. Ilcathcote,

(1892) 1 Ch. at p. 483.

[So it seems that a grant of growing trees, apart from the

soil, to a man and his heirs, confers the right to cut them,

which is an incorporeal hereditament : 11 Co. 49 b.J

\* [The Editor is indebted to his learned friend, Mr. L. L. Shadwell, for

drawing his attention to these letters-patent.]

( 59 )

CHAPTER VIII.

OF ESTATES AT THE COMMON LAW.

[The distinction between absolute dominion, or absolute owner- The origin of

ship, such as the law permits to be had in chattels, and an ^ \* ^'

estate, to which the English law restricts the ownership of

land, is no doubt referable to the universal existence in England

of tenure. But the existence of estates of inheritance was

suggested, and made possible, by the indestructibility of their

commonest and earliest known subject.

There are three ancient sources of lawful rights of property

in England — (1) the common law ; (2) the statute law ; and

(3) customs allowed by the law.\* To these must, for many

practical purposes, be added — (4) the course of equity, as

devised and consolidated by the Court of Chancery before the

passing of the Judicature Acts. This last is the origin of

equitable estates, which seem now to have a good claim to be

also styled lawful. But the circumstances of their origin have

impressed upon them some important characteristics, which

they still in a great measure retain, by which they are distin-

guished from legal estates, commonly so called, and which

make it imjftroper to apply to them the epithet legal.f

All lawful estates must be traced to one or another of these

sources. The j&rst is the source of common law estates ; the

second is the source of entails ; the third is the source of

copyhold and customary estates ; and the fourth, as already

mentioned, is the source of equitable estates.

From the common law spring two primitive estates of free-

hold— (1) a fee simple, which is of inheritance, and the largest Fee simple,

estate known to the law ; and (2) an estate for life, that is, for Estate for

the life of the tenant himself. From the fee simple, by its

\* " Co/mietiido is one of the maine triangles of the lawes of England ; those

lawes being divided into common law, statute law, and custome." (Co. Litt.

llOb).

t [See the editor's note, mpra, p. 57]. ,

life.

60

ON ESTATES IN GENERAL.

Estate pur

autre vie.

No other

estates at

common law.

Origin of

fees tail.

rsuffering certain modifications which the law permits to be

imposed upon it, are derived determinable fees, conditional fees,

and a peculiar kind of fee which may conveniently be styled

a qualified fee or qualified fee simple. The nature of these

modifications, and of the estates to which they give rise, will

hereafter be explained. From the estate for life is derived, by

its being assigned over to another person, the estate pur autre

vie. But this last-mentioned estate, though it probably arose

from, or was suggested by, the assignment of an estate for

life, does not necessarily arise by assignment, but admits of

being created de novo by express limitation.

The above-mentioned estates are the only estates known to

the common law, and are therefore the only estates held by

common law tenure and the only estates of freehold. At the

present day a conditional fee of lands or other tenements can

exist only in the shape of a fee tail, or estate tail ; which

estate may be said to owe its existence to the common law, but

to derive some of its most important characteristics from the

statute De Donis Conditionalihus, Stat. Westm. 2, or 13 Edw. 1,

cap. 1. It is convenient, for some purposes of discussion, to

separate fees tail from the other estates above mentioned. The

latter may conveniently be styled common law estates; and

those which are estates of inheritance, namely, a fee simple, a

determinable fee, \ conditional fee, and a qualified fee simple,

may conveniently be styled common law fees.

The statute De Donis restricted in some important respects

the right of alienation incident to a conditional fee at common

law ; and a conditional fee thus modified has ever since been

styled a fee tail, or (of late years more commonly, but less

properly) an estate tail. The epithet refers to the cutting down

of the quantum of the estate, by the restriction of the

inheritance to a class of special heirs, in the place of the heirs

general. The diminution of the quantum appears by the fact,

that there could be no remainder or reversion, but only a

possibility of reverter, upon a conditional fee ; \* while there is

a remainder or reversion upon a fee tail. (Litt. sect. 19.)

Vidfi infra, pp. 83-5.

OF ESTATES AT THE COMMON LAW. 61

[The statute uses only the word tenementum, which the All tenements

English versions mistranslate land. Not only lands, but all "''^ '" ^' ^ ^'

tenements, provided that they are also hereditaments (without

which there can of course be no inheritance of them) are

intailable by force of the statute. For this purpose the word

tenement includes not only tenements properly so called, which

are capable of being held, in the strict sense of the word, by

common law tenure, but also all mixed hereditaments.

Such hereditaments as are not tenements cannot be intailed.

These are personal hereditaments ; and, as has above been

observed, any limitation which, in the case of a tenement,

would create an estate tail, will, in the case of a personal

hereditament, create a conditional fee at the common law.

From the fee tail sprang the base fee commonly so called. Origin of

Methods of harring the entail having been invented, some of \*^^ ^^\*

them barred it only so far as the rights of the issue in tail were

concerned, leaving unaffected the rights of the persons entitled

in remainder or reversion. Hence arose an estate which, as

will hereafter be shown more fully, was by construction of law

an estate of inheritance descendible to the heirs general, and

was determined as soon as the right of the remainderman

became a present right ; that is to say, upon default of issue

inheritable under the entail.

Other methods are, or in the earlier times have been, known

to the law, whereby the duration of an estate in one man and

his heirs might, by operation or construction of law, and not

by mere conveyance or assurance between the parties, be

made to depend upon the continued existence of issue

inheritable under an entail previously vested in another

person. All such estates are commonly styled base fees.

An •state conterminous with a base fee, as above defined. Vide infra,

may arise by express limitation, as well as by the conversion ^' ^^^' ^^' ^'

of a fee tail. When created by express limitation, it is a

determinable fee. But there is this cardinal distinction between

a base fee, as above defined, and a determinable fee of the

like duration arising under the ordinary rules of limitation ;

62

ON ESTATES IN GENERAL.

[namely, that there exists a remainder or reversion in fee

simple upon a base fee, while no remainder or reversion can

subsist upon a determinable fee arising by limitation only.\*

Modified feesi All fees, whether common law fees, fees tail, or base fees,

except a fee simple, may conveniently be collected together

under the term modified fees.

How far

modified fees

now exist.

Hemarks on

the division

of fees.

Such hereditaments as are not tenements, namely, personal

hereditaments, cannot be intailed; and words of limitation

which, if applied to tenements, would create an entail, will, at

the present day, if applied to them, create a conditional fee at

common law. {Earl of Stafford v. Buckley, 2 Ves. sen. 170 ;

and see 2 Bl. Com. 154.) The same remark, mutatis mutandis,

applies also to copyholds of manors in which there exists no

custom to permit entail ; the estate being in this case a

customary fee, not a common law estate. (See the cases cited

in the chapter on fees tail, infra.) The learning of conditional

fees is, therefore, not wholly obsolete, even apart from its

bearing upon the existing law of entail.

Determinable fees are as valid in their limitation at the

present day as they ever were ; nor are they wholly obsolete

in practice, for they sometimes occur by express limitation in

settlements of realty. Qualified fees simple, as hereinafter

defined, if indeed they can be said ever to have existed in

practice, are now no longer found ; but there seems to be no

good reason to doubt the possibility of their existence.

The division of fees above proposed is not verbally identical

with that given by Lord Coke, Co. Litt. 1 b, 10 Rep. 97 b ; but

the doctrines laid down are Lord Coke's doctrines, and some

difference of language has been adopted only in order to

express them more clearly. He sometimes uses the phrase

conditional Jee to include not only conditional fees as herein

defined, but also fees limited upon or subject to a condition ;

and also, in reference to the statute De Donis, to include fees

\* " If A enfeoffs B of the manor of D, to have and to hold to him and his heirs,

80 long as C has heirs of his body, this is calletl a fee simple limited and quali-

fied ; and .... the whole estate in the land is in the feoffee ; and therefore

no remainder or reversion can be expe<jtant upon " it. (10 Rep. 97 b.) This

kind of estate is, in the present work, always styled a determinable fee.

OP ESTATES AT THE COMMON LAW. , 63

[tail. He also uses the phrase qualified or base fee to include

all fees except fees simple and conditional fees ; and in this

usage he is often followed by other authors. He sometimes

(10 Kep. 97 b) seems to use the phrase fee simple determinable

to include all fees except fees simple and base fees. But, with

the exception of the peculiar estate which, in the present work

is styled a qualified fee simple, which denotes an estate ^o

seldom thought worthy of special mention that it can hardly

be said to have acquired a special name, the proposed terms

are here used in senses which they frequently bear in the

most approved authorities. It has been a common custom for

the same author at different times to use the same term in

different senses, trusting to the context to show the sense on each

particular occasion. In the present work, the phraseology

adopted is, at all events, used with exact consistency.

The common law of England knew of no estate, or pro- The origia

prietary interest, less than a freehold. The only other title of terms of

to possession, in the nature of a proprietary right, was a J'^^'^"

tenancy at will, and there is much reason to believe that the

division between estates of freehold and tenancies at will

originally corresponded with the division of the population

into free and villein. The influence of custom and the

growth of humane sentiment gave stability to the ancient

tenancies at will, by turning them into the customary estates

of the manor ; while at the same time the strict legal idea of

a tenancy at will, in fact as well as in name, remained

applicable to tenancies at will created newly and by mere

contract.

A term of years is an anomalous estate, which grew up

later than the feudal settlement upon which the estates of

freehold were based ; and it never acquired any definite place

in the feudal system. In the opinion of some early jurists,

terms of years, at all events for longer than forty years, were

void, as being against the policy of the law. (Co. Litt. 45 b,

ad fin.) This, however, cannot be shown to have left any

traces in the actual practice of any period, and it was

undoubtedly obsolete in the time of Richard II. (Co. Litt.

46 a; Harg. n. 1.)

64 ON ESTATES IN GENERAL.

But terms of years were by the common law liable to

destruction at the will of the reversioner having the freehold.

If the latter suffered judgment to go against him by default

in a collusive action of recovery, a lease previously granted by

him for years had no validity as against the recoveror, who

claimed and obtained judgment upon a supposed title para-

mount to the title of the reversioner ; and this destruction of

his estate could not be hindered by the termor, because,

having no freehold, he had no lucus standi to intervene in an

action of recovery. This hardship was partly remedied by

the Statute of Gloucester, 6 Edw. 1, and completely remedied

by the 21 Hen. 8, c. 15, which enabled termors to falsify

recoveries obtained on feigned titles. (2 Inst. 321, 322 ; Co.

Litt. 46 a.)

They exist as An estate which could not, by the common law, be defended

oifw by '^'^^ at law, seems at common law to have been no estate. The

statute. foregoing considerations warrant the conclusion, that terms of

years originally pushed themselves into the rank of " legal

estates," only by virtue of the statute 21 Hen. 8, c. 15. This

statute has been repealed by the Statute Law Kevision Act,

1863 ; but the previous abolition of common recoveries by the

Fines and Recoveries Act, s. 2, and of real actions generally

by 3 & 4 Will. 4, c. 27, s. 36, will prevent the repeal from

affecting the legal status of terms of years.

This conclusion, as to the primitive legal status of terms of

years, is confirmed by the fact, that the word seisin is used by

the old writers synonymously with possession; showing that

they recognized no possession, so far as real property is con-

cerned, unaccompanied by an estate of freehold. The word

seisin is still appropriated solely to describe the possession of

freeholders {Leach v. Jay, 9 Ch. D. 42) ; while the word

possession is commonly used to denote the possession of

termors for years, of tenants from year to year, or at will,

and of other persons having chattel interests, or in possession

under any right or title which is not founded upon an estate

of freehold.\* (Litt. sect. 324.)

\* In his translation of Litt. sect. 177, Lord Coke uses the word xeisin to de-

note the act of taking jjussegsion 0/ chattels. And in Litt. sect. 567, the word

OF ESTATES AT THE COMMON LAW. 66

It is also evident that an estate which at the common law On the use

did not exist, could not possibly be the subject of common law tenure in

tenure; and it seems to be the more judicious course, to avoid ^ith terms of

altogether the use of the word tenure in connection with yea™,

terms of years. However, a practice has sprung up, of

referring to terms of years under the name of " lands held

by leasehold tenure." This phrase is peculiarly inaccurate,

because there is nothing in the word \*' leasehold " to confine

it to terms of years, and it is equally applicable to lands which

are held under leases for lives. Thus the phrase compresses

within a single word both the nondescript tenure (if there is

one) by which terms of years are held, and the well-known

common law tenure by which estates of 'mere freehold are

held.

Littleton has lent some countenance to the use of these

loose expressions. In sect. 1 32 he arrives at the conclusion

that some kind of tenure subsists between a termor for years

and the lessor. His language (as translated by Lord Coke) is

as follows : " Also if a lease be made to a man for terme of

" yeares, it is said, that the lessee shall do fealty to the lessor,

\*' because he holdeth of him. And this is well proved by the

" words of the writ of wast, when the lessor hath cause to

" bring a writ of wast against him ; which writ shall say, that

" the lessee holds his tenements of the lessour for terme of-

\*\* yeares. So the writ proves a tenure betiveene them.'' Here

Littleton first cites the opinion that the reason why termors

for years were admitted to do fealty was that they held of

their lessors; and then, but with a very circumspect air,

seised is used in reference to a term of years. Professor F. W. Maitland has

also shown, in a very interesting article in the Law Quarterly Review, Vol. I.,

p. 324, that in early times the word seisin was used indifferently in relation both

to real and personal property. This does not, of course, prove that lawyers then

saw no distinction between the seisin of lands and the seisin of chattels. On the

contrary, it should rather be inferred, that they saw the distinction so clearly^

and had so little fear of its being overlooked, that they apprehended no danger

of confusion in the use of a single word to express the two things. Professor

Maitland is of opinion that the word acquired its special appropriation to land at

some time during the fifteenth century. This looks as though the stricter use

of the word had been introduced at about the time when, by reason of the grow-

ing importance of chattel interests in lands, some danger of confusion might

have been apprehended, if a single word had continued to be used to denote the

two kinds of possession. [See also Pollock and Maitland, bk. 2, chap, iv.]

C.R.P. p

66

ON EHTATKS IN OBNERAL.

infers the existence of some kind of tenure from the language

of the writ of waste.\*

Chattel

interests in

land other

than terms

of years.

The cessation of an estate of freehold can only occur by

the dropping of a life, or the failure of issue, or the failure of

heirs, or the happening of some event of which the happening

is uncertain ; and it is often said, that this affords a distinc-

tion between estates amounting to a freehold, and ^estates

(meaning thereby, terms of years) less than a freehold. But

it is to be observed that, partly by the common law and partly

by virtue of divers Acts of Parliament, a chattel interest may

under peculiar circumstances arise in lands, which, though it

is not a term of years, nevertheless endures for a time

unascertained at its commencement : — (1) Under a devise to

executors merely for the payment of debts ; (2) tenancy by

statute merchant ; (3) tenancy by statute staple; (4) tenancy

by elegit; (5) by the guardian in chivalry holding over for

" single or double value," after the ward's marriage within

«the age of wardship without the consent of the guardian ; as

to which penalties, see Co. Litt. 82 b. For some account of

these chattel interests having an uncertain duration, see Co.

Litt. 42 a ; ibid. 43 b. The three first mentioned are now

obsolete in practice, and the fifth was abolished with the

abolition of tenure in chivalry by 12 Car. 2, c. 24. The only

one now occurring in practice is tenancy by elegit. These

interests are not properly estates, and can hardly even be

styled proprietary rights, but are rather temporary liens,

subject to an obligation to apply the profits in a specified

manner.

A devise of lands to a man and his executors for the pay-

ment of debts gives a chattel interest to the legatee. (1 Prest.

Est. 508.) But if the devise had been to the man and his

heirs, it would have created a determinable fee. {Vide infra,

p. 259, Nob. 21— 23.)t

\* For some further remarks upon this subject, see Appendix I., in/ra.

t [See Jarman on Wills, 6tb ed, pp. 1839 teq.]

( 67 )

CHAPTER IX.

ON THE DERIVATION AND SUCCESSION OF ESTATES.

Proprietary ownership, in the absence of any special cause

of incapacity, such as infancy, coverture, or lunacy, imports

by the common law, as a general characteristic, the right of

alienation ; which right may be exercised either absolutely or

partially, in accordance with the maxim, Cuju& est dare, ejus

est disponere ; partial alienation being made possible by the

fact that estates differ one from another in quantum. It

follows that, either by means of successive partial alienations,

or by means of a single disposition creating several successive

estates, several persons may at the same time be entitled, in

different degrees of nearness and remoteness, to the possession

of the same land, one\* only being entitled to the possession

for the time being.

The idea of a partial, as distinguished from an absolute, Distinctions

alienation, opens the distinction between original estates and the^succession

derivative estates. The fact that several successive estates °^ estates.

may be simultaneously derived out of one original, whereby it

comes to pass that a derivative state may be an estate not in

possession, leads to the distinction between remainders and

reversions. The fact that estates may be so limited as to take

effect only upon the happening of a contingency, suggests the

distinction between vested estates and contingent estates;

which last-mentioned estates can only be remainders, because

estates in possession and reversion are necessarily vested.

And the fact that the ingenuity of conveyancers, operating

upon the statutes of wills and the Statute of Uses, has devised

other prospective possibilities, unknown to the common law,

as interests to arise at a future time, which are not estates, but

\* 'J'enants in common, coparceners, joint-tenants, and tenants by entireties,

being for this purpose counted as one person.

F 2

68 ON ESTATES IN GENERAL.

which will be estates wlien they arise, makes it necessary to

distinguish executory interests from contingent remainders.

The distinctions above mentioned are the most important of

those which need to be considered in treating of the relations

inter sc of estates in respect to the time of their enjoyment.

Original Estates and Derivative Estates.

The terms derivative and original, as applied to estates,

scarcely need definition. When by the act of a grantor or

settlor, a less estate is (or several estates are) parcelled out

from a greater, every such less estate is derivative in respect

to the greater ; which latter, in respect to all the less estates,

is original.

The same The word derivative is applied to estates not in reference to

^th original^ any intrinsic quality in the derived estates, but only to

andderiva- describe their relation to the original estate. An estate which

is derivative in respect to a larger estate, may itself be an

original estate in respect to a less estate subsequently derived

out of it. Every estate (greater than a tenancy at will) is

capable of being an original estate. For this purpose, a term

of years, or a tenancy from year to year, is regarded as an

estate ; though the word estate is strictly applicable only to

estates existing by the common law.

Merger. The opposite of the process by which one or more less

estates may be derived out of a greater, is the merger of

estates;\* by which one or more less estates may become

blended with a greater, so as to be indistinguishable from it in

the same sense, and to the same extent, as was the case before

the less estates were derived out of the greater. Some

remarks upon this subject will be found in a subsequent

chapter.

Estates can- From the difficulty of preserving strict consistency when

de novo. dealing with abstractions, and the confusion introduced by the

\* styled the merger of ettaies—i.e., the merger of one estate in another

estate, — to distinguish it from the merger (more correctly styled extinguuhmerit)

of incumbrances in the estate over which they subsist : a subject with which the

merger of estates is sometimes confused.

ON THE DERIVATION AND SUCCESSION OP ESTATES. 69

practice of classing together physical objects and estates

under the terms tenements and hereditaments, there have

arisen several inaccurate phrases, which can be used only

subject to a perpetual tacit correction. A lawful estate can-

not, unless perhaps by the express operation of an Act of

Parliament, be created cle novo in any other sense than that

of being derived de novo out of an existing estate in which it

was previously included. Lands themselves cannot be settled,

devised, or intailed, for the subject of the settlement, devise,

or entail, is an estate in the lands, not the lands themselves ;

and the nature of all dealing with lands is in general circum-

scribed by the nature of the estate by which such dealing is

made possible.

Estates which are derived out of any estate less than a fee Derivative

simple, retain the characteristics of their restricted original. destroyed\y

No settlor can emancipate the derivative estates from any thedestruc-

restriction, or liability to determination, which affects the original

original estate out of which they are derived. If the original

estate is itself less in quantum than a fee, or is a determinable

fee, or other determinable estate, or is an estate subject to a

condition, then every event by which the original estate is to

be, or may be, determined, is by construction of law annexed,

as a determinable limitation, to each of the derivative estates ;

so that each of the latter will be ipso facto determined by the

happening of any event which determines the original estate,

in accordance with the maxim, Cessante statu primitlvo, cessat

derivativus. (1 Prest. Est. 123 ; and see 8 Eep. 34 a.)

Nevertheless, it must be remarked, in qualification of the Apparent

.... . exceptions

precedmg paragraph, that a tenant m tail in possession can, from ti»e

by virtue of the Fines and Eecoveries Act, dispose of the p^ncipil

intailed lands for a fee simple absolute; which estate is of

course not liable to be determined by the happening of any

event which would have determined the estate tail. A tenant

in tail in remainder, with the consent of the protector of the

settlement, can make a like disposition. Similarly, the tenant

for life in possession, under a settlement which comprises the

fee simple, can dispose of the fee simple in the settled lands

70

ON ESTATES IN GENERAL.

under the powers conferred by the Settled Lands Acts. These,

and other like cases, are only apparent exceptions from the

principle stated in the foregoing paragraph. The fee simple

of which the tenant in tail disposes, is the fee simple out of

which the estate tail was derived ; and the fee simple of which

the tenant for life disposes, is the fee simple comprised in the

settlement ; and in both cases the disposition takes effect under

a statutory power : a subject which is further considered in

the next following paragraph.

Operation of

powers.

The practical application of the maxim, Ciijus est dare, ejus

est disponerc, is complicated by the existence of powers ;

whereby a separation may be effeated between the potcstas

dandi and the potestas disponendi, to such purpose that there

is no necessary relation between the estate (if any) of the

person exercising the power, and the estates which may arise

by its exercise. In such cases the proposition remains never-

theless true, that the estates which so arise are derived out of

an original estate, though that estate may not be, and usually

is not, vested in the person by whom the power is exercised.

Therefore, in applying the maxim, Cessante statu pnmitiio,

cessat derivativus, to the exercise of powers, we must obsers-^e

that the status primitivus is not necessarily, or usually, the estate

of the donee of the power. In the case of powers contained

in wills, or powers operating by virtue of the Statute of Uses,

the original estate is the estate of the testator or settlor. In

the case of powers created by express statute, the original

estate is the fee simple, upon which, wheresoever it may be

subsisting, the statutory power acts, by the direct authority of

the law, so far and to such an extent as may be necessary

to give effect to the exercise of the statutory power ;

Modes of

derivation.

Thus the methods by which one estate may be derived out

of another may be divided into three heads : —

1. "When the original estate is vested in the person by whom

the derivation is effected ; and who has, by the common

law, the right to effect such derivation, as an incident

attached to his ownership ;

2. When the derivation is effected by the exercise of a

ON THE DERIVATION AND SUCCESSION OF ESTATES. 71

power, operating by means either of a devise or of the

Statute of Uses ; and

3. When the derivation is effected by the exercise of a statu-

tory power, which operates directly upon the legal estate,

without need for the intervention of the machinery of

uses or devises.

To these must be added certain cases in which it would seem As to estates

that, by force of an express statute, an estate is truly created ^^ J^^,J.^,

de novo, being made to arise in one person under circumstances ^y statute.

which are inconsistent with the hypothesis that it arises by

derivation out of an existing estate, or by the transfer of an

existing estate from one owner to another.

(1) By the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74,

s. 39, it is enacted, that if a base fee in any lands, and

the remainder or reversion in fee in the same lands,

shall be united in the same person, without the inter-

vention of any intermediate estate, the base fee shall

not merge, but be ipso facto enlarged into as large an

estate as the tenant in tail, with the consent of the

protector (if any) might have created by any disposition

under the Act if such remainder or reversion had been

vested in any other person. This estate is usually a fee

simple absolute. Here the declaration, that enlarge-

ment shall be substituted for merger, is equivalent to a

declaration that the estate obtained by the enlargement

is created de novo ; since the contrary hypothesis would

require a different declaration ; namely, that, notwith-

standing merger, the remainder or reversion should

retain certain characteristics of the base fee.

(2) The Conveyancing Act of 1881, s. 65, amended by the

Conveyancing Act, 1882, s. 11, enacts, that any of the

' persons interested in manner therein mentioned in a

long term of the kind therein specified, may by deed

declare that the term shall be enlarged into a fee simple ;

and that thereupon the term shall be enlarged accord-

ingly. For reasons similar to those alleged in the

previous case, the conclusion seems to follow, that the

estate obtained by the enlargement is created de novo,

72 ON ESTATES IN GENERAL.

and is not obtained by a transfer of the pre-existing

fee simple.

A question may still remain, whether the pre-existing

fee simple is destroyed, or whether it continues to exist

in the shape of a reversion upon the fee simple obtained

by the enlargement ; in which case the latter would exist

as a base fee. (Vide infra, p. 333.)

The derivation of estates out of an original by the act of

parties only, is substantially the same process, whether it is

effected by direct assurance, or circuitously, by the exercise of

a power created by a settlor. The limits to what can be effected

by the direct process are the same a? the limits to what can

thus be effected by the circuitous process. But the operation

of a statutory power is subject only to the limits imposed by

the statute. The following observations will illustrate the

different aspects of the derivation of estates.

Estates 1. A fee tail is in the eye of the law a conditional fee, though

o/ a fee ^l ^^ ^^® statute De Bonis certain rights are given to the

issue in tail, to defeat alienations made at the common

law by their ancestor. That the tenant in tail has a

fee, and that a fee tail does not consist of a mere succes-

sion of estates for life taken by the successive tenants

in tail, is shown by the fact that the alienation of tenant

in tail, when it had not the peculiar efficacy of a fine or

recovery, would suffice to create a base fee, which on the

death of the tenant in tail creating it did not become

absolutely void, but only liable to be avoided by the

entry of the issue in tail. (Vide infra, p. 322.) The

same remark holds good of dispositions at the present

day made by the tenant in tail, which are insufficient

to bar the entail by virtue of the Fines and Eeooveries

Act. In this sense a fee may be derived out of a fee

tail ; but the fee so derived is made voidable by the

statute De Bonis.

Leases made by tenants in tail under 32 Hen. 8, c. 28

(of which the term might not exceed twenty-one years,

or three lives), were by that statute made effectual m

ON THE DERIVATION AND SUCCESSION OP ESTATES. 73

law as against the issue in tail. Such terms seem to

have been derived out of the estate tail. (See 8 Eep.

34 a.) This statute was repealed, so far as tenants in

tail are concerned, by 19 & 20 Vict. c. 120, s. 35.

And since no right of entry can accrue to the issue in

tail until the death of the preceding tenant in tail, it

follows that, to the extent of an estate for the life of the

tenant in tail, or a term of years determinable on the

dropping of his life, estates may be effectually derived

at common law out of an estate tail.

2. Out of an original estate for the life of the grantor, there Estates

can be derived only estates determinable upon the of an estate

dropping of his life. These may be either estates for ^^^ ^'^^'

joint lives, one of the lives being the life of the grantor ;

or they may be terms of years determinable either upon

the dropping of one of such joint lives, or upon the

dropping of the grantor's life.

The tenant of an estate for life which arises under a

settlement, when his estate is vested in possession,

being the person who is for the time being, under the

settlement, beneficially entitled to the possession of the

settled land for his life, is enabled, by the Settled Land

Act, 1882, to exercise the powers of sale, exchange,

partition, leasing, and other powers conferred by that

Act. (See sect. 2, sub-s. 5 of the Act.) Estates created

by the tenant for life in possession under a settlement,

in exercise of the powers conferred by the Settled Land

Acts, cannot be derived out of the estate for life of the

donee of the powers, but arise by force of the statute.

They seem to be derived out of the original estate of

the settlor, and to be, under the provisions of the Act,

determinable with it, in cases where it is liable to

determination.

3. Out of an original estate pur autre vie, whether for life or Estates

lives, there can, in like manner, be derived only estates of an estate

determinable upon the dropping of all, or some, of the ^^^"' '\*"^''\* ^''\*'

original lives. Such estates may be estates for life,

estates jp«j" autre vie, or terms of years.

74

ON ESTATES IN GENERAL.

Efitatcs

derived out

of a term of

years.

4. Out of a term of years there can be derived no estate,

except a term of years, either expressed to be of less

duration than the original term, or determinable

(whether expressly or by operation of law) with its

determination.

Vested estates

defined.

On the Terms Vested, Contingent, and ExectUory.

Of the divisions into vested and contingent and into vested

and executory, neither is exhaustive; but the term vested

estate is sometimes opposed to the term contingent estate, and

is sometimes opposed to the term executory interest.

An estate may be either vested i7i possession, or vested only

in interest, the actual possession being in another. The

phrase, vested in possession, needs no definition. An estate

is said, though not vested in possession, to be vested in interest

in a given person, when that person would be entitled, by

virtue of it, to the actual possession of the lands, if the estate

should become the estate in possession by the determination

Trne criterion of all the precedent estates. In the words of Fearne : — " It is

" not the uncertainty of ever taking effect in possession that

" makes a remainder contingent ; for to that, every remainder

" for life or in tail is and must be liable ; as the remainderman

\*' may die, or die without issue, before the death of the tenant

" for life. The present capacity of taking effect in possession,

" if the possession were to become vacant, and not the certainty

"that the possession will become vacant before the estate

" limited in remainder determines, universally distinguishes

\*' a vested remainder from one that is contingent." (Fearne,

Cont. Rem. 216.)

between

vested and

contingent

estates.

Restriction

upon the

criterion.

The doctrine laid down by Fearne in the foregoing passage,

is almost universally true ; though it is possible to imagine a

case which would impose some qualification. For example, a

limitation in a deed to the use of A for life, with remainder to

the use of his heir, and the heirs male of the body of such heir.

In such a case, the heir of A would take an estate in tail male

by purchase because the words of limitation superadded to the

word heir would prevent the application of the rule in Shelley's

ON THE DERIVATION AND SUCCESSION OF ESTATES. 75

Case ; and during the life of A this estate tail would be a con-

tingent remainder, although the heir apparent or presumptive

for the time being would always be ready, during the ancestor's

lifetime, to step into the possession if it should become vacant.

The above-cited language does not apply to the case of a person

claiming by purchase as heir in remainder expectant upon an

estate for life limited to his ancestor, during his ancestor's life-

time : such a remainder being contingent, because the heir's

claim is liable at any time to be defeated by his ceasing to be

heir, either, if he is heir apparent, by his own death in the

ancestor's lifetime, or, if he is only heir presumptive, also by

the birth of a prior heir.

It is now clearly settled, after considerable doubt and hesi- Existence of

tation, that the existence of a power of appointment will not does not pre-

prevent estates limited to take effect in default of the exercise ^^°\* vesting.

of the power from vesting, if they are such as, apart from the

existence of the power, would be vested estates. (Fearne, Cont.

Eem. 226 et seq.) Such estates are said to be vested, but liable

to be devested by an exercise of the power.

Contingent estates are capable of being limited under the Contingent

rules of the common law ; \* and their distinguishing quality of

contingency is conferred upon them by the terms of their

limitation ; either (1) by a provision that the specified person

shall not take unless a contingency shall happen, or (2) that

he shall not take until the happening of a future event, or

(3) by reason that the limitation is in favour of a person not

ascertained, or not yet in being.

Of these three sub-divisions, the first comprises the first and

second of Fearne's four classes ; and the second and third

correspond with his third and fourth classes respectively.

Executory interests do not admit of being limited under the Executory

• interests

rules of the common law.f They owe their whole existence

partly to the statutes permitting devises of lands, and partly to

• [Not under the original rules of the common law. The old common law

rule was that " every remainder which commenceth by a deed ought to vest in

him to whom it is limited, when livery of seisin is made to him that hath the

particular estate." (Co. Litt. 378 a.) See Law Q. R. xxv. 393.]

t [As to executory devises of terms of years, vide infra, pp. 171, 210 nj

76

ON ESTATES IN GENERAL.

Distinction

between

contingent

estates and

executory

interests.

How far

assignable or

transmissible.

the Statute of Uses. The limitations under which they arise

are called executory limitatiom, which in a will are executory

devises, and in a deed are springing or shifiing uses. Phrases

which properly refer to the mode of their limitation are in prac-

tice often confused, or used interchangeably with, phrases which

properly refer to the nature of the interest taken under such

limitations. This usage is especially frequent with respect to

executory devises ; that is to say, an executory interest arising

by executory devise, is often briefly styled an executory devise.

Since executory interests may be, though they are not neces-

sarily, limited to arise upon a contingency, they are liable to be

confused with contingent remainders. The distinction between

them is given by the following propositions : — Every limitation

which creates, in favour of a specified person, a possibility of

the vesting of an estate in him at a future time, which is valid

by the rules of the common law, gives rise to a contingent

remainder. And every such limitation which is valid in a

will or in a conveyance to uses, but would not be valid as a

limitation under the rules of the common law, gives rise to an

executory interest.

In the view of the common laW) both contingent remainders

and executory interests were only possibilities\* and therefore

were not assignable inter vivos (Case in C. B. cited in 4 Rep. at

p. 66) ; though, as being notbare possibilities, but possibilities

\* The word possibility has been obscured by its confused usage. But three

kinds can be distinguished : —

(1) Possibilities coupled with an interest ; as contingent remainders and

executory interests ; which, so soon as the person in whom they will vest,

if they do vest, is ascertained, are both descendible and deviseable.

(2) Bare possibilities ; as the possibility of reverter on the breach of a condi-

tion, and the possiVjility of reverter upon a common law fee other than a

fee simple ; these at common law are descendible but not deviseable.

(3) Absolutely bare jwssibilities, or mere expectations of possible benefits, not

founded upon the dispositiona or provisions of any operative assurance.

These at common law are neither descendible nor deviseable ; though the

succession of children by representation in heirsbip often did, so far as

the expectations of heirs are concerned, amount practically to the same

thing. But, in strictness, they did not succeed to the expectation, but to

the heirship upon which it was founded.

Such possibilities of devisees, if children of the testator, are practically made

sometimes descendible by the Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 33.

ON THE DERIVATION AND SUCCESSION OF ESTATES. 77

coupled with an interest,, they might be devised under the

Statutes of Wills. {Roe v. Jones, 1 H. Bl. 30 ; S. C. in B. E.

sub nam. Jones v. Boe, 3 T. R. 88.) They might also, at com-

mon law, be released (Lampet's case, 10 Rep. 46), and be bound

by estoppel. (Weale v. Lower, PoUexf. 54; Doe v. Martyn, 8

B. & C. 497 ; Doe v. Oliver, 10 B. & C. 181.) Contracts, and

assurances relating to them, if made for valuable consideration,

might generally be enforced in equity {Wright v. Wright, 1 Ves.

sen. 409 ; Crofts v. Middleton, 8 De G. M. & G. 192) ; which

remark applies even to such absolutely bare possibilities as the

expectations of heirs during the lives of their ancestors, and of

devisees and legatees during the lives of their testators or pos-

sible testators. {Beckley v. Neidand, 2 P. Wms. 182.) Now by

8 & 9 Vict. c. 106, s. 6, both contingent remainders and execu-

tory interests may be " disposed of " by deed.\*

Remainders and Reversions.

Remainder and reversion are both relative terms, each depend- Nature of the

ing upon the relation of an estate which is posterior in point of betw°en°'^

time to an estate which is prior in point of time. The prior them,

estate is in both cases styled the particular estate. The dis-

tinction between a remainder and a reversion lies in the differ-

ence in the relation borne by them respectively to the particular

estate ; and this relation depends upon the circumstances under

which the particular estate became separated from the reversion

or remainder.

A remainder is constituted by the act, expressly directed to

that end, of a grantor or settlor, who simultaneously derives two

(or more) estates out of his own estate, and limits them to

different persons by way of succession, in such a way that the

\* A present right of entry may also be assigned by virtue of this enactment.

(Jenkins v. Jo7ie8, 9 Q. B. D. 128.) In Ilu/d v. Bishoj), 8 Exch. 675, and iru/it

V. Remnatd, 9 ibid. 635, a doubt is expressed, whether a right of entry, which

has accrued by the breach of a condition, can be assigned under the same enact-

ment. In the former case, at p. 680, a distinction in this respect seems to be

drawn between a right of entry which has accrued by breach of condition, and

" an original right where there has been a disseisin, or where the party has a

right to recover lands, and his right of entry and nothing but that remains."

The present writer humbly conceives that there is nothing in reason to support

this supposed distinction, while authority is against it. Littleton expressly says,

that entry and re-entry are the same thing. (Litt. sect. 347.)

78 ON ESTATES IN GENERAL.

estates may successively become the estate in possession, each of

them (except the first in order) giving a j^^'sent title to the

future possession. Of two estates so created, that which is

posterior subsists as a remainder in expectancy upon that which

is prior in the order of time and of limitation.

A reversion, without any express act of the grantor or settlor,

is left in him by the operation or construction of law, when he

merely parts with less than his whole estate, retaining in him-

self a residue which awaits the determination of that with which

he has parted, before it can become the estate in possession.

Every reversion is (or rather, once was) an original estate in

respect to the particular estate, which latter, with respect to the

reversion, is derivative. (1 Prest. Est. 123.) The relation

between a remainder and the particular estate consists in their

having both been simultaneously derived out of the same

original ; and for many purposes the particular estate and all

remainders upoiQ it are in law regarded as making together but

one estate. (Co. Litt. 49 b ; ibid. 143 a.)

Thus the priority in time of the particular estate over the

remainder is due to the intent, expressed in the limitation, of

the grantor or settlor ; but the priority in time of the particular

estate over the reversion is due to the construction or operation

of law.

The rule is, that there can be no remainder where there can

be no reversion. (3 P. Wms. 6th ed. 231, note A.) But this

rule, as is there remarked, does not apply to limitations by which

incorporeal hereditaments, such as a rent-charge, which have no

existence apart from the limitation, are originally created. For

example, a rent-charge might, at its creation, be limited to A

for life with remainder to B in tail; though under such a

limitation there could be no reversion, because a reversion must

have existed before the particular estate, and, in the case sup-

posed, nothing in the shape of a rent-charge existed before the

particular estate.

The following definitions, by which remainders are distin-

guished from reversions, will be found instructive : —

Remainder "A remainder is an estate limited to commence after the

" ■ determination of a particular estate, previously limited by the

ON THE DERIVATION AND SUCCESSION OF ESTATES. 79

same deed or instrument out of the same subject of property."

(1 Prest. Est. 90.)

Here deed must be taken to include any act in the laiv. By

the common law, before the Statute of Frauds, a particular

estate followed by a remainder might have been created by

feoffment without any writing; and a deed was first made

necessary by the 8 & 9 Vict. c. 106. It would also seem that

the expression same deed must be taken to include several deeds

delivered at the same time, upon the principle of the maxim,

Quce incontinenti Jiunt, inesse videntur. But Preston questions

this application of the principle. (1 Prest. Est. 90, note q.)

" ' Remainder ' in legall Latine is remanere, coming of the

Latine worde remaneo : for that it is a remainder or remnant

of an estate in lands or tenements, expectant upon a particular

estate created together with the same at one time." (Co. Litt.

143 a.)\*

" \* The remainder ' is a residue of an estate in land depend-

ing upon a particular estate, and created together with the

same." (Co. Litt. 49 a.)

"A reversion is where the residue of the estate always Reversion

doth continue in him that made the particular estate, or

where the particular estate is derived out of his estate." (Co.

Litt. 22 b.) The second clause of this definition was not

intended to give an alternative definition, but only to expand

the meaning of the first clause. In this definition, the words

doth alicays continue, are emphatic. The reversion is the same

estate that was in the grantor before the creation of the

particular estate.

\* Although Loi'd Coke correctly derives the word from remanere, his language

strongly suggests the conclusion, that he took remainder to signify what is left

over when a part has been cut off. " But," says Prof. F. W. Maitland, in a

}iassage worthy of all acceptation, " if we look at the documents of the thirteenth

" century, we soon see that the word remanere did not express any such notion

" of deduction or subtraction. The regular phrase is that ' after the death of A,'

" or ' if A shall die without an heir of his body,' then ' the said land,' or ' the

" said tenements shall remain to B,' that is, shall await, shall abide for, shall

" stand over for, shall continue for, B. We may compare the then common

" phrase ' loquela remanet,' the parol demurs, the action stands over till someone

" is of age or some other event happens ; or, to use a form of speech not yet

" forgotten, the action ' is made a remanet.' " (Law Quarterly Review, vol. vi.,

p. 25.)

defined.

80

ON ESTATES IN GENERAL.

Rercreions

and remain

cicrs upon

terms of

years.

The ambiguous nature of terms of years, gives an ambiguous

meaning to reversions and remainders expectant upon terms

of years. In so far as such a reversion, or remainder, does

not give an immediate title to the actual or physical possession

of the lands, during the continuance of the term, it may be

regarded as being in fact a reversion or remainder ; and in

this sense such estates are commonly styled reversions and

remainders. But for some purposes the question is not, who

has an immediate title to the physical possession, but, who has

an immediate title to the feudal seisin ; and for these purposes,

such a so-called reversion or remainder is not truly a rever-

sion or remainder, but is itself the estate which confers the

freehold during the continuance of the term. {Vide infra,

p. 99.)

Remainder

upon a base

fee.

The remainder which may subsist upon a base fee has in all

essential characteristics the quality of a remainder, and not of

a reversion. In a certain sense, it is an exception to the rule,

that every remainder must be created by the same act or deed,

and at the same time, as the particular estate ; for it was not

created along with the base fee, but with the fee tail, out of

which the base fee subsequently arose. And in a like sense it

constitutes an exception to the rule, that remainders are created

by act of parties, and reversions by operation of law ; for though

the remainder upon the fee tail was created by act of parties,

yet, when the fee tail is turned to a base fee, the remainder

upon it may more properly be said to be created, and to

subsist, by operation of law.

The same Out of an estate in remainder, which is already in esse, other

SfhreTain^\*^ estates may be derived. With regard to such estates the

der and revcr- remainder itself will be a reversion ; but with regard to the

sion. ^ , '^

estate out of which it was itself derived, it will be a remainder.

Thus the same estate may, in different relations, be both a

remainder and a reversion. (1 Prest. Est. 123.)

Alternative Several fees may, at the common law, be limited in the

\_^main ers alternative by way of remainder upon the same particular

estate; upon such contingencies that not more than one of

ON THE DERIVATION AND SUCCESSION OF ESTATES. 81

them can by possibility happen. (Loddington v. Kime, 1 Salk.

224, Ld. Eaym. 203 ; and see Fearne, Cent. Rem. 373 ; Doe

V. Burmall, 6 T. R. 30; Re White and Hindle's Contract,

7 Ch. D. 201.) Of such fees, each is a remainder in regard

to the particular estate, but none is a remainder in regard

to any other of them.

It is essentially characteristic of a remainder (1) to await Twoinvari-

oVjin rules

the regular determination of the precedent estate, and (2) to be relating to

limited to take effect in possession immediately upon that ^^'^^i^^^''^-

determination. A remainder may neither be limited to take

effect upon the determination of the precedent estate by for-

feiture for breach of a condition, nor to take effect upon the

expiration of an interval of time after the regular determination

of the precedent estate.

In both these respects remainders differ from executory These rules

interests. An executory limitation may take effect upon the to executory

defeasance of an estate of freehold by entry for the breach of ^"^^'^^s\*^^-

a condition, and it may be limited to take effect at the expira-

tion of an interval to elapse after the determination of a

precedent estate.

1. The first rule, that every remainder must await the regular First Rule.

Every

determination of the precedent estate, follows from the rule of remainder

the common law, that no one may take advantage of a con- ^g^reguiar

dition, except the person making it, or his privies in right and f.^^^^'^l'jf "

representation ; that is — (1) the heirs, quoad estates descendible precedent

to them, (2) the executors or administrators, quoad estates

transmissible to them,^ and (3) the successors of corporations

sole. (Prest. Shep. T. 149.) The statutory innovations upon

the common law (32 Hen. 8, c. 34 ; 22 & 23 Vict. c. 35, s. 3,

and the Conveyancing Act of 1881, ss. 10, 12) which have in

certain cases enabled grantees and assignees of reversions to

take advantage of conditions annexed to particular estates,

contain nothing to alter the common law, so far as persons

entitled in remainder upon a particular estate are concerned.

But if a particular estate is at its limitation expressed to be a distinction

defeasible upon breach of a condition, there is an important °^\*^-

distinction between — (1) cases in which a remainder is limited

C.R.P. o

82 ON ESTATES IN GENERAL.

to commence upon the defeasance of the particular estate, and

(2) cases in which a remainder is limited, without any reference

to the condition, to commence upon the determination of the

particular estate. In the former case, an entry made upon the

tenant of the particular estate for breach of the condition will

destroy the remainder ; but in the latter case, the limitation

of the remainder makes the condition itself void. ' (Fearne,

Cont. Rem. 270; 1 Prest. Est. 91.) But in the former case,

though an entry made for breach of condition will destroy the

remainder, yet the remainder is not void in its inception ; and

it is not destroyed by a breach of condition, unless an entry

is made for the breach. If the person entitled to enter for

the breach waives his right of entry, the particular estate

continues in being ; and upon its subsequent regular determi-

nation, the remainder will take effect.

A determinable estate, which is liable to determine upon the

happening of a future event, by virtue of a determinable (or

collateral) limitation, is normally determined by the happening

of that event ; and a remainder may be as well limited over

upon such a determinable estate, as upon the like estate when

not determinable. (2 Bl. Com. 155 ; Foye v. Hynde, 5 Yin.

Abr. 63, pi. 12.) Thus, a remainder may be limited after an

estate to a woman durante viduitate, as well as after an estate

to her for life simply. This doctrine is often, but not very

felicitously, expressed by saying, that a stranger can take

advantage of a conditional (that is, a determinable or collateral)

limitation, but not of a condition. (Go. Litt. 214 b.)

Second RuU: 2. The second rule, that no remainder may be limited to take

take eff«:t ^ff^^^ "P^'^ '''<^ expiration of an interval of time after the determina-

immediately (ton of the precedent estate, follows from the rule of the common

upon such dc- .

termination law, that the immediate freehold may not, by any act of parties,

be placed in abeyance. {Vide infra, p. 104.)

Possibility of JRevei'ter,

Reverter and reversion are synonymous terms, denoting an

estate vested in interest though not in possession; but the word

reverter is sometimes loosely used to denote what is properly

ON THE DERIVATION AND SUCCESSION OF ESTATES. 83

styled i^ossihilitij of reverter. Possibility of reverter denotes no

estate, but, as the name implies, only a possibility to have an

estate at a future time. Of such possibilities there are several

kinds; of which two are usually denoted by the term now

under consideration : — (1) the possibility that a common law

fee may return to the grantor by breach of a condition subject

to which it was granted, and (2) the possibility that a common

law fee, other than a fee simple, may revert to the grantor by

the natural determination of the fee.

Since every remainder and every reversion is a part\* only ,

of the estate of the grantor or settlor, it follows that, by the

common law, no remainder can be limited in expectancy upon

the determination of a fee, and that no reversion can remain

in a grantor or settlor who parts with a fee. There cannot Two common

exist two common law fees in the same land. (Co. Litt. 18 a ; cannot exist

Willion V. Berkeley, Plowd. 223, at p. 248 ; and authorities j^^J^ '^°\*^

cited in the margins.) In regard to a fee simple and a deter-

minable fee, this proposition has never been disputed. In

regard to a conditional fee, Preston treats it as being not

indisputably certain, but as depending only upon a preponder-

ance of authority. (2 Prest. Est. 318 ; ibid. 320, note.) In

more than one passage of his works something like a wavering

of his own opinion may perhaps be detected. (See 2 Prest.

Est. 299 ; iUcl 353 ; 1 Prest. Abst. 379.)

It is conceived that no reason can be given, upon principle, This rule

why conditional fees should be distinguished in this respect conduLn\*ai

fees.

\* Vide supra, p. 79, note. Although it would be historically and etymo-

logically incorrect to regard the word remainder as signifying what is left over

when the particular estate has been subtracted, yet the doctrine of the relative

quantum of estates has been now for several centuries firmly established in

English law ; and it is quite usual, and not improper, to speak of a particular

estate, or several successive estates, as having been carved or derived out of an

original estate ; and the doctrine that all common law fees are, for the purposes

of a grant, equal in quantum, is inconsistent with the hypothesis of a remainder

or reversion subsisting in expectancy upon the determination of a common law

fee. Littleton (sect. 11) says, "And note, that a man cannot have a more

large or greater estate of inheritance than a fee simple ; " upon which Lord

Coke remarks : " This does extend as well to fee simples conditional and

qualified, as to fee simples pure and absolute. For our author speaketh here of

the amplenesse and greatnesse of the estate, and not of the perdurablenesse of

the same. And he that hath a fee simple conditionall or qualified, hath as

ample and as great an estate, as he that hath a fee simple absolute ; so as the

diversity appeareth betweene the quantity and quality of the estate."

a 2

84 ON ESTATES IN GENERAL.

from other fees. The later authorities seem to concur with

Lord Coke in the opinion, which is clearly expressed by him

on several occasions, that no expectancy other than a possi-

bility of reverter can exist upon a conditional fee. (Co. Litt.

22 a ; ibid. 327 a ; 2 Inst. 335 ; ibid. 336 ; Marq. of Winchester's

Case, 3 Rep. 1, at p. 3 b. See also his comment on Litt.

sect. 11. Also, Co. Cop. sect. 12 = Co. Law Tr. 181 : "For if

•' a conditional fee, then a remainder over of it could not be

•' limited.")

The question was expressly decided in this sense by Lord

Hardwicke in Earl of Stafford v. Buckley, 2 Ves. sen. 170 : a

decision which, for all practical purposes, is conclusive ; though

Preston shows some disposition to carp at it. (1 Prest. Abst.

379 ; 1 Prest. Est. 417, note.)

It is an indisputable fact, that by the common law there did

exist Q.formcdon en reverter for the benefit of the donor, as is

expressly stated in the statute De Bonis ; \* while there did not

exist dkformedon en remainder in respect of conditional fees.t

This seems to show that there could be no such remainder

upon a conditional fee ; and if there could be no remainder,

it follows that there could be no reversion.

The fact that a doubt at one time prevailed (Co. Litt. 22 b)

whether there could exist a reversion upon a fee tail after the

statute De Donis, is a strong argument to show that there

could not previously have existed a reversion upon a conditional

fee at the common law.

• " The writ whereby the giver shall recover, when isrni^; faileth, is common

enough in the Chancery." (I Stat, Rev. p. 43. And see 2 Inst. 336.) In the

same page, Loyd Coke denies ih&t Afonncdoti en descender lay at the common law,

though in Co. Litt. 19 a ; ibid. 20 a, he affirms the contrary. In note (5) on

Co. Litt. 19 a, where the reference to 2 Inst, is incorrectly given, Hargrave

endeavours to reconcile the discrepancy. (See also Co. Litt. 60 b.) It is a

plausible view, to be gathered from Hargrave's remarks, that the proper remedy

was a writ of moH d'anncextor, unless by reason of special circumstances, as

where the issue j}er /ormam doni was by a second marriage of the father, and

there had been like issue by the first marriage, whereby the heir per forniam doni

coidd not show himself as next heir to the father.

t Several authorities mention that, in the opinion of some people, the remain-

derman upon an estate for life might, after the death of the tenant for life, have

had a.formedon en remainder at the common law. (Booth, Real Actions, p. 151 ;

Litt. sect. 481, and Lord Coke thereon.) Booth doubts this, while Littleton

and Lord Coke both deny it. The question is, at all events, foreign to the

present purpose. (See also Appendix II., infra.')

ON THE DERIVATION AND SUCCESSION OF ESTATES. 85

Preston (2 Prest. Est. 351) has cited some remarks from

Watkins on Copyholds, with reference to which he observes

(p. 353) that "Mr. Watkins's observations tend strongly to

"prove the existence of remainders [upon conditional fees] at

" the common law." But these observations of Watkins about

such remainders are only made by the way, in the course of

an argument addressed to the solution of another question : —

the perhaps insoluble question, how there can exist a custom

to permit entails of copyholds, seeing that all customs must, in

the eye of the law, have been in existence before the first year

of Ric. 1, while the statute De Bonis was not passed until the

thirteenth year of Edw. 1. Watkins seems to conclude that, [On this sub-

since this is in fact impossible, it cannot be true that entails of chapter on

copyholds exist by virtue of a custom to intail as affected by ^^^^^^^

the statute; but that they exist solely by virtue of a custom

to grant in customary fee simple as affected by the statute ;

and that, by consequence, entails of copyholds may exist in

all manors in which there is a custom to grant in fee simple.

But it must be taken as settled by authority, that in manors

where no custom of entail can be alleged to exist, a gift in tail

will create a conditional fee.\*

Preston also (2 Prest. Est. 324) cites a passage from Bracton

(lib. 2, c. 6, fo. 18 b of eds. 1569, 1640 ; Vol. I., p. 46, of the

Eolls ed. 1878), which expressly states that several successive

conditional fees in remainder, one after another, may be

limited at the common law. Professor F. W. Maitland has

proved, in a deeply interesting article,! that this statement

is well warranted by the then current practice ; and that in

ancient documents, considerably prior to the statute De Bonis,

such limitations occur not unfrequently. There cannot, as he

seems to admit, be any doubt that at the present day such

limitations would be held void.

\* [The possibility of reverter on a conditional fee is devisable under the Wills

Act : Peinberton v. Barnes, (1899) 1 Oh. 544.]

t Law Quarterly Review, Vol. VI., p. 22. For some further remarks upon

this subject, see Appendix II., infra.

86

ON ESTATES IN GENERAL.

CHAPTER X.

MERGER.

Definition. MERGER is the opposite of the process by which less estates are

derived out of a greater, whereby one or more less estates may

so become blended with a greater, as to be indistinguishable

from it in the same sense, and to the same extent, as was the

case before the less estates were derived out of the greater.

Merger generally takes place when two estates, either related

inter se as derivative and original, or else being both derived

out of the same original, and both being held in the same

right, meet together in the same person ; the posterior estate —

(1) being greater, or, at least, not less, in quantum than the

prior estate ; and (2) following immediately after it in the

order of succession, without the intervention of any inter-

mediate estate.

And if any number of successive estates, of which each

successive pair fulfils the conditions above laid down, should

meet together in the same person, all the prior estates will

in general be merged in the estate which is last in the order

of succession.

It is immaterial whether an intermediate estate was created

at the same time as, or subsequently to, both or either of two

estates which it separates : in either case, such intermediate

estate will prevent merger. (3 Prest. Conv. 127.)

Contingent

remainders.

A contingent remainder, not being in the eye of the common

law an estate, but only a possibility to have an estate at a

future time upon the happening of a contingency, did not

suflSce to prevent merger, if interposed between two vested

estates, which were otherwise such that the one would merge

in the other. {Vide infra, p. 136.)

But there was in this respect an important distinction

between cases in which the two vested estates came to the

same hand subsequently to the creation of the contingent

MERGER. 87

remainder, and cases in which they came to the same hand

eo instanti with the creation of the contingent remainder.

In the former case, the merger was absolute, and thereby the

contingent remainder was for ever destroyed. But in the latter

case, the merger was not absolute, and the two estates united

by it remained, according to the language in use, liable to open

and let in the contingent remainder, provided that it became

vested during what would have been the continuance of the

precedent estate if it had not been merged. {Vide infra, -p. 138.)

Several successive contingent remainders have of course no

more efficacy to prevent merger than a single one.

For all purposes of merger, an undivided share of land is a Undivided

separate tenement. When estates in undivided shares meet in

the same person, merger does not ensue unless the contiguous

estates both refer to the same undivided share : a question

which commonly admits of being answered, upon properly

deducing the titles to the several shares. If there is nothing

whatever to show whether they refer to the same or to different

shares, the presumption seems to be, that they refer to the

same share. (3 Prest. Conv. 98, 99.)

Merger has a very close resemblance in its operation to Distinctions,

surrender ; and it is frequently confused with extinguishment.

It would also appear to have been sometimes thought to

resemble discontinuance and remitter. (3 Prest. Conv. 9 — 13.)

A few remarks, by way of distinction, may therefore be here

introduced.

It is the general rule, that two estates will merge when they Surrender,

meet in the same person, without the intervention of any

intermediate estate, and are such that the prior estate might

have been surrendered to the tenant of the posterior estate.

(3 Prest. Conv. 152.) In this sense it may be said, that the

scope of merger is identical with the scope of surrender. But

this resemblance holds good only for the purpose of ascertain-

ing the relative quantum of the relevant estates. Merger is

not due to the same cause as surrender ; for it arises by

operation of law, and as the mere result of the situation of the

86

ON ESTATES IN GENERAL.

May differ

from merger

in operation.

estates inter se at the time of the merger, without regard to

the intention of the parties by or through whom they were

placed in that situation. But surrender is due to the intention,

and is the effect of the act of surrender, and not merely of the

situation in which the surrender places the two estates. (Pres.

Shep. T. 301.) Under special circumstances, the operation of

merger and of surrender may be very different. Thus, if there

be an estate for life in one person, with the reversion in fee

simple in two other persons as joint tenants, then, if the

tenant for life should surrender his estate to one of the joint

tenants, it will be destroyed, since one joint tenant can accept

a surrender as fully as if he were solely seised ; whereby the

estate of each joint tenant is accelerated, and the joint tenants

will become joint tenants in fee simple in possession. But if

the tenant for life should grant his estate to one of the joint

tenants, one moiety only would be merged in his moiety of the

reversion, and the other moiety would remain on foot, and

vested in the same joint tenant, as an estate pur autre vie,

with the reversion in fee simple to the other joint tenant.

(8 Prest. Conv. 24.) The merger would effect a severance of

the joint tenancy in the reversion. (Co. Litt. 183 a.)

Extinguish-

ment.

Suspension.

Extinguishment is properly used to denote the annihilation

of a collateral thing in the subject out of which it issues, or

in respect to which it is enjoyed ; as of a rent-charge, chief

rent, common, profit d prendre, easement or seignory, in the

land to which they respectively relate ; or of an incum-

brance, or an equitable estate, in the corresponding legal

estate.

It is necessary, in order that an extinguishment may take

place, (1) that the right to the collateral thing and an estate

in the land itself, shall come to the same hands ; and (2) that

the estate in the land be not less, in point of quantum and

duration, than the estate in, or right to, the collateral thing.

If the estate in the land should be less than the other estate

or right, or if it should be defeasible, the rent or other collateral

thing will only be suspended during the continuance of the

estate in the land, and it will be revived upon the latter's

determination or defeasance. (Co. Litt. 313 a, b.)

MERGER. 89

A discontinuance, when that term is applied to estates in Discontinu-

land, was the result of certain assurances which, by the common

law, had a tortious operation, whereby, under certain circum-

stances, one person might wrongfully destroy the estate of

another ; or rather, interrupt and break off the right of posses-

sion, or right of entry, subsisting under that estate, without

any assent or laches on the other's part. (See Littleton,

Book 3, Chap. 11.) For example, a feoffment purporting to

be made in fee simple by a tenant in tail actually seised in

possession, destroyed (or rather, interrupted) both the estate

tail itself, and all remainders, and the reversion, if any,

expectant thereupon ; and obliged the persons lawfully claiming

by virtue of those estates respectively, if they desired to pro-

secute their rights, to have recourse to a real action. The

word discontinuance properly denotes this turning of an estate

to a right oj action ; though it is sometimes used to include

also the turning of an estate to a right of entry (Litt. sect. 470,

and Co. Litt. 325 a), a change which could be effected much

more easily, and which obviously did much less injury to the

owner of the estate. The word devest is more properly used to

denote the turning of an estate to a right of entry. While no

feoffment would discontinue lawful estates, except the feoffment

of a tenant in tail actually seised, the feoffment of any person

lawfully in possession, though only as tenant at will, would

suffice (at common law) to devest lawful estates. This capacity

of a tenant in tail in possession to effect a discontinuance, arose

from the fact that, at common law, he had a conditional fee ;

and that the rights of the issue in tail, given to them by the

statute De Donis, and also the rights of remaindermen and

reversioners, could be prosecuted only by a real action brought

upon a writ of formedon.\* The destruction of an estate

\* The writ was styled formedon eii dexcender when brought by the issue, en

reniahuler when brought by the remainderman, and en reverter when brought by

the reversioner. On actions of formedon, see Booth, Keal Actions, 139 — 166.

(1) As to formedon en descender, since at common law an estate tail was a con-

ditional fee, and the alienation of the tenant of a conditional fee, even before

issue had, bound the issue if bom subsequently, though it did not bar the

reverter, it seems to follow that there could not possibly have existed any such

writ at common law to enforce a right in the issue as against the alienation of

their parent, because the right in question did not exist. Such a writ could only

have existed, if at all, to enforce the right in the issue as against a disseisor, or

90 ON ESTATES IN GENERAL.

formerly existing under a lawful title, and the simultaneous

coming into existence of a fee simple existing only under a

wrongful title, may be thought to have some sort of resem-

blance to the operation of merger ; but such illustrations are

perhaps better adapted to confuse than to enlighten. The

abolition of fines and recoveries, and of the tortious operation

of feofifments, has deprived the subject of its application to

practice : though there remains a possibility that the learning

of the subject may be required in the investigation of old titles.

Remitter. The law of remitter is a very curious and entertaining

branch of learning ; but it probably has now no practical

importance. Remitter might be defined as the opposite of

discontinuance, being an act or operation of law, whereby a

right of entry, or a right of action, might be turned to an

actual estate without the necessity for making an entry or

bringing an action, in fact. This occurred whenever the actual

seisin, existing under a tortious title, accrued to a person

having also in himself a rightful title in the shape of a right

of entry or a right of action, such person not being implicated

in the tort under which the tortious seisin had arisen, or other-

wise estopped from asserting and maintaining his rightful title,

and not having assented to the vesting of the tortious seisin in

himself. Eemitter gave to the person who was said to be

remitted his rightful estate, or rather, the estate under his

rightful title, to the same extent as he might have gained it

by making an entry or bringing a real action, as the case

other person tortiously in possession. Lord Coke perhaps thought, that the writ

lay at common law under special circumstances. (See Harg. n. 5 on Co. Litt,

19 a, and what is said in the note at p. 84, supra.') (2) As to formedon en

remainder, it seems to be the better opinion that this did not lie at common law

in respect to conditional fees ; and probably not in respect to anything else.

{^Vide iupra, p. S"!, note t) Booth's language about the possibility of the exist-

ence of a formedon en remainder in favour of the remainderman upon an estate

for life, is not quite consistent, for he begins by alleging the invention of the

writ of entry in connmUi eaun, by virtue of Stat. Westm. 2, c. 24, as a reason for

disbelieving altogether in the existence of formedon en remainder, in respect to

remainders upon estates for life, and then suggests that this evidence perhaps

only shows that the writ could not be had in the lifetime of the tenant for life.

(3) There was a possibility of reverter upon a conditional fee, and formedon en

reverter was the proper remedy therefor at common law ; as is expressly stated

by the statute De Dorm.

MEEGER. 91

might require. For example, if a tenant in tail in possession

had by a (tortious) feoffment discontinued the estate tail, and

had afterwards re-acquired the seisin by a disseisin of the

feoffee, then, upon his death, if his heir in tail was also his

heir general, the heir would have acquired by descent the

seisin existing under the disseisin, and would also have

inherited the mere right subsisting under the discontinued

estate tail. The disseised feoffee might have defeated the

seisin acquired under the disseisin, by bringing a writ of

entry sur disseisin in the per against the heir ; but since the

heir had been no party to the discontinuance or to the dis-

seisin, and the tortious seisin had descended upon him by

inheritance without his assent, he was remitted by operation

of law to his earlier title under the entail, which was inde-

feasible so far as any proceedings under the disseisin were

concerned. (Litt. sect. 659.) Therefore, under the ancient

system of procedure, questions of remitter were often of great

practical importance. At the present day, when no assurance The law of

can operate by tort, and real actions no longer exist, the law now^obsoietc

of remitter seems to have no practical interest, except what ^^ practice,

may be derived from its possible bearing upon old titles. It

is true that such a thing as an actual disseisin is still possible,

as was expressly held by the Court of Appeal in Leach v. Jay,

9 Ch. D. 42, see p. 44 ; and indeed this seems to be too

obvious to need any authority ; and it is also true that the

effect of an actual disseisin is to turn the estate of the disseisee

to a right of entry ; which might seem to afford an opening

for the learning of remitter. But there seems to be nothing

in the modern rules of pleading to prevent the defendant in

an action for the recovery of land from relying upon any title

whatever which he may possess ; and this seems to deprive

the law of remitter of all importance in relation to modern

practice.\* Kemitter may be said to resemble merger, in so

\* It would appear from Agency Company v. ShoH, 13 App. Cas. 793, that, in

the opinion of the Judicial ('ommittee of the Privy Council, if a disseisor should

go off the land without any intention of returning, this would be a remitter of

the seisin in favour of the disseisee, without any entry made by him. But the

decision does not necessarily rest upon this proposition, which may perhaps be

regarded as of questionable authority. (See Appendix III., infra.') And even

though it should be followed by the House of Lords, it does not affect practice

92

ON ESTATES IN GENERAL.

When estate

en autre droit

is not merged.

When estate

en autre droit

is merged.

Distinction

taken by

Lord Coke.

far as it involves the disappearance of one estate upon the

revival of another estate ; but the two estates, in a case of

remitter, arise under distinct titles, whereas it is essential to

merger that the two estates shall both arise under the same

original title.

Estates en Autre droit.\*

If two estates, which would under the foregoing rules be

capable of merger, come into the hands of the same person by

operation of law and not by act of parties, there will be no

merger unless both the estates are held in the same right. For

example, a term of years coming to a man as executor of the

deceased termor, and therefore held by him en autre droit,

will not merge in his own freehold. (Co. Litt. 338 b.) A term

held by the heir as executor of his ancestor, will not merge in

the inheritance descending upon him. (Vineeiit Lee's Case, 3

Leon. 110.)

"When the accession of the two estates is not by operation of

law but by act of parties, it is the better opinion that at law,

merger would ensue. (3 Prest. Conv. 285 ; Wms. Exors. 7th

ed. 641, 642.) Mr. Justice Fry, in Chambers v. Kingham, 10

Ch. D. 743, at p. 746, seems obiter to have expressed a contrary

opinion ; but he does not seem to have been aware that the

distinction had ever been taken. There is a passage in

Gage v. Acton, 1 Salk. 325, at p. 326, in which Lord Holt

seems obiter to have expressed a similar opinion, also without

showing any consciousness of the existence of any distinction.

The question is not now of any practical importance ; for it

may confidently be predicted that, at all events with the aid

of the Judicature Act, 1873, s. 25, sub-s. (4), which will

shortly be discussed, the courts would never decide in favour

of a merger under such circumstances.

According to Lord Coke, though a man may have a freehold

in his own right and a term of years en autre droit, he cannot

or pleading in the same way as the old law of remitter, but only introduces a

new rule relating to the validity of titles under special circumstances. [See

note by the editor, infra, pp. 435-6].

\* [The proper spelling is in auter droit ; the phrase does not mean " in

another right," but " in right of another person."]

MERGER. 98

have a term of years in his own right and a freehold en autre

droit. (Co. Litt. 338 b.) This distinction does not seem to be

well grounded. (3 Prest. Conv. 278 ; Jones v. Davies, 7 H.

&-^ N. 507.) Yet it is clear that Lord Nottingham thought

there would be a merger at law; see 3 Swanst. at pp.618,

619. But merger under such circumstances was not recog-

nized in equity. {Thorn v. Newman, 3 Swanst. 603 ; Nurse v.

Yerworth, 3 Swanst. 608, at p. 619.) Therefore, by virtue of

the above-cited enactment, there would now at all events be no

merger at law.

Of Estates Tail and Base Fees.

There is no merger of the estate tail in a remainder, or the No merger in

J. • 1 1 ., L • la a fee simple,

reversion, m fee simple, when they meet in the same person

without the intervention of any intermediate estate. (3 Prest.

Conv. 341 ; WiscoVs Case, 2 Rep. 60, at p. 61 a.)

One estate tail will not merge in another. An estate in or in a subse-

quent fee tail,

tail male may co-exist with another estate m tail female in

remainder, both being vested, without the intervention of any

intermediate estate, in the same person. (Litt. sect. 719, and

Lord Coke's comment.) The rule is not confined to the

particular kinds of estates tail just mentioned. Several estates

tail, limited in immediate succession, may co-exist in the same

person by way of remainder, so long as the limitation is not

made nugatory by the absolute inclusion of any of the posterior

estates in any of the prior estates ; as, for example, by the

limitation of an estate in tail male or in special tail, in

remainder upon an estate in tail general. (3 Prest. Conv.

246.) If the posterior limitation is absolutely included in the

prior limitation, the posterior limitation is void for absurdity,

(Co. Litt. 28 b.)

The rule which protects estates tail from merger is one of Base fees, and

the consequences of the statute Dc Bonis, and it holds good tenant in

only so long as the estate tail is required to be in being for the J^'^fbiHty

purpose of securing to the issue in tail the benefits designed

94

ON ESTATES IN GENERAL.

for them by the statute ; and when that purpose cannot be

served, there is no protection against merger. Accordingly

neither a base fee, nor the estate of tenant in tail after

possibility of issue extinct, is at common law protected against

merger. (Co. Litt. 28 a ; 3 Prest. Conv. 345.)

Enlargement

of base fees

in lieu of

merger.

The Fines and Recoveries Act, s. 39, provides, that whenever

after 28th August, 1833, a base fee in any lands, and the

remainder or reversion in fee in the same lands, shall be

united in the same person, and there shall be no intermediate

estate, the base fee shall not merge, but shall be ipso facto

enlarged into as large an estate as the tenant in tail (which

here, by virtue of s. 1, signifies the person who would have

been tenant in tail if the estate tail had not been barred),

with the consent of the protector, if any, might have created

by any disposition under the Act, if such remainder or reversion

had been vested in any other person.

36 & 37 Vict.

c. 66.

Merger now

follows the

rules of

equity.

Merger not

favoured in

equity.

The Modern Law of Merger, and Merger in Equity.

The Judicature Act, 1873, s. 25, sub-s. (4), enacts that after

the commencement of the Act, there shall not be any merger

by operation of law only of any estate, the beneficial interest

in which would not be deemed to be merged or extinguished

in equity. By virtue of 37 & 38 Vict. c. 83, s. 2, this enactment

takes effect as from 1st November, 1875.

It has been said, " that mergers are odious in equity, and

never allowed, unless for special reasons." (1 P. Wms. at

p. 41.) But this must not be understood to mean, that equity

never suffered a merger at law to effect any practical alteration

in the rights of parties ; for such a proposition would be mani-

festly erroneous. Equity never hindered the destruction of

contingent remainders by merger through collusion between

the tenant for life and the vested remainderman ; and even

in cases where trustees to preserve contingent remainders

were parties to the destruction, relief in equity could not

always be given by preventing the merger, though the trustees

would be ordered to make good the damage.

MERGER. 95

The following points are very material, in considering the

practical result of the assimilation of merger at law to merger

in equity.

1. Since the common law courts could take no notice of Trusts.

trusts, there might be a merger at law between two

estates held in the same right, although one of them

was held upon a trust. (3 Prest. Conv. 285.)

2. The eldest son and heir apparent of a man who was Fraud.

entitled to a long term of years, by collusion with the

reversioner, and by misrepresentation and fraud prac-

tised on his father, induced the father (apparently) to

assent to certain conveyances whereby the term of

years became merged at law in the reversion, so that

ultimately the heir at law might obtain the land dis-

charged from the term, and the father be prevented

from availing himself of the term in order to provide

portions for younger children. It was held that the

fraud was a ground for relief in equity. (Danhy v.

\*Danhy, Eep. temp. Finch, 220.)

3. If the above-mentioned distinction taken by Lord Coke Lord Coke's

as to estates en autre droit (namely, that though a man s^io^n^o^iti-e

may have a freehold in his own right and a term of '^'■'"^•

years en autre droit, he cannot have a term of years in

his own right and a freehold en autre droit) ever was

the rule at law, it is the rule no longer. (Thorn v.

Newman, 3 Swanst. 603; and see Nurse v. Yerworth,

3 Swanst. 608, at p. 619.)

4. In Chamhers v. Kingham, 10 Ch. D. 743, at p. 746, Lord The distinc-

Justice (then Mr. Justice) Fry seems obiter to have en^j^re^droit,

expressed the opinion, that even at law two estates ^ regards act

••^ . ^^ parties and

cannot merge when one is held en autre droit, although act of law.

they both come to the hands of the same person by act

of parties and not by operation of law. In the same

case he seems to have expressly decided, that at all

vents there is under such circumstances no merger

96

ON ESTATES IN GENERAL.

iii equity. This decision is not entirely satisfactory ;

because there seems to have been little argument, and

it appears that the court was imperfectly informed as

to the authorities. But the decision is not intrinsically

unreasonable, and it may not improbably be followed.

Infants.

Extinguish\*

meut.

5. There is a dictum of Lord Eldon in Lord Compton v.

Ojcenden, 2 Ves. 261, at p. 264, which seems to imply

that merger would be prevented in equity for the

benefit of an infant. This remark is founded upon

a case, Thomas v. Kemeys, 2 Vern. 348, which has

nothing to do with merger, but refers to the extin-

guishment of a daughter's portion in the inheritance

descending upon her. The portion was secured by a

term of years vested in trustees, so that merger was

wholly out of the question. Here there is some likeness

in principle between merger and extinguishment. See

also Forbes v. Moffatt, 18 Ves. 384, where the question

of the extinguishment of charges in the fee is treated

as being a question of intention ; and Toulmin v. Steere,

3 Mer. 210, as explained in Adams v. Angell, 5 Ch. D.

634, at p. 645, where note the words, \*\* in the absence

of any contemporaneous expression of intention."

Cases of the type of Toulmin v. Steere seem to depend

upon the question of the extinguishment of charges

in the fee, because the legal mortgagee may be said,

by a release of the equity of redemption, to have

obtained the fee in equity.\*

Something to the same effect is the doctrine, that

if the legal fee and the equitable fee should come to

• Questions relating to the extinguishment of charges in the fee, or other

estate charged, have nothing to do with merger properly so called, though they

are often confused with it, and are often improperly included in the word.

It may now be regarded as conclusively settled, (1) that upon a charge and

the estate charged coming to the same hands, the charge will never be

extinguished contrary to the expressed intention of the party, and (2) that

in the absence of any expressed intention, the intention may be inferred from

considering what would most have conduced to the party's benefit.

Though there will never be an extinguishment contrary to the intention of

the party, yet special circumstances may exist to prevent him in equity from

setting up the charge against a subsequent incumbrancer.

MERGER. 97

the same hands, the latter is extinguished ; and if it

should happen that the course of descent should not

be identical, the descent of the legal fee will prevail.

{Selhy V. Alston, 3 Ves. 339 ; Re Douglas, Wood v.

Douglas, 28 Ch. D. 327.)

6. The point actually decided in Brandon v. Brandon, 31 Estoppel by

L. J. Ch. 47, seems to have been, that the parties to

an administration suit are estopped in equity from

raising the question of merger between two estates,

when, with the consent of all parties, the two estates

have during a long series of years been treated by the

court as being both in subsistence. The judgment Qucere asio

contains dicta which would seem to go the length of

laying it down, that in equity merger depends wholly

upon intention.\*

\* [And an intention tliat there shall be no merger may be presumed : see

Capital and Counties Hank v. Rhodes, (1903) 1 Ch. 631 ; Lea v. Thursby, (1904)

2 Ch. .57.]

C.R.P.

98 ON ESTATES IN GENERAL.

CHAPTER XL

RULES OF LIMITATION AT COMMON LAW.

It has been remarked above, that terms of years were

unknown to the common law, which recognized no estate

other than estates of freehold. (Vide supra, p. 63.) Since

these latter were the only known estates, it follows that, in

the eye of the common law, the person having the first

vested estate of freehold was necessarily the person who was,

for the time being, entitled to the actual possession of the

land. Here possession is synonymous with seisin, and it is

perpetually used in this sense by the older writers on the

law. In the case of writers who wrote before the statute

21 Hen 8, c. 15, or, at all events, before the Statute of

Gloucester, this usage is so obviously natural as to require

no explanation ; and later writers long retained the language

which had become the customary exponent of the law's

meaning. The statutes which made the estate or interest of

the termor for years practically indefeasible, contained nothing

to disturb the old legal theory, that he had no seisin in him,

but occupied the land only under a contract and in right of

the seisin of the reversioner.

Definition of Seisiji may therefore be defined to be a possession of land

seisin. founded upon the title given by an estate known to the common

law ; or, which is the same thing, by an estate of freehold.

" Seisitus commeth of the French word seisin, i.e., possessio,

saving that in the common law, seised or seisin is properly

applyed to freehold, and possessed or j^ossession properly to

goods and chattels ; although sometime the one is used instead

of the other." (Co. Litt. 17 a.) When greater complexity

had been introduced into the relations of legal estates, and

it became requisite to use a greater nicety of language in order

to preserve accuracy, the word seisin, which was originally

used interchangeably with possession and in reference both

RULES OF LIMITATION AT COMMON LAW. 99

to real and personal property, gradually became appropriated

to the former, and the word possession to the latter. It is

remarkable that the change should be assignable to the fifteenth

century: about the epoch when the growing importance of

terms of years might have given rise to confusion, if the

verbal discrimination had not been made. (Vide siqrra, p. 65,

note.) The word possession is now commonly used to mean

any possession which is founded upon any title which the law,

as now administered, will recognize and protect.\*

When a number of successive vested estates of freehold are The actual

derived out of the same original estate, the tenants of all such ®^'^'°'

estates, though only one estate can at one time be vested in

possession, are all said to be in the seisin of the fee. The first

in order of the estates, which is vested in possession as well as

in interest, is said to confer the right to the actual seisin or

immediate Jreehold.

Any estate which, if vested in possession, would give the Mere freehold

right to the immediate freehold, but which imports no inherit- from°hiherit-

ance.

ance, is styled an estate of mere freehold. The only estates of

this nature are estates for life (including tenancy in tail "after

possibility ") and estates pw?\* autre vie.

The seisin is quite independent of, and unaffected by, the in what sense

. , £ L L £ rni- J! i! a remainder

existence of any term or terms oi years. 1 herefore, so far as of freehold is

the seisin is concerned, there can exist no such thing as a ^f'^ ^^ subsist

'^ after a term

remainder of freehold expectant upon a term of years. The of yeai-s.

existence of a prior term of years does not prevent the first

vested estate of freehold from being an estate of freehold in

possession. (Litt. sect. 60 : — " If the termour in this ease

entreth before any livery of seisin made to him, then is the

freehold and also the reversion in the lesxor.") Words and

phrases which grammatically import futurity, such as " then,"

\* " Scuin is a word of art, and in pleading is only applied to a freehold at

least, as 2><'S>iessed for distinction sake is to a chattell reall or personall." (Co.

Litt. 200 b, on Litt. sect. 324, q.r.) This applies not only to corporeal here-

ditaments, but to all incorporeal hereditaments in which there may be estates of

freehold ; that is, to all tenements intailable under the statute De Bonix, On

the phrase, " seised in bis demesne as of fee, ' see Litt. sect. 10.

H 2

100

ON ESTATES IN GENERAL.

" when," " from and after," and the like, when they refer to

the determination of a prior term of years, do not make the

subsequently limited freehold contingent, or postpone the vest-

ing of it until the expiration of the term ; but under such

circumstances the freehold is vested immediately. {Boraston's

Case, 3 Eep. 19.) During the continuance of a prior term, the

first estate of freehold is properly described, not as being a

remainder of freehold expectant upon the term of years, but as

being the freehold in possession subject to the term.\* But

since the possession of the freeholder is in such a case subject

to the rights of the termor, and since these rights may, and in

practice usually do,f deprive the freeholder of the immediate

use and occupation of the lands during the term, the result is,

for many practical purposes, much the same as if the freehold

subsisted only as a veritable remainder. In this sense the

word remainder is often applied to estates of freehold limited

after a term of years. But when this language is used the

reader must bear in mind, (1) that a prior term of years does

not prevent a subsequent vested estate of freehold from being

an estate of freehold in jJossession ; and (2) that a prior term

of years does not prevent a subsequent contingent estate of

freehold from being void in its inception, as being an attempt

to create a freehold in futuro.

The seisin

cannot be

placed in

abeyance by

act of parties.

By the common law, the tenant of the immediate freehold

was the only person against whom a writ could be brought in

a real-action, or from whom the lord could demand the feudal

services incident to the tenure ; and in ancient times this was

equivalent to saying that, during abeyance of the immediate

freehold, all rights, both public and private, in reference to

the land, were in abeyance also. This sufficiently explains

the common law rule, that every act of parties is void, by

♦ [But see Litt. sect. 60.]

t Where the terra is created by way of lease, and for the ordinary purposes

of a lease, the use and occupation is of course always in the lessee. But terms

of years are often created in settlements, or under powers conferred by settle-

ments, merely by way of security for jointures and portions ; and they do not

then interfere with the use and occupation of the lands, unless some default is

made in satisfying the charges for which they are a security. Similar terms

were also formerly in common use for the creation of ordinary mortgages for

securing money lent.

RtJLES OF LIMITATION AT COMMON LAW. 101

which, if it were taken to be valid, the immediate freehold

would be placed in abeyance. The strictness of this rule is

absolute : under no circumstances whatever, by the common

law, can the immediate freehold be placed in abeyance by any

act of parties. (1 Prest. Est. 216.) From this rule some

very important consequences are deduced, with regard to the

limitation of estates at common law.

But by unavoidable necessity, the immediate freehold might Sometimes

be placed in abeyance by operation of law, though not by the abeyance by

act of parties. In the case of a corporation sole seised of lands, ^aw'^^^'^"

during the interval between the death of one incumbent (or

other cause of a vacancy) and the accession of his successor,

the immediate freehold is in abeyance. (Litt. sect. 647.) And

on the death of a tenant pur autre vie, whose estate was barely

limited to him by name (without any mention of the heirs)

during the life of cestui que vie, the immediate freehold was, by

the common law, in abeyance, unless or until some person had,

or obtained, such a possession as caused the freehold to be cast

upon him by the title of general occupancy. (Co. Litt. 342 b.)

By the provisions of several statutes, the immediate free- The seisin

hold may perhaps, under certain circumstances, be placed in piac^ in

abeyance.\* At common law a contingent remainder was g^a^tu'^e'^® ^^

destroyed, unless it became vested in interest either previously

to, or eo instanti with, the determination of the precedent

estate of freehold ; because the immediate freehold would

otherwise have been in abeyance pending the contingency.

The statutes above referred to provide that, subject to certain

restrictions, contingent remainders may take effect, notwith-

standing the determination, pending the contingency, of the

precedent estate of freehold ; but they make no provision

for the vesting of the freehold during the interval. (For an

account of the said statutes, and remarks upon their operation,

see pp. 138, 141, infra.)

The impossibility, at common law, of causing any abey-

ance of the immediate freehold by any act of parties is the

\* [As to the effect of sect. 1 of the Land Transfer Act, 1897, see Johti v. John,

(1898) 2 Ch. 573 ; In bonis Pryte, (1904) P. 301.]

102 ON ESTATES IN GENERAL.

foundation of several of the rules regulating the limitation of

legal estates. These rules remain valid at the present day,

except in so far as their operation, in respect to the liability

of contingent remainders to destruction, has been restricted

by the statutes above referred to.

Exempt ion

of executory

limitations.

But it must be borne in mind that the rules of limitation

which depend upon the necessity for a continuous seisin do

not necessarily apply either to assurances taking effect by the

Statute of Uses, or to wills, because limitations which, in a

common law assurance, would place the freehold in abeyance,

would not necessarily place it in abeyance if contained in an

assurance by way of use or in a will. In the case of executory

devises, the seisin will descend, during the unappropriated

interval, to the testator's heir-at-law ; and in the case of

springing and shifting uses, it may result to the grantor,

during any such interval. At the present day, assurances at

the common law rarely occur in practice ; and it follows that

the practical application of the rules in question is not of wide

extent. Their application is probably restricted in practice to

leases for lives, which, when granted by an absolute owner,

whether an individual or a corporation, are commonly granted

in the shape of common law leases,\* as distinguished from

leases which take effect by the Statute of Uses. Nevertheless,

it is necessary that the rules relating to abeyance of the seisin

should be not only known, but intimately known, to every

conveyancer who aspires to possess more than an empirical

acquaintance with his art. Moreover, the general rule against

abeyance of the freehold remains in full force and validity ;

\* Even these leases are not, strictly speaking, common law assurances ; for

they are in practice made by grant under 8 & 9 Vict. c. 106, s. 2, whereas at

common law they would need livery of seisin. But this point is not material to

the present distinction, for such statutory grants seem to be amenable, in all

other respects, to the rules which govern common law assurances. In the same

sense, it might also be said that conveyances in fee simple, expressed to be made

"unto and to the use of" the grantee — which often occur in practice — are

common law assurances, since they <lo not take effect by the Statute of Uses.

But the form of such assurances does not offend against the present rules. [In

Sarin Brothers, Limited v. Jiethell, (1902) 2 Ch. 523, one ground of the decision

was that the conveyance.by ordinary deetl of grant unto and to the use of tlie

grantee, took effect at common law, and that an exception out of the con-

Tcyance, of an estate of freehold to commence in future, was therefore bad.]

RULES OF LIMITATION AT COMMON LAW. 103

and the existence of executory limitations is explained, not by

the hypothesis (which would be untrue) that by their means

an abeyance of the freehold can be effected, but by the

theoretical devices which account for the vesting of the free-

hold, in wills and conveyances to uses, during any interval

which is not specifically mentioned and appropriated by the

instrument.

Of the rules stated in this chapter, the first four depend upon The bearing

the doctrine of abeyance of the seisin. The remaining two upon per-

were designed to prevent the creation of what in modern times P^tuities.

is styled " a perpetuity," by the limitation of remote estates to

unborn persons as purchasers.\* The latter rules are the ancient

counterpart at common law of the modern rule against per-

petuities ; and they fulfil a function, in respect to legal limita-

tions, similar to that of the rule against perpetuities in respect

to executory limitations.

Lord Brougham pointed out, in Cole v. Sewell, 2 H. L. C.

186, at p. 232, that the rule forbidding abeyance of the seisin

also directly tended to prevent the creation of perpetuities, by

preventing the existence of any interval between the determina-

tion of a particular estate and the commencement in possession

of the remainder : — " If it may be for one year after the life of

A. terminates, it may be for a thousand years, and so it might

end in a perpetuity." This observation is marked by the

greatest acumen. But the rule was founded historically, long

before any such reasons had been thought of, upon the above-

mentioned grounds relating to feudal services and writs in real

actions : matters which, at the time of the rule's origin, were of

such immense practical importance, that nothing further is

needed to explain its rigorous enforcement.

\* [This is not strictly accurate. In the sixteenth, seventeenth, and eighteenth

centuries " perpetuity " commonly meant an attempt to create an utibarrable

entail by limiting land to unborn persons as purchasers, but it is seldom or

never used in that sense at the present day. The modern " Rule against

Perpetuities," so-called, is directed against the creation of remote interests, by

me.ins unknown to the ancient common law, in any kind of property, and

wliether the objects intended to be benefited are in existence or not (jnfra,

pp. 205 seq). As to the confusion between " perpetuity " and " remoteness," see

Law Q. R. xv. 71, xxv. 385 ; Jarman on Wills, Gth ed. pp. 283, 3i;9 seq.^

104 ON ESTATES IN GENERAL.

Rule 1. — Any limitation by which an estate of

freehold in corporeal hereditaments inirports to be so

granted as to commence, either upon the expiration of

a fixed interval of time after the execution - of the

assurance, or upon the happening of some future con-

tingency other than the determination of a precedent

estate of freehold, is void in its inception. {Bar-

wick's Case, 5 Rep. 93, at p. 94 b ; Buckler's Case, 2

Rep. 55 ; Boraston's Case, 3 Rep. 19, at p. 21 a ; Hogg

V. Cross, Cro. Eliz. 254 ; 10 Yin. Abr. 200 = Estate, B.

pi. 10 ; ibid. 208, pi. 26 ; Plowd. 156 ; 2 Bl. Com. 165 ;

1 Brest. Est. 217.)

An estate of freehold so limited is often styled a freehold in

futuro ; and the above rule is often summarized by the state-

ment, that the limitation of a freehold infuiuro is void. There

are three kinds of limitations, which come directly under the

description of a freehold infuiuro : —

Three kinds (1) A vested estate, (or rather, an estate which, by the terms

in futuro. of its limitation, purports to be a vested estate,) not

preceded by another estate, but limited to commence

after the expiration of a fixed interval, or upon the

happening of a contingency ;

(2) A vested estate limited subsequently to another estate,

but with an interval of time to elapse between its com-

mencement in possession and the determination of the

precedent estate ; and

(3) A contingent remainder not immediately preceded by a

vested estate of freehold.

In the recent case of Boddington v. Robinson, L. R. 10 Exch.

270, the validity of the above-stated rule was expressly ad-

mitted ; though, by a strained construction of the deed which

was there in question, the legal consequences of the rule were

avoided. But this admission of the rule's validity is subject

to the extraordinary suggestion, which seems to have been

made arguendo in that case as to the effect of 8 & 9 Vict,

c. 106, s. 6, upon which the court pronounced no opinion.

{Vide infra, p. 109.)

Reason of the The existence of this rule is intimately connected with the

rule's con- yie^y taken by the common law of the common law assurances,

RULES OP LIMITATION AT COMMON LAW. 105

and particularly of 'a feoffment. In the view of the common common law

assurances.

law, a feoffment necessarily devested the seisin, forthwith and

during the whole time comprised in the estate or estates to which

it referred, out of the feoffor. Unless, therefore, the feoffment

purported, forthwith and for the whole of that duration, to

vest the seisin in the feoffee, it would follow that, during

some unappropriated interval, the actual seisin or immediate

freehold would be placed in abeyance.

Whether the supposed unappropriated interval had its exist-

ence at the beginning, or somewhere in the middle, of the

period for which the seisin was taken out of the feoffor

by the feoffment, makes no difference to the ultimate result.

In either case, supposing the limitation to take effect, the actual

seisin would, sooner or later, be placed in abeyance. There-

fore, estates of freehold in futuro, unpreceded by any other

estate, and remainders (as they may be called) in futuro,

separated by an interval of time from the precedent estate, are

at common law, both equally void in their inception.

The case of a contingent remainder, provided that in its Application

inception it is preceded by an immediate estate of freehold, contingent"

differs from what is above styled a remainder in futuro ; because, remainders,

though such a contingent remainder might by possibility place

the immediate freehold in abeyance, the terms of its limitation

do not exclude the possibility that it may take effect without

causing any such abeyance. Therefore, while a remainder

expressly limited in futuro is void in its inception, the con-

tingent remainder is (at common law) void only in case the

possible mischief should actually arise ; that is, in case the

precedent estate of freehold should determine before the

vesting of the contingent remainder by the happening of the

contingency.

The rules of limitation which are derived from the rule The rule

against abeyance of the freehold, are not confined to assurances common °ia^w

made by feoffment, though their origin is closely connected with assurances,

the mode in which a feoffment is supposed by the law to freehold can

be coDVCvcd

operate. They have always been held to apply also to all other

assurances by which, at common law, estates of freehold may be

106 ON ESTATES IN GENERAL.

limited or conveyed ; namely, as regards "corporeal heredita-

ments, to fines, recoveries, releases, and confirmations by way of

enlargement; and, as regards incorporeal hereditaments, to

grants.

The release in the old-fashioned assurance styled a " lease

and release," is a release operating at common law by way of

enlargement of the estate created by the lease. Therefore, any

estate infuturo, purporting to be created by lease and release,

is void, no less than such an estate purporting to be created by

feoffment. {Roe v. Tranmarr, Willes, 682, 2 Wils. 75.)

A covenant to stand seised to uses in consideration of blood

or marriage, is not a common law assurance ; and the present

rule does not apply thereto. {Roe v. Tranmarr, Willes, 682,

2 Wils. 75.)

Exchanges. It is laid down in books of great authority (Shep. T. 295 ;

Perk. sect. 265) that the rule is not binding upon common law

exchanges, in the sense that an exchange may be made to take

effect after the expiration of a definite interval of time. It is

also laid down in Shep. T. 293, that an exchange may be made

of a definite parcel of land for either of two others at the

election of the other party; and that upon election being

made, the exchange is good: which approaches nearly to the

doctrine of Perkins. Preston questions the first doctrine, but

does not expressly deny it (1 Prest. Est. 217, note d) ; and in

his addition to the Touchstone, he appears to accept the second

doctrine there laid down. Common law exchanges probably

never occur in modern practice ; \* and therefore the question

is of no practical importance.

\* It is now the common practice to employ ordinary conveyances, one made

by each party to the other, in order to efifect exchanges. Such conveyances,

except in the statement of the consideration, do not differ in form from ordinary

conveyances upon sales.

On common law exchanges, see Co. Litt. 51 b. ad init. Five things are

enumeratctl as being necessary :— (I) that the parties should both be seised

(or, in the case of terms of years, pos8es.sed) of estates of the like (juantum and

quality ; (2) that the proper word, excambium, or exchange, should be used ;

(3) both parties must enter on their respective parcels during their joint lives ;

but an entry in late was sufficient in ca-ses where an entry in deed could not be

made ; which is what Lord Coke means when he says that entry or claim is

necessary ; (4) if the exchange were of things lying in grant, it must be made

RULES OF LIMITATION AT COMMON LAW. 107

A feoffment takes effect from the livery of the seisin, not The rule does

from the execution of any accompanying deed or charter. Untji t^T\*^^

Therefore, if the deed should purport to limit a freehold in assurance is

perfected.

futuro, but the livery of seisin should not in fact be made until

after the preliminary interval has expired, the feoffment will

be good ; because the estate conveyed commences from the

feoffment, and does not under such circumstances commence

in futuro. (1 Prest. Est. 222; 10 Vin. Abr. 205 = Estate,

B. pi. 4 ; 13 Vin. Abr. 193 = Feoffment, T. 2, pi. 1.)

Similarly, an assurance by deed, which needs no livery,

takes effect from the delivery of the deed. Accordingly, in an

assurance by lease or release, or in a lease made by grant

under 8 & 9 Vict. c. 106, of lands for life or lives, if the estate

limited should purport to be a freehold in futuro, but the deed

(though previously sealed) should not be delivered until after

the expiration of the preliminary interval, the deed will be

good and the estate will take effect. (1 Prest. Est. 222.)

The natural meaning of the words, "from the day of the From what

date," is, "after the day of the date;" and a lease of which commence!

the commencement is so indicated, properly begins with the

beginning of the next day. {Clayton's Case, 5 Rep. 1 ;

Cornish v. Cawsy, Aleyn, 75.) Therefore in the case of a lease

for lives of which the commencement is so indicated, if livery

of seisin had been made on the day of the date, this would

upon a strict construction amount to the limitation of a free-

hold in fituro and would be void. (10 Vin. Abr. 204 = Estate,

B. pi. 1, 2.) If this doctrine were enforced, there seems to be

no reason why it should not apply to leases for lives made by

grant, under 8 & 9 Vict. e. 106, s. 2, as well as to leases for

lives made by livery of seisin. But it has been held in more

recent cases, in order to avoid a result which must be contrary

tc the intention of the parties, that the above-mentioned

by tlectl ; (5) if the exchange were of lands in the same county, it might at

common law be effected by parol ; but, according to the common opinion, the

Statute of Frauds made writing necessary, though it does not expressly mention

exchanges ; and by 8 & 9 Vict. c. 106, s. 3, a deed is now necessary ; if the

lands were in different counties, a deed, and according to Lord Coke and the

Touchstone, an indenture, was necessary. Preston (Prest. Shep. T. 21(1) questions

the necessity for an indenture.

108 ON ESTATES IN GENERAL.

expression will be deemed to include the day of the date.

(Hatter v. Ashe, 3 Lev. 438, Ld. Raym. 34 ; Freeman v. West,

2 Wils. 165.)

Remarks In Boddington v. Rohiiison a lease which purported to create

upon tlie case .iii-^ i-i

oiJioddington » freehold m futiiro, having been drawn by an incompetent

L. r!' I'o" ' draftsman, happened to contain some absurd and superfluous

Kxch. 270. expressions. The court, being very desirous to escape from

declaring the lease void, made use of these absurdities to

impute to the deed a legal operation which, in respect to

the time of the term's commencement, was manifestly not

the intention of the parties.

In that case the material facts were as follows : — A. being

tenant for his own life of a house, by a deed, dated, and pre-

sumed to be delivered, on the 10th November, 1864, purported

to grant, demise, and lease to B. his executors, administrators,

and assig7i8, the house in question, to have and to hold the

same from the Idtli of November [sic] for the term of the

aforesaid A. for the term, of his natural life. This lease there-

fore purported to create, on the 10th November, 1864, an

estate 2^ur autre vie to commence from the 13th day of some

undefined month of November ; but from certain circumstances

connected with the dealings with the house which had taken

place, the court inferred that the intended year was the year

1874. The principal question was, whether this was void, as

being a freehold in futuro, purporting to be created by what

is for this purpose a common law assurance.

The court held that the w^ords contained in the premisses

were sufficient expressly to pass the whole estate of A., and

that they were not cut down by the words contained in the

habendum importing the omission of the interval between the

10th November, 1864, and the 13th November, 1874. It

followed that, in the opinion of the court, the freehold created

by the deed was an immediate freehold and not a freehold

in futuro.

The reasoning upon which this conclusion was based seems

to consist of two propositions. The first imports that an

express estate contained in the premisses of a deed, and which

is capable of taking effect by virtue of the deed without any

BULES OF LIMITATION AT COMMON LAW. 109

such extraneous ceremony as livery of seisin, is not liable to be

abridged or avoided by anything contained in the habendum :

a proposition which has for a very long time past been settled

beyond question. (Vide infra, -p. ill.) The second proposition

(which is much more dubious) imports, that the addition of

the words, " his executors, administrators, and assigns," to

the name of a grantee, will, when the grantor has an estate for

his own life, expressly convey the whole estate of the grantor

to the grantee. This second proposition seems to be a purely

arbitrary proposition, unsupported by any shadow of authority,

which seems to have been invented expressly to suit the

exigencies of the particular case.

The only reason, or semblance of a reason, alleged in favour

of the second proposition was, that the words, "his executors,

administrators, and assigns," are "proper words of limitation "

for granting the whole of the estate of the grantor in prcesenti.

But this statement seems to be very arbitrary doctrine. There

exists no authority to show that those words, unaccompanied

by the words, "during the life of the grantor," would have

any such effect. And the last-mentioned words would have

that effect, without any need for the mention of executors,

administrators, or assigns. This was, in fact, a material part

of the grounds upon which general occupancy was permitted

by the common law ; because the assignor or grantor, having

parted tvith the whole estate during the life of cesiiii que vie, had

himself no better right to enter upon the lands, after the

grantee's death, than anybody else had.

It is to be regretted that the arguments of counsel are not

given in the above cited report. An extraordinary suggestion Suggestion as

to 8 & 9 Vict

seems to have been made, in argument, that 8 & 9 Vict. c. 106, c. 106, s. 6,

s. 6, has in effect repealed the rule of law now under con- ^^^^ , .

. ^ '^ arguendo in

sideration, and that it authorizes the creation de novo of a SoddinpUm

freehold in futuro by a common law assurance. But it is

conceived that the language of that enactment manifestly

refers only to the conveyance of " future interests " which are

already in esse, as subjects of limitation — that is, contingent

remainders and executory interests ; and that it has no refer-

ence to the creation de novo of anything whatever. In the

110

ON ESTATES IN GENERAL.

discussion of this subject the phrase, freehold in fuiuro, has

acquired a peculiar significance, and the phrase, future interest,

is never used in the same meaning. The suggestion above

referred to seems, in fact, to be a mere inept playing upon

words. The court in Boddinffton v. BoUnson declined to con-

sider this question, upon the ground that, in view of their

opinion upon the other point, it was not material to the

decision.

Reasons for

rejecting the

above-

mentioned

suggestion.

The following reasons (if any be required in addition to the

apparent scope of thfe Act's language) for rejecting the sug-

gested interpretation of 8 & 9 Vict. c. 106, s. 6, seem to be

conclusive. If that interpretation were correct, its effect could

hardly be restricted to the particular case which happened to

suit the convenience of the defendant in Boddington v. Robinson.

The result would be that, independently of 40 & 41 Vict. c. 33,

no reason would any longer exist, why a contingent remainder

should be destroyed by the expiration of the precedent estate

of freehold pending the contingency. But nobody has ever

suggested that the last cited statute is superfluous, so far as

regards contingent remainders created by instruments coming

into operation after Ist October, 1845. In Brackenhiinj v.

Gibbons, 2 Ch. D. 417, which was decided more than thirty

years after the passing of 8 & 9 Vict. c. 106, Vice-Chancellor

Hall, who was probably the most learned judge of his day in

respect to such matters, assumed that the common law rule

was applicable to contingent remainders created by a will dated

in 1854. In Be LecJimere and Lloyd, 18 Ch. D. 524, the late

Master of the Eolls, Sir G. Jessel, evidently made the same

assumption, though he thought that, upon the wording of the

instruments under consideration, the limitations in both cases

gave rise to executory interests, and not to contingent re-

mainders. (See also Cunliffe v. Brancker, 3 Ch. D. 393). More-

over, if such contingent remainders as are not within the

protection of 40 & 41 Vict. c. 33, are by 8 & 9 Vict. c. 106,

protected against destruction by expiration of the precedent

estate, it is to be observed that neither statute makes them

liable to the rule against perpetuities, and it is at least

doubtful whether any such liability otherwise affects them.

RULES OF LIMITATION AT COMMON LAW. Ill

EuLE 2. — Any similar limitation of an estate of free-

hold derived out of a remainder or reversion, expectant

upon a particular estate of freehold, is likewise void in

its inception. {Barivick's Case, 5 Rep. 93, at p. 94 b ;

Buckler's Case, 2 Rep. 55 ; Swyji v. Eijres, Cro. Car.

646 ; 10 Yin. Abr. 206 = Estate, B. pi. 9 ; 1 Prest. Est.

219.)

Such limitations, when they are to commence in possession

after the expiration of a definite interval, are manifestly

identical in principle with limitations of a remainder in futiiro,

derived out of an estate in possession, leaving an unappro-

priated interval between the determination of the precedent

estate and the vesting in possession of the remainder. To

them applies the same criticism, that they not only contemplate

ah initio the possible abeyance of the freehold, but also (unlike

contingent remainders) are such that they could not possibly

take effect as estates in possession without the occurrence of

such an interval of abeyance.

The rule also applies to the limitation of a contingent

remainder derived out of an estate in remainder or reversion,

not supported by a precedent estate derived by the same

instrument out of the same remainder or reversion. For the

particular estate upon which the remainder or reversion is

expectant, not having been created at the same time as the

contingent remainder, will not suffice to support the contingent

remainder. {Vide infra, p. 120.)

Rule 3. — Any similar limitation of an estate of free-

hold in any incorporeal hereditament, already in esse

at the time of the limitation, is void in its inception.

(1 Prest. Est. 217.)

This rule points out the distinction between the creation de

novo of incorporeal hereditaments, and subsequent dealings

with them when they have been created.\* The grantor, who

limits de novo a rent-charge in fee simple out of his lands, is

not bound by the foregoing rule ; but it binds the grantee, in

\* [As to incorporealhereditaments created de novo, me su^pra, pp. 54, 56,]

112 ON ESTATES IN GENERAL.

regard to any conveyance, or settlement, which he may

subsequently make of the rent-charge.

In respect to some incorporeal hereditaments, such as a

rent-charge, this rule seems rather to have been imposed by

analogy, and in order to secure uniformity in the law, than

from any direct reason ; for it is evident that the abeyance of

a rent-charge has no tendency to put in abeyance the seisin

of the land out of which it issues, and the terre-tenant would

always be available for the purpose of bringing an action to

recover the rent on the part of any person who conceived him-

self to have a claim thereto, and would be the proper person

against whom to bring it. But in respect to certain other

incorporeal hereditaments, such as an advowson in gross, the

analogy of the reason against abeyance of the seisin of the

land holds good ; for during an abeyance of the seisin of the

advowson, the claimant would have no one against whom to

bring his action. If a usurper had presented to the benefice,

and his clerk had been admitted and instituted, the rightful

patron would have been without remedy, so long as the

abeyance, if permitted to exist, had continued.

J^imitations When an incorporeal hereditament, as a rent-charge, is

within the created de novo, it may be limited to commence at a future

"^^®- time ; and such future time may either be a specified time, or

it may be ascertainable by the happening of a contingency.

(See Plowd. 156, where the authorities are collected in the

margin, note c. See also Case of Sutton's Hospital, 10 Rep.

23, at p. 27 b.)

Rule 4. — No estate of freehold, whether in corporeal

hereditaments, or in incorporeal hereditaments already

in esse, can be limited, or caused, to exist at intervals

only and not continuously. (Jlie Prince's Case, 8 Rep.

14, see p. 17 a ; Corbet's Case, 1 Rep. 83, see p. 87 a, b ;

Prest. Shep. T. 127 ; 19Vin.Abr. iM = Statute, A. 2,

pi. 6 ; 4 Com. Dig. 5 ; 1 Prest. Est. 218.) This rule

applies even to grants by the Crown. (17 Vin. Abr.

79, pi. 6= Prerogative of the King, G. b. 3, pi. 5.)

It is in consequence of this rule that a determinable fee in

lands, limited to a man and his heirs, being peers of the realm,

RULES OP LIMITATION AT COMMON LAW. 113

is absolutely determined by any separation occurring between

the peerage and the heirship, and the estate will not revive

in case the peerage and the heirship should subsequently

become united in the same person. {Vide infra, p. 255.

No. 1.)

But an incorporeal hereditament, as a rent - charge,

may, at its creation, be limited to arise and fall into

abeyance or extinction by alternate intervals ; just as, at

its creation, it may be limited to arise after the expiration

of a specified time. {Rex v. Kempe, Ld. Raym. 49, 2

Salk. 465.)

The visitorship of a college is suspended during a temporary

union of the office with the headship of the college, and

revives upon a severance. {Rex v. Bishop of Chester,

2 Stra. 797.) It seems to follow, that such a visitorship

miglit be limited, upon its creation, by way of desultory

limitation.

Of this type is the curious limitation mentioned by Lord

Hale in note 6 on Co. Litt, 27 a : — " The hospital of Saint

Katharine was founded by Queen Eleanor, wife of Hen. 3,

reserving the patronage sihi et reginis Anglice pro tempore

existentibus, et eo titulo regina Philippa uxor E. 3, habet

patronatum." Such limitations are sometimes styled desultory Desultory

limitations. See the case of Atkins v. Mountague, 1 Ch. Ca.

214, in which this limitation was held to be good. It

was from this case that Lord Hale derived the above

cited note.

Not only may a lease for years be limited at its creation so

as to commence hifuturo, or to fall into abeyance at one time

and to revive at another time ; but also, after its creation, it

may be avoided by one person, being entitled to the reversion

pro tempore, and may afterwards revive as against another.

(2 Prest. Conv. 142, and the Earl of Bedford's Case, 7 Rep. 7,

there cited. See also the 2nd resolution in Matthew Manning's

Case, 8 Rep. 94, at p. 95 b.) For example, if A, B, and

C are successively tenants for life, and A and C concur in

making a lease (at common law, not under the powers of

the Settled Land Acts) for 1,000 years, this is not binding

upon B, who, if he should survive A, may therefore repudiate

<i.R.P. I

114

ON ESTATES IN GENERAL.

it ; but it will afterwards revive as against C, if he should

survive B.

Remarks The above cited case of Atkins v. Mountague, 1 Ch. Ca. 214,

y^HuuHHtagne. is supported by the authority of Lord Hale. Yet it has some

features which prevent it from being regarded with unmixed

satisfaction. Desultory limitations made upon the creation

(h novo of an incorporeal hereditament, are not unknown to

the law ; but the other authorities, unlike Atkins v. Mountague,

seem to assume that a limitation of this kind must be such

that, if it had not been desultory, it would have been the

limitation of a fee. In the present case, the limitation was in

favour of a merely arbitrary series of persons who are capable,

indeed, of being intelligibly described, but are not connected

together in any of those ways which are requisite to the

limitation of a fee. Though for some purposes the Queen

Consort is in law a feme sole (Co.- Litt. 3 a; ibid. 133 a), yet

there seems to be no authority for saying that she is a corpora-

^ tion sole. Nor could Lord Hale have supposed that the

Queen Consort is a corporation sole ; for he expressly laid it

down, that such a limitation of an advowson in esse would be

bad ; whereas, if the Queen Consort were a corporation sole,

there could be no more harm in the limitation of an advowson

to her and her successors, than in its limitation to a bishop

and his successors. The successive Queens Consort, being

neither the successors of a corporation sole nor the heirs of

any specified person or persons, are not a proper subject for

the limitation of a fee ; and it would be difficult to defend the

principle of the above cited decision, without maintaining

that a similar desultory limitation might lawfully be made in

favour of any arbitrary series of persons who are capable of

being intelligibly described.

Descent of

peerage

among co-

parceners.

In a similar manner, a peerage, if descendible to females,

will, by act of law, fall into abeyance upon a descent among

coparceners. The crown enjoys the undoubted prerogative,

to revive any such dormant peerage in favour of any one of

the persons among whom, for the time being, the right is

distributed. (Co. Litt. 165 a, and Harg. notes 6, 7, thereon.)

RULES OP LIMITATION AT COMMON LAW. 115

An office of honour, held by what, previously to 12 Car. 2, Offices held

c. 24, was tenure in grand serjeanty, does not fall into abey- ^rfeanty.

ance among coparceners ; but how, upon such a descent, it

should be exercised, has been a matter of doubt. Lord Coke

thought, that the husband of the eldest coparcener was

entitled, as of right. But it seems now to be settled, that

such office must be exercised by a deputy appointed by all the

coparceners, such deputy not being below the degree of a

knight, and being subject to the approval of the crown.

(Harg. n. 8 on Co. Litt. 165 a.) On the appointment of

deputies in lieu of persons for any cause disqualified, see Co.

Litt. 107 b.

KuLE 5. — If in a deed there are two limitations, one

to an unborn person and the other (by purchase) to

any issue'of such unborn person, the second limitation

is void. And all limitations subsequent to such void

limitation are also void. (2 Prest. Abst. 114, 115 ;

Fearne, Cont. Rem. 602, and Posth. Works, 215 ;

Brudenell v. Elwes, 1 East, 442, at p. 453 ; Monypenmj

V. Dering, 2 De G. M. & G. 145, at p. 170 ; Hay v.

Earl of Coventry, 3 T. R. 83, at p. 86.) If in a will

there are two such limitations, the prior limitation

(whether it be executed, or executory) may be con-

strued as a limitation in tail, provided that such

limitation would, if not barred, carry the estate by

descent to the issue specified in the second limitation.

(2 Prest. Abst. 166 ; Butl. note on Fearne, Cont. Rem.

204 ; Parfitt v. Hemher, L. R. 4 Eq. 443 ; Forshrook v.

Forshrooh, L. R. 3 Ch. 93.)\*

It is clear from the above cited authorities, that a limitation,

in a deed, to an unborn person for life is good ; and that a

remainder may be limited upon such life estate, though not to

the issue of such tenant for life.

The construction of a prior life estate in a will as an estate

tail, is made in order to give effect to the apparent intention

of the testator, so far as the rules of law will permit ; and it Cy jnh

doctrine

is therefore commonly referred to as the cy prh doctrine. The

\* [Bfi Richardson, (1904) 1 Ch. 332 ; Jarman on Wills, 6th ed. 290.]

I 2

116 ON ESTATES IN GENERAL.

quality of the estate tail is regulated by the quality of

the issue who are the subjects of the second limitation.

The doctrine is not likely to be extended. (Butl. uhi

supra ; [He Mortimer, (1905) 2 Ch. 502.] )

This rule is independent of, and in addition to, the rule

against perpetuities ; so that any limitation of a legal estate

wliich contravenes the rule, is void, although such limitation

may not be obnoxious to the rule against ijerpetuities.

{Whitby V. MitcheU, 44 Ch. D. 85.)\*

EuLE 6. — The limitation of a remainder to a cor-

poration not in esse, or to the righi heirs, as purchasers,

of a person not in esse, is void. {Cholmleifs Case, 2

Eep. 50, at p. 51 a, b ; 2 Bl. Com. 170 ; Fearne, Cont.

Kern. 250, 251.)

The authorities declare that such a limitation is void in its

inception, even though a corporation answering to the descrip-

tion should be created, during the continuance of the precedent

particular estate ; or though a person answering to the descrip-

tion should come into being, and leave an heir at the time

when the estate to arise under the limitation would fall into

possession : wherein it differs from the limitation of a contin-

gent remainder to the heirs (though not yet in being) of a

person in esse, or to the unborn son of a person in esse. {Vide

infra, p. 131.)

The maxim This rule, as well as the foregoing, is avowedly founded

double upon the maxim, that the law will not contemplate a double

possibilities, possibility, or a possibility upon a possibility. (Co. Litt. 25 b ;

ibid. 184 a ; 1 Rep. 156 b ; 10 Rep. 50 b.) This maxim has

certainly been applied with very little consistency. Shortly

before insisting upon it, Lord Coke states that a limitation in

special tail to a married man and a married woman (other

than his wife) is good, upon the ground that the wife of the

• [The nile applies to equitable limitations in a deed : Jie Nash, (1909) 2 Ch.

450, C1910) 1 Ch. 1. See an article in the Law Q. R. xxv., 385, writte-i before

the case came before the Court of Appeal.]

RULES OF LIMITATION AT COMMON LAW. 117

man might die in his lifetime, and the husband of the woman

in lior lifetime, whereupon the marriage of the donees

might ensue ; though this hypothesis has mightily the

aspect of a triple (not to say a quadruple) possibility. (See

Co. Litt. 25 b.)

The maxim against double possibilities has been questioned

by Lord Nottingham. {Duke of Norfolk's Case, 3 Ch. Ca. 1,

at p. 29.) It does not clearly appear whether he meant to

question the maxim altogether, or only the particular applica-

tion of it (by Popham) above cited, at 1 Rep. 156 b. His

remarks, at all events, only go to show, not that the instances

alleged by Lord Coke are wrong, but that the maxim probably

means something different every time it is cited. Though the

maxim may be of such vague import, that it could not safely

be relied upon for any new inference, yet th^re is not much

reason to doubt that the above-stated rule would be enforced,

if the occasion should arise ; seeing that it only affirms the

natural tendency of the courts, which leans strongly against

the validity of remote and unusual limitations.

The maxim against double possibilities, when rightly viewed,

is nothing worse than a somewhat clumsy restriction upon the

remoteness of legal limitations ; and some of the criticisms

which have been passed upon it are much more foolish than

the maxim itself.

If, as in the older authorities, the maxim against double

possibilities is regarded only in the light of a reason to support

the two propositions above stated — (1) that a limitation to the

issue of an unborn person, as purchasers, in remainder upon

an estate for life to that person, is void ; and (2) that a

limitation to the heirs of an unborn person, as purchasers, is

void — its validity is unimpeachable, and has been expressly .

allowed by the Court of Appeal in the above cited case of

Wliithij V. Mitchell, 44 Ch. D. 85. But it does not follow that

we may treat the maxim as being itself a rule, and therefore

as forbidding every limitation in which an ingenious person

can detect what he calls a double possibility. Lord Justice

(then Mr. Justice) Kay went a good length in this direction in

the case of Re Frost, Frost v. Frost, 43 Ch. D. 246. But this

novel proposal ought not to be imported into the law, without

118 ON ESTATES IN GENERAL.

more careful consideration than it appears hitherto to have

received.\*

• [Some ycnrs ngo the c<litor ventured to put forward the theory that the rule

in Whitby v. Mitcliell has nothing whatever to do with the so-called maxim

against double jiossibilitics, but is merely the statement, in an abbreviat eel form,

of the old rule prohibiting the limitation of land to the unborn descendants of

a person in succession, beyond the firet generation ; this rule was established

to check the persistent attempts to create unbarrable entails made by land-

owners in the sixteenth and seventeenth centuries (Law Q. R. xv., 71). There

is in truth no maxim or rule against double possibilities ; the notion arose from

the caution or timidity of the judges in the sixteenth century, who feared that

the introtluction of contingent remainders (a form of limitation unknown to the

ancient common law) might lead to land being tied up beyond due limits ; when

this fear was discovered to be groundless, the objection to double possibilities

disappeared. For example, a limitation of land to A for life and after his

death to the eldest grandson of B, a bachelor, involves two possibilities, for B

may possibly not have a child, and if he has, that child may not have a son ;

but if there is no grandson of B living at A's death, the remainder fails ; con-

sequently the land is not tied up longer than if the limitation were to A for life

and after his death to B, and the remainder is as good in one case as in the

other. The history of the matter is given in an article by the present writer

(Law Q. R. XXV., 385), and his contention appears to be justified by the judg-

ment of the Court of Appeal in Re Xash, (1910) 1 Ch. 1.

[It is also clear, historically, that the doctrine of cij prex is an exception

to the old rule above referred to, which prohibited the limitation of land to the

unborn descendants of a person in succession. This is the conclusion arrived

at by Mr. Fearne, the Real Property Commissioners, and Mr. Joshua Williams.

The notion that the doctrine of cy pres is an exception to the modem Rule

against Perpetuities (\_i)ifra, p. 180) is quite inadmissible, and indeed unintelli-

gible ; see Jarman on Wills, 6th ed., p. 288 ; Law Quarterly Review,

XXV. 392.]

( 119 )

CHAPTER XII.

CONTINGENT REMAINDERS.

As has above been remarked, for all purposes which regard the

seisin, a term of years is not properly styled a particular estate,

because it does not in any way affect the seisin, under the next

estate of freehold ; and similarly, an estate of freehold cannot

properly be said to subsist in remainder upon a term of years,

because the subsistence of the term does not prevent the vesting

of the seisin under the freehold during the term. But the

consecutive relation of a term of years and the next estate of

freehold, when they are contemporaneously created, bears a

marked resemblance to the relation between a particular estate

properly so called and a remainder expectant upon it, and in

view of this relation a term of years is often styled a particular

estate, and the next estate of freehold is often styled a

remainder. . These explanations are here repeated, because

the facts in question need to be borne in mind during the

perusal of the next following paragraphs.

The particular estate preceding a vested remainder of free- Must be sup-

hold may be a term of years ; and in that case the seisin, estate of

during the continuance of the term, is vested in the remainder- thefrfn/"^

man. {Vide supra, p. 80.) But the particular estate preceding ception.

a contingent remainder of freehold may not be a term of

years; because in such case the seisin would not be vested,

but would be in abeyance during the continuance of the con-

tingency. (Goodright v. Cornish, 1 Salk. 226.) Such a con-

tingent remainder would be void in its inception, for want (as

the common phrase goes) of a sufficient estate of freehold to

support it. It is conceived that this is still the law.

But such a limitation, though void as a remainder at common Executory

law, and therefore necessarily void if contained in an assurance n^|| no°°^

which takes effect only by the common law, may be good as support.

120

ON ESTATES IN GENERAL.

an executory limitation, if contained in an assurance which

takes effect under the Statute of Uses, or in a will. In the

former case it will be a springing use, and in the latter case it

will be an executory devise.

Mast also, by

the common

law, be

8upj)orted

pending the

contingency.

For the same reason, every contingent remainder of freehold

must, by the common law, be supported by an estate of free-

hold, not only in its inception, but also throughout the pending

of the contingency ; because, if any interval had been per-

mitted to exist between the determination of the precedent

estate\* and the vesting of the remainder, the immediate free-

hold would have been in abeyance during such interval.

Unless the remainder, by the happening of the contingency,

becomes vested, either previously to, or at the same instant

with, the determination of the precedent estate, it is (by the

common law) destroyed. But this liability to destruction has

been greatly modified by recent legislation, as hereinafter will

be mentioned.

The precedent

estate must

be created

by the same

instrument.

The precedent estate must (it would seem) be created by the

same instrument as the contingent remainder. If A be tenant

for life with remainder in fee simple to B, the life estate of A

would not (at common law) support contingent remainders

created de novo out of B's fee simple. Such contingent

remainders will require a new precedent estate, created at the

same time with them and derived out of the same fee simple.

(Fearne, Cont. Kem. 301, vii.) But the cases seem only to

prove, not that such a limitation would be held void, but that,

in order to establish it, it would be construed as an executory

limitation. The same doctrine applies to copyholds; see 3rd

resolution in Snowe v. C littler , 1 Lev. 135.

Various Any determination of the precedent estate pending the

Uie^r^^ contingency would at common law have destroyed the

destruction, remainder, whether such determination were due to the natural

expiration, or to the forfeiture, surrender, or merger of the

\* The phrase, j)recedent entnte, may conveniently be used to denote a vested

particular estate of freehold, immediately precedent, in the order of limitation,

to a contingent remainder.

CONTINGENT REMAINDERS. 121

precedent estate. But in order that a merger of the precedent

estate in a subsequent vested remainder of inheritance, should

absolutely destroy the contingent remainder, it was necessary

that the merger should take place subsequently to the creation

of the precedent estate. {Vide infra, p. 137.)

The yfovd failure is in this connection more strictly proper

to be used than the word destruction, but the use of the latter

word is common and convenient. The efifect of the destruction

or failure of a contingent remainder is to accelerate the next

vested estate. (Goodright v. Cornish, 1 Salk. 226.)

Determination of the precedent estate by natural expiration, How far a

devested.

or by forfeiture, or surrender, or (in general) by merger, is an estate would

absolute determination of such precedent estate. A contingent cont/^gg\* ^

remainder was also destroyed at common law, if the precedent remainder,

estate, instead of being absolutely determined, was turned to

a ri{iht of action, which required a real action to restore its

existence as an estate. If the precedent estate was devested

only so far as to be turned to a right of entry, it was deemed to

be still sufficiently in existence for the purpose of supporting

contingent remainders. (Fearne, Cont. Eem. 287.) Thus,

the disseisin of the tenant of the precedent estate would not

alone have sufficed to destroy any subsequent contingent

remainders ; but if, by a descent cast, the right of entry of

the disseisee had been tolled, whereby his right became a right

of action, the subsequent contingent remainders would have

been destroyed. Hence it is commonly said, that a right of

entry was sufficient, at common law, to support a contingent

remainder, but that a right of action was not.

The above stated rules, that every contingent remainder of The liability

freehold must in its inception be supported by a precedent i^indepen-

estate of freehold, and must vest at a time not later than the '^^^^\ ^^ ^^^

' mode in

determination of the precedent estate, are equally applicable which the

to all contingent remainders, whether they be created by arises,

limitations taking effect by the common law, or by limitations

which take effect under the Statute of Uses. (Fearne, Cont.

Eem. 284 ; ibid. 324.) And also, if the limitation is by devise.

{Mansell v. Mansell, 2 P. Wms. 678 ; see p. 682.) It was

122

ON ESTATES IN GENERAL.

Equitable

contingent

remainders

not liable to

destruction.

Copyholds

assumed in the last cited case, that contingent remainders

created hy devise are liable to destruction, the question being,

whether trustees who had concurred to destroy them were

guilty of a breach of trust. Their liability to destruction has

never been questioned. {CunUffe v. Brancker, 3 Ch. D. 393.)

The last preceding paragraph is not inconsistent with the

above stated proposition, that a limitation which would be void

ill its inception as a contingent remainder, may be good as an

executory limitation if contained in an assurance by way of

use or in a will. The words in italics are emphatic. If the

limitation is, in its inception, capable of taking efTect as a

remainder, it will be construed as a remainder, under whatever

kind of assurance it may arise. {Vide infra, pp. 123, 124.)

And if it has once taken efifect as a remainder, it cannot after-

wards be construed as an executory limitation, in order to

preserve it from a subsequent liability to destruction.

The foregoing rules were not applicable to contingent

remainders limited out of an equitable fee, when the legal fee

was conveyed to trustees by the same instrument. (Fearne,

Cont. Eem. 304, 305 ; ibid. 321 ; Ben-y v. Bernj, 7 Ch. D. 657 ;

Abbiss V. Burney,n Ch.D.211, at p. 229; Marshall w. Gingell,

21 Ch. D. 790 ; ^Re Brooke, (1894) 1 Ch. 43.]) Nor were they

applicable to contingent remainders limited out of an equity

of redemption, the legal estate being in a mortgagee. {Astley

V. Mieklethwait, 15 Ch. D. 59.) In all such cases, neither a

premature determination of the precedent estate, nor its

natural expiration, before the vesting of the contingent

remainder, would have hindered the latter from subsequently

vesting. It is conceived that the principle of the last cited

case extends also to contingent remainders limited out of an

equitable fee not created by the same instrument : a case

which seems never to have been expressly decided. And an

equitable contingent remainder, even though created before the

coming into operation of the 40 & 41 Vict. c. 33, is not rendered

liable to destruction by getting in the outstanding legal estate.

{Re Freme, Freme v. Logan, (1891) 3 Ch. 167.)

In the case of copyholds, it is well settled that a premature

determination, otherwise than by natural expiration, of the

CONTINGENT REMAINDERS. 123

precedent estate, would not have hindered a contingent

remainder from subsequently vesting. (Fearne, Cont. Eem.

319, 320 ; Doe v. Martin, 4 T. R. 89, at p. 64 ; Roe v. Brigrjs,

16 East, 406, at p. 413.) But in the above cited passage of

Fearne, it is laid down, that if the precedent estate had

determined by regular expiration pending the contingency, the

contingent remainder would at common law have been destroyed.

If a particular estate and any remainder or remainders be Effect of the

subsisting in copyholds, and the copyholds are enfranchised by ment of copy-

a conveyance, purporting to be in fee simple, from the lord to \*^°^^^\*

the tenant of the particular estate, the enfranchisement will

enure to the benefit of the remaindermen, whose estates will

thenceforward become freehold. But their estates, if con-

tingent remainders, will lose the protection from destruction

which they enjoyed so long as the freehold was in the lord.

{Roc V. BrUjcjs, 16 East, 406.)

For some further discussion of the particular circumstances,

under which a contingent remainder of freehold is liable to

destruction at common law, vide infra, p. 135. The liability How far

to destruction by reason of forfeiture, surrender, or merger, destruction

of the precedent estate, or by reason of its being turned to a ^^'^^ exists.

mere right, has been, either directly or indirectly, abolished by

statute. For a long time before its express abolition, it had

been to a great extent practically counteracted, by the intro-

duction into settlements of trustees to preserve contingent

remainders. The liability to destruction by reason of the

natural expiration of the precedent estate pending the con-

tingency has been greatly mitigated ; but it still affects

contingent remainders created by instruments executed on or

before the 2nd August, 1877, and contingent remainders

which do not conform to the rules regulating the limitation of

executory interests. {Vide infra, p. 141.)

In construing all instruments under which executory no limitatioa

interests may arise, whether wills or conveyances to uses, it ^ ex°curo^

has long been the settled rule, that no limitation which is which can

take effect as

capable of taking effect at the common law shall be construed a remainder,

to take effect as an executory limitation ; and therefore, that no

124 ON ESTATES IM GENERAL.

limitfttion shall be construed as an executory limitation which

would be good in its inception as a remainder. (2 Prest. Abst.

158, 164.) The fact that a limitation may, in the common

course of things, possibly, or even probably, fail, if construed as

a remainder, under the rules regulating the vesting of contingent

remainders, will not exempt it from this rule of construction.

(Fearne, Cont. Kem. 395 ; see also ibid. 386 ; Smith on

Executory Interests, p. 71, and cases there cited.)

All limitii- But a legal remainder cannot be subsequent to an executory

quenUflan limitation. (Fearne, Cont. Rem. 503, v.) This seems to

executory follow inevitably from first principles. A remainder, being a

limitation are \*' . .

executory. legal limitation, could not possibly, by the rules of law, subsist

as a remainder in expectancy upon a limitation which itself

violates the rules of legal limitations. But nothing hinders

an executory limitation from being subsequent to a legal

remainder. And though the whole of a series of limitations,

if subsequent to an executory limitation, must, in their incep-

tion, be executory limitations, yet, if the first executory

limitation should afterwards become vested, then, if the sub-

sequent limitations are such that they are inter se capable of

being related as particular estate and remainder, they are

usually styled by those names, and they possess the essential

characteristics of particular estate and remainder, although in

their inception, since they would have been void at the

common law, they were executory limitations. For example,

a settlor might limit lands to the use of himself and his heirs

until his marriage, and, after his marriage, to the use of himself

for life, and after his death to the use of his sons successively

in tail male, with divers remainders over. Here, since the

limitations commence with a fee, all the subsequent limita-

tions must be executory. Nevertheless, if the marriage

should in fact take place, nobody would scruple to say that the

settlor was then tenant for life, with remainder (contingent,

until the birth of a son) to his eldest son in tail male ; and

their respective estates would possess all the essential

characteristics of an estate for life and a contingent remainder.

This usage is in accordance with the practice of the best

authorities. For an example, see Fearne, Cont. Rem. 459,

CONTINGENT REMAINDERS. 125

where he speaks of " a limitation after an executory devise in

tail being so limited as to take effect, either in lieu of the

preceding executory devise, if that failed, or else as a remainder

upon it, if that took effect.'"

If the limitation is in favour of a class, as to some of whom Application

it will be good in its inception if construed as a contingent to a class.

remainder, while as to others it fails in its inception if con-

strued as a contingent remainder, and can take effect, if at all,

only as an executory limitation, this will not generally suffice

to exempt the limitation from the above-stated rule ; and the

limitation will take effect as a contingent remainder in favour

of those members of the class as to whom it is good in its

inception, and will fail as to the others. (Festing v. Allen,

12 M. & W. 279, at p. 301 ; Rhodes v. Whitehead, 2 Dr. & Sm.

532 ; Brackenhury v. Gibbons, 2 Ch. D. 417.) But in a will. Qualification

of flip I'll If\* 3.S

if it is the clearly expressed intention of the testator that the to ^ class. '

whole of the members of the class shall take, this will enable

the limitation to be construed as an executory devise, in order

to let in those members of the class as to whom it would

have necessarily failed in its inception if construed as a con-

tingent remainder. {Re Lechmere and Lloyd, 18 Ch. D. 524 ;

Miles v. Jarvis, 24 Ch. D. 633 ; Dean v. Dean, (1891) 3 Ch.

150.) The importance of this distinction is much lessened

by the recent legislation, whereby the common law liability

of contingent remainders to be destroyed has, in a great

measure, been removed.\*

In Re Lechmere and Lloyd, Jessel, M.R., expressed the

opinion that the case in Brackenbwy v. Gibbons ought to have

been distinguished from the case in Rhodes v. Whitehead, and

that it did not, when properly considered, come within the

latter principle, but rather within the principle laid down by

himself in Re Lechmere and Lloyd. But he did not impugn

the principle of Rhodes v. Whitehead, in respect to the cases

to which it is applicable.

All contingent remainders have this common characteristic, General

that they depend for their vesting upon the happening of jstics,

\* [There are other exceptions to the rule: see Fearne, Cont. Rem, 398 ; He

Wrlghtmn, (1904') 2 Ch 95 j White v. Summers, (1908) 2 Ch. 25G.]

126

ON ESTATES IN GENERAL.

Classirtciitiou

adopted by

Fearne.

some event, which is such that hy possibility it raay happen

neither during the continuance of the precedent estate nor eo

instanti with the latter's determination. (Fearne, Cont. Eem.

9, Butl. note g.)

For a succinct statement of the true criterion between con-

tingent estates and vested estates, see p. 74, supra.

From certain motives of convenience, contingent remainders

have been divided by Fearne, for the purpose of discussion, into

the four following classes : —

1. Where the contingent event is the determination

of the precedent estate in one, or some only, out of

several possible ways ;

2. "Where the contingent event is an event which

may by possibility never happen at all ;

3. Where the contingent event is such that it must

happen at some time, but possibly not until after the

determination of the precedent estate ;

4. Where the contingent event is the coming into

being of a person not yet in esse, or the ascertainment

of a person not yet ascertained.

First Class of Contingent Remainders.

Definition, A. Contingent remainder is of the first class, when " the

remainder depends entirely on a contingent determination of

the preceding estate itself " (Fearne, Cont. Eem. 5) ; that is

to say, when the precedent estate is capable of being deter-

mined in more than one way ; but the remainder is so limited

as to become vested only in case the determination shall take

place in one specified way, or in some only out of several

specified ways.

Example. For example, A makes a feoffment to the use of B till C

returns from Rome, and after such return of C to the use of D

and his heirs. (See 3 Rep. 20 a.) By this limitation B takes

by implication an estate for his own life, which is by the

limitation made determinable upon the return of C. This

estate may, therefore, determine in either of two ways : either

by the death of B or by the return of G. But it is only in the

CONTINGENT REMAINDERS. 127

event of the latter determination that the remainder of D is

limited to take effect. This remainder, pending C's return,

is contingent ; because if B's estate should be determined by

B's death before the return of C, D would not be duly qualified

by virtue of the remainder to enter upon the possession.

In this class of contingent remainders, the remainder can

never become vested during the continuance of the particular

estate, because the event which is to vest the remainder

will also determine the particular estate. The remainder

can only become vested, if at all, eo instanti with the

determination of the particular estate. Contingent remain-

ders of the other three classes admit of becoming vested

during the continuance of the particular estate; except

certain limitations by purchase to the heirs of a living

person, coming under the fourth class, where such person

takes an immediately precedent estate for his own life.

Such limitations are not only rare, but difficult to frame ;

because in general a limitation to the heirs, subsequent to a

limitation for life to the ancestor, does not take effect in the

heirs by purchase, but, under the rule in Shelley's Case, by

vesting a fee in the ancestor. But a limitation to A for life

and after his death to his heir (in the singular) and the heirs

male of the body of such heir, would give an estate in tail

male by purchase to the person who, at A's death, could show

himself to be his heir general. This, therefore, affords an

example of the kind of limitation now in question.

The definition above given is not, as it stands, entirely The definition

satisfactory. Its terms, if taken literally, seem to include the requires

estate of trustees to preserve contingent remainders ; which, "^"^ ' ca ion.

both upon principle and authority, seems more properly to be

included among vested estates than among contingent estates.

This subject is further considered infra, p. 144.

Second Class of Contingent Remainders.

A contingent remainder is of the second class, when the Definition,

happening of an uncertain event, which has no connection

with the determination of the precedent particular estate, and

128

ON ESTATES IN GENERAL.

is such that it may by possibility never happen at all, is by

the nature of the limitation to precede the vesting of the

remainder. (Fearne, Cont. Rem. 6.)

Examples. For example, if lands be limited to the use of A for life,

remainder to the use of B for life, and if B shall die in the

lifetime of A then remainder to the use of C for life, or in

tail, or fee simple. Here the remainder to C is not to take

effect unless B shall die in the lifetime of A ; which event

may never happen at all, for though B must die some day,

he is not obliged to die in the lifetime of A ; and accordingly,

so long as B is living, C is not duly qualified to enter upon the

lands by virtue of his remainder, and the remainder is there-

fore contingent. If A should die in the lifetime of B, the pre-

scribed event would thereby be made impossible ever to happen,

and the remainder to C would never be capable of taking effect.

As a second example, suppose lands to be limited to the use

of A for life or in tail, and if B should come to Westminster

Hall on a specified day, then to the use of C in tail or in fee

simple. Here also, unless and until B shall have come to

Westminster Hall on the specified day, C is not duly qualified

to enter upon the lands by virtue of his remainder, and the

remainder is therefore contingent. (Fearne, Cont. Rem. 7, 8.)

Third Class of Contingent liemainders.

Definition. A Contingent remainder is of the third class when it is

limited to take effect after the happening of an event, which

is such that it must necessarily happen at some time, though

it may by possibility not happen during the continuance of

the precedent particular estate. (Fearne, Cont. Rem. 8.)

Examples. For example, if lands be limited to the use of A for life, and

after the death of B to the use of C in tail, or in fee simple.

Here, if A should die in the lifetime of B, C would not be duly

qualified to enter upon the lands by virtue of his remainder,

and the remainder is therefore contingent.

This class may be said to diflfer from the second class in

two respects; namely, (1) the uncertain event is not an event

CONTINGENT REMAINDERS. 129

which may by possibility never happen at all; and conse-

quently, it does not admit of becoming impossible to happen

during the continuance of the precedent estate; (2) the

remainder is contingent only by reason of the rule of law

which defeats a remainder upon the occurrence of any interval

of time between the determination of the precedent estate and

the vesting of the remainder ; whereas, in the second class,

the happening of the uncertain event is expressly made a

condition precedent to the vesting of the remainder.

Exception from the Third Class.

There is a certain class of limitations which, though in form Distinguish-

they resemble limitations which come within the definition of jstfc?

the third class of contingent remainders, have been decided to

be vested remainders. Such remainders, being vested, do not

need to be supported by a precedent estate of freehold, but

may be preceded by a chattel interest. This is, in fact, their

distinguishing characteristic.

A limitation to A for twenty-one years, if B should so long whatlimita-

live, and after the death of B to C in tail, or in fee simple, within the

would be an example of a contingent remainder preceded by a exception,

chattel interest. This remainder may be regarded as being

of the same type as the third class of contingent remainders,

being limited to take effect after an event which, though it

must happen at some time, may by possibility not happen

during the continuance of the precedent estate ; and Fearne

treats it as coming under the third class. But it admits, at

least equally well, of being regarded as an example of the

limitation of a freehold in future, which is no remainder at

all J namely, as being the direct limitation of an estate of

freehold to C, without any precedent estate at all, (for a term

of years is not a precedent estate,) but subject to the con-

tingency of B's death occurring before the expiration of the

twenty-one years. Such a limitation, if contained in an

assurance at the common law, would therefore be void in its

inception, as purporting to create a freehold in futiiro. But

if, instead of being a term only of twenty-one years, the

C.R.P. K

130 ON ESTATES IN GENERAL.

precedent term is so long that there is no probability, or no

possibility, that B will be living at the time of its expiration,

it is not true that the event, after the happening of which

the estate limited to .C is to take effect, may by possibility

not happen during the continuance of the term of years.

Therefore in such a case it is not true that the estate of C

is liable to any contingency ; for it is absurd to treat the

happening of the death of B before the expiration of (say) a

hundred years, as though it were a contingency ; and there-

fore in such a case the words " after the death of B " are

merely equivalent to the words " after the determination of

the term." It follows that, under such circumstances, there

is no more harm in a limitation to C after the death of B

than in a limitation to C, after the expiration of a term of

years ; which latter limitation, by the rule in Boraston's Case,

3 Rep. 19, is unquestionably a vested estate. It has accord-

ingly been decided that limitations in the above form, when

the term of years is so long as to give rise to a vehement

presumption, or a certainty, that it will not expire during a

life then in being, are vested estates. (Fearne, Cont Rem.

21.) A term of eighty years, or upwards, will suffice for this

purpose. Such a limitation, though preceded only by a

chattel interest, is therefore good, even in an assurance at

the common law. In wills and assurances by way of use,

such limitations may be good qudcunqm via, either as

remainders or as executory limitations.

The case of Cases have occurred in which it was thought to be material

^SrS.^ to consider the application of this doctrine, although, by reason

that the limitation was contained in a will, there might be no

question as to its validity ; because, if comformable to the

rule against perpetuities, it would be valid as an executory

devise, if void in its inception as a quasi-remainder. In

Beverley v. Beverley, 2 Vern. 131, a testator devised lands to

his eldest son, for the term of sixty years, if the son should

so long live, and after the son's decease to a grandson in tail

male. The son and grandson, who were both in being at the

date of the will, after the testator's death suffered a common

recovery. Here there was no question as to the validity of

CONTINGKNT REMAINDERS. 131

the limitation to the grandson, but it was urged that the

recovery was bad for want of a tenant to the pnecipey the

freehold during the life of the son being (as they are reported

to have said) in abeyance. This was a strange contention,

because executory devises, which in form leave the freehold

undisposed of, are held good upon the very ground that they

do not in fact place the freehold in abeyance, but leave it to

descend in the meantime to the heir-at-law. However, it

appears that in this case, which is very badly reported, the

legal estate was outstanding, and all the limitations were

therefore equitable; so that the court had no difficulty in

holding the recovery to be good as an equitable recovery.

But the court seems to have thought that a term of sixty

years would not be long enough to prevent the words, " if he

shall die during the term," (which, by the way, did not occur

in the present will,) from importing a contingency.

Fourth Class of Contingent Remainders. \*

A contingent remainder is . of the fourth class when it is Defimtion.

limited to a person not ascertained, or not in being, at the

date of the limitation, but there is a possibility that a person

to satisfy the description may be ascertained, or may come

into being, during the continuance of the precedent particular

estate. (Fearne, Cont. Rem. 9.)

For example, if lands be limited to the use of A for life, ^^^^n^pies.

remainder to the use of the right heirs of J. S., who is at that

time living ; or, remainder to the use of the first son of J. S.

who at that time has no son ; or, remainder to the use of the

last survivor of several living persons. In all these cases it is

evident that the remainder cannot vest until the ascertainment,

or coming into being, of a person to satisfy the description in

the limitation ; and in the case of limitations to the heirs of a

living person, such ascertainment can only take place upon his

death ; because, Nemo est heres viventis.

It might at first sight be thought that the remainder is

vested in the heir presumptive or heir apparent ; but as the

heir is, by the terms of the limitation, to take as a purchaser,

K 2

132 ON ESTATES IN GENERAL.

and as the purchaser is to be the person who in fact comes

within the description of heir, it is clear that the remainder

cannot vest in the heir presumptive or apparent so long as

his heirship remains only presumptive or apparent, because

such a person may not, in fact, ever be the true heir at all,

and therefore may never be qualified, under the terms of the

limitation, to take the estate at all.

Exceptions from the Fourth Class.

Heir as In Certain cases, a limitation of a remainder to the heirs of

7e7ignata. ^ living person, as purchasers, occurring in a will, has been

held to be a limitation, not to the heir of that person strictly

according to the legal definition of an heir, but to his then

living heir apparent, or heir presumptive. If the limitation

had been to the heir, strictly so called, of the living person,

such limitation would have created a contingent remainder,

upon the principle of the maxim, Nemo est heres viventis.

But in the cases under consideration, the word has been held

to indicate a persona designata then in being ; which person is

accordingly capable of taking a vested estate.

In the case of Burchett v. Durdant, 2 Vent. 311, Carth. 154,

sub nom. James v. Richardson, 2 Lev. 232, the limitation of a

remainder " to the heirs male of the body of B now living"

was held to give a vested remainder to the then heir male

apparent of the body of B. The words in italics obviously

supply the grounds of this decision.

In the case of Darhison v. Beaumont, 1 P. Wms. 229, there

was a limitation in a will, not immediately preceded by a

vested estate of freehold, to the heirs male of the body of the

testator's aunt, who was living, and had three sons all living,

at the date both of the will and of the testator's death ; and

the testator gave a pecuniary legacy to his said aunt, and to

each of her sons, thereby taking notice of the fact that they

were all living. This remainder, if construed as a contingent

remainder, to the heirs male in the strict sense of the words,

being preceded by no vested estate of freehold, would have

CONTINGENT REAfAlNDERS. 133

been void in its inception ; and even if not void in its

inception, it would have been void in the events which

happened. But the Court of Exchequer held that, under the

circumstances, the words must be construed to give a vested

estate in tail male to the eldest son of the testator's aunt.

This judgment, having been reversed in the Exchequer Cham-

ber, was afterwards restored and affirmed in the House of

Lords. (3 Bro. P. C. 60.)

It is material to observe, that in the last cited case the Eemarks

limitation, if construed as a contingent remainder, would have ^^ariison v.

been void in its inception, and not only in the events which ^^'««»«<'™^

happened ; which is a sufficient reason for holding that it was Goodright v.

1 Vli it 6

an executory devise ; nor does there seem to be any obstacle

in the way of its validity as an executory devise. The result

seems to be, that the question really at issue was not whether

the limitation should be construed as a contingent or as a

vested remainder, but whether the limitation should enure to

the benefit of a persona designata, or whether it should wait

for the death of the aunt to ascertain the person entitled to

the benefit of it. This circumstance does not seem to have

been sufficiently considered. It has a very important bearing

upon the inference to be drawn from the case. If the validity

of the limitation had depended upon its being construed as a

vested remainder, this might have afforded a strong argument

in favour of such construction. But since the limitation seems

to be good qndcunque rid, as an executory devise, if not as a

vested remainder, this argument in favour of the construction

adopted seems not to have existed.

The same remark seems also to apply to the case of Good-

right V. Wliifc, 2 W. Bl. 1010, which is cited in this connection

by Fearne. (Fearne, Cent. Rem. 212.) In that case a testator

devised lands, subject to certain annuities, to his daughter

Margaret for two years from his decease, with remainder to

his son Richard, if then living, for ninety-nine years, if he so

long lived, and subject to such ninety-nine years term he

devised the premises to his son Richard, his heirs male, and

to the heirs of his daughter Margaret jointly and equally, to

hold to the heirs male of Richard lawfully begotten, and to

134 ON ESTATES IN GENERAL.

the heirs of Margaret jointly and equally, and their heirs and

assigns for ever. After the death of Richard, Margaret entered

upon the whole, and the son of Richard brought ejectment for

the whole. Margaret obtained a rule to defend only for a

moiety. The plaintiff recovered a moiety only, apparently

upon the ground that the other moiety had vested in the heir

apparent of Margaret immediately upon the testator's death,

subject, of course, to the annuities and the terms of years.

Here the limitation, which was construed as a vested remainder

in the heir apparent of the testator's daughter during her life-

time, would have been void in its inception if construed as a

contingent remainder, and was therefore capable of being

construed as an executory devise.

Fearne appears to have adverted to the distinction above

taken, in the following words: — "We may observe, however,

that there was not one of the last noticed cases, in which the

ancestor took the legal estate of freehold. Those cases only

operated by way of exception to the rule, Nemo est heres vn'entig;

and consequently made that a vested limitation which other-

wise would, according to that maxim, have been contingent."

(Fearne, Cent. Rem. 212.) It may certainly be doubted,

whether the point attracted as much attention as it perhaps

deserved. The language both of the counsel and of the judges

strongly suggests the conclusion, that they thought themselves

obliged to choose between holding the limitation to be vested,

and holding it to be void.

Fearne's Fearne also treats all limitations to heirs, or heirs of the

toihe Rule in body, coming within the Rule in Shelley's Case, as being excep-

Case^^^\*\* tions from the fourth class of contingent remainders. That

rule embraces all limitations, included in the same instrument,

of an estate of freehold to an ancestor, followed by a subsequent

limitation to his heirs, whether general or special. It is the

settled rule of law that, under these circumstances, the heirs,

except under special circumstances, take no estate at all, but

the limitation apparently made to them coalesces with the

freehold previously taken by the ancestor, in such a way as to

give him the inheritance ; such inheritance being an estate

tail, or a fee simple, accordingly as the limitation to the heirs

CONTINGENT KElMAiNbEftS. l35

is in tail or in fee simple. In such limitations, as the phrase

goes, the word heirs is used only as a word of limitation, not

as a woj'd of purchase.

Since the heirs do not, under these limitations, take any

estate at all, it seems to be not very appropriate to treat the

limitations to them as being exceptions from a class of contin-

gent remainders. That expression seems more properly to

denote a species of remainders which, seeming to be contingent,

are in fact vested. It therefore seems to be the more appro-

priate course, to indicate the bearing of the rule in Shelley's

Case upon the forms of limitation appropriate to the fourth

class of contingent remainders, and to reserve that subject,

which is sufficiently complex, for a separate statement.

Further Remarks on the Liability to Destruction.

The causes, or methods, of the destruction of contingent Division of

remainders at common law, may conveniently be divided into

the following heads : —

1. Forfeiture ;

2. Surrender ;

3. Merger;

4. Tortious alienation ;

5. Turning to a right of action ; and

6. Natural expiration of the precedent estate.

Of these, the first five have been, either directly or indirectly,

wholly abolished by statute ; but a knowledge of them is

required in order to understand questions which may arise

during the examination of old titles. The sixth division is

still a matter of practical importance.

By the common law, a tenant for life incurred a forfeiture i. Forfeiture.

of his estate by making any alienation which devested the

remainders and reversions thereupon, as by making a tortious

feoffment in fee simple ; \* or by doing anything in any matter

of record which amounted to the assertion of a right in him-

\* When the reversion or remainder was in the king, a tortious feoffment did

not devest the king's estate, but it was nevertheless a forfeiture. (Co. Litt.

251 b.)-

186 ON ESTATES IN GENERAL.

self to the inheritance, or to an admission of a like right in a

stranger, as by levying a line, suffering a common recovery, or,

in a genuine action of recovery founded upon an adverse title

in the demandant, by. /ojntn// thcmixc on the mere rufht, that is,

• by presuming to defend the action himself instead, as was his

duty, of " praying aid " from the remainderman. The various

methods by which a forfeiture might be thus incurred are

enumerated and explained in Lord Coke's comment on Litt.

sect. 416. Such a forfeiture generally gave an immediate

right of entry to the next remainderman having a vested

estate. If such a forfeiture had been incurred by the tenant

of the precedent estate, an entry made by the next vested

remainderman would at common law have destroyed all inter-

mediate contingent remainders. (Fearne, Cont. Rem. 323.)

But since an estate of freehold cannot be defeated without an

entry made by the person entitled to take advantage of the

forfeiture, the forfeited estate would, until entry, continue to

subsist and to support the subsequent contingent remainders.

2. Surrender. If the tenant of the precedent estate had surrendered his

estate to the next vested remainderman, such remainderman

having-an estate at least as great in quantum as the surrendered

estate, the precedent estate would have been destroyed by the

surrender, and all intervening contingent remainders would at

common law have been destroyed with it. (Fearne, Cont. Eem.

318; and Butl. note /, at p. 321.) Unless the subsequent

estate was an estate of inheritance, little would be gained by

the destruction of the intervening contingent remainders.

But if the subsequent estate was of inheritance, the destruc-

tion of the intervening contingent estates would liberate the

inheritance from all liability to be postponed to them, in case

they should ever become vested ; and thus the tenant for life

and next vested remainderman could, by collusion, absolutely

dispose of the inheritance pending the contingency. These

are probably the cases referred to by the word surrender in the

statute 8 & 9 Vict. c. 106, s. 8, hereinafter cited. The cases

there referred to by the word merper are probably those dis-

cussed in the next following paragraph. Upon the distinction

between surrender and merger, see p. 87, supj-a.

CONTINGEKT REMAINDERS. 137

If either by conveyance, or by descent, the next vested estate Merger.

of inheritance came to the tenant of the precedent estate, the

precedent estate was destroyed by merger, and all intervening

contingent remainders were destroyed. (Fearne, Cont. Eem.

317 ; ibid. 343 — 345.) But this is subject to the observations

contained in the next following paragraph.

The inlieritance cannot, properly speaking, be conveyed to in what cases

the tenant of the precedent estate, as such, unless the prece- ^gftg^i „(,

dent estate is already in being as a separate estate ; so that in destruction.

all cases in which merger takes place by the conveyance of the

inheritance to the tenant of the precedent estate, such merger

is necessarily subsequent to the creation of the precedent estate.

But it is possible, either by descent, or by the operation of the

Rule in Shelley's Case, for the precedent estate and the next

vested estate of inheritance to meet in the same person simul-

taneously with the creation of the precedent estate. If a

testator seised in fee simple should devise lands to his eldest

son for life, with remainder in tail male to the successive sons

of the eldest son, and the will should contain no further limi-

tations ; then the estate for life and the next vested estate of

inheritance (the reversion in fee simple upon the limitations

contained in the will) would simultaneously be vested in the

eldest son, the former by the will and the latter by descent. And

if a settlor should in a settlement\* insert limitations similar to

those above supposed, and should further insert a limitation

in fee simple to the eldest son's right heirs, the eldest son

would, by the operation of the Eule in Shelley's Case, simul-

taneously take an estate for life and the next vested estate of

inheritance. And if the limitations in tail to the successive

sons should, at the testator's death, or at the execution of the

conveyance, be contingent, — either by reason of there being no

such son yet in esse, or by reason of the limitations to them

being postponed until they should attain the age of twenty-one

years, they being m esse but below that age, — all such con-

tingent remainders, if the law of mergfer were suffered to apply

strictly, would have been destroyed at the moment at which

the settlement first came into operation ; thus to a great

extent making the settlement nugatory in its inception. In

188

ON ESTATES IK QEKEIIAL.

Destruction

through

forfeiture,

surrender, or

merger now

preventetl by

statute.

order to prevent this hardship, a modification was introduced

into the law of merger. In any such case, when a merger

takes place eo instanti with the creation of the precedent estate,

it is not for all purposes an absolute merger ; and it did not,

even at common law, destroy any intermediate contingent

remainders limited by the same instrument ; but the estates

united by the merger remained, as the phrase goes, liable to

open and let in the contingent remainders, provided that they

became vested during what would have been the subsistence

of the precedent estate if it had not been merged. (Feame,

Cont. Kem. 36, V. 6 ; ibid., 341—345 ; 3 Prest. Conv. 161 ;

ibid. 374 et seq. ; Lewis Bowles's Case, 11 Eep. 79 ; Harg. n. 8

on Co. Litt. 28 a.)

The 8 & 9 Vict. c. 106, s. 8, enacts, that a contingent

remainder existing at any time after 31st December, 1844,

shall be, and, if created before the passing of the Act, shall

be deemed to have been, capable of taking effect, notwith-

standing the determination, by forfeiture, surrender, or

merger, of any preceding estate of freehold, in the same

manner in all respects as if such determination had not

happened.

This enactment was in substitution for 7 & 8 Yict. c. 76,

s. 8 ; which was repealed, as from its commencement, by

8 & 9 Vict. c. 106, s. 1.

4. Tortious

alienation of

precedent

estate.

Certain assurances, namely, a feoffment, a fine, and a

recovery, were capable at the common law of what is called a

tortious operation ; that is to say, they could convey to the

feoffee, conusee, or recoveror, a greater estate than was right-

fully possessed by feoffor, conusor, or recoveree. The estate

so conveyed was not, either wholly or in part, the estate of

the person making the assurance, but a totally new estate, and

the old estate of the person making the assurance\* was

absolutely destroyed. If the precedent estate upon which any

\* But not the estate of the person entitled, upon the expiration of his estate,

as the remainderman upon an estate for life, or becoming entitled as issue in tail

upon his death. Such estates, were not destroyed, but were said to be devested or

discontinued, accordingly as they were turned to a rit/ht of entry or to a riyht of

action.

CONTINGEKT REMAINDERS. 139

contingent remainder depended was destroyed by this means,

the contingent remainder was destroyed h'kewise. (Airher's

Case, 1 Eep. 66 ; and cases cited in margin, Fearne, Cont.

Rem. 317.)

The tortious operation of feoffments made after 1st October, is now no

1845, is prevented by 8 & 9 Vict. c. 106, s. 4 ; and fines and p(^ffbie.

recoveries were abolished by the Fines and Recoveries Act,

s. 2. Thus this cause of the destruction of contingent

remainders has been indirectly removed by statute.

The methods hitherto considered, by which contingent •'»• Taming

of precedent

remainders may be destroyed, depend upon the destruction of estate to a

the precedent estate, in such a sense that, after its destruction, ^^^^ '^'^

it no longer has any existence, even as a right of action

requiring a real action for its recovery. But a contingent

remainder might equally be destroyed if the precedent estate,

instead of ceasing absolutely to exist, was, as the phrase goes,

discontinued, by being " turned to a right of action," in

which case the person entitled by virtue of the estate, though

he still retained a title, yet could only enforce that title by

bringing a real action against the person in possession and

obtaining judgment.

Thus, if the precedent estate had first been turned to a right

of entry by the disseisin of the tenant, and this right of entry

had been subsequently tolled, or turned to a right of action,

by a descent cast on the part of the disseisor, then, if the

latter event took place pending the contingency, any contingent

remainders which depended for their existence upon the pre-

cedent estate, would have been destroyed. Thisns commonly

expressed by saying, that a right of action is not sufficient to

support a contingent remainder. (Fearne, Cont. Rem. 286.)

The subject contains some rather intricate learning, upon

which, in the present state of the law, it is not necessary to

enlarge.

For the purpose of taking by descent, a child en ventre sa 6. Natural

mere has always been regarded as standing in the position of of precedent

a child in esse ; and it seems that in devises of lands under a f^^the^^" '

special custom, before the Statutes of Wills, a devise of an contingency.

140

ON ESTATES IN GENERAL.

immediate freehold to an infant en ventre sa mere was good.

(3 Swanst. at p. 617.) But, by devises made under the Statutes

of Wills, it is doubtful whether the infant could take, except

The principle by way of remainder; and it is the better opinion that a child

common^iw"' <^'\* ventre 8a mere could not, at the common law, have taken

to a ohii.i en |)y yirtue of a contingent remainder, if the precedent estate of

vetUiena \*' . .

mh-e. freehold had expired before his birth.\* The law was so laid

down by the Courts of King's Bench and Common Pleas, in

the case of Reeve v. Lonri, 1 Salk. 227, 3 Lev. 408, 4 Mod.

282 ; and though this judgment was afterwards reversed by

the House of Lords, that decision, which was contrary to the

unanimous opinion of the judges, ^Yas regarded with so much

dissatisfaction, that the statute mentioned in the next follow-

ing paragraph was not long afterwards passed in order to

remove all doubt.

statute in

relief of

posthumous

children.

The statute commonly cited as 10 & 11 Will. 3, c. 16, but in

the Statutes Revised, vol. 2, p. 85, given as 10 Will. 3, c. 20,

enacts, in effect, that where any estate then already was or

should thereafter, by any marriage or other settlement, be

limited in remainder, either in favour of the first or other son

or sons of the body of any person lawfully begotten, or in

favour of a daughter or daughters lawfully begotten, with any

remainder over, then any child lawfully begotten, but posthu-

mously born, should, by virtue of such settlement, take such

estate in the same manner as if such child had been born in

the father's lifetime.

In lleeve v. Long, the limitations occurred in a will, and

this fact may^ have been relied upon by the House of Lords as

affording ground for a distinction. It is said that the language

of the above-cited statute, which seems to point towards settle-

ments effected by deed, was due to their reluctance to admit

into it anything which might seem to throw doubt upon their

decision in Reeve v. Long. (Butl. n. 3 on Co. Litt. 298 a.)

• In old marriage settlements of the strict type, before the statute of Will. 3

referred to in the next following paragraph, a limitation was inserted to the

(intended) wife enceinte at the death of the husband, and her assigns, until the

birth of one or more {wsthumous sons. (Booth's Opinion, datel 1761, printed at

end of Prcst. Sbep. T., p. 529.)

CONTINGENT REMAINDERS. 141

An abortive attempt to remedy the hardship frequently 7 & 8 Vict. c.

wrought by the destruction of contingent remainders through ^^' ^' ^'

the natural expiration of the precedent estate pending the

contingency, was made by the statute 7 & 8 Vict. c. 76, s. 8.

This section was repealed, as from its commencement and

taking effect, by 8 & 9 Vict. c. 106, s. 1.

The statute 40 & 41 Vict. c. 33, enacts, that every contin- statutory

gent remainder created by any instrument executed after 2nd ceH;ahi'^° °

August, 1877, or by any will or codicil revived or republished contingent

'='''•'•' ^ ^ remainders.

by any will or codicil executed after that date, in tenements or

hereditaments of any tenure, which would have been valid as

a springing or shifting use, or executory devise, or other

limitation, had it not had a sufficient estate to support it as a

contingent remainder, shall, in the event of the particular

estate determining before the contingent remainder vests, be

capable of taking effect in all respects as if the contingent

remainder had originally been created as a springing or shifting

use, or executory devise, or other executory limitation.

This Act is generally believed to have been passed in con-

sequence of the observations made by the judges in the case

of Cimliffe v. Brancker, 3 Ch. D. 393.\*

It will be seen that the common law doctrine of the destruc- what

tion of contingent remainders by the natural expiration of the remainders

precedent estate pending the contingency, is by no means j^aWe to

obsolete ; since it still applies (1) to all contingent remainders destruction,

created by any deed executed on or before 2nd August, 1877,

■or by any will executed before that date and not subsequently

revived or republished ; and (2) to all contingent remainders,

whenever created, which do not conform to the rules regulating

the creation of executory interests.

Legal contingent remainders which are protected from Immunity

destruction by 40 & 41 Vict. c. 33, must therefore conform to tion implies \*

the rule against perpetuities. And this doctrine applies also ruie^aeainsr

to contingent remainders which are protected from destruction perpetuities.

by reason that the legal estate is outstanding in trustees or

mortgagees. {Abbiss v. Burney, 17 Ch. D. 211.) As to the

\* [See Third Report or Real Property Comm., p. 25.]

142 ON ESTATES IN GENERAL.

immunity from destruction of the last-mentioned contingent

remainders, see p. 122, supra.

Trwstecs to preserve Contingent liemainders.

Their origin The liability of contingent remainders to be destroyed by

ami nature. . , .i . •

the premature determination of the precedent estate, — that is,

by its determination otherwise than by natural expiration, —

led to the invention of trustees to preserve contingent remainders.

An estate was interposed between the precedent estate and

the contingent remainders, intended to take effect in case the

precedent estate should be determined by any means in the

lifetime of the tenant thereof, and in such case to subsist in

possession during the continuance of the residue of his life.

These limitations were introduced into practice in the seven-

teenth century. The common form of them, as stated by

Butler (Fearne, Cont. Eem. 6, note d) is to the following

effect : —

, After the determination of the precedent estate, by forfeiture

or otherwise, in the lifetime of the tenant, To the use

of the trustees and their heirs during the life of such

tenant, in trust for him and to preserve the contingent

remainders.

The precedent estate contemplated by these limitations is in

general an estate for life, though it might by possibility be an

estate tail ; because the immediate object of the limitation was

. in general the preservation of the contingent remainders im-

mediately following the limitation ; and if an estate tail had

preceded these, no precautions could prevent the destruction

of any subsequent estates, whether contingent or vested, at

the will of the tenant in tail in possession, if of full age.\* It

was not necessary that the limitation should expressly refer

\* But it was quite proper, before 8 & 9 Vict. c. 106, to insert trustees to

preserve contingent remainders after an estate tail, in cases where further con-

tingent remainders were limited after the estate tail ; because an estate tail does

not necessarily endure for longer than the life of the donee, seeing that he may

die without issue ; and as he might also die without having barred the entail,

there might possibly be the same practical need for the trustees, but the

probability was of course much less.

CONTINGENT REMAINDERS. 143

to the possibility of the destruction of the estate of the tenant

for life, by forfeiture or otherwise, in his lifetime ; and if the

limitation was merely in the form of a remainder to the

trustees and their heirs during the life of the precedent tenant,

the possibility that such a premature determination might

occur was sufficient, without express reference to it. This

was, in fact, the actual form of the limitation in the great case

of Dormer v. Parkhurst, hereinafter cited. In that case,

moreover, the precedent estate was not an estate for life, but

a term of years determinable upon the dropping of a life :

a further development of the device for preserving con-

tingent remainders, upon which some remarks will be made

shortly.

The following form is given in Davidson, 4 Prec. Conv.

2nd ed. 333, as being suitable for insertion in a will, in any

case in which, notwithstanding the provisions of 8 & 9 Vict,

c. 106, s. 8, the conveyancer might wish to insert such a

limitation : —

From and after the determination of that estate by any

means in his lifetime. To the use of [trustees] and their

heirs during the life of the tenant for life whose estate

shall so determine. In trust for him and by the usual

ways and means to preserve the contingent remainders

expectant or dependent thereon.

Upon the construction of such limitations, when the restric- Limitations

tion, "during the life of the tenant for life," was omitted, so and theh" ^ ^^'^

that the limitation was to the trustees and their heirs simply, ^^'^^ simply,

thus assuming the form of a limitation in fee simple instead

of a limitation pur autre vie, see Lewis v. Rees, 3 Kay & J. 132,

and the cases there cited. Such an omission of course could

occur only through carelessness, not by design.\*

Under such a limitation as the foregoing, the trustees would How these

evidently take an estate pur autre vie ; and the question, preserved the

whether such estate is vested or contingent, is the only question remamders.

\* The result seems to be, that in general the trustees would take a fee simple,

and that all the subsequent limitations would be equitable only.

144

ON ESTATES IN GENERAL.

that could arise. Then, if it be granted that this estate is a

vested estate, it will be seen that tlie tenant of the precedent

estate could not, by the methods above enumerated, destroy

the contingent remainders (because they were not the imme-

diate remainders upon his own estate) without the concurrence

of the trustees ; and the courts of equity treated such con-

currence on the part of the trustees as being generally a

breach of trust. (Fearne, Cont. Rem. 326 — 328.) By conse-

quence, trustees so concurring were personally liable for cny

damage which might accrue from the breach ; and any person

taking the lands, either as a volunteer, or as a purchaser for

value with notice of the breach, was himself bound by the

trust. (See Manscll v. Mansell, 2 P. Wms. 678, at p. 681.)

But under special circumstances, the court would permit, or

even order, the trustees to concur in destroying contingent

remainders. {Basset v. Clapham, 1 P. Wms. 6th ed. 358, and

cases there cited in notes.)

The estate of

the trustees

was a vested

estate.

The question whether the trustees took a vested estate, was

obviously, before 8 & 9 Vict. c. 106, a question of the utmost

practical importance ; because, if they had taken a contingent

estate, their estate would have been nothing but one more

contingent remainder, which would have been equally liable to

destruction with all the rest. This question has led to some

difference of opinion. But it was for all practical purposes

set at rest for ever by the decision of the House of Lords in

the case of Smith d. Dormer v. Packhurst or Parkhiirst,

commonly cited as Dormer v. Parkhurst, or Dormer v. Fortescue,

3 Atk. 135, 6 Bro. P. C. 351, Willes, 327, 18 Vin. Abr. 413,

pi. 8, in which case the estate was decided to be a vested

remainder. Fearne approved of this decision ; Butler expresses

no dissatisfaction with it ; but Mr. Josiah Smith plainly inti-

mates his opinion, that it was directly opposed to the principles

of the law, and that it can be justified only by the pressing

necessity not to overturn all the settlements then in existence.

(Smith on Executory Interests, pp. 116 et seq.)

Review of the It is conceived that, in this controversy, each side is partly

controversy. ^^ ^^^e right, and partly in the wrong. The truth seems to be,

CONTINGENT REMAINDERS. 145

that the definition of the first class of contingent remainders,

as given by Fearne, is somewhat incomplete ; and that, by

- reason of this incompleteness, it contains within its terms the

estate of trustees to preserve contingent remainders ; and that

in this sense, and to this extent, those who have contended

that the estate in question is a contingent remainder, are

right ; but that the definition admits of being rectified so as

to exclude this estate, without at the same time excluding any

other estate which it was designed to include ; and that, when

examined by the proper tests for distinguishing vested estates

in general from contingent estates in general, the estate of the

trustees seems much more properly to come within the con-

ception of a vested estate than of a contingent estate. This

is equivalent to saying that the decision in Dormer v. Park-

hurst seems to be substantially right in principle.

In the definition given of the first class of contingent re-

mainders (at p. 126, supra) the words between inverted commas

are taken literally from Fearne, and the explanatory clause

which follows them is adapted from the words of Butler, in a

note upon the passage. The estate of the trustees does seem

to come within the words both of Fearne and of Butler, if they

are taken strictly. It is the fact that in this case " the re-

mainder depends entirely upon a contingent determination of

the preceding estate itself " ; and that, while the precedent

estate is capable of being determined in several ways, the estate

of the trustees is so limited as to take effect only in case the

determination shall take place in some of those ways. But the

examples given by Fearne show his meaning. In those

examples the contingent remainder is capable of being destroyed,

if the precedent estate should determine in what may be called

the wrong way; and this quality of contingent remainders

supplied the principal motive which induced him to write his

treatise. This distinguishing characteristic is not possessed by

the estate of the trustees, because, if the precedent estate should

determine in the wrong way, that is, by the death of the tenant

for life, the estate of the trustees will not be destroyed, but will

simultaneously determine by its own natural expiration.

Nothing is more evident than that Fearne's treatise was not

written to illustrate the nature of estates of this description ;

C.R.P. L

146

ON ESTATES IN GENERAL.

and if by inadvertence he has included any of them in his

definition, the most reasonable course seems to be, to amend

the definition so as to exclude these extraneous specimens, and

not to take advantage of the words of the definition in order to

include within it something to which it was not meant to

apply.

The estate of the trustees is such that it either must actually

take effect in possession or else must determine by natural

expiration eo instanti with the determination of the precedent

estate. But no words could be more appropriate to describe a

vested estate. Every vested estate which is capable of a natural

expiration, may by possibility fail to become an estate in pos-

session, by reason of its determination during the continuance

of, or €0 instanti with, the precedent estate. The peculiar

feature of contingent remainders, and the only feature which

makes it necessary to bestow upon them special consideration, is

their liability to fail to become estates in possession by reason

of something else than their own natural expiration.

Proposed

modification

of Fearne's

definition.

It accordingly seems to be expedient that the following pro-

viso should be added to the definition above given (p. 126) of

the first class of contingent remainders : — Provided always,

that the precedent estate he capable of deteiuwiation in at least

one nay, ivhicJi icill neither vest the remainder nor cause it to

determine by its oivn natural expiration.

Cases in

which the

first estate

In lieu of an estate for life to the person who was intended

to take the first beneficial estate, a term of years was sometimes

yeare\* \*\*^™ ^^ limited to him determinable upon the dropping of his own life,

followed by an estate to the trustees in the usual form to pre-

serve contingent remainders.\* This was the form of the limi-

\* This practice, which was formerly not uncommon, of limiting a term of

years determinable upon the dropping of his life, instead of an estate for life, to

the person who was intended to take the first beneficial estate in the settled

property, supplies the reason why an "estate for years determinable on the

dropping of a life or lives," is specified in the Fines and Recoveries Act, s, 22,

as qualifying a person to be protector of the settlement. Probably the practice

has now died out, and the limitation of an estate for life, either legal or equit-

able, is universal. But the Settled Land Act, 1882, s. 58, sub-s. (1), (iv.),

includes among the persons by whom the statutory powers of a tenant for life

may bp exercised, a " tenant for years determinable on life, not holding merely

CONTINGENT REMAINDERS. 147

tations of the settlement in the above cited case of Dormer v.

Parklmrst. In such cases the estate of the trustees, being

2mr autre vie, was of freehold ; and since it was a vested

estate, the actual seisin, during the continuance of the term

of years, was in the trustees. The object of the limita-

tion to the trustees was not, strictly speaking, to prevent the

tenant of the precedent estate from destroying the contingent

remainders, which he could not effectually have done, since he

had only a term of years ; but its object was, having first

deprived the tenant of the precedent estate of all power of

destruction, to provide a sufficient estate of freehold to support

the contingent remainders. In other words, the supporting

estate having been taken away from the tenant for life, by

turning him into a tenant for years, it became necessary to vest

the supporting estate in somebody else ; which was effected by

vesting it in the trustees. A tortious feoffment was the only

method by which the tenant of a precedent estate for years

could have attempted to affect the contingent remainders ; but

by this means he would have gained nothing, for the right of

entry of the trustees would have preserved the contingent

remainders until the trustees could revest their freehold by

making an actual entry upon the feoffee ; so that the tenant

of the precedent estate would have incurred a forfeiture to no

purpose.

It was suggested in the 2nd edition of Davidson's Precedents

in Conveyancing (vol. 3, p. 208, and see also vol. 2, p. 331,

note (J) that the word forfeiture in 8 & 9 Vict. c. 106, s. 8, is

not well adapted to include the case of a forfeiture incurred by

any act or default of the tenant for life which, instead of taking

place by mere operation of law, is effected by an express proviso

for cesser contained in the settlement ; as, for example, under

an ordinary " name and arms clause ;" and that in such cases

a limitation to trustees to preserve contingent remainders might

under a lease at a rent." This provision was very necessary ; because there is

no practical difference, so far as regards the enjoyment of the profits, between a

tenant for life without impeachment of waste, and a tenant for a long term of

years determinable upon the dropping of his own life without impeachment of

waste ; and therefore, if this provision had not been inserted, a means would

have existed of evading the intention of the Act.

L 2

148 ON ESTATES IK GENERAL.

prudently be inserted in the settlement, notwithstanding the

provisions of the last cited enactment. But no remainder

properly so called, can take effect upon the determination of a

precedent estate by a forfeiture in this sense of the word. {Vide

supra, p. 81.) It would therefore seem that the forfeitures above

referred to were such that the subsequent limitations need no

trustees to preserve contingent remainders, either by reason of

the statute, or else by reason of the intrinsic nature of the subse-

quent limitations themselves. The subsequent estates, if valid,

could take effect only as executory interests, which did not

require trustees to preserve them from destruction. In the 3rd

edition of the same work (vol. 3, p. 322) it is said that the prac-

tice of omitting such limitations had then (1873) become well

established ; though it was mentioned that writers of authority

recommended adherence to the old practice, with a view to the

interference of the trustees for checking waste on the part of the

tenant for life, if necessary, or to the convenience of their being

entrusted with the protectorship of the settlement in the event

of the extinguishment of the life estate. (See Lewin on Trusts,

eh. viii. s. 1, § 18, 8th ed. p. 121 ; ch. xvi. § 11, ibid. p. 383.)

The trustees above described are very much in the nature

of a device of conveyancers, designed to intercept the opera-

tion of a rule of law, and not intended, under ordinary

circumstances, to exercise any active function. They bear in

this respect a very close resemblance to the dower trustees in

the old-fashioned limitations of uses to bar dower. These were

designed, by the interposition of an estate which, by the rule

recognized in Dormer v. Parkhurst, was a vested estate of

freehold, but which generally conferred no positive privilege

or active duty, to prevent the merger of an estate for life in

the subsequently limited inlieritance. It is probable that

trustees to preserve contingent remainders such as those above

described, are the only trustees referred to under the phrase

" bare trustee " in the Fines and Recoveries Act, ss. 27, 31.

Another kind But Under Certain circumstances trustees to preserve contingent

of trustees to remainders were needed in a settlement, who differ in function

preserve '

contingent and require to be distinguished from the bare trustees above

remainders. , . . , ,

described. When contingent remainders were limited to the

CONTINGENT REMAINDERS. 149

sons, or other issue, of a living person, who did not himself

take a prior life estate, it was necessary to limit a prior estate

to trustees, during the life of such person, to preserve con-

tingent remainders, lest the prior estates should all determine

in the lifetime of the said person, before the birth of issue in

whom the contingent remainders might vest, whereby such

contingent remainders would have failed. Even if there were

issue of the said person living at the date of the settlement,

it would have been quite proper to insert trustees to preserve

contingent remainders ; because such issue might all have

died in the person's lifetime, and it would have been proper

to provide for the possibility of the birth of other issue subse-

quently to the determination of all the prior estates. The

difference in function between these trustees and the previously

described bare trustees is obvious : the function of the trustees

now being described was to guard against a destruction of

the contingent remainders, by reason of the natural expira-

tion of the precedent estate pending the contingency. The

present writer has met with an example of the insertion of

trustees of the lastly described kind, in a will, dated in 1880,

by which very extensive and valuable estates were settled. It

would therefore appear that some conveyancers are, or recently

were, unwilling to rely for this purpose upon the provisions of

40 & 41 Vict. c. 33.

The object of the insertion of a limitation to the dower Resemblance

trustee, in the uses to bar dower, according to the common of dower

practice before the Dower Act, 3 & 4 Will. 4, c. 105, is to effect \*^°stee8.

the formal interposition of a vested estate between a life estate

and a remainder of inheritance ; though in this case the

remainder was always a vested fee simple, not a contingent

remainder. This limitation therefore bears, in its general

design, a close resemblance to the limitation to trustees to

preserve contingent remainders ; and the form of limitation

in common use was identical with the form used to create

trustees to preserve contingent remainders.

There are some grounds for doubting whether, subsequently whether such

to the coming into operation of 8 & 9 Vict. c. 106, the limita- are novTvaiid.

tions now under discussion have any longer had any meaning,

150 ON ESTATES IN GENERAL.

and whether they are not therefore now void for absurdity, if

they follow upon an estate of freehold. So far as the preserva-

tion of contingent remainders is concerned, this question is

of no practical importance. So far as dower trustees are

concerned, it will remain a question of practical importance

as long as any husbands are in existence, whose wives are

still living, and who were married on or before 1st January,

1834, the date of the coming into operation of the Dower Act,

3 & 4 Will. 4, c. 105. To such husbands it is still necessary

to make the conveyance of a legal estate in fee simple under

the form of a conveyance to uses to bar dower, in order to

prevent the wife's dower from attaching. At the present day

the class must be a small one, rapidly tending towards

extinction.

The reasons for doubting the validity of the limitation are

as follows : — Forfeiture can no longer be incurred, either by

making a tortious feoffment, since 8 & 9 Vict. c. 106, s. 4,

by which the tortious operation of feoffments made after

1st October, 1845, is prevented ; or by levying a fine, or suffering

a common recovery, now that those assurances have been

abolished by the Fines and Eecoveries Act, s. 2 ; or hjjohiim/

the mise on the mere right, or otherwise compromising the title

of the remainderman in a real action, now that the only real

actions in which those offences could practically be committed

have been abolished by 3 & 4 Will. 4, c. 27, s. 36. Whether a

forfeiture by operation of law, as distinguished from the

operation of an express condition of forfeiture contained in

the settlement, can now be incurred by a tenant for life in

any way whatever, is now, to say the least, exceedingly

doubtful. With respect to surrender and merger, the aspect

of the question is curious. Taking merger to refer to cases

in which the next vested remainder of inheritance is conveyed

to the tenant for life, any merger of the life estate would, of

com-se, be impossible upon the hypothesis that the estate of

the trustees is an actually existing estate ; because, if the

estate exists, it is undoubtedly a vested estate ; and this, being

interposed between the estate for life and the remainder, would

make all such merger as that above supposed impossible, so

that the hypothesis which would make the estate of the

CONTINGENT REMAINDERS. 151

trustees a vested estate, also deprives the law of merger of all

meaning in relation to the question, and therefore (so far)

destroys the reasons for supposing that the estate is in fact a

vested estate. Similarly, with regard to surrender, the inter-

position of the estate of the trustees, if it exists, would

prevent a surrender to any remainderman whose interest is

subsequent to the contingent remainders. And a surrender

cannot be made by a tenant for his own life to a tenant pur

autre vie, so that no surrender to the trustees themselves is

possible, nor will an estate for a man's own life merge in an

estate pur autre vie. (8hep. T. 305 ; 3 Prest. Conv. 225.)

These objections are discussed with some minuteness in an

acute and learned note contained in the third edition of David-

son's Precedents, vol. 3, p. 323, note (n), in which the opinion

is expressed, that such limitations are still valid; but the

suggestion is made, that there can, at all events, be no question

as to their validity, when they follow upon a term of years

determinable with the life of the tenant for life, instead of

following upon an estate of freehold for his life. It does

not appear to have been thought necessary to adopt this

suggestion in practice.

X52

ON ESTATES IN GENERAL.

CHAPTER XIII.

THE RULE IN SHELLEY S CASE.

The title at the head of this chapter commonly refers to the

statement of the circumstances under which verbally distinct

limitations contained in the same instrument, one limitation

being to a given person, and the other being to his heirs,

either general or special, will not give any distinct estate to

the heir, but will give an estate of inheritance to the ancestor.

The statement of the cases under which such limitations to

the heirs take effect, not in the heirs themselves, but in the

ancestor whose heirs they are, is commonly styled the Rule in

Shelley's Case, from the reported case of that name. (1 Rep.

93, Serj. Moore's Rep. 136, 1 Anders. 69, Dy. 373 b, pi. 15,

Jenk. cent. 6, c. 40.) It will be convenient, before discussing

that case, to draw some general outline of the rule of law in

question.

The word ^^ the limitations now under consideration, there occurs

these hmita- ^^"^^7^ ^n estate of freehold limited to a specified person, and

tions a word a subsequent limitation, whether immediate or remote, ex-

of limitation, , i . 1.11.

not a word of pressed to be made to the heirs, or to some class of the heirs,

pure ase. ^j ^j^^ Same person. The prior estate and the subsequent

limitation must both arise under or by virtue of the same

instrument. Grammatically, the construction of the second

limitation might be, to give a remainder by purchase to the

specified heirs. And since the person whose heirs they are,

or rather, are to be, is living at the date of the limitation, such

a remainder, if taken by the heirs as purchasers, would be

a contingent remainder of Fearne's fourth class, being a

limitation in remainder to a person not yet ascertained

or not yet in being. {Vide supra, p. 131.) But the law

puts upon the limitation to the heirs a different construc-

tion, not giving to them any estate at all by purchase, but

taking account of the mention of the heirs only for the

THE RULE IN SHELLEy's CASE. 153

purpose of giving a corresponding estate to the specified

ancestor. Therefore, it is commonly said, that in limitations

coming within the Kule in Shelley's Case, the word heirs is

not a word of purchase but a word of limitation.

We have therefore the following essential features in these

limitations : — (1) a prior estate of freehold ; (2) a subsequent

limitation, contained in the same instrument, expressed to be

to the heirs, whether general or special, of the same person.

In all such cases the general rule is, that no estate is taken by

the heirs; but an estate of inheritance, corresponding in

quantum to the class of heirs specified, is taken by the specified

ancestor. Thus, the mention of the heirs general will give him

a fee simple ; the mention of the heirs of his body will give

him an estate in tail general ; the mention of the heirs male

of his body will give him an estate in tail male; and the

mention of the heirs female of his body will give him an estate

in tail female.

If the subsequent limitation to the heirs follows immedi- The ancestor

ately, without the interposition of any mesne estate, upon ^fhe/one

the prior freehold, the freehold is generally merged in the ^t^te, or two

inheritance, and the specified person generally takes an estate

of inheritance in possession. If any estate sufficient to prevent

merger is interposed, or if, by reason of any other circum-

stance, merger is prevented from taking place, he takes two

distinct estates, a freehold in possession and an inheritance in

remainder.

The last preceding paragraph assumes that the prior limita-

tion of the freehold is a limitation of a freehold in possession.

If the prior freehold is itself a freehold in remainder, the

merger of it in the inheritance will of course not give rise

to an inheritance in possession, but to an inheritance in

remainder, which occupies the place, in the order of limitation,

which would have been occupied by the freehold if it had not

been merged.

With respect to merger, it must be borne in mind that,

when two consecutive estates are created eo instanti and by the

same instrument, merger will not always ensue. A limitation

154 ON ESTATES IN GENERAL.

to two men and the heirs of their fewo bodies begotten, gives

them a joint estate for their lives, with benefit of survivorship

to the suFvivor, and to each an estate tail in a moiety ; and

there is no merger of the estate for life in the estates tail.

(Litt. sect. 283.) And when merger does take place its effect

may be different from the effect of merger between two estates

which at the time of their creation were not consecutive ; for

under such circumstances, the merged estates are, as the

phrase goes, liable to open for the purpose of letting in

contingent remainders. (Vide supra, p. 137.)

Shelley's Case As Shelley's Case is one of the most important in the books,

tUscusscd. and as its true bearing does not seem to be a matter of

universal knowledge, some account of it may be not unaccept-

able to the reader. A consideration of the subjoined pedigree

will materially contribute to a right understanding of the case.

It is stated by Lord Coke that the case was in ejectione firvue ;

and according to more modern usage it would be styled

Nicholas Wolfe d. Richard Shelley v. Henry Shelley.

EDWARD SHELLEY M. JOAN.

Tenants in special tail general, with remainder to

Edward Shelley in fee simple. The wife died

in the husband's lifetime, thus leaving him sole

tenant in tail.

!

I I

HENRY SHELLEY. RICHARD SHELLEY.

Who died in his father's lifetime Under whom the plain-

leaving a daughter, Mary, living, tiff claimetl by demise,

and a son, Henry, the younger,

eti ventre ja mere.

I I

MARY SHELLEY. HENRY SHELLEY,

'The defendant.

Edward Shelley and his wife Joan were tenants in special

tail general, that is, to them and the heirs of their two bodies

begotten, with remainder to Edward Shelley in fee simple, of

the manor of Barhamwick, in the county of Sussex, of which

the lands in question were parcel. The wife died in the hus-

band's lifetime, thus leaving him sole tenant in tail. Henry

Shelley, the elder, afterwards died in his father's lifetime,

leaving a daughter, Mary Shelley, living, and leaving his wife

THE RULE IN SHELLEY's CASE. 155

enceinte of a posthumous child, afterwards Henry Shelley, the Shelley's

younger, the defendant in the case. Before the birth of the

posthumous child, Edward Shelley, being sole tenant in tail,

suffered a common recovery of the said manor, pursuant to a

covenant in that behalf, in which he had covenanted that the

said recovery should be to the use of himself for the term of his

life without impeachment of waste ; and after his decease, to

the use of certain persons for twenty -four years ; and after the

said twenty-four years ended, then to the use of the heirs male

of the body of himself lauftdly begotten, and of the heirs male of

the body of such heirs male lawfully begotten; with remainder

over.

This recovery was actually suffered, and judgment therein

was given, and a writ of habere facias seisinam awarded for the

purpose of executing the seisin according to the recovery, upon

the 9th October, the day on which Edward Shelley died ; and

these proceedings took place some hours subsequently to his

death, which occurred between the hours of five and six in the

morning. On the 19th October the writ was executed ; and on

the 4th December the posthumous child was born.

The first question which arises upon this statement of the

facts is, obviously, the question, whether the recovery, having

been executed as aforesaid after the death of the recoveree, was

valid. It is convenient to state, at the outset, that this question

was decided in the affirmative.

The distinction between the capacity of a posthumous child

to take by descent, and (according to the better opinion, which

had not then been questioned) his incapacity to take by purchase

has been above referred to. (Vide supra, p. 139.) It would

seem (as the present writer understands the case) that Richard

Shelley, the uncle, conceiving that the limitation to the use of

the heirs male of Edward Shelley was a limitation to the heir

male by purchase in tail male, and that his posthumous nephew

was disqualified to take by purchase, by reason that he was en

ventre sa mere at the time when the limitation became vested,

assumed himself to be tenant in tail male of the manor. He

accordingly entered, and made a lease of the lands in question,

being parcel of the manor, to Nicholas Wolfe, upon whom

Henry Shelley, the nephew, afterwards entered. Thereupon

156 ON ESTATES IN GENERAL.

Shelley's Nicholas Wolfe brought the present action against Henry

Shelley, the nephew ; and at the assizes for the county of

Sussex a special verdict was returned, upon which the matter

of law was afterwards argued in the Court of King's Bench.

The case being very important, both from the nicety of the

points of law involved in it and from the magnitude of the

interests at stake, it attracted much attention and was argued

at great length. Before the Court of King's Bench had

arrived at any decision, Queen Elizabeth, with a view to pre-

vent, if possible, the ruin of both parties through protracted

litigation, directed the Lord Chancellor, Sir Thomas Bromley,

to assemble all the judges in conference, that they might come

to some resolution. Several meetings of the judges were

accordingly held, and afterwards, in accordance with their

almost unanimous opinion, judgment was given in the Court

of King's Bench in favour of the defendant, Henry Shelley,

the posthumous child.

The points principally debated are stated by Lord Coke to

have been four. Of these, the first question related to the

validity of the recovery, which, as above-mentioned, was

decided in the affirmative by the opinion of " the better and

greater part of all the justices and barons." (1 Rep. 106 a.)

The second question arose upon the fact that, at the time of

the recovery suJBfered, there was in existence a lease for years

of the manor. The question here was, whether, under such

circumstances, a recovery is executed by the judgment of

recovery, before execution thereof by the writ of habere facias.

The contention seems to have been, that, just as the heir, if

he succeeds by descent to the reversion upon a term of years,

is actually seised without entry, because the possession of the

termor is adjudged in law to be the possession of the rever-

sioner, so the recoveror, when the subject of the recovery is

the reversion upon a term of years, might be actually seised

by virtue of the judgment without any need for a writ of

execution. This contention was unanimously overruled.

(1 Eep. 106 b.) It is not material to the present purpose ;

because it was held that the judgment was good, seeing that

the law takes no account of fractions of a day, so that it was

sufficient if the tenant in tail had been alive at any time on

THE RULE IN SHELLEy's CASE. 157

the day of the judgment ; and the judgment related back to Shelley's

the date of the return to the writ, and the execution related

back to the judgment; and therefore there was no need to

resort to this contention, in order to support the recovery.

The third and fourth questions, according to Lord Coke, were

as follows : —

3. If tenant in tail have issue two sons, and the elder dies The third

in the lifetime of his father, leaving his wife prirement ^^\*^'" '

enseint with a son, and then tenant in tail sufifers a

common recovery to the use of himself for term of his

life, and after his death to the use of A. and C. for

twentj'-four years, and after to the use of the heirs

males of his body lawfully begotten, and of the heirs

males of the body of such heirs males lawfully begotten,

and presently after judgment an habere facias seisinam

is awarded, and before the execution, that is to say,

between five and six in the morning of the same day in

which the recovery was suffered, tenant in tail dies, and

after his death, and before the birth of the son of the

elder son, the recovery is executed, by force whereof

Kichard, the uncle, enters, and after the son of the

elder son is born, if his [the posthumous son's] entry

upon the uncle be lawful or not.

4. If the uncle in this case may take as a purchaser, for as The fourth

much as the elder son had a daughter which was heir

genej-'al and right heir of Edward Shelley, at the time

of the execution of the recovery.

It will be observed that the third question merely states the

whole of the facts, and then asks which party was in the right.

If this can be regarded as the " statement of a point " in the

case, such statements would present little difficulty ; and it is

manifest, that every case can contain only one such point as

this. The reader will notice, without surprise, that this point

is styled " the great doubt of the case." (1 Eep. 94 b.)

It will be convenient first to dispose of the fourth point. The fourth

upon which no opinion seems to have been expressed by the cussed.

158 ON ESTATES IN GENERAL.

Shelley's judges. This point refers to a distinction laid down by Lord

Coke, with respect to the interpretation of the word " heir " ;

firstly, as a word of limitation, and secondly, as a word of pur-

chase. According to this rule, in limitations to special heirs,

where they do not take by purchase, but only supply the

measure of an estate tail to the ancestor, and therefore take, if

at all, by descent, the special heir may inherit, although he is

not the heir general. But in limitations to heirs as pur-

chasers, no heir can take by purchase except the heir general ;

and therefore the special heir cannot take as purchaser, itnlesg

he aluo unites in himself the character of heir general. In the

words of Lord Coke: — "When a man giveth lands to a man

and the heires females of his body, and [the donee] dyeth,

having issue a son and a daughter, the daughter shall inherit.

.... But in case of a imrchase it is otheruise : for if A. have

issue a sonne and a daughter, and a lease for life be made, the

remainder to the heires females of the bodie of A. [and] A.

dieth [leaving a son and a daughter] the heire female can take

nothing, because she is not heire ; foi' she must be both heire and

heire female, which she is not, because the brother is heire."

(Co. Litt. 24 b.) This distinction was a well recognized rule

of law in Lord Coke's day ; but it has been shaken by some

more recent decisions. (See ir/7/.s' v. Palmer, 2 W. Bl. G87, 5

Burr. 2615 ; Goodtitle v. Bnrtenshaw, Fearne, Cont. Rem.

App. I.) In Shelley's Case, the heir general of Edward

Shelley, at the time of his death, was Mary Shelley, the

daughter of Eichard Shelley's elder brother ; so that, by the

above-stated rule of law, Richard Shelley, though the heir

male of Edward Shelley, was incapable of taking under a

limitation to the heirs male as purchasers, since he did not

also unite in himself the character of heir general. This con-

tention would have been fatal to Richard Shelley's claim, who

was constrained to claim by purchase ; since, if the estate tail

was executed in Edward Shelley, so that Richard could claim

only by descent, the subsequent birth of the posthumous son

of his elder brother would have defeated his claim.

It is unnecessary further to consider this objection against

the plaintiff's claim ; because, in the view taken by the judges

of the third point, there was no need to come to any decision

THE RULE IN SHBLLEy's CASE. 159

upon the fourth. TiieLord Chancellor, and all the judges but Shelley's

one, held that under the rule of law named after the present

case, the estate tail was executed in Edward Shelley, and con-

sequently that Richard could take, if at all, only by descent ;

and that the posthumously born nephew had the prior right.

An attentive consideration of the arguments and judgment Two relevant

seems to show, that the decision went upon, and clearly esta- decided in

blished, these two distinct propositions, in relation to the rule ^^^ ^^^'

now under consideration : —

1. When the ancestor by any assurance takes an estate of

freehold, and by the same assurance an estate is limited,

either mediately or immediately, to his heirs in fee or

in tail, always in such cases tlie heirs are words of

limitation, and not of purchase. (1 Rep. 104 a.)

2. The further addition of words of limitation to "the

heirs," makes no difference : provided that the further

limitation is to heirs of the same quality ; that is to

say, heirs general may be added to heirs general,

heirs male to heirs male, and heirs female to heirs

female.

The plaintiff's counsel began by admitting that the recovery. The argu-

after the death of the recoveree, could be executed as against ^aintiff^

the issue in tail ; but (hey took the distinction, that when so

executed, it operated only as from the time of the execution ;

whence they inferred, that no use, and therefore no estate,

could have been executed in Edward Shelley; and that his

heirs male must necessarily take, under the limitation to them,

by purchase. This last point was afterwards decided against

them ; upon the ground that the execution, when perfected,

related back to the time when the recovery was suffered.

(1 Rep. 106 b.) They proceeded to argue that, even though the

recovery had been executed in the life of Edward Shelley, Richard

must nevertheless have taken by purchase; for that the rule now

under consideration did not apply to the above-stated limitation.

\*' For they said; that the manner of the limitation of the

uses is to be observed in this case, which is, first to Edward

Shelley for the term of his life, and after his death to the use

160

ON ESTATES IN GENERAL.

Shelley's

case.

of others for the term of twenty-four years, and after the

twenty-four years ended, then to the use of the heirs males of

the body of the said Edward Shelley lawfully begotten, and of

the heirs males of the body of the said heirs males lawfully

begotten ; in which case they said, that if the heirs males of the

body of Edward Shelley should he words of limitation , then the

subsequent words, viz., of the heirs males of the body of the

said heirs males lawfully begotten, nould he void : for words of

limitation cannot be added and joined to words of limitation,

but to words of purchase." (1 Rep. 95 a, b.)

Tlie argu-

ment for the

defendant.

The defendant's counsel began by arguing that the recovery

was altogether void, for that execution could not be sued

against the issue in tail after the death of the recoveree.

(1 Rep. 96 a.) It will be observed that the defendant, Henry

Shelley the younger, being both heir general and heir male

to Edward Shelley, had a double title ; and was equally

entitled to succeed, whether the court held the recovery to

be void, or whether they held that an estate in tail male was

vested by the recovery in Edward Shelley. This first point,

as to the validity of the recovery, which they contended to

be invalid, was decided against them, as above mentioned.

We may omit the argument on the second point, which has

no connection with the Rule in Shelley's Case, and proceed

at once to the part of the argument upon the third point,

which bears immediately upon that rule, and especially upon

the above-cited argument of the plaintiff's counsel. "And as

to what hath been objected, that, forasmuch as the limitation

was to the heirs males of the body of Edward Shelley, and of

the heirs males of the body of the heirs males lawfully begotten,

that the heirs males of the body of Edward Shelley should

be purchasers, for otherwise the subsequent words would be

void; the defendant's counsel answered. That it is a rule in

law, when the ancestor by any gift or conveyance takes an estate

of freehold, and in the same gift or conveyance an estate is

limited, either mediately or immediately, to his heirs in fee or

in tail ; that always in such cases (the heirs) are words of

limitation of the estate, and not words of purchase And,

if it should be admitted, that in regard of the said subsequent

THE RULE m Shelley's case. 161

words, the right heirs males should have by purchase to them Shelley's

and the heirs males of their bodies, then a violence would

be offered as well to the words as to the meaning of the party ;

for if the heir male of the body of Edward Shelley should

take as purchaser, then all the other issue males of the body

of Edward Shelley would be excluded to take anything by

the limitation .... for by that means the plural number

will be reduced to the singular number, that is to say, to

one heir male of the body of Edward Shelley only." (1 Rep,

104 a, b.)

It is to be regretted that the third point, " the great doubt The judg-

in the case," is stated in such wide terms ; because the reader ™

gathers few details from the summary information " That upon

the third question the law was for the defendant, and therefore

the defendant's entry upon the uncle was lawful." (1 Rep.

106 a.) This defect is partly supplied by the statement of

reasons given in the King's Bench by the Lord Chief Justice,

Sir Christopher Wray, at the request of the counsel on both

sides. He gave the following reasons as being the chief

grounds for holding, upon the third point, that the uncle could

have no claim except in the nature of a descent : — " First,

because the original act, viz., the recovery, out of which all the

uses and estates had their essence, was had in the life of Edward

Shelley, to ivhich the execution after had a retrospect. Secondly,

because the use and possession might have vested in Edward

Shelley, if execution had been sued in his life. Thirdly, the

recoverors by their entry, nor the sheriff by doing of execution,

could not make whom they pleased inherit. Fourthly, because The rule is

the uncle claimed the use by force of the recovery, and of the downTD^th^e

indentures, hy words of limitation and not of purchase. These Ji^gment.

were, as the Chief Justice said, the principal reasons of their

judgment." (1 Rep. 106 b.)

The writer leaves to the judgment of his readers the question,

whether the considerations above stated justify the conclusion

above drawn touching the true bearing and import of Shelley's

Case. He has been thus particular in stating the grounds of

this conclusion, in view of the following strange remark by

C.R.P. M

162 ON ESTATES IN GENERAL.

Butler : — " It is generally called the rule in Shelley's Case,

reported 1 Co. 93, and by contemporary reporters. In that

case, it was not a subject for the determination of the court, (W even

a subject of discussion ; but it is expressed in the arguments in

clear terms, as an acknowledged rule of law, and has thence

received its appellation." (Butl. note on Fearne, Cont. Rem.

28.) If Butler's reputation were less securely established, this

remark might almost suggest a suspicion, that the practice of

talking about Shelley's Case without having read it, is not

wholly confined to the present generation.\*

The Statement of the Rule.

The following propositions will, under all ordinary circum-

stances, suffice to determine the question of the rule's applica-

tion to a particular case. It is to be observed that a great

part of the subtleties with which this subject is congested,

arose out of ill- constructed limitations, which can be of no

service to the conveyancer, unless as warnings what to

avoid.

(1) The prior estate must be of freehold. (Co. Litt. 319 b ;

ibid. 376 b ; 1 Eep. 104 a ; Fearne, Cont. '^em. 28 ; 1

Brest. Est. 266 ; ibid. 309.) Such freehold is not neces-

sarily for the life of the ancestor, but may be determin-

able in his lifetime ; as an estate to a woman durante

viduitate. (Fearne, Cont. Eem. 30, v. 1.)

• It is possible that Butler may have been misled by a momentary confusion

between Shelley's Gate and Taltarum'g Case ; and that what was in bis mind was

the fact, that Taltarvm 's Case is often cited as the authority upon which depends

the validity of common recoveries, as assurances by tenant in tail, though it

contains no decision to any such purpose.

When a man like Butler makes a slip, he is likely to find others to follow him.

With the remark above cited from Butler, compare the following passage from

a later author : — " Although termed the rule in Shelley's Case, the rule is of

much greater antiquity than that case, where, it will be observed, 7w question

arose upon it for the decision of the court ; but it is only stated in the arguments,

but in such precise and clear terms, that it has derived its name from the case."

(Tudor, Lead. Cas. on R. P. 3rd ed. 599.) Fearne and Preston both treat

Shelley's Case as being an express decision in favour of the rule. (Fearne,

Cont, Rem. 181, 182 ; 1 Prest. Est. 347.)

THE RULE IN SHELLEY's CASE. 163

(2) The subsequent limitation may be either to the heirs

general or special. (Fearne, Cont. Rem. 28 ; 1 Prest.

Est. 263 — 266.) But the limitation to the heirs must

be to the heirs of the person who has the prior freehold ;

and not, for example, to the heirs to be begotten of the

bodies of that person and his wife, or possible wife ;

which is a limitation in special tail by purchase. (See

1 Scriv. Cop. 146.)

(3) Both estates must arise under the same instrument.

(Fearne, Cont. Eem. 71, v. 13 ; 1 Prest. Est. 309.)

(4) An estate taken by the ancestor by way of resulting use,

is, for this purpose, an estate arising under the same

instrument. (Fearne, Cont. Rem. 41, v. 8; 1 Prest.

Est. 309.) In such cases, the ancestor must himself

be the settlor.

(5) An estate limited under a subsequent exercise of a power

contained in the instrument, is, for this purpose, an

estate arising under the same instrument, (Fearne,

Cont. Rem. 74, v. 14 ; Venables v. Morris, 7 T. R. 342,

at p. 348.) But Preston questions this doctrine. (1

Prest. Est. 310.)

(6) The interposition of one or more intermediate estates

does not prevent the application of the rule. (1 Prest.

Est. 266, 267.) But, as above mentioned, accordingly

as such estates are, or are not, interposed, the inheritance

executed in the ancestor is remote or immediate. (Vide

supra, p. 153.)

(7) The subsequent limitation may be contingent. In such

a case it seems that, if the contingency upon which the

vesting depends should happen in the ancestor's lifetime,

the remainder will thereupon vest in him ; and that,

pending the contingency, he has a contingent remainder.

(Fearne, Cont. Rem. 34, v. 2 ; 1 Prest. Est. 267 ; ibid.

318, 319.)

M 2

164 ON ESTATES IN GENERAL.

(8) In a devise, the word issue has, for this purpose, the

same effect as the word heirs ; unless it appears to

have been intended as a designation of particular

individuals. (Smith on Executory Interests, p. 248,

Chapter XIII. ; where the learning on this point, which

opens an obvious door to doubt and confusion, is ably

collected.)

The reasoning in the case of Bowen v. Lewis, 9 App.

Cas. 890, is almost as obscure as the language of the

will to which it refers. It might be taken to mean

that under a devise to T. during his life, and after his

decease to his legitimate child or children, T. takes an

estate tail by virtue of the Rule in Shelley's Case,

because child or children may mean issue generally,

and issue may in a will be equivalent to heirs of the

body. But the case seems rather to have been decided

upon the ground, that T. took an estate tail by implica-

tion, by reason of a subsequent gift over in the event

of his death without issue, the testator having died

before the coming into operation of the Wills Act.

These two possible grounds of the decision are not very

clearly discriminated.

(9) The further addition to the word heirs, or heirs of the

body, of words of limitation to their heirs, or heirs of the

body, does not prevent the application of the rule, if the

latter heirs are of the same description as the former

heirs. {Shelley's Case, 1 Eep. 93; Fearne, Cont.

Rem. 181, v. 26 ; 1 Prest. Est. 347.) Even if the

latter heirs are not identical with the former heirs,

the rule seems to apply, unless there is a positive

incongruity between them. (Fearne, Cont. Rem. 183,

184.) Thus, the rule will apply where the first

limitation is to the heirs male of the body, if the

second is to the heirs general of the body ; but not (it

would seem) if the second limitation is to the heirs

female of the body.

If the word heir is in the singular, and words of

limitation are added, the rule does not apply, and the

THE RULE IN SHELLEY\*S CASE. 165

heir takes by purchase.\* But in a will the word heir in

the singular, without words of limitation, will be equiva-

lent to the use of the word heirs, and the fee is executed

in the ancestor. (Fearne, Cont. Eem. 178, v. 25.)

(10) The rule applies to equitable as well as to legal limita-

tions ; but the prior and the subsequent limitation must

both be of the same quality in this respect. (Fearne,

Cont. Rem. 52, v. 9 ; ibid. 57, v. 10 ; Venahles v. Morris,

7 T. R. 342.) It will make no difference if the prior

equitable limitation is to a feme coverte for her separate

use, unless the settlement contains some further indica-

tion of intention which is incompatible with the rule.

(Fearne, Cont. Eem. 56.)

Where the prior limitation is in form equitable, while

the subsequent limitation is in form legal, it has been

held that the rule will apply, if all the limitations are

made in fact equitable, by reason that the legal estate

in the fee happens to be outstanding. {Re White and

Hindu's Contract, 7 Ch. D. 201). But it may be doubted

"whether this case is not at variance with the decision of

Lord Cran worth in Coape v. Arnold, 4 De G. M. & G.

574. He seems to lay down the rule, that the limitations

must be such as are capable of being all translated into

corresponding legal estates by getting in the legal estate ;

and that if, on affecting the change, the limitations are

such that the prior and posterior estates will not both

become legal estates, the Eule in Shelley's Case does not

apply to them while they remain equitable. (See p. 587.)

This case was not cited in Be White and Hindle's

Contract.

(11) The rule applies to limitations of copyholds, as well as

to limitations of freeholds. (Fearne, Cont. Eem. 60,

V. 11.)

(12) The rule does not apply where the subsequent limita-

tion is an executory limitation. (Fearne, Cont. Eem.

276; 1 Prest. Est. 323).

\* [See Ecant v. Evans, (1892) 2 Ch. 173.]

166 OK ESTATES IN GENERAL.

In Re White and Ilindle's Contract, 7 Ch. D. 201, at

p. 203, Sir Richard Malins, V.-C, stated obiter, that he

" should be slow to admit " this proposition, if the ques-

tion should come before him. It is conceived that he

is not very likely to be followed in this doubt. The

coalescence of an estate which is executory with an

estate which is executed, is a mixture impossible to be

figured by a well-disciplined imagination. This is iden-

tical in principle with the reasoning upon which it is

held that an equitable limitation cannot coalesce with

a legal limitation. Moreover, the modern tendency of

the courts does not seem to lean towards unnecessarily

extending the scope of the rule.

(13) The rule does not apply to executory trusts, which do

not make a settlement but only give directions for the

making of a settlement at a future time, if the intention

is clear that the heirs should take by purchase ; and in

such cases the court will order the settlement to be made

according to the intention. In executory settlements

made in consideration of marriage, where a main part of

the intention is usually the protection of the issue from

the caprices or misfortunes of the parents, the intention

that heirs shall take as purchasers is presumed. {White

V. Thornhurgh, 2 Vern. 702 ; Trevor v. Trevor, 1 P. Wms.

622 ; Papillon v. Voice, 2 P. Wms. 471).

Origin of the The question as to the origin, or true grounds, of the Rule in

^^ ^' Shelley's Case, has given rise to much speculation, into which it

is not desirable to enter at length. Considering that, at the

time when the rule arose, tenure was the mainstay of our poli-

tical constitution, and that the preservation of the fruits of

tenure was notoriously a principal aim of the law, and that

settlements giving an estate for life to the ancestor with a

remainder to his heir, if they had been permitted to take effect

by way of remainder, would have enabled a family to enjoy all

the advantages of a descent, while evading the feudal burdens

by which a descent was accompanied : the opinion seems to be

more than plausible, that the true origin of the rule is to be

THE RUL'B.IN SHELLEy's CASE. 167

found in the policy of feudalism.\* (See 1 Presfc. Est. 295 —

309.

\* This is at all events the policy of the Statute of Marlebridge, 52 Hen. 3,

cap. 6, enacting that the lord should not lose his wardship by a feoffment made

in the tenant's lifetime to the tenant's heir, being within age ; and the language

of the statute shows that this and other like devices for evading feudal burdens

were then well known. This enactment was not merely levelled at covinous

feoffments, where the feoffor continued afterwards in receipt of the profits, but

extended to hondjide feoflfments to the heir's use, (Bacon, Uses, p. 25, ad i/rrt.)

[See Van Grutten v. Foxwell, (1897) A. C. 659, where the origin of the Rule was

discussed. The true view seems to be that the Rule was an inevitable result of

the doctrines of the ancient common law. At the time when the Rule was

established, contingent remainders were not recognized as lawful limitations ;

consequently it was impossible to give effect to a limitation to the heirs of a

person, unless they took by descent (Williams R. P., 3rd ed, 218, note) ; and

even if such a limitation had been legal it would have been impossible to give

literal effect to it, because this would have involved giving the heirs estates in

succession by purchase (see Goodeve, R. P. 5th ed. p. 224). The only way of

carrying out the intention of the settlor was to give the ancestor an estate of

inheritance. So far, therefore, from having been invented in order to defeat

the intention of settlors, the object of the Rule was benignant, namely to give

effect to the intention as far as possible.]

168 ON ESTATES IN GENERAL.

CHAPTER XIV.

EXECUTORY LIMITATIONS.

Their origin. FoR a long time previously to the Statute of Uses, 27 Hen. 8,

c. 10, while uses existed only in the shape of what are now

known as trusts, the Court of Chancery had been accustomed to

give effect to devises of the use of lands ; whereby for many

practical purposes, lands may be regarded as having been then

deviseable, although the common law (except by the special

custom of certain localities) permitted no devise of the legal

estate. When by the operation of the Statute of Uses, uses had

been converted into legal estates, this general privilege of devise

was lost ; and since the statute was expressly extended to uses

in being at the time of its enactment, this deprivation had, in a

certain sense, a retrospective operation. The power practically

to devise lands, by means of the creation of uses, would sub-

sequently have been recovered through that construction of the

statute which afterwards gave rise to the modern system of

trusts. But the loss of a privilege to which people had long

been accustomed was felt to be so great a hardship, that the

government found itself in a manner compelled, without waiting

for this indirect remedy, which was probably not at all foreseen,

to restore by express enactment, what it had, perhaps without

due foresight of the consequences, taken away. Within a few

years after the passing of the Statute of Uses, the Statutes of

Wills permitted the devise of all lands held in socage for a fee

simple, and of two equal third parts of lands held by knight-

service for a fee simple.\* Thus, within a short space of time

there were introduced into our legal system two separate

methods, both unknown to the common law, by which legal

estates in lands might be created and conveyed, t

\* It was probably due to a fear lest the language of 32 Hen. 8, c. 1, might

be held to extend to lands in tail, that it was expressly restricted to lands in fee

simple by 34 & 35 Hen. 8, c. 5. (As to these statutes, see p. 227, Infra.)

t Under customs to devise, some traces of executory devises are found prior

to the Statutes of WiUs. In Pelh v. Brown, Cro. Jac. 590, at p. 592, the court

EXECUTORY LIMITATIONS. 169

The language of the Statutes of Wills is exceedingly wide,

permitting devises to be made by the owner " at his free will

and pleasure" ; and there existed this reason for relaxing, in

respect to devises, the severity of the common law rules relating

to abeyance of the seisin, namely, that, in case the seisin was

not completely disposed of by the devise, there was nothing in

the theory of the law to compel the conclusion, that during any

unappropriated interval the seisin must be in abeyance. A

devise, upon becoming operative, necessarily followed upon the

death of the testator ; and therefore the seisin, during the un-

appropriated interval, might be suffered to descend upon his

heir-at-law, who would have taken the whole estate in the

absence of the devise. This view was ultimately adopted,

though not without opposition, and of course not immediately

upon the passing of the statutes. Some time was required

before such important changes in the theory and practice of

conveyancing could be first thought of, then thought out, then

generally accepted as plausible, and lastly adopted into the

common practice.

The remarks in the foregoing paragraph only suffice to

explain the emancipation of executory devises from the common

law rules relating to abeyance of the seisin; and this accounts for

only a part of the distinction between common law limitations

and executory limitations. The latter are untrammelled, not

only by the rules relating to abeyance of the seisin, but also by

the rule which makes it impossible at the common law to limit a

fee simple upon the determination, or in defeasance, of another

fee simple. ( Tk/c supra, p. 83.) The introduction of this second

element is explained by the operation of the Sjtatute of Uses.

Before the statute, when uses existed only as trusts, the Court

of Chancery, in prescribing rules for the limitation of uses, did

not confine them within either of the above-mentioned restric-

tions, which were applied by the common law courts to the

limitation of legal estates. The Court of Chancery did not

insist upon the analogy of the law being followed, either (1) as

refers to a devise of land to executors to sell, in case the heir should fail to pay

a given sum by a given day, as being what " hath always been allowed." But

the subject did not attain to much practical importance until after the Statutes

of Wills.

170 ON ESTATES IN GENERAL,

regards the impossibility of limiting a future interest, to take

effect after or in defeasance of a fee ; or (2) as regards the

necessity for guarding against abeyance of the freehold, which

had no application to uses before the Statute of Uses, because

the freehold was unaffected by the use, and therefore an abey-

ance of the use did not cause any abeyance of the freehold.

Limitations of uses were allowed which, if they had been limita-

tions of legal estates at the common law, would have violated

one or both of the above-mentioned rules. When the Statute

of Uses converted uses generally into legal estates, the question

arose, whether uses thus limited in contravention of the rules of

the common law should be allowed to take effect as legal estates

by virtue of the statute. The ultimate decision of the courts

was, after some hesitation, in favour of their validity. This

result, however, was not affected by permitting the freehold to

be placed in abeyance, but by recognising sundry hypotheses for

supposing it to be vested in some person or persons during the

unappropriated interval. In the case of wills the unappro-

priated seisin was held to descend during the interval to the

heir of the testator, and in the case of conveyances to uses it was

generally held to result to the grantor.

By this means executory limitations were introduced into the

law. It is possible that, if executory devises had stood alone,

they would never have acquired their freedom from the common

law rule forbidding the creation of a fee upon a fee ; and this

quality of them seems to be satisfactorily explained only by

analogy to executory limitations contained in a deed, and taking

effect under the Statute of Uses. But some doubt is thrown

upon this explanation, regarded in the light of a positive his-

torical fact, by the circumstance that limitations of a fee upon a

fee seem to have been permitted in executory devises, at least

as soon as, or even earlier than, in executory limitations made

by deed. In 1 Eq. Ca. Ab. 186, pi. 3, Lord Nottingham is said

to have stated, that the case of Hinde and Lyon, 3 Leon. 64,

which was decided in the nineteenth year of Elizabeth, was the

first case in which an executory devise over upon the defeasance

of a fee was held to be good. It may be doubted whether any

earlier example of a similar executory limitation contained in a

deed can be found in the books.

EXECUTORY LIMITATIONS. I7l

Whatever may be the historical connection, in these respects, Every execu-

.... tory limita-

betvveen executory devises and executory limitations contained tion of free-

in a deed, it is certain that the most marked characteristic of ,3 possible in

both species is their freedom from both of the common law ^ "^^^1%^^

restrictions above mentioned ; and that it has never been deed ; and

suggested that in either respect, so far as regards dealings

with the freehold and inheritance of lands, there is any

difference between executory devises and executory limita-

tions contained in a deed, in the sense that anything can be

done by the one which could not (by the use of appropriate

language) have been equally well done by the other.

But in respect to dealings with chattel interests, there is a Distinction as

wide and important distinction between executory devises and chattels real,

other executory limitations. There may be an executory devise

of a chattel real, or term of years, whereby the legal estate in ,

the term may be given to one for life, with a quasi-remainder

over to another person, which, when it becomes executed in

possession by the determination of the precedent life estate,

will carry with it the legal estate for the residue of the

term. {Matthew Manning's Case, 8 Eep. 94 ; Lampet's Case,

10 Rep. 46 ; Fearne, Cont. Eem. 401, iv.) Such a limitation

of the legal estate in a term is not possible in a deed ; because

such limitations in a deed can be effected only by the medium

of the Statute of Uses, and no use of a chattel interest in esse,

as distinguished from a chattel interest to be carved de novo

out of freehold, can be executed into legal estate by the statute.

Such a use of a chattel interest in esse, if declared in a deed,

not being executed by the statute, can take effect only as a use

apart from the statute ; that is to say, as a trust. Accordingly,

settlements of chattel interests, when effected by deed, are

necessarily effected by settling the trust of them.

Executory devises, or rather bequests, are even possible,

within certain limits, of personal chattels, so long as these are

not things quce ipso usu consumuntur. But such bequests lie

outside the scope of the present work.

And although it is possible to effect by deed every limitation Differences in

of freehold or inheritance which could be effected by devise, it betwle"n\*wiiis

does not follow that the construction of a limitation contained a°d ^^6\*^^, in

172

ON ESTATES IN GENERAL.

respect to

executory

interests.

in a will must always be identical with what would be the

construction of the same limitation if contained in a deed ;

and important distinctions exist between the two cases. In

the first place, the rule which requires proper words of limita-

tion to create a fee was, even before the Wills Act, applied

much less strictly to wills than to deeds, and it sometimes

happened that words which in a will would suffice to devise a

fee would not suffice in a deed to limit anything beyond an

estate of mere freehold. In the second place, the rule as to

the abeyance of the freehold was, as respects deeds, got over

by holding that during the unappropriated interval the use in

general resulted to the settlor ; and if by reason of special

circumstances there appeared to be an intention that the use

should not result, the courts held that it would not result

contrary to the intention, and came to the conclusion that in

such cases, by analogy to the common law governing the

limitation of estates, the abeyance of the use had the same

effect to destroy the limitations as an abeyance of the freehold

would have had at the common law. But in a will even

an express declaration by the testator would not have availed

to prevent the descent of the lands to his heir during any

unappropriated interval. {Fitch v. Weber, 6 Ha. 145 ; Ee

Cameron, Nixon v. Cameron, 26 Ch. D. 19.) Thus it might

possibly happen that in a deed a limitation by way of use

might be held to be void under the rule relating to abeyance

of the seisin, while it could never happen in a will that a

devise could be held to be void for the like reason. {Adams

V. Savage, 2 Salk. 679, Ld. Kaym. 854 ; Bawley v. Holland,

22 Vin. Abr. 189 = Uses, F. p. 11, 2 Eq. Ca. Abr. 753.)

Though these cases seem, upon principle, to be open to

adverse criticism,\* it is probable that they would now be

accepted for law.

General

definition.

As a deduction from the foregoing observations we arrive at

the following general definition : — An executory limitation is

a limitation of a future estate in lands, or of a future interest

in chattels, or chattels real, which would be invalid, if made in

\* " On a point in the Law of Executory Limitations." Law Quart. Rev. Vol. L,

p. 412. [Gray. Perp. §§ 59, GO.]

EXECUTORY LIMITATIONS. 178

an assurance at the common law, but which, so far as regards

the freehold and inheritance of lands, is valid either in a will

or a conveyance to uses, and, so far as regards chattels or

chattels real, is valid in a will or testament.

In the definition above given, it is essential that the limita- No remainder

tion, though valid in a will or conveyance to uses, shall not be cuU)iy.^'^'^"

such as would be valid in a conveyance at the common law.

In construing all instruments under which executory interests

may arise, whether wills or conveyances to uses, it is the settled

rule, that no limitation which is capable of taking effect at the

common law shall be construed to take effect as an executory

limitation. (Vide supra, p. 123.) In other words, since a

remainder is the only future estate which can take effect at

the common law, no estate shall be construed as an executory

interest which is capable of being construed as a remainder.

Two classes of executory limitations may therefore be dis- Two classes,

tinguished, corresponding to two respects in which they differ

from remainders at the common law : —

(1) Devises and limitations of uses whereby a precedent fee, i. Limita-

devised or limited by the same instrument, is followed upon a fee.

by subsequent limitations. The subsequent limitations

must be to arise upon the happening of a contingency.\*

They may either defeat the precedent fee upon the

happening of the contingency ; or, if the precedent fee

is a determinable fee, and is so limited as to deter-

mine upon the happening of the same contingency, and

this contingency is such that, if^ it happens at all, it

must happen within the time prescribed by the rule

against perpetuities, they may follow upon the regular

determination of the fee.

(2) Devises and limitations of uses, not less in quantum than 2. Limitations

a freehold, which are limited to take effect either upon In/tJuro!^

a contingency or after the expiration of a fixed period,

• Because it is impossible for a fee to be so limited as to be determinable at a

fi?ed period. (^Vide infra, ■p. 261.')

174

ON ESTATES IN GENERAL.

and which are such that, if they had been legal limita-

tions arising at the common law, they would have been

void as tending to create a freehold infuturo.

These two classes will be found to agree with a division

proposed by Fearne, Cont. Rem. 399, 400. Fearne's language,

which is confined to devises, is in effect as follows : —

The first sort (of executory devises) is, where the devisor

parts with his whole fee simple, but upon some con-

tingency qualifies that disposition, and limits an estate

on that contingency.

The second sort of executory devises is, where the devisor,

without parting with the immediate fee, gives a future

estate to arise either upon a contingency, or at a period

certain, unpreceded by, or not having the requisite

connection with, any immediate freehold to give it

efifect as a remainder.

Division into

shifting and

tpringing

limitations.

This partly corresponds with the division of executory limi-

tations, accordingly as they do or do not defeat an estate pre-

viously limited by the same instrument ; which is eminently

convenient for many purposes of practical discussion. Those

which defeat the estate are distinguished by the epithet shifting:

those which do not, are distinguished by the epithet springing.

When these epithets are used, the additional epithet, executory,

may conveniently be omitted.

Shifting limitations are styled shifting uses, when they occur

in assurances made by way of use, and shifting devises when

they occur in wills.

Springing limitations are similarly divided into springing

uses and springing devises.

The distinction between contingent remainders and execu-

tory limitations has been so repeatedly pointed out and insisted

upon, in the course of the foregoing pages, that the attentive

reader will be in no danger of confusing shifting and springing

limitations, which are to arise upon a contingency, with con-

tingent remainders. The following examples will illustrate the

distinction between the two classes of executory limitations

EXECUTORY LIMITATIONS. 175

above noted, — (1) those which defeat a previously limited

estate, and (2) those which do not.

1. In strict settlements of real estate, when they are made

\)y a settlor in contemplation of his marriage,\* the limi-

tations regularly begin with a limitation to the use of

the settlor and his heirs until the solemnization of the

intended marriage; and afterwards to certain other

specified uses. These subsequent uses are in their

inception executory limitations, for they would be void

as remainders at the common law, since they are limited

after a determinable fee. (See p. 256, infra, No. 10.)

Here the precedent fee is a determinable fee, which,

if it should determine at all, must determine within the

time prescribed by the rule against perpetuities ; and the

subsequent executory limitations are not in defeasance

of the fee, but await its regular determination. If the

precedent fee had been a fee simple, any subsequent

limitation must necessarily (if valid) have been in

defeasance of it.

2. "One devises lands to his wife, till his son came to tlie

age of twenty-one years, and then that his said son

should have the lands to him and his heirs ; and if he

dies without issue before his said age, then to his [the

testator's] daughter and her heirs. This is a good con-

tingent or executory devise to the daughter." (1 Eq.

Ca. Ab. 188, pi. 8.) With regard to the devise of the

fee to the son, it is to be observed, that the case occurred

before the Descent Act, 3 & 4 Will. 4, c. 106 ; and that

the fee simple to the son (which, by the rule in Boraston's

Case, 3 Rep. 19, is a vested estate) therefore passed to

\* In practice, strict settlements of real estate are not usually made in con-

sideration of marriage, though examples of such settlements do occur. The

more usual course is for the eldest son, tenant in tail, as soon as he comes of

age, to concur with his father, tenant for life, in barring the entail and re-

settling the family estates in strict settlement, giving to each successive

incumbent (as he may be styled) power to jointure a wife or wives and to

charge the lands with portions for younger children. When he marries, the

marriage settlement does nothing 'to settle the lands, but only exercises the

power of jointuring and charging portions.

176

ON ESTATES IN GENERAL.

him by descent and not by purchase. But now, by

sect. 3 of the last-cited Act, the heir to whom a devise

is made, is deemed to take as devisee, that is, as a

purchaser, and not by descent. (Vide infra, p. 239.)

Therefore, at the time when the case was decided, the

executory devise to the daughter came under the class

of springing limitations, because it was not subsequent

to, or in defeasance of, an estate limited by the same

instrument. But as the law now stands, the fee to the

son would pass by the will, and not by descent ; and

therefore the executory devise to the daughter would

now come under the class of shifting limitations.

Executory

interests are

descendible

and devise-

able.

The benefit of an executory limitation, which purports to

create a future interest of the quantum of a fee, is descendible

in a regular course of descent, if or so soon as the person is

ascertained in whom it would vest if it should then become

vested. (Watk. Desc. 13.) And all executory interests, not

determinable by the death of the party, have been held to be

deviseable, since the case of Roe v. Jones, 1 H. Bl. 30 ; affirmed

in B. E. sub nom. Jones v. Roe, 3 T. R. 88.\* They are expressly

made deviseable by the Wills Act, 7 Will. 4 & 1 Vict,

c. 26, s. 3. .

Not assign-

able inter

vivos at the

common law.

At the common law executory interests, as being, in the eye

of the law, not estates, but only possibilities to have an estate

at a future time, were not assignable by act inter vivos.

(16 Vin. Abr. 462 = Possibility, B, pi. 5.) As above mentioned,

they might be released to the person entitled subject to them ;

and they might be bound by estoppel of the party entitled

to the benefit of them. Also, in equity they might be assigned,

and contracts relating to them might be entered into, for

valuable consideration. (Vide supra, p. 77.)

Now made

assignable by

statute.

The Act to amend the Law of Real Property, 8 & 9 Vict.

c. 106, s. 6, enacts, that after 1st October, 1845, a contingent,

an executory, and a future interest, and a possibility coupled

\* This doctrine had previously been denied. See Bishop v. Fountain, 3 Lev.

427.

B:5tECUT0RY LIMITATIONS. 177

with an interest, in any tenements or hereditaments of any

tenure, whether the object of the gift or limitation of such

interest or possibility be or be not ascertained, may be

disposed of by deed.

For some remarks upon a suggested interpretation of this

enactment, see p. 109, supra. The words above cited are

equally applicable both to contingent remainders and to execu-

tory interests. The words permitting assignment before the

ascertainment of the object of the limitation, do not, of course, •

refer to such objects as are not yet in being, as in limitations

to the children of an unmarried person ; but to such objects

as heirs apparent, or heirs presumptive, or the survivor of

several specified persons.

By the introduction of executory limitations, and the conse- How far

quent emancipation of the limitation of legal estates from the Hmitat?ons

rules of the common law, the obstacles opposed by, the common °otsubse-

law to the creation of what are somewhat vaguely styled per- estate tail,

petuities,\* were made nugatory in practice. Moreover, the feasible,

machinery of common recoveries, laboriously built up by the

courts to promote freedom of alienation in fraud of the statute

De Donis, was found to have lost part of its efficacy. For,

though it was never doubted that an executory limitation in

defeasance of a fee tail might be barred by a common recovery,

it was held by three judges of the Court of King's Bench,

against the opinion of Doderidge, that an executory limitation

in defeasance of a fee simple could not be so barred without

the concurrence of the person entitled to the benefit of the

executory limitation. {Pells v. Broun, Cro. Jac. 590.) If such

person had been vouched, and had entered into the warranty,

it was agreed that the executory limitations would be barred ;

but this proceeding would merely have effected by matter of

record what might equally well have been effected by release

between the parties. The same doctrine is also applicable

to estates pur autre vie. The opinion was expressed by Preston,

that an executory limitation annexed to an estate pur autre vie,

limited to a grantee and his heirs general, cannot be barred

by the first taker; and this has recently been affirmed by

\* [See iw/m, p. 205.]

C.R.P. N

178

ON ESTATES IN GENERAL.

How barred

by fine.

judicial decision. (1 Prest. Abst. 438; Re Barher'a Settled

Estates, 18 Ch. D. 624.) Thus it will be seen that, by means of

executory limitations, there emerged into practice a new method

of interposing an obstacle to the alienation of property.

A claim arising under such an executory interest was as

much within the language of the Statutes of Fines as any

other kind of claim ; and therefore it could equally be bound

by non-claim on a fine levied with proclamations under those

statutes. (1 Cruise, Fines & Eec. 313.) But for this purpose

it was necessary that there should be a non-claim of five years'

duration after the claim under the executory limitation had

become enforceable, that is, had vested in possession ; and

thus the practical effect of a fine, in this respect, was merely

to shorten the ordinary period for the limitation of actions to

five years. This restricted power of barring executory limita-

tions, other than executory limitations subsequent to an estate

tail, was lost upon the abolition of fines by the Fines and

Recoveries Act. It requires carefully to be distinguished from

methods of barring executory limitations subsequent to an

estate tail, or to a quasi-estate tail carved out of an estate

pur mitre vie. These took effect immediately, and without the

expiration of any period of limitation.

void by

statute.

Certain The Conveyancing Act, 1882, s. 10, enacts that, where there

f^ftet^ons is ^ person entitled to land for an estate in fee, or for a term

under certain ^f years absolute or determinable on life, or for term of life,

circumstances •' \_ ' '

now made with an executory limitation over, contained in any instrument

coming into operation after 31st December, 1882, on default

or failure of all or any of his issue, whether within or at any

specified period of time or not, that executory limitation shall

be or become void and incapable of taking effect, if and as

soon as there is living any issue who has attained the age of

twenty-one years, of the class on default or failure whereof the

limitation was to take effect.

Remarks

upon the

above-cited

enactment.

It was probably the aim of this enactment -to assimilate

these executory limitations, in respect to the period of time

during which they are secured against destruction, to executory

limitations subsequent to an estate tail, contained in a

EXECUTORY LIMITATIONS. 179

settlement upon a tenant for life, with remainder to his sons

successively in tail. Such executory limitations, as well as the

estate tail itself, can be, and in practice usually are, barred as

soon as any son of the tenant for life has attained the age of

twenty-one years.

It is not clear that the provisions of this enactment apply .

to executory limitations in defeasance of an equitable fee

simple. It is still less clear that they apply to executory

limitations of a trust of a term of years. The Conveyancing

Act of 1881 contains a definition of the word " land," which

would undoubtedly include an equitable fee simple ; but the

Act of 1882 contains no provision for incorporating the

definitions of words contained in the Act of 1881 ; and by

separately defining, in almost the same language as the Act of

1881, the words "property" and "purchaser," it seems even

to show a design to exclude the definitions of the earlier Act.

And in any case, the definition of " land " in the Act of 1881

contains nothing which could include a trust of a term of

years. Executory limitations of such trusts are clearly not

within the language of the above-cited enactment; and it

must not be assumed that they will be held to come within its

intention, because the possible existence of executory devises

of the legal estate in a term of years gives a sufficient meaning

to all the language used.

The obstacles opposed by the common law to the creation of

perpetuities having thus been rendered nugatory in practice,

it became necessary, either to acquiesce in the creation of

limitations by which property might be " tied up " for in-

definite periods of time, or else to devise some new restrictions

for preventing this result, which should be applicable to the

newly introduced limitations. This was effected by the intro-

duction of the rule which is now commonly known as the " rule

against perpetuities ; " and as this is the principal, if not the

only, restriction now placed by the law upon the creation of

executory limitations, it will require a somewhat detailed

statement. It will be observed that the Conveyancing Act,

1882, s. 10, though it affects the possible duration of certain

executory limitations, does not interfere with their creation.

N 2

180 ON ESTATES IN GENERAL.

The Rule against Peiyetuities..

General The rule against perpetuities fixes certain limits of time,

remarks upon ^it^jn wliich every executory limitation, not being a limitation

subsequent to an estate tail, must necessarily vest, if it vests at

all, on pain of being otherwise void. The rule has never been

considered to be binding upon limitations subsequent to estates

tail, because such limitations have at all times since the inven-

tion of executory limitations been liable to destruction, either

by means of a common recovery or by the method provided by

the Fines and Kecoveries Act. Such limitations are therefore

not obnoxious to the mischief which the rule was designed to

prevent. (See Nieolls v. Sheffield, 2 Bro. C. C. 215 ; Heasman

V. Pearse, L. E. 7 Ch. 275.)

The terms of the rule do not import that the limitation

must necessarily vest within the specified time, but only that

it must necessarily vest within that time, if it vests at all.

The vesting may depend upon a contingency which is such

that, by possibility, it may never happen at all ; but it must

be such that, if it does happen at all, its happening must

necessarily fall within the specified limits. Though it may

be such that it either may, or may not, happen within the

limits of the specified time, it must be such that it cannot

possibly happen outside those limits.

Much elaborate effort has been expended upon attempts to

define a " perpetuity," and to found the reason of the rule now

under consideration upon the definition. These labours seem

to be superfluous.\* Without any definition of a perpetuity,

the proposition is easily intelligible, that all future interests

or claims in, to, or upon any specified property, whether real

or personal, which do not arise under, or take effect by virtue

of, the rules of the common law, and are not subsequent to

an estate tail, must (with a few exceptions requiring specific

mention) vest absolutely within certain specified limits of time ;

and the mischief which would result from the absence of any

Buch restriction, is too obvious to need any proof.

\* [See Note I. by the editor at the end of this chapter, infra, p. 205.]

EXECUTORY LIMITATIONS. 181

The period of vesting (as it may be called) prescribed by the stages in

rule against perpetuities, since it is in the nature of a remedy development,

gradually devised by the discretion of the judges, to meet a new

mischief arising out of the raising of legal estates by means of

uses and devises, could not, from the circumstances of its origin,

be clearly ascertained from the commencement.

It will be sufficient to note the following points : —

(1) It was settled by the Duke of Norfolk's Case, 3 Ch. Ca. 1,

Pollexf. 223, that an executory limitation, which must

necessarily vest (if at all) during the life or lives of a

specified person or persons in esse, is good.

In that case Lord Nottingham, while expressing the opinion

that an executory limitation in defeasance of a fee simple (which

he used as an example of executory limitations generally) to

take effect during a life or lives in being, was indisputably

good, further observed that " the ultimum quod sit, or the utmost

[executory] limitation of a fee upon a fee," was not then

plainly determined ; but that it would soon be found out, if

men should set their wits to contrive that which the law had

so long laboured against. (3 Ch. Ca. at p. 36.)

(2) It is now clearly settled that a term of twenty-one years

in gross, that is, limited simply as a space of time and

not with reference to the infancy of any person interested,

is allowed in addition to the life or lives in esse. {Lloyd

v. Carew, 1 Show. P. C. 137, as explained by Preston,

in his argument in Bengough v. Edridge, 1 Sim. 173, at

p. 192 ; Cadell v. Palmer, 1 CI. & F. 372, 10 Bmg. 140.)

This is now regarded as an axiom. In Cole v. Sewell,

2 H. L. C. 186, at p. 233, Lord Brougham, while

hinting some disapproval, and intimating that this rule

had been established by oversight, admitted that it was

settled law. The point cannot be said to have been

indisputably settled until the decision of Cadell v. Palmer

by the House of Lords in 1833 ; which is the same case

under another name as Bengough v. Edridge, cited above,

where Sugden obstinately maintained the contrary

doctrine in opposition to Preston.

182 ON ESTATES IN GENERAL.

(3) It would have been a very reasonable restriction, if some

connection had been established between the person or

persons in question and the property ; for example, if

no life had been thought admissible for the purpose,

except the life of a person having a prior life interest

in the property, or the life of the parent of a person

taking a subsequent interest. But no such restriction

seems ever to have been judicially suggested. In

Thellusson v. WooiJford, 11 Ves. 112, at pp. 145, 146,

Lord Eldon plainly lays it down that the number of

the lives, being lives simultaneously running, may be

unlimited, and that the persons may have no connection

with the property ; provided only that the circumstances

make it possible to ascertain as a fact the dropping of

the life of the last survivor of them.

(4) It has not been doubted, since the case of Long v.

Blackall, 7 T. E. 100, that, for the purposes of the rule,

a life in being may be the life of a person en ventre sa

mere at the date of the limitation.

(5) There was never any doubt that an executory limitation

might, at the expiration of the period allowed by the

rule, vest in a person en ventre sa mere ; and thus a

second period of gestation is allowed, at the end of the

prescribed period, if circumstances should require it.\*

(6) But the periods of gestation above referred to, since

they arise only by reason of the doctrine that a person

en ventre sa mere is, for the present purpose, a person

in esse, must both of them be periods of actual gestation :

that is to say, if there is no person actually en ventre

sa mere in the case, no extension of time is allowed

upon the ground that there might possibly have been

such a person. (Cadell v. Palmer, 1 CI. & F. 372, 10

Bing. 140.) \*

Expressions have sometimes been used, which might seem

to imply, that a period equal to the term of gestation may, as

\*7Jarman on Wills, 6th ed. p. 298 ; Be Wilmer, (1903) 1 Ch. 874, 2 Ch. 411.]

EXECUTORY LIMITATIONS. 183

a term in gross, be added to the permitted term of twenty-one-

years. Such dicta seem to be erroneous.

Thus the effect of the rule may be summed up by specifying

the longest period, commencing with the coming into operation

of the instrument under which the interests arise, during which

the vesting of limitations coming within the scope of the rule,

may be postponed, as follows : —

A life, or any number of lives, in being — the life of statement

a person en ventre sa mere being considered for this ofvestmg

purpose a life in being — and twenty-one years after aiioweciby

the dropping of the life, if only one, or after the drop-

ping of the last surviving life, if there be more than

one. And at the expiration of the aforesaid period,

the executory interest may vest in a person en ventre sa

mere.

Not only must the title become vested in an ascertained class

of specified persons within the prescribed period, but the shares

in which the different persons are to take the property must

also then be ascertained ; that is to say, the magnitude of the

share to be taken by each member of the class must not

depend upon an event which may happen beyond the period

allowed by the rule ; otherwise the gift will be void for

remoteness. (Curtis v. Lukin, 5 Beav. 147.)

It is unnecessary to cite particular cases, to show that To what sub-

, . . . 1 1 •,., • 1 . i jects the lule

executory devises, spnngmg and shiftmg uses, and trusts applies,

executed, are bound by the rule against perpetuities. That

proposition is now an undisputed axiom of law. The rule

also applies to trusts executory. (Duke of Marlborough v.

Earl Godolphin, 1 Eden, 404.) The rule also applies to

nondescript equities, not amounting either to equitable estates

or to express trusts, but being in the nature of claims upon

specific property, arising out of covenants and other contracts

for the assurance, at some future time and upon specified

terms, of a proprietary interest. (London and South Western

Railway Co. v. Gomm, 20 Ch. D. 562.) In the last-cited case,

the case of Birmingham Canal Co. v. Cartwright, 11 Ch. D. 421,

was expressly overruled ; together with several earlier cases in

which it had been doubted or denied that nondescript equities

arising upon contracts are within the scope of the rule.

184

6N ESTATES IN GENERAL.

Collateral

covenants.

Remarks

upon Keppell

V. Bailey.

But it is necessary that the equity should give a specific

claim to some specific property. A general claim to damages,

upon the breach of a personal covenant, stands out of all

relation to the rule. {London and South Westejii Railway Co.

V. Gomm, 20 Ch. D. 562, at p. 580. See the judgments

delivered in the House of Lords in the case of Witham v.

Vane, Appendix V., infra.)\*

Perhaps the distinction referred to in the last preceding

paragraph may serve as an explanation of Lord Brougham's

remarks in Keppell v. Bailey, 2 My. & K. 517, at p. 527, to

the effect that the covenant in that case did not tend to a

perpetuity. The covenant bound the covenantors to procure

all limestone used upon certain works from a specified quarry.

There was no proviso for re-entry upon a breach of the cove-

nant ; and it would be absurd to say that such a covenant,

standing by itself, gives rise to a specific claim upon the

quarry, which could in the future mature into a proprietary

interest. But in so far as the remarks of Lord Brougham

were grounded upon the fact, that the covenantee could at

any time release the covenant, they seem to be erroneous ;

because the same argument would suffice to prove, that no

executory limitation can be void for remoteness, provided that

it is capable of being released by the person, or persons, entitled

• [In South- Eastern Railway v. Associated Portland Cement Manufacturers

(1900), Ltd.^ (1910) 1 Ch. 12, it was held that a contract, not under seal, by a

corporation, giving A., his heirs and assigns, the right at any time thereafter

to make a tunnel through the land of the corporation, was not obnoxious to the

Rule against Perpetuities, so far as the corporation was concerned, and that

the corporation could not prevent the assigns of A. (who was dead) from

making the tunnel, more than sixty years after the date of the contract. The

decision is notable for two reasons. In the first place, it establishes the doctrine

that although a contract by A. that he, or persons claiming under him, will

give B., or persons claiming under him, an interest in A.'s land at some

indefinite future time, is void for remoteness as against persons claiming under

A., yet it is, prima facie, specifically enforceable against A. personally, so long

as he owns the land, not only at the suit of B., but of any person entitled to

the benefit of the contract by assignment or devolution from him. In the

second place, the case decides that this doctrine applies where A. is a corj^oration,

with the result that the burden of such a contract may be perpetual, especially

in the case of a railway company, which has no power to aliene its land. So

far as the second point is concerned, the decision has been questioned. See

a criticism of the decision by Mr. T. Cyprian Williams, 64 Sol. J. 471, 501.]

EXECUTORY LIMITATIONS. 185

to the benefit of it. This doctrine was the foundation of the

erroneous decision (now overruled, as above mentioned) in

Birmingham Canal Co. v. Cartwright, 11 Ch. D. 421.; see p. 433.

It is worthy of observation that, although the general

principle laid down by Lord Brougham in Keppell v. Bailey,

namely, that covenants which do not run with the land at

law ought not to be enforced in equity against a purchaser

taking with notice of them, has been completely discredited

by Tulle V. Moxhay, 2 Ph. 774, and the subsequent cases, yet

the decision itself in Keppell v. Bailey might be supported, in

accordance with the distinction laid down by the Court of

Appeal in Haywood v. Brunswick Permanent Benefit Building

Society, 8 Q. B. D. 403 ; namely, that the principle of Tulk v.

Moxhay does not apply to affirmative covenants, but only to pro-

hibitive covenants. In Tulk v. Moxhay the covenant was partly

affirmative and partly prohibitive ; but the decree dealt only

with the prohibitive part : a remarkable circumstance, which

seems to have slept unnoticed during the interval between

the decision of that case and the case of Haywood v. Bruns-

wick dx. Society above cited.\* But the whole principle of

Tulk V. Moxhay rests upon dubious grounds of equity, and

it seems, in the courts below, to have been carried to some

absurd lengths. It has never been considered by the House

of Lords ; and it is not improbably destined, like the doctrine

of the consolidation of mortgages, to have its wings clipped

whenever it shall come before that august tribunal, t

\* In Lmidon Sf South Western Railway Co. v. Gomm, 20 Ch. D. 562, at p. 583,

■Tessel, M.R., observed that, " the covenant in Tulk v. Moxhay was afBrmative

in its terms, but was held by the Court to imply a negative." This remark is

not strictly true ; for the covenant contained an express negative, namely, to

keep the land " uncovered with any buildings." The doctrine that an affirma-

tive covenant implies a negative, introduces much uncertainty into the law, and

is very liable to abuse. It might easily be so stretched as to destroy the dis-

tinction between affirmative and negative covenants. But it is quite possible

that, upon the strength of the above-cited observation, the affirmative covenant

in Keppell v. Bailey would now be held to imply a negative. [See Great

Northern Railway v. Inland Rev. Conim., (1901) 1 Q. B. 416.]

t [The principle of Tulk v. Moxhay was tacitly recognised by the House of

Lords in Spicer v. Martin, 14 A. C. 12. As to the limits of the doctrine, see

Fonnhy v. Barker, (1903) 2 Ch. 529. As to the application of the principle to

a person who acquires title to land by adverse possession, see Re Xi»bet and

Pott's Contract, (1906) 1 Ch. 386, and two notes on the decision by the present

editor, Juridical Review, vol. xviii. p. 415, vol. xix., p. 66.]

186 ON ESTATES IN OENBRiL.

Revereionary [It has been suggested that the rule against perpetuities

terms of applies to reversionary terms of years. Historically, there

years. .^ ^^ foundation for the suggestion, for the interesse termini

is a common law interest, and the common law did not restrict

its creation to any future time. (Third Report of the Real

Property Comm., pp. 29, 36 ; Smith v. Day, 2 M. & W. 684 ;

60 Sol. Journal, 760.) But the tendency of modern judges

to extend the rule against perpetuities is so strong as to be

almost irresistible. (See infra, pp. 187, 200.)]

Exceptions The main exceptions out of the operation of the rule, seem

out of the , , , ,,

rule. to be as follows : —

(1) Conditions in defeasance of a term of years.

It has never been suggested that such conditions are

within the scope of the rule, unless (which hardly

seems to be the case) a loose remark thrown out obiter

by Mr. Justice Buller, in Roe v. Galliers, 2 T. R. 133, at

p. 140, amounts to such a suggestion. Since such con-

ditions have come almost daily before the courts during

some centuries, there could hardly be a stronger proof

that their validity is not open to question.

As to conditions in defeasance of an estate of free-

hold, some remarks will be found at p. 187, infra.

(2) Covenants for the renewal, whether perpetually, or for

certain turns only, of leases. (London d- South Western

Railway Co. v. Gomm, 20 Ch. D. 562, at p. 579.)

There is perhaps some difficulty, upon principle, in

explaining this exception ; but its existence is beyond

all doubt, and has repeatedly been recognized by the

House of Lords. {Earl of Ross v. Woi'sop, 1 Bro. P. C.

281 ; Pendred v. Griffith, ibid. 314 ; Sweet v. Anderson,

2 Bro. P. C. 256.) When the covenant is for a per-

petual renewal, it is probably regarded by the law as

being only an indirect mode of alienating the whole

beneficial interest in the fee, under cover of a succession

of terms of years.\*

• [Historically, the truth seems to be that the validity of such covenants was

recognized long before the modern Rule against Perpetuities was established.

Both the old and the modem Rules against Perpetuities were originally directed

EXECUTOEY LIMITATIONS. 187

(3) Negative covenants which are contained in Conveyances of

the fee, and, upon the principle of Tulk v. Moxhay, 2 Ph.

774, " run with the land " in equity, though not at law.

{London d: South Western Raihvay v. Gomm, 20 Ch. D.

562, at p. 583 ; Mackenzie v. Childers, 43 Ch. D. 265.)

The question, whether a common law condition in defeasance Whether the

of an estate of freehold, is within the rule against perpetuities, common law °

in the sense that it is void if it may defeat the estate at a time conditions m

•^ defeasance of

more remote than is allowed by the rule, may perhaps, in view a freehold.

of the present disposition of the courts, which leans strongly

in favour of the rule, be a question requiring to be treated

with some degree of caution. The affirmative reply is open to

the obvious objection, that the rules relating to common law

conditions had been settled for some centuries before the rule

against perpetuities had been thought of, and that there is not

only no trace to be found, in the old common law authorities,

of any disposition to apply what may be called a " time test "

to common law conditions, but their language by the clearest

implication asserts the absence of any such rule.

In the old common law authorities, down to and including

Lord Coke, there are innumerable references to conditions in

defeasance of a freehold, expressed simpliciter without any hint

of a restriction within any period whatever ; and not only do

such references invariably assume that the validity of such

conditions had never yet been called in question upon this

ground, but in some cases they affirm, by the clearest implica-

tion, that the benefit of a condition of re-entry may be claimed

at any distance of time by the heirs of the grantor. At a

subsequent time it became necessary to devise a novel restric-

tion to be applied to novel forms of limiting, or otherwise con-

ferring, an estate or interest unknown to the common law.

Upon what principle can it be said, that the emergence of

against perpetual settlements on unborn descendants, and it was not until

comparatively recent times that the courts by a gradual (and apparently

unconscious) process of judicial legislation, gave to the modern Rule against

Perpetuities its present extensive scope. It is not to be wondered at that the

law relating to perpetuity and remoteness is full of anomalies and absurdities.

See Marsden, Perp, 2, and an article by the present editor in the Juridical.

Review for July, 1906.]

188 ON ESTATES IN GENERAL.

novel matter into the law had simultaneously introduced into

the common law a new rule of construction, newly made

applicable to matters with which the common law was familiar,

but previously unknown to the common law ? The prescrip-

tion upon which the common law depends, is of much greater

antiquity than the reign of Henry VIII.

No court, except the High Court of Parliament, has any

jurisdiction or authority to alter the common law. (Co. Litt.

115 b.) When any part of the common law is found to

require amendment, the legislature alone is competent to

apply the remedy. (Cunliffe v. Brancker, 3 Ch. D. 393, at

p. 410.) In imposing the rule against perpetuities upon the

novel limitations and interests to which, by universal acknow-

ledgment, it is applicable, the inferior courts did not. alter the

common law, but merely laid down certain terms upon which

they would interpret certain statutes in relation to the creation

of legal estates, and upon which they would give legal effect

to equitable interests of a certain type. Much more than this

is needed, in order to bring matters previously settled by the

common law within the scope of the neW rule.

Upon these grounds it is conceived, that there cannot exist

any jurisdiction in the courts of law to hold that the rule

against perpetuities is, in the sense above mentioned, applicable

to common law conditions. But this conclusion refers only to

conditions as they exist strictly at the common law, whereby,

upon a breach of the condition, a right of entry accrues solely

to the grantor of the estate to which the condition is annexed,

or his heirs, and cannot be reserved to a stranger. (Litt.

sect. 347, and Lord Coke's comment.) The possibility of

reverter upon such a condition can neither, at the common

law, be assigned inter vivos nor devised. (Prest. Shep. T. 120.)

Suggestion as And it might plausibly be maintained, that 8 & 0 Vict. c. 106,

me^s Mid 8. 6, and the Wills Act, s. 3, by which such possibilities are

made assignable and deviseable, tacitly and by implication

impose upon assignments and devises of them, though not

upon the conditions themselves, the liability to the rule

against perpetuities.

There exists no judicial decision, so far as the present writer

is aware, that a strictly comiiion law condition is subject to the

devises.

EXECUTORY LIMITATIONS. 189

rule against perpetuities. In Flotver v. Hartopp, 6 Beav. 476,

it was assumed that such a condition was valid in perpetuity

in a crown grant ; though it was held that the condition had

subsequently been destroyed by the act of the crown.\*

In Be Macleay, L. K. 20 Eq. 186, the condition, or con-

ditional clause, which was in dispute may be styled a common

law condition, in the sense that, standing by itself it might

import a condition at the common law ; and Jessel, M.R., by

the way in which he remarked that, since it was confined

to a life in being, it could not be open to any objection upon

the ground of remoteness, may be thought to have given an

intimation of his opinion. But the mere surmise that he may

have intended to deliver an obiter dictum, would be a slender

foundation upon which to build an important conclusion of

law. At p. 190 he also added the further remark ; — " Then it

[the condition in question] is not, strictly speaking, limited as

to time, except in this way, that it is limited to the life of the

first tenant in tail ; of course, if unlimited as to time, it would

be void for remoteness under another rule." But this remark

bears plain traces of confusion and mistake ; for the case con-

tains nothing about any tenant in tail. Moreover, though

the form of words referred to might at the common law

import a condition, and may in this sense be styled a common

law condition, yet the subsequent destination of the property,

apparently not being in favour of the heir of the testator

could take effect, if at all, only as an executory limitation ; and

therefore the language of the learned judge may be explained

by supposing that he was rather referring to the validity of

the subsequent limitation than to the validity of the con-

ditional clause regarded as a condition. This is equiva-

lent to saying (what seems, in fact, to be the case) that

the learned judge was not referring to conditions at all,

but to executory limitations. For the same reason, the

expressions used by the same learned judge in London and

South Western Railway v. Gomm, 20 Ch. D. 562, at p. 582,

afford no indication of his opinion upon the question now

\* [Compare Cooper v. Siuart, 14 App. Ca. 286, where it was held that the

Rule against Perpetuities did not apply to a crown grant of land in New South

Wales made in 1823.]

190 ON ESTATES IN GENERAL.

under discussion. He evidently thought that " a limitation to

A in fee, with a proviso that whenever a notice in writing is

sent and 100/. paid by B or his heirs to A or his heirs, the

estate shall vest in B and his heirs," would be within the rule

against perpetuities. But, in the words immediately preceding

those cited, he styled the limitation, or form of words, to which

he meant to refer, a " conditional limitation ; " and in all the

many meanings of that much-abused phrase, it has at least

been always carefully distinguished from a common law con-

dition. In one of its meanings, the phrase "conditional

limitation " is used to denote an executory limitation, which is

to take efifect in defeasance of a prior estate of freehold, upon

the happening of a contingency which is in the nature of the

performance of a condition. This meaning fits exceedingly well

into the words above cited ; and no doubt exists that such con-

ditional limitations are subject to the rule against perpetuities.

But this proves nothing about common law conditions.

In Dunn v. Flood, 25 Ch. D. 629, the opinion expressed by

Mr. Justice North, that a common law condition is subject to

the rule against perpetuities, was obiter dictum. Not only is it

not material to the decision, but it makes against the decision,

so far as it goes. The decision was afterwards affirmed by the

Court of Appeal, 28 Ch. D. 586 ; but nothmg was said to

support the obiter dictum.

Moreover, casual remarks delivered obiter, whatever may be

the learning and experience of their authors, cannot rationally

be regarded as having sufficient weight to decide an obscure

question of law which has never been properly considered.

It may, however, be surmised with some confidence, that at

the present day the courts would not acquiesce in the conclusion

above drawn without great reluctance. Therefore no convey-

ancer could be advised, in the absence of express judicial deci-

sion, to rely in practice upon the conclusion, that common law

conditions are not within the rule against perpetuities. But

every argument that can be derived from history and general

principle seems to be in its favour.\*

• [In Me HollW Hospital and Hague, (1899) 2 Ch. 541, the question arose

whether a common law condition, unrestricted in point of time, was valid ;

Byrne, J., dissented from Mr, Challis's view, and held that the condition was

EXECUTORY LIMITATIONS. 191

The question as to the validity of a particular limitation is to Remoteness

be decided at the time when the instrument under which it depend upon

arises comes into operation ; and the answer to the question \*^^® event,

is quite independent of what happens to be the course of sub-

sequent events. If it is possible, in the nature of things, that

the limitation may not vest until after the expiration of the

period specified by the rule, it is void for remoteness ; and the

subsequent happening of any event whereby, if held to be

valid, it would in fact have vested within tlie specified period,

will not make it valid. [Re Wood, (1894) 2 Ch. 310.] Nor

will the fact that a specified person, a married woman, was, at

the date of the coming into operation of the instrument

creating a power, past the age of child-bearing, suffice to take

out of the rule a case which, upon the hypothesis that she

might subsequently have had children, would have been

within its scope. {Jee v. Aiidley, 1 Cox, 324 ; Re Sayer's

Trusts, L. R. 6 Eq. 319 ; Re Daivson, Johnston v. Hill, 39 Ch.

D. 155. The contrary view taken in Cooper v. Laroche, 17 Ch.

J). 368, may safely be disregarded.)

If the limitation is in favour of the whole of a class, as to Limitations

some of whom it would be good, but as to others it is void objec^ta!^^ °

for remoteness, the limitation fails as to the whole. (Pearks v.

Moseley, 5 App. Cas. 714.) But this rule seems to be founded,

so far as regards wills, upon the intention of the testator to

benefit the whole class and not a part only, and, so far as

regards deeds, upon the fact that, by the terms of the instru-

ment, the limitation is in favour of the whole class and not of

a part only. It is therefore possible, by the use of apt

expressions, to construct a limitation in favour of such

members only of a class as, with reference to the rule

against perpetuities, shall be capable of taking under it.

{Leake v. Robinson, 2 Mer. 363, at p. 390.)

Not only must the class be incapable of being subsequently

increased, but also it must be incapable of being subsequently

diminished. {Blight v. Hartnoll, 19 Ch. D. 294 ; which case

void, but as the heir-at-law of the original owner was not a party to the pro-

ceedings, and declined to be bound by them, he held that the title could not be

forced on a purchaser. As to this decision, see Note II., infra, p. 207.J

192

ON ESTATES IN GE1?ERA1.

Failure of

limitAtion

does not

accelerate

subsequent

interests.

But a void

restriction

upon an

absolute gift,

is merely

inoperative.

was appealed on another point, 23 Ch. D. 218, but no objection

was raised upon the above-stated point.)

When a limitation is void for remoteness, any subsequent

limitation to take effect after it is not accelerated, but is also

void. (1 Jarm. Wills, 4th ed. 283, 284, and cases there cited

[6th ed. 350 seq., where Beard v. Westcott, 5 B. & Aid. 801, is

explained.] Also Earl of Chatham v. Tothill, 7 Bro. P. C. 453.)

A subsequent limitation must, of course, be distinguished

from an alternative limitation. In the case of alternative

limitations, one of which, standing alone, would be good, while

the other, standing alone, would be void for remoteness, the

limitation will fail or take effect according to the course of

events. (1 Jarm. Wills, 4th ed. 285 [6th ed. 354].)

If an absolute gift is followed by a void provision, the bad-

ness of the latter does not affect the validity of the former ;

and therefore where a testator by his will first makes an

absolute gift of chattels, and by a subsequent clause cuts this

gift down to a life interest followed by a limitation over which

is void for remoteness, the absolute gift takes effect, unaffected

by the attempted restriction. {King v. Hardwick, 2 Beav.

352 ; Taylor v. Frobisher, 5 De G. & Sm. 191 ; Goodier v.

Johnson, 18 Ch. D. 441.) The same principle applies also to

real estate. {Browne v. Stoughton, 14 Sim. 369 ; Turvin v.

Newcome, 3 K. & J. 16.) [As to beneficial interests not being

affected by invalid trusts, see Goodier v. Edmunds, (1893)

8 Ch. 455 : Re Appleby, (1903) 1 Ch. 565.] A restraint

on anticipation superinduced upon an appointment to the

separate use of a married woman will be bad, if the restraint

may continue beyond the period allowed by the rule, although

the interest of the married woman may vest in due time ; and

in accordance with the principle above stated, the married

woman will take freed from the restraint. {Cooper v. Laroche,

17 Ch. D. 368.)\*

\* [The application of the Rule against Perpetuities to restraints on anticipa-

tion is erroneous, and due, as Mr, Gray points out (Perp. § 437 a) to " that

fertile source of error, the confusioQ between remoteness and restraints on

alienation .' ' Jessel, M. R., also disapproved of the doctrine (^Re Ridley, 1 1 Ch. D.

645). But it is firmly established : Re Game, (1907) 1 Ch. 277.]

EXECUTORY LIMITATIONS. 193

If the right to a fund, or share in a fund, vests within the Similarly,

, . . • . . . as to a void

tnne hmited by the rule, but the will contains a direction, that direction ag

the fund shall not be paid over until a time which, if it were of aT^ted

the time of vesting, would make the gift void for remoteness, ^^^^'

this direction is itself inoperative {Greet v. Greet, 5 Beav.

123) ; and the fund becomes payable as soon as the person in

whom it vests is qualified to give a discharge for it. {Josselyn

V. Josselyn, 9 Sim. 63 ; Saunders v. Vautier, 4 Beav. 115 ; S.C.

Cr. & Ph. 240; and see Curtis v. Lukin, 5 Beav. 147, at pp.

155, 156.)

When an executory limitation arises under the exercise of a Special

special power of appointment, the time from which the period within ^e

prescribed by the rule begins to run, is the date of the coming ^^^^'

into operation of the original instrument creating the power,

not that of the instrument by which the power is exercised.

Therefore nothing can be done in exercise of the power, wjbich

might not have been done in the original instrument. (Chance \*

on Powers, sects. 1230, 1387 ; Re Brown and Sibly's Contract,

3Ch. D. 156. [Re Thompson (1906), 1 Ch. 199']). This rule

does not apply to general powers, because in their nature they

are incapable of operating as a restraint upon alienation.\*

And a special power is not void in its inception, merely by

reason that its expressions are sufficiently wide to extend to a

possible exercise of it which, if made, would be void for

remoteness ; but, in general, the validity of the exercise of the

power will depend upon the question, whether the exercise

does in fact exceed the limits prescribed by the rule against

perpetuities ; not upon the question, whether it might, under

the terms of the power, have exceeded those limits ; and if the

attempt to exercise the power is p'imd facie in part good and

in part bad, the appointment will be upheld, so far as it keeps

within the limits of the rule. (Slark v. Dakyns, L. E. 10 Ch.

35. See also Re Teague's Settlement, L. R. 10 Eq. 564 ; Re

Cunynghame's Settlement, L. R. 11 Eq. 324.)

\* This doctrine, that a general power is not liable to remoteness, applies to a

general power exerciseable by a married woman in respect to her separate

estate. (^Rous v. Jackson, 29 Ch, D. 521 ; Re Flower, Edmonds v. Edmonds, 55

L. J. Ch. 200.)

C.R.P. 0

194

ON ESTATES IN GENERAL.

Powers of

sale and

exchange.

Doubts have sometimes been expressed, whether the common

powers of sale and exchange usually found in strict settle-

ments might not be void, if appearing to be exerciseable

indefinitely ; and Fearne, and other eminent conveyancers,

sometimes expressly restricted the exercise of such powers

within the period of lives in being and twenty-one years after-

wards. (2 Prest. Abst. 159.) In 1805 Lord Eldon, in Ware

V. PoUiill, 11 Ves. 257, at p. 283, made some remarks which

would abundantly justify this precaution ; but it was subse-

quently decided that unlimited collateral powers of sale, which,

so far as they might be exerciseable at a time later than tlie

terms of the rule would permit, are subsequent to an estate

tail, and are therefore liable to be defeated by a bar of the

entail, are valid. {Waring v. Coventry, 1 My. & K. 249;

Wallis V. Freestone, 10 Sim. 225.) And it was decided in

Boyce v. Hanning, 2 C. & J. 334, and Lantsbery v. Collier, 2 K.

& J. 709, that, apart from any argument founded upon the

existence of an estate tail, the power is valid in its inception,

and can be exercised at any time before the ultimate remainder

or reversion in fee simple becomes vested in possession. The

subject is now deprived of much of its importance, by the

provisions of the Settled Land Act, 1882, by which the

powers commonly given to trustees in strict settlements, have

in a great measure been superseded in practice. It is certain

that the common powers of sale and exchange have not, in

general practice, been expressly restricted, as to their exercise,

within the limits of time imposed by the rule. This amounts

to indisputable proof, that such express restriction is not, at all

events, necessary to give validity to an exercise of the power

which in fact takes place within those limits. And it is to be

observed that, as a collateral power is spent as soon as the fee

simple becomes vested in possession, and as this must happen

within the time allowed by the rule unless the fee simple

is preceded by a limitation in tail, therefore such an exercise

of the power must always be capable of being theoretically

justified upon one or the other of the above stated grounds.

Charitable

uses.

It has sometimes been said, that gifts to charitable uses are

exceptions from the rule against perpetuities. {Yeap Cheah Neo

EXECUTORY LIMITATIONS. 196

V. Ong Cheiifj Neo, L. E. 6 P. C. 381, see p. 394. See also

Thomson v. Shakespear, 1 De G. F. & J. 399, at p. 407.) But

it seems to be clear that a gift merely made to charitable uses

by way of executory limitation, if it be such as might by

possibility not vest in interest within the specified time, is

void, like any other executory limitation. (See Chamherlayne

V. Brockett, L. R. 8 Ch. 206, at p. 211.) The language above

referred to seems only to mean, that gifts to charitable uses

are valid, notwithstanding that the charitable use may exhaust

the whole fee simple or absolute interest in the thing given.

(See Re Dutton, 4 Exch. D. 54.)\*

Somewhat in a similar spirit it seems to have been said, or

intended to be said, that a claim of user which would be bad

sinqdiciter, may be made good by the fact that the heredita-

ment, out of which the use arises, is lawfully vested in a

corporation by way of mortmain. {Goodman v. Mayor oj

Saltash, 7 App. Cas. 633, at p. 669.)

There seems, however, in this respect to be a distinction

between gifts to charitable uses, and dispositions whereby a

gift is, upon the happening of a contingency, shifted from one

charitable body to another. It has been decided that disposi-

tions of the latter character are not within the rule ; and that,

when charitable uses have once been validly established, the

property may be transferred from one body to another at any

period of time however remote, and the objects of the charity

may be varied. {Christ's Hospital v. Grainger, 1 Mac. & G,

460; Re Tyler, Tyler v. Tyler, (1891) 3 Ch. 252.) t

The rule against perpetuities was fixed by reference to what. Origin of the

at the time when the rule was invented and consolidated, existing ^

might by possibility happen as the result of legal limitations, shape.

At the common law, there could be no remainder of inheritance

except a remainder in fee simple; and such a remainder could

\* [The confusion to which Mr. Challis here alludes is due to the ambiguity of

the word " perpetuity," which is sometimes used to mean an inalienable interest,

and sometimes to mean a limitation or trust which is void for remoteness (see

note, /»//•«, p. 205). A charitable trust is never void on the ground that it creates

an inalienable interest, but it may be void for remoteness ; see Jarman on

Wills, 6th ed., pp. 280,-366.]

t [As to these decisions, see Juridical Review, July, 1906.]

0 2

196 ON ESTATES IN GENERAL.

subsist in expectancy only upon an estate for life or p»r autre

vie. After the statute Dc Bonis, a remainder of inheritance

became possible in the shape of a fee tail. The rules of the

common law, which forbade any remainder to be given to the

unborn issue of an unborn tenant for life, and which forbade

the limitation of an estate of inheritance to the heirs of an

unborn person, were designed to introduce into legal limitations

some restriction analogous to that applied by the rule against

perpetuities to executory limitations. {Vide supra, pp. 115, 116.)

Under the legal rule, when estates tail had lost their inalien-

able quality by the invention of common recoveries, the strictest

allowable settlement was effected by giving an estate for life to a

person in esse, followed by remainders in tail to his unborn issue

as purchasers. Under such a limitation it might possibly

happen that the tenant for life would die, leaving an infant son.

The tenant for life and the vested remainderman or reversioner

in fee simple could not (after the invention of trustees to preserve

contingent remainders) make a good title during the existence

of the remainder in fee tail to the unborn issue of the tenant for

life ; and after the birth of such issue, he, as tenant in tail,

could not make, or concur in making, any alienation during

his infancy. Thus, the fee simple of the property might be so

settled as, by possibility, to be incapable of alienation duringii

life in being and the infancy (which might amount to twenty-

one years) of his issue. This accounts by analogy for the

"life in being and twenty-one years afterwards" of the rule

against perpetuities. With regard to the further allowance,

by the latter rule, of a period of gestation, both at the begin-

ning and at the end of the time, this seems to be due to the

strong disposition of equity to regard a child en ventre sa mere

as being in esse for all purposes. But this was an extension

beyond the utmost limits of the time during which, under the

strict rules of law, the property could by any possibility have

been tied up against alienation ; for it is the better opinion

that, before the statute 10 & 11 Will. 3, c. 16, if the tenant

for life had died leaving a child en ventre sa mere, a remainder

in fee tail limited in favour of such child would have been

destroyed. {Vide supra, p. 139.)

Thus it will be seen that the doctrine of executory limitations,

EXECUTORY LIMITATIONS. 197

though restrained by the rule against perpetuities, reduces to a

certainty what by the rules of law can happen only by chance.

It permits a restraint on alienation to be imposed always, and

as a matter of sure calculation, during the longest period that

is possible, under the legal rules, by the happiest concurrence

of all contributory accidents.

Whether the rule against perpetuities applies (apart from The rule does

express statutory enactment) to legal limitations made by way the vesting

of remainder, is one of those questions which ought never to reminders.

have arisen. It implies an anachronism which may be said to

trench upon absurdity. The argument from history and

principle against the affirmative doctrine may not intrinsically

be stronger than the argument against the application of the

rule to common law conditions. But if not intrinsically

stronger, it is even more obvious. Legal limitations had

flourished for four or five hundred years, and the rules applic-

able to them had, during that time, been discussed with the

greatest assiduity, before the rule against perpetuities had ever

been heard of.\* Moreover, all the authorities concur in

the tradition, that the rule against perpetuities was framed

upon the analogy of the ascertained efifect of the rules applic-

able to legal limitations by way of remainder. And, though

the rule against perpetuities was framed with reference to the

2)ossihle effect of legal limitations, yet the rule itself, regarded

as a proposition, is repugnant to the spirit of the rules applic-

able to legal limitations. And since estates have always been

much more common than estates upon condition, the absolute

failure of the old common law authorities, down to and

\* [At common law, there were two rules which effectually restricted the

creation of remote interests by way of remainder ; one was that every contingent

remainder must vest at or before the determination of the particular estate ; and

the other was that land could not be limitetl to the unborn descendants of a

person, as purchasers, for successive estates, beyond the first generation (Fearne,

Cont. Rem. 502 ; Wliithy v. Mitchell, 44 Ch. D. 85). It \*s clear that the

modern Rule against Perpetuities was invented to check the creation of future

interests, whether in real or in personal property, by shifting uses, executory

devises and bequests, and trusts, in ways unknown to the ancient common law,

and the suggestion that the Rule applies to contingent remainders was unheard

of until about the middle of the nineteenth century. The suggestion does

indeed, as Mr. Cballis remarks, " trench upon absurdity."]

198 ON ESTATES IN GENERAL.

including Lord Coke, to give any hint of any such doctrine,

applies with increased significance to the present case. It is

incredible that, if any such doctrine had existed, no hint of its

existence should have emerged into the records of the law.

And in this instance, the claims of reason are aided by some

strong expressions of opinion.

One of the greatest real property lawyers since Lord Coke

has thus expressed his sentiments : — \*

Opinion of " As to the question of remoteness, at this time of day, I was

Sngden. very much surprised to hear it pressed upon the court, because

it is now perfectly settled, that where a limitation is to take

affect as a remainder, remoteness is out of the question ; for

the given limitation is either a vested remainder, and then it

matters not whether it ever vest in possession, because the

previous estate may subsist for centuries or for all time ; or it

is a contingent remainder, and then, by the rule of law, unless

the event upon which the contingency depends happen so

that the remainder may vest eo instanti [that] the preceding

limitation determines, it can never take effect at all. There

was a great difficulty in the old law, because the rule as to

perpetuity, which is a comparatively modern rule (I mean of

recent introduction, when speaking of the laws of this

country)^ was not known ; so that, while contingent remainders

were the only species of executory estate then known, and

uses and springing and shifting limitations were not invented,

the law, [in the current language of the lawyers] did speak of

remoteness and mere possibilities as an objection to a remainder,

and endeavoured to avoid remote possibilities ; but since the

establishment of the rule as to perpetuities, this [kind of

language in reference to legal limitations] has long ceased, and

no question now ever arises with reference to remoteness ; for

if a limitation is to take effect as a springing, shifting, or

secondary use, not depending on an estate tail, and if it is ^o

limited that lit may go beyond a life or lives in being, and

twenty-one years, and a few months equal to gestation, then

it is absolutely void; but if, on the other hand, it is a

remainder, it must take effect, if at all, upon the determination

\* [The square brackets in this quotation occur in Mr. Challis's text, and

indicate additions or emendations made by him.]

EXECUTORY LlMITATIOl?^. 199

of the preceding estate. In the latter case, the event

[upon the happening of which the contingent remainder is to

vest] may or may not happen before or at the instant [that]

the preceding estate is determined, and the limitation will fail,

or not, according to that event. It may thus be prevented

from taking effect, but it can never lead to remoteness. That

objection, therefore, cannot be sustained against the validity

of a contingent remainder." (Sir Edward Sugden, in Cole v.

Sewell, 4 Dr. & W. 1, at p. 28.) The judgment of Sir Edward

Sugden in that case was afterwards affirmed in the House

of Lords, when Lord Brougham very forcibly expressed the

same view. (2 H. L. C. at pp. 230, 231.)

In truth, any objection against the validity of a contingent

remainder grounded upon the rule against perpetuities, is not

so much an objection against the time of the vesting of the

remainder, as an objection against the duration of the precedent

estate.

It is in accordance with the view above advocated, that the Contingent

Tf\* TO 3.1 n d^f^

statute 40 & 41 Vict, c. 33, which exempts subsequently-created protected by

contingent remainders in general from their liability, at the ^^^^"'^ ^^^^^

'3ommon law, to be destroyed by the determination of the pre- \*^he rule.

cedent estate pending the contingency, extends this exemption

only to such contingent remainders as comply with the rule

against perpetuities. (Vide supra, p. 141.)

In Cattlin v. Brown, 11 Ha. 372, at p. 374, Sir "William a solitary

Page-Wood, V.-C, is reported to have said :— " I apprehend, f^^^Zj. ^^^

however, that a contingent remainder cannot be limited as

depending on the termination of a particular estate, whose

determination will not necessarily take place within the period

allowed by law " ; by which he appears to have meant, the

period prescribed by law for the vesting of executory limita-

tions. This observation seems strongly to support what was

said above, that objections of this kind are really objections

against the duration of the precedent estate, not against the

vesting of the remainder. This opinion seems to be hardly

sufficient to counterbalance the weight of previous authority ;

especially as it is manifestly repugnant to principle. The

200 OK ESTATES IN GENERAL.

year 1853, as Sir George Jessel, M.R., observed (on another

point) in Re Maclcay, L. R. 20 Eq. 186, at p. 191, was rather

a modern time at which to alter the law of real property.

Since the publication of the first edition of this work, Mr.

Justice (now Lord Justice) Kay, in Re Frost, Frost v. Frost, 43

Ch. D. 246, not only expressed the opinion, that legal con-

tingent remainders are within the rule against perpetuities, but

announced that, if it had been necessary, he would have decided

the case upon that ground. The ground upon which the

learned judge professed to decide the case is perhaps not of

such a kind as to strengthen the authority of this dictum.\*

In conclusion, it must be borne in mind that judges are very

ready to extend the rule against perpetuities ; and that, though

the historical argument against extending the rule to legal

limitations cannot easily be answered, it can easily be dis-

regarded, t

Restrictions iipon Trusts, or Directions, for Accumulation of

Income.

{The Thellusson Act, 39 tC- 40 Geo. 3, c. 98.)

How far j^o distinction was drawn by the rule against perpetuities,

accumulation "^ ore

is allowed, in- between the right to suspend the vesting of an estate or interest,

dcDcndcntlv

of the Act, aiid the right to dispose of the intermediate income before its

vesting ; and therefore, independently of statute, the law per-

mitted a settlor to direct accumulation to be made during the

whole of the period for which he was permitted to suspend the

vesting of an executory interest. (Per Lord Cranworth, V.-C,

\* [Mr. Justice Kay's decision, so far as it is based on the supposed

existence of a rule against double possibilities, may now be regarded as

erroneous (i?e Nas/i, (1910) 1 Ch. 1, »upra, p. 118, n.). So far as the learned

judge intended to decide that the Rule against Perpetuities applies to contingent

remainders, his judgment is based on a singular andalmost incredible misappre-

hension ; he thought that the passage in which Mr. Fearne states the old Rule

against Perpetuities (the rule now known as the rule in ]Vhitby v. Mitc1i€ll),a,i

a rule governing the creation of contingent remaindera (Cont. Rem. 502), has

reference to the modern Rule against Perpetuities. Mr. Fearne elsewhere says,

with unmistakeable clearness, that the modern Rule against Perpetuities does

not apply to contingent remainders (Cont. Rem. 441).]

t [Since Mr. Challis wrote, Mr. (now Lord) Justice Farwell has expressed the

opinion that contingent remaindere are subject to the Rule against Perpetuities :

Me Ash/oiih, (1905) 1 Ch. 535. As to this decision, see Note III. iit/ra, p. 213.

In \Miithy v. Van Lvedecke, (1906) 1 Ch. 783, the question was not argued.]

EXECUTORY LIMITATIONS. 201

in Wilson v. Wilson, 1 Sim. N. S. 288, at p. 298.) Taking Will of Mr.

advantage of this rule, Mr. Thellusson fixed on the lives of all his

sons and grandsons born in his lifetime or living at his death,

including any then en ventre sa mere, — for such seems to be the

construction of his will, — as the period during which his pro-

perty (amounting, it is said, to 5,000/. pe?- annum in land, with

personal estate to the value of 600,000/.) should accumulate for

the benefit of those branches of the respective families of his

sons, who, at the end of that period, should answer to the descrip-

tion of the heirs male of the respective bodies of those sons;

thus dividing the property into three parts, and giving one

third part to the family of each son. It was calculated at the

time that the accumulation would probably endure for about

seventy or eighty years ; and this period might possibly have

been further prolonged by the infancy of the persons in whom,

under the limitations, the property would ultimately vest.

According to the common mode of calculating the rate of

increase, property would be multiplied more than a hundred-

fold in the course of a century of unintermitted accumulation.

This rate would give, in the present instance, a sum approach-

ing to one hundred millions as the amount finally to be divided.

It will indeed be observed that Mr. Thellusson's directions kept

well within what is now the acknowledged limit independently

of statute; for he might, without infringing upon the rule

against perpetuities, have substituted, for the contingent addi-

tion arising from possible infancy, a fixed period of twenty-one

years.\*

Mr. Thellusson succeeded in his object, and his will was

established by a decree of Lord Loughborough, Thellusson v.

Woodford, 4 Ves. 227, afterwards affirmed in Dom. Proc. 11

Ves. 112. In consequence of this decision, the statute 39 & 40 Accumula-

Geo. 3, c. 98, commonly called the Thellusson Act, was passed rra"ricted

to prevent such abuses of the letter of the law for the future, ^y statate.

This Act does not at all affect the rule against perpetuities, but

deals only with the period during which an accumulation of the

• This was not indisputably settled at the date of Mr. Thelliisson's will ; and

probably the conveyancer by whom it was drawn advisedly refrained from going

to the utmost limit.

202 ON ESTATES IN OKNERAL.

income may be directed in a settlement. This period which,

independently of statute, is the whole period during which the

vesting of the corpus out of which the income is to arise may

be suspended, must now by virtue of the Act, with certain

exceptions to be presently noticed, be confined within some one

of the following limits : —

(1) During the life or lives of the settlor or settlors ;

(2) During the term of twenty-one years from the death of

the settlor ;

(3) During the minority, or respective minorities, of any

person or persons living, or en ventre sa mere, at the time

of the settlor's death ; or

(4) During the minority, or respective minorities, of any

person or persons who under the settlement would, for

the time being, if of full age, be entitled to the income

directed to be accumulated.

The Act applies equally to settlements of real and of personal

property.

The several periods for accumulation permitted by the Act

are alternative, not cumulative ; and the settlor cannot adopt

more than one of them. {Wilson v. Wilson, 1 Sim. N. S. 288 ;

Jiigger v. Jagger, 25 Ch. D. 729.) The distinction between the

third and the fourth is, that in the fourth case, the minors,

during whose lives accumulation is permitted, may be persons

neither born, nor respectively en ventre sa mere, at the time of

the settlor's death. But this latitude of selection is compensated

by the condition, that in the fourth case the minors must be

prospectively entitled to the income.

If an interval is directed between the testator's death and the

commencement of the accumulations, this will not enable the

process of accumulation to be continued after twenty -one years

have elapsed from the testator's death. {Webb v. Webb, 2

Beav. 493.)

How far It is now settled that any provision which exceeds these

accumulation lin^its, without transcending the limits allowed previously to

excess"^ ^°^ the Act, is not void in toto, but is good for such a period of

accumulation as might lawfully have been directed, being void

EXECUTORY LIMITATIONS. 203

only for the residue. (Griffiths, v. Vere, 9 Ves. 127 ; Longdon

V. Simson, 12 Ves. 295 ; Haley v. Bannister, 4 Madd. 275.)

But if the period prescribed for accumulation should exceed

the limits allowed previously to the Act, that is, should extend

beyond the time prescribed for the vesting of executory interests

by the rule against perpetuities, the direction for accumulation

will be void in toto. (Lord Southampton v. Marquis of

Hertford, 2 Ves. & B, 54 ; and see LeaJce v. Robinson, 2 Mer.

363, at p. 389 ; Marshall v. Holloway, 2 Swanst. 432.)

With regard to such part of the accumulations, directed to be What

made by will, as may be void under the Act, there is an of surplus

intestacy, unless the property from which the accumulations accumuia-

arise is absolutely vested, subject only to the direction for

accumulation. (Weatherall v. Thornhurgh, 8 Ch. D. 261.) So

far as such surplus accumulations are derived from real pro-

perty, they will go to the heir, and, so far as from personal

property, to the next of kin. In the case of a settlement made

by deed, there will, upon the same principle, be a resulting

trust of all such void accumulations to the settlor. {Re Lady

Rosslyn's Trust, 16 Sim. 391, see pp. 394, 395.) If there is a

residuary bequest of the personal estate, the surplus accumula-

tions will fall into this residue. (Haley v. Bannister, 4 Mad\*

275 ; Ellis v. Maxwell, 3 Beav. 587 ; O'Neill v. Lucas, 2 Keen,

313 ; Attorney-General v. Poulden, 3 Ha. 555 ; Jones v. Maggs,

9 Ha. 605). If the residue is settled by way of succession, the

surplus accumulations form part of the corpus. (Crawley v.

Crawley, 7 Sim. 427.) If there is a residuary devise, the sur-

plus accumulations of residue, in the absence of evidence of

a contrary intention in the will, go to the residuary devisee,

by virtue of the Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 25.\*

The excepted cases, to which the Act's restrictions do not Exceptions

extend, are as follows :- 'ZZ^o^''

(1) The Act does not extend to any provision for payment First

of debts, whether of the settlor or of any other person. ^^^^^ '^°'

(Sect. 2.)

\* [For further details as to the operation of the Act, and the recent cases,

see .Jarman on Wills, 6th ed., pp. 377 seq.l

204

ON ESTATES IK GENERAL.

Second

exception.

(2) The Act does not extend to any provision for raising

portions for any children of the settlor, or for any

children of any person taking any interest under the

settlement. (Sect. 2. See on this subject, Morgan v.

Morgan, 4 De G. & Sra. 164, at pp. 171—174.)

If this second exception should be construed literally, it would

seem to open a tolerably wide door to evasion. The following

suggestion has been made upon this point : — " It is conceived

that the word interest, as used in the second of the above excep-

tions, refers to a freehold interest, or at least to a long term

for years, in the property, the income of which is directed to

be accumulated, or to an interest in the funds accumulated,

considered as a certain corpus, analogous to a corporeal here-

ditament ; and that it does not refer to a mere right to

something issuing out of or collateral to such property or

accumulated funds. Indeed, if it wer« otherwise, the exception

would open so wide a door to provisions for accumulation, as

virtually to repeal the Act." (Smith on Executory Interests,

p. 422.) But this suggestion seems to savour rather of recon-

struction than of interpretation. There is nothing (as the

learned author in effect admits) to suggest a freehold interest

rather than a term of years ; and there is nothing in the

Act's language to suggest a long term of years rather than

a short one.

Third

exception.

Ireland and

Scotland.

(3) The Act does not extend to any direction touching the

produce of timber or wood upon any lands or heredita-

ments. (Sect. 2.)

[For other points arising on the Act, and decisions on its

construction, the student may consult Jarman on Wills,

6th ed., 377 et seq.']

The Thellusson Act, having been passed before the union of

the British and Irish legislatures, does not extend to Ireland ;

and by sect. 3, its application to heritable property in Scotland

was expressly prevented. But now, by 11 & 12 Vict. c. 36,

s. 41, its provisions are extended to heritable property in Scot-

land. English leaseholds, and, of course, a fortiori, English

EXECUTORY LIMITATIONS.

freeholds, are bound by the Act, irrespectively of the testator's

domicil. {Freke v. Lord Carbery, L. R. 16 Eq. 461.)

[The Accumulations Act, 1892, forbids the accumulation of

income for the purchase of land only, except during minority ;

Jarman on Wills, 6th ed., p. 387.]

205

Note I. (By the Editor.)

THE RULE AGAINST PERPETUITIES.

[The difficulty in defining "perpetuity," to which Mr. Meaning of

Challis alludes (siqyra, pp. 177, 180), arises from the fact that "perpetuity."

there are two rules against perpetuities, which are historically

independent of one another, although they are frequently con-

fused. One of them is older than the other, but neither is

really old, because the original common law did not require

any rule on the subject. As the Real Property Commis-

sioners remarked, in their third report (p. 29) : " It is a

mistake to suppose that at the common law, properly so

called, there was any rule against perpetuities."

[" Perpetuity," in its primary or widest sense (the word is Perpetuities

used in this sense in Pells v. Brown, supra, p. 177), is a dis- impossible at

position which, if it is effective, makes property inalienable for ^'^°^'^°" \*^-

ever; as in the case of a charitable trust, for charities are

exempt from the general principle of law which forbids the

creation of perpetuities. Trusts, however, form no part of

the common law, and at common law it was impossible to

create a perpetuity, either in personalty or in land. Personalty

was the subject of absolute ownership, and no future or con-

tingent interests in it could be created.\* Nor could a

perpetuity be created in land. At common law, all inheritances

were in fee simple; the only other estates were for life or for

years, and every estate in remainder was required to be vested

at the time of its creation. This simplicity was broken into,

first by the Statute De Donis, and secondly by the introduction

of contingent remainders. Estates tail eventually became

barrable by fines and recoveries, and although for many years

after the Statute of Uses and the Statute of Wills, persistent

attempts were made by the landowners to create perpetuities,

or unbarrable entails, by shifting uses and executory devises

and bequests in favour of unborn descendants, and by other

devices, these attempts were defeated by the firmness of the

judges (Real Property Commissioners' Third Report, p. 31),

and it became a settled doctrine that land could not be limited

• [As to executory bequests of chattels, see xuj>ra, p. 171, and infra, p.210 n.]

206

ON ESTATES IN GENERAL.

Old Rule

against

Perpetuities.

Modern Rule

against

Perpetuities,

[to the unborn descendants of a person, as purchasers, beyond

the first generation (Fearne, Cont. Remainders, 502). This

may be called the old Rule against Perpetuities, for in the

sixteenth century, when this doctrine became established,

"perpetuity" was almost invariably used in the sense of a

limitation designed to create an unbarrable entail. The rule

in question is, however, generally stated in an abbreviated

form, namely, that if land is limited to an unborn person for

life, no estate or interest can be given to any child of that

unborn person, and in this form it is known as the rule in

Whitht/ V. Mitchell {nupra, p. 116).\* With regard to contingent

remainders, at the time they were first allowed, fears were

entertained that land might by their means be made inalienable

beyond due limits, by the vesting being postponed until the

happening of a remote contingency, or "possibility on a

possibility." But as soon as it was settled that a contingent

remainder failed unless it was ready to take effect on the

determination of the particular estate, these fears were found

to be groundless. The matter is so clearly explained by the

Real Property Commissioners (in their Third Report) that

misconception might have been thought impossible ; neverthe-

less, the two doctrines above referred to — namely, the rule

forbidding the creation of " perpetuities," or unbarrable

entails, and the obsolete rule against double possibilities —

were frequently confused, with the result that the rule for-

bidding the limitation of land to the unborn descendants of a

person beyond the first generation (the rule in Whitby v.

Mitchell), was until recent years looked upon as an application

of the rule against double possibilities. Since the decision of

the Court of Appeal in He Nash, (1910) 1 Ch. 1, this theory

may be treated as exploded.

[As soon as it was settled that estates and interests created by

shifting or springing uses, or by executory devises or bequests,

or by means of trusts, could not be barred or destroyed

{supra, p. 177), it became necessary for the courts to invent a

new rule to prevent property from being tied up beyond due

limits. "It is with reference to these estates that the modern

doctrine, limiting the extent of perpetuities, has arisen."t

The modern rule was framed by analogy to the period allowed

for the limitations of a strict settlement ;t under such a

settlement land cannot be made inalienable beyond the life

of the tenant (or tenants) for life, and the infancy of the first

tenant in tail who attains majority; in other words, for

\* [The identity of the old Rule against Perpetuities and the rule in Whitby

V. Mitchell is clearly shown by the pas^^age in Fearne's Cont. Rem., p. 502, where

he uses "perpetuity" in the same sense in which it is used in Humherston v.

Humbergton (1 P. W. 332). In that case the intention of the testator to create

an unbarrable entail was carried into effect cy-prh (jiupra, p. 115).]

t [Real Property Commissioners, Third Report, p. 31].

X [Per Lord Kenyon, Long v. Blackall, 7 T. R. at p. 102.J

EXECUTORY LIMITATIONS.

207

[the maximum period, in ordinary cases, of a life (or lives) in

being and twenty-one years afterwards {supra, p. 196). But

there is an important difference between the rules which

govern the creation of contingent remainders, and the rules

which govern the creation of executory interests : for at

common law, provided a contingent remainder does not »

infringe the rule in Whitby v. Mitchell (supra, p. 115), it may

be limited to take effect on any event, however remote ; if the

event does not happen on or before the determination of the

particular estate, the remainder fails, but it is not void ab

initio. On the other hand, if an executory interest is limited

to take effect on an event which may possibly not happen

within a life or lives in being and twenty-one years afterwards

(allowing for gestation), it is void ab initio : even if the event

does in the result happen within the period allowed by the

Rule against Perpetuities that does not make the interest

good {supra, pp. 180, 191).

[The student will notice that the foregoing statement of Contingent

the rules applying to contingent remainders is qualified by the remainders,

words " at common law." The rule that a legal contingent

remainder cannot be void for remoteness is clearly laid down

by an overwhelming majority of the most eminent real

property lawyers of the last two generations, including

Mr. Fearne, the Eeal Property Commissioners, Mr. Butler,

Mr. Preston, Mr. Burton, and Mr. Joshua Williams. But

in recent years several Chancery judges of first instance have

asserted the doctrine that a legal contingent remainder is void

unless it conforms to the modern Rule against Perpetuities

{suj)ra, p. 200, n.). It is respectfully sabmitted that this

view is based on a misapprehension of the doctrines of the

common law, and on a confusion between the old and the

modern meaning of the term " perpetuity," for the learned

judges who have laid down the doctrine in question clearly

did not claim to have jurisdiction to alter the rules of the

common law. The subject is discussed, infra, pp. 213, seq.

Note II. (By the Editor.)

RE HOLLIS' HOSPITAL AND HAGUE.

[In this case (referred to supra, p. 190) land was in 1726 Proviso of

conveyed by T. H. to trustees in fee upon trust for a re-entry held

hospital, subject to a proviso that if at any time thereafter ^°'^'

the land, or the rents and profits tliereof, should be employed

for any other purposes, it should revert to the right heirs of

T. H. On a summons under the Vendor and Purchaser Act,

1874, it was held by Byrne, J.,\* that the proviso was void

• [(1899) 2 Ch. 640.]

208

ON ESTATES IN GENERAL.

Unlimited

right of re-

entry valid at

common law.

Judges

cannot alter

rules of

common law.

[under the Rule against Perpetuities ; but he refused to force

the title on the purchaser.

[At common law, it is clear that such a proviso would have

been valid. The Real Property Commissioners, in their third

report (p. 29) put the matter thus : — " The ancient common

law did not restrain the creation of future interests to a given

period. The time allowed for re-entries under conditions

broken, and for grants of rent-charges, or other incorporeal

hereditaments, commencing in fnturo, and for creating the

interesse teiinini, was indefinite, however courts of justice may

at present be disposed to consider them within that policy

of the law which restrains perpetuities. Sir Edward Coke

expressly says ' If I enfeoff another of an acre of ground,

upon condition that if mine heir shall pay the feoffee, etc.,

twenty shillings, he and his heirs shall enter, this condition is

good.' We know of no bounds originally fixed by the common

law within which interests of these kinds were restrained ; and

it is a mistake to suppose that at the common law, properly

so-called, there was any rule against perpetuities." \*

[At first sight it is a little difficult to understand how a

right of re-entry which would have been held good in 1628,

when Lord Coke wrote, should be held bad in 1899. No

statute altering the law has been passed in the interval, and

it is clear that no judge can alter a rule of the common law,

however much he may disapprove of it. As Jessel, M.R., said,

in speaking of the rule which makes a contingent remainder

fail unless it is supported by a particular estate of freehold :

" This is an arbitrary feudal rule, one of the legacies of the

Middle Ages which has come down to our times, and which,

not having been interfered with by the legislature, I cannot

interfere with " (3 Ch. D. at p. 399).

[The difficulty was appreciated by Byrne, J., in Re Hollis\*

gumption of Hospital and Hague. He conceded the accuracy of Mr. Challis's

^™^' • contention — that " when any part of the common law is found

to require amendment, the legislature alone is competent to

apply the remedy " — and endeavoured to answer it by an

ingenious argument. He said that where the common law

lays down a general principle, the courts may vary the appli-

cation of that principle to meet the changes which take place

from time to time in the conditions of life, and gave as an

illustration the principle of the common law against restraints

of trade. But the argument of the learned judge rests on an

erroneous assumption, and his illustration is therefore mis-

leading. There never was a general rule against perpetuities

at common law. " It is a mistake to suppose that at the common

Erroneous

• [At common law, whenever an estate upon condition was created, a proviso

of re-entry was implied (Litt. sec. 831). This is an additional proof, if any

were needed, that there was no principle of the common law against such pro-

visoes (see Encycl. Laws of England, xi. 73).]

fiXECUTORY LIMITATIONS.

209

[law, properly so called, there was any rule against per-

petuities."\* If the common law had laid down any such

general rule it would have been figliting an imaginary foe,

for under the original common law it was' impossible to

create inalienable interests in property. It has been already

pointed out {supra, p. 205) that it was not until after the

introduction of entails and contingent remainders, which

made it possible to settle land on unborn persons, that the

courts found it necessary to make a rule restricting the limita-

tion of land to unborn descendants, as purchasers. This rule,

which was the logical result of the decision in Taltarum's

Case, was the first rule against perpetuities,! and it applied

only to limitations of the particular kind just referred to.

After the introduction of shifting uses, executory devises and

bequests, and trusts, it became necessary for the courts again

to interfere, and to make a rule restricting the creation of

future interests in property by these means, which were

unknown to the original common law ; this is the rule which

we call the Rule against Perpetuities. So far as the common

law is concerned, its application is restricted to future interests

in land created by shifting use or executory devise or bequest.

It is true that it applies to all equitable future interests in

property, whether real or personal, and this has probably given

rise to the impression that it is a rule of general application

in English law I, but the notion is erroneous. It is a rule of

general application in equity, but not at common law ; there

never was a general Eule against Perpetuities at common law.§ . \*

[There are numerous common law interests of undoubted Prescriptive

legality which could not exist if the Rul eagainst Perpetuities and

embodied a principle of universal application. Thus a man rights?^'^^

\* [The attention of Byrne, J., does not appear to have been called to this

important statement contained in the third report of the lieal Property Com-

missioners. The whole passage is cited supra, p. 208. ]

t [Now commonly stated in the form of the rule in Wliitby v. MitcJiell, supra,

p. 115.]

X [Even that eminent judge, Sir G. Jessel, seems to have been under this

impression ; his dictum in Re Macleay (quoted supra, p. 189) cannot be explained

on any other theory. And in London ^ South Western Railway v. Gomm (20

Ch. D. at p. 583) he referred to the common law doctrine with regard to ease-

ments as " an exception to the rules against remoteness." But this was a slip

on the part of the learned judge : easements were recognized by the common

law long before the Rule against Perpetuities was invented.]

§ [It has been suggested more than once ie.g., by Fry, J., in Re Parry and

Daggs, 31 Ch. D. 130), that a principle forbidding the creation of inalienable

interests in property has existed '• from the earliest times," and that the rule in

Shelley's Case is based on it. The suggestion is inadmissible, if only because it

assumes that, in the absence of the principle in question, a limitation falling

within the rule in Shelley's Case could and would have had effect given to it

in accordance with the literal terms of the gift ; this was impossible, for

reasons explained elsewhere {supra, p. 167). The suggestion of Fry, J., is how-

ever, historically inaccurate, for at the time when the rule in Shelley's Ca^e was

invented, there was no occasion to lay down any principle in favour of the

alienability of property ; as Lord Macnaghten observed {Van Grutten v.

Foxwell, (1897) A. C. at p. 668), the suggestion involves an " anticipation of

the course of events and the development of modern ideas."]

C.R.P. P

210 ON ESTATES IN GENERAL.

[may be entitled to have a fence or a sea-wall kept in repair by

his neighbour, not as a matter of personal contract, but by

reason of his ownership of a particular piece of land ; and

there are old customs which entitle the inhabitants of a par-

ticular place to use private land for purposes of profit or

recreation. Mr. Gray sees that the continued existence of

rights of this kind is inconsistent with his theory that there is

in English law a rule against perpetuities of universal applica-

tion, and he therefore says that they exist " in violation of the

Rule against Perpetuities."\* But his view is based on the

assumption that the modern Rule against Perpetuities " was

created to effect a general end of public policy." t There is no

foundation for this assumption. When the judges framed

the new Rule against Perpetuities, by adapting the old rule to

the novel conditions which had arisen in the sixteenth and

seventeenth centuries, they did so in order to check the

creation of remote interests by new-fangled methods : they did

not intend to interfere with interests which were recognized as

valid by the original common law, nor indeed had they any

power to do so. Prescriptive and customary rights of the nature

above referred to cannot be treated as " violations " of a rule

which was not invented until long after their validity had been

established ; they are altogether outside the scope of the Rule.

[The suggestion of Byrne, J., is therefore no answer to Mr.

Challis's arguments.

Views of [In arriving at the conclusion that common law conditions

Sanders, g^^.^ within the Rule against Perpetuities, the learned judge

Gray. ' relied to some extent on the opinions of Sanders, Lewis, and

Mr. Gray. He does not, however, seem to have been aware

that the Real Property Commissioners were of the contrary

opinion ; it is hardly necessary to point out that the weight

of their authority is very great, seeing that they included in

their number the most eminent real property lawyers of the

day. It is also to be remarked that Mr. Lewis and Mr. Gray,

in contending that the modern Rule against Perpetuities is of

universal application, were largely influenced by a desire to

make the law symmetrical 1 ; and that this desire, however

\* [Perp., §§ 572 seq. Mr. Gray distinguishes between customary and pre-

Bcriptive rights ; the former, he says, cannot be released, while the latter can ;

but this seems inconsistent with what he says elsewhere (§§ 268 seq)^]

t \Ihid., § 298.]

t [Lewis on Perp. 620, and pri

[The student should beware of 1

preface : Gray, §§ 284, 298.

"being misled by an ingenious argument used by

Mr. Gray in his attempt to prove that rights of re-entry, and other interests

which were recognized as valid at common law before the Rule against Per-

petuities was invented, can now be made subject to the Kule without altering

the doctrines of the common law. He says : " The practical importance of

tracing the history of the Rule against Perpetuities lies in the proof it affords that

the Rule is not confined, as has been often contended, to interests arising under

the Statutes of Uses and Wills, but that it was developed by cases on executory

devises of chattels which were common law interests, and that it should govern

all kinds of future contingent limitations " (Perp., 2nd e<l., § 200 a). And

again: "So far is it from being true that the Rule against Perpetuities was

EXECUTORY LIMITATIONS. 211

[praiseworthy in itself, is not a sufficient reason for altering the

doctrines of the common law without legislative authority.

[Mr. Jarman, in describing the origin of the modern Rule Courts

against Perpetuities, says (Wills, 1st ed., p. 220) that it was justified in

introduced, " not by legislative interference, but by the courts mo^e^°|yi

of judicature, who, in this instance, appear to have trodden against

very closely on the line which divides the judicial from the Perpetuities,

legislative functions." The answer to this, as already pointed

out, is that the courts had to deal with a new problem, caused

by the introduction of shifting uses, executory devises and

bequests, and trusts, and that they were justified in applying

to these new-fangled modes of tying up property a rule formed

by analogy to the existing rule governing strict settlements of

land, which made it impossible, except in very unusual cases,

to tie up land for more than a life in being and twenty-one

years afterwards.\* To adapt an existing rule to novel circum-

stances is one thing : to alter well-established rules of the

common law, as Byrne, J., attempted to do in lie Hollis'

Hospital and Hague, is another.

introduced, and is now in force, only against interests created by the Statutes of

Uses and Wills, that, in fact, it was to a common law limitation that the Rule

owed its development. Executory devises of chattels were common law interests.

There could be no use of a chattel, and chattels were always devisable at

common law. But it was in the long line of cases touching these common law

interests, culminating in the Duke of NorfuWg Case itself, that the Rule against

Perpetuities grew and took its shape "(§ 296). But Mr. Gray does not state

the case accurately. In the first place, it is familiar learning that the Rule

against Perpetuities is not confined to interests arising under the Statutes of

Uses and Wills ; Mr. Challis (supra, p. 171) includes executory devises of terms

of years in the class of executory limitations which are subject to the Rule against

Perpetuities ; and it is distinctly stated by Mr. Fearne, Mr. Burton, and the

Real Property Commissioners, that the Rule applies to executory devises of

terms of years. In the second place, Mr. Gray ignores the fact that executory

devises of terms of years were void at common law, and that their legality was

not established until early in the seventeenth century (Manning's Case, 8 Co.

94, sujj/'a, p. 1 7 1). It is with reference to estates created by shifting or springing

uses, executory devises and executory trusts, as the Real Property Commissioners

point out (third report, p. 31), that " the modern doctrine, limiting the extent

of perpetuities, has arisen." The judges of the seventeenth century may have

gone to the extreme verge of their judicial powers, first in admitting the validity

of executory devises of terms of years, and secondly in inventing the modern

Rule against Perpetuities to check them and other novel methotls of tying up

property, but it is quite clear, as a matter of history, that the judges never

intended to interfere with the creation of interests which had been recognized

as valid at common law before these novel methods were hciinl of.

[A similar criticism may be made on Mr. Gray's suggestion (Perp. §§ 297, 323)

that a retrospective operation was given to the modern Rule against Perpetuities

in applying it to equitable interests, because they existed long before the Rule

was invented, and that therefore the Rule ought to be given a retrospective

operation with regard to contingent remainders and other common law interests

which existetl before it was invented. But as a matter of history, it is clear

that the motleru system of trusts and the modern Rule against Perpetuities

(" motlem " is of course a relative term) came into existence almost simul-

taneously ; Lord Nottingham was the father of them both (see y^^r Lord Kenyon,

in Jee v. Audley, 1 Cox, 324 ; Long v. Blackall, 7 T. R. 100 : per Lord Mansfield,

in Burgess v. Wheate, 1 Ed. at p. 223. See also Maitland's Lectures on Equity,

10). It follows that no retrospective operation was given to the Rule in

applying it to executory bequests of years or to equitable interests.]

• lSu2\*ra, pp. 190, 206.]

P 2

212

ON ESTATES IN GENERAL.

Policy of the

Rule against

Perpetuities.

Whether

rights of re-

entry should

be made

subject to

Rule against

Perpetuities.

[It is also to be remarked that conditions similar to the

one which was in question in Re Ilollis' Hospital and

Hague, so far from being within the scope of the Rule against

Perpetuities, are not even within its policy. The Rule is

directed against the creation de novo of certain kinds of future

interests, but a common law condition of re-entry is rather

the reservation of an existing interest than the creation of a

new one \* : it is similar to a reversion or possibility of reverter.

There is no policy or principle of law which forbids such

reservations. Not only are they allowed by the common law,

but they are in some cases expressly authorized by statute.

Thus, under the School Sites Act, 1841, land may be granted

for certain purposes of education in such a way that upon its

ceasing to be used for those purposes it reverts to the estate

of which it originally formed part (see Att.-Gen. v. Shad-

well, (1910) 1 Ch. 92). Again, land can at common law be

granted for any term of years, for any lawful purpose, subject

to a proviso of re-entry in the event of its ceasing to be used

for that purpose ; or the term may be so limited that it comes

to an end on breach of the condition without any entry by the

lessor. (Hood & Challis, 5th ed., p. 62.) So in equity, the

user of land can be restricted by negative covenant for an

indefinite period.!

[The Eeal Property Commissioners, although of opinion

that common law conditions are not within the rule against

perpetuities (supra, p. 208), thought that they ought to be

made subject to it, and they advised that an Act of Parliament

should be passed, including, among other enactments, a pro-

vision to that effect. It is singular that, more than sixty years

after this recommendation was made, a judge should assume

the power to make an alteration in the law which the legisla-

ture lacked either time or inclination to effect.^

\* [A right of re-entry was implied by law on the grant of an estate on

condition ; mpra, p. 208 n.]

t [If the conveyance in He HollW Hospital and Hague had been executed a

few years later, it would have been void under the Mortmain Act of 1730, which

invalidated every conveyance of land to charitable uses containing any reserva-

tion or condition for the benefit of the grantor or any person claiming under

him, and Byrne, J., seems to have regarded this as an argument supporting the

view that the reservation in the case before him was against public policy. But

it is clear, from the preamble to the Mortmain Act, that the object of this pro-

hibition was to prevent a conveyance to charitable uses from being made in

such a way as not to take effect until after the death of the grantor, and that it

was not intended to invalidate conditions of re-entry similar to the one which

was in question in He nullW Hospital and Hague ; in order to prevent the

Act from having this operation, the legislature passed the Act 24 Vict. c. 9,

which enabled provisions as to the use of the land, and a right of entry on

breach, to be inserted in any conveyance of land to charitable uses made in

accordance with the Act of 1736. The provisions of the Mortmain Acta there-

fore tell against the reasoning of Byrne, J. The Mortmain, &c., Act, 1888,

which consolidates the previous Acts, unfortunately omita the preamble to the

Act of 1736.]

X [If an Act of Parliament should be passed to carry out the recommenda-

tions of the Commissioners by extending the Rule against Perpetuities to all

EXECUTORY LIMITATIONS.

213

[It is to be remembered that judicial legislation, extending Dangers of

the scope of the Kule against Perpetuities, may lead to grave j"^'\*;'^-

injustice, for it is necessarily retrospective. The conveyance ®8»saion.

on which the question arose in the case before Byrne, J., was

executed in 1726, and at that time no practical conveyancer

could reasonably be expected to foresee that any difficulty as

to the validity of the condition would ever arise. If the con-

veyancer yfho was responsible for the deed had had the gift of

prophecy, he would probably have avoided the difficulty by

granting the land for a long term subject to a proviso of

re-entry.

[Since Re Hollis' Hospital and Hague was decided, the case

of Att.-Gen. v. Cummins has been reported.\* The learned

judgment of Pallas, C.B., supports the views expressed by Mr.

Challis.]

Note III. (By the Editor).

RE ASHFORTH.

[In this case (referred to supra, p. 200) land was devised (in Limitation

effect) to trustees and their heirs upon certain trusts for the ^^'^ ^^^^ ^°\*"

benefit of A., B., and C. and their children, born not later '^®™° °^^

than twenty-one years from the death of the testatrix ; after

the death of all the children except one, the testatrix devised

the land to such surviving child in tail, with remainder over.

It was held by Farwell, J.,t that the devise to the last surviving

child was void for remoteness. It is respectfully submitted that

the decision is correct, but that the reasons given for it are

contrary to principle and authority.

[ (1) The learned judge, in an early part of his judgment, Oariand v.

said that the case was " really undistinguishable from Garland Brown.

v. Brown " (10 L. T. 292). If this were so, the decision in Re

Ashforth would be no authority on the question whether the

Kule against Perpetuities applies to legal contingent remain-

ders, for in Garland v. Brown the limitations were equitable,

and it is well settled that all equitable limitations are subject

common law interests, it would probably be advisable to except from its opera-

tion provisions for the enforcement of covenants relating to the user of land

and similar mattei s. When an estate is laid out for building, it is often desired

to make the owners for the time being of the different plots contribute to the

maintenance of roads, drains, gardens, &c., for the common benefit. This can

easily be done if long leases (say for 1,000 years) arc granted, but where the

plots are conveyed in fee simple there is a difficulty in doing this, because,

owing to the doubts which have been raised in recent years as to the scope of

the Rule against Perpetuities, many practitioners hesitate to insert powers of

entry and distress, or to reserve rent-charges, for the purpose of making such

provisions eflFectual, unless they are restrictecl to the period allowed by the Rule.

This causes practical inconvenience. If there is no objection, on the score of

public policy, to such remedies being made to endure for 1,000 years, there

cannot be any reason why they should not be made perpetual.]

• [(1906) 1 Ir. R.406.]

t [(1905) I Ch. 535.]

214

ON ESTATES IN GENERAL.

No contingent

remainder in

Bs Athforth,

Origin of

Rule against

Perpetuities.

Mr. Joshua

Williams's

opinion

vindicated.

[to the Rule. As a matter of fact, however, the limitations in

lie Ashforth were legal, and Garland v. Brown has nothing to

do with the case.

[ (2) The learned judge, in the concluding part of his judg-

ment, said : " The present attempt is made by vesting a legal

estate pur autre vie in trustees, and limiting the contingent

remainders as a legal use." But there is no authority for the

proposition that an estate pur auter vie can be limited during

the lives of unborn persons; such a "particular estate " is

unknown to the common law ; the limitation in tail in He

Ashforth was therefore an executory devise, and clearly void

for remoteness.\*

[ (3) The learned judge remarked : " It is very difficult

to say when the conception of perpetuity in its modern

meaning first appeared in our courts." But there is really

no difficulty in the matter. The history of perpetuities

has been traced with perfect clearness and accuracy by the

Real Property Commissioners.! The difficulty felt by Farwell,

J., in Re Ashforth is caused by the change in the meaning of

the word " perpetuity." Down to the end of the eighteenth

century, " perpetuity " was rarely applied to any kind of property

except land (including long terms of years), and was commonly

used to denote an attempt to tie up land by limiting it to the

unborn descendants of a person in such a way as to make it

inalienable; in other words, " perpetuity" formerly meant a

limitation in the nature of an unbarrable entail. A clear dis-

tinction is taken by Mr. Fearne between " perpetuity " in this

sense, and a future interest which is void for remoteness under

the modern Rule against Perpetuities. Mr. Fearne states in

the most explicit way that a contingent remainder is absolutely

void if it infringes the old rule forbidding the creation of

"perpetuities" (Cont. Rem. 502), but that it cannot be void

for remoteness, because the modern Rule (which applies to

future interests created by shifting uses, executory devises, &c.)

does not apply to contingent remainders (Cont. Rem., 441,

infra, p. 217, where the passage is quoted).

[(4) The learned judge said that the opinion of Mr. Joshua

Williams had been " displaced " by Mr. Gray. It would, how-

ever, be more accurate to say that the opinion of Mr. Gray

has been displaced by the Court of Appeal. Mr. Joshua

Williams (following the opinion of Mr. Fearne, Mr. Preston,

\* [If the will in Re Axh/orth had been subject to the old law, it seems that

the devise to the trustees would either have given them the fee {Dite v. Bavie\*,

1 Q. B. 430 ; Poad v. Wation, 6 E. & B. 606 ; adlier v. Walterx, L. R. 17 Eq.

252 : Re TowngetuVs Contract, (1895) 1 Ch. 716), or an estate pur auter vie

during the lives of A., B., and C, followed by a chattel interest during the lives

of the children : Doe v. Simpwn. 5 East, 162 ; Doe v. Cafe, 7 East, 675 ; Collier

V. Walters, L. R. 17 Eq. at p. 264. Since the Wills Act, if the purposes of a

devise cannot be satisfied by an estate pur auter vie, the trustees take the fee :

Jarman on Wills, 6th ed., p. 1843.]

t [The result of their investigations is stated shortly, supra, p. 206.]

EXECUTORY LIMITATIONS. 215

[Mr. Charles Butler, the Eeal Property Commissioners, Mr.

Burton, and Lord St. Leonards) contended that contingent

remainders are governed by the old rule forbidding the limita-

tion of land to unborn generations in succession, and not by

the modern Rule against Perpetuities.\* Mr. Gray, on the

other hand, contended that the old rule never existed except in

the imagination of certain judges and conveyancers, and that

contingent remainders are subject to the modern Rule against

Perpetuities. Mr. Joshua Williams's contention was accepted

as correct by the Court of Appeal in Whithp v. Mitchell (44

Ch. D. 85) so far as it bore on the question in that case, and

it follows that Mr. Gray's opinion is erroneous, at least to

that extent. But he still denies that the rule established by

the decision in Whitby v. Mitchell ever existed.f

[(5) The learned\* judge said : " The Rule against Perpetui- Norule

ties applies to all contingent equitable limitations of real against per-

estate, and all contingent limitations of personal estate, commcmkw

including leaseholds. It would certainly be undesirable to add

another to the anomalies that adorn our law, as I should

succeed in doing if I held that the rule did not apply to legal

contingent remainders." But this argument seems to be

based on the assumption that there is a general principle or

rule forbidding the creation of remote interests, and that this

general principle formed part of the common law. In making

this assumption (which the Real Property Commissioners say

is unfounded I) the learned judge seems to have been misled

by the ambiguity of the word " perpetuity," used by Lord

Nottingham in a well-known passage in his judgment in the

Duke of Norfolk's Case, which is quoted by Farwell, J. In

Lord Nottingham's time (1681) " perpetuity " was never used

in the modern sense of remoteness : it meant a limitation in

the nature of an unbarrable entail, as Lord Nottingham him-

self tells us.§ It is quite clear that at common law there was

\* 1 Williams, R.P., 3rd ed., p. 227 ; 12th ed,, p. 269.]

t [He describes it (Perpetuities, 2nd ed., § 290) as "a non-existent rule

based on an exploded theory," referring to its supposed derivation from the

so-called doctrine of double possibilities. That doctrine is no doubt " an exploded

theory" (Liw Quarterly Review, xxv., 385: Mp Nash, (1910) 1 Ch. 1), but as

the rule in Whitby v. Mitchell is really derived (as Mr. Fearne tells us) from

the old rule forbidding the creation of " perpetuities," or unbarrable entails

{supra, p. 206 n.), the explosion of the double possibilities theory does not affect it.

Mr. Gray objects to the rule in Wkitby v. Mitchell because it shows that the

modern Rule against Perpetuities is not a rule of universal application, which

he thinks it should be. He says : " As the Rule governs all contingent equit-

able limitations of real estate, and all contingent limitations, legal and equitable,

of personal property, whether in the form of remaiadei"s or not, it is very

desirable that legal contingent remainders of real estate should be subjectetl to

the Rule also" (Perp. § 284). But this is a matter for the legislature, not for

text-writers ; they cannot alter the rules of the common law.]

X [Supra, pp. 208-9.]

§ [" A perpetuity is the settlement of an estate or an interest in tail, with

such remainders expectant upon it as are in no sort in the power of the tenant

in tail in possession to dock by any recovery or assignment " : Duke of Norfolk's

Case, 3 Ch. Ca. at p. 31. " Perpetuity is used in law where an estate is so

216

ON ESTATES IN GENERAL.

Limited scope

of Rule

Against

Perpetuities.

[no general principle forbidding the creation of remote

interests, for the simple reason that the rules of the common

law made it impossible to create such interests {supra, p. 205).

[The history of the modern Rule against Perpetuities only

requires to be stated to show that it never applied to

continf^ent remainders. The common law rules governing

the settlement of land, before the introduction of executory

interests, were extremely stringent, and made it impossible

to tie up land with certainty for a longer period than a life

or lives in being and the minority of a person born before

the death of the last tenant for life {supra, p. 206). But

estates created by way of executory devise, shifting use, or

trust (modes of settlement introduced in the sixteenth and

seventeenth centuries), stood upon a different footing ; if limited

after a particular estate, they were not liable to fail by its pre-

mature determination, and if limited after an estate in fee,

they could not be barred by common recovery. Hence

executory devises, "if some limit had not been prescribed,

would have been a shelter for perpetuity. To prevent such an

abuse, the judges limited the time for the contingency on

which an executory devise was to operate. . . . Thus as for

the sake of general utility the judges exercised a discretion in

permitting executory devise to be introduced, so to prevent

public inconvenience they limited the time for the contingency,

and proscribed all contingencies exceeding that time as too

remote, and therefore against law. The courts of equity

followed the courts of law in this, and circumscribed trusts

of the nature of executory devise in like manner. Hence

gradually arose the boundary which now circumscribes execu-

tory devises, and limitations and trusts of the same nature,

namely, the rule confining the contingency for the springing

up of future and executory estates to the compass of a life or

lives in being and twenty-one years after, including a sufiicient

number of months for the birth of a child en ventre sa mere."\*

This period was fixed by analogy to the period during which,

as above explained, land could at common law be tied up by a

strict settlement ; that is, by limiting land to a living person

for life, with a contingent remainder to his unborn children in

tail. " The rules respecting executory devises have conformed

to the rules laid down in the construction of legal limitations,

and the courts have said that the estate shall not be unalienable

by executory devises for a longer time than is allowed by the

designed to be settled in tail, &c., that it cannot be undone or made void"

Termes de la Lej, Jacob's Law Dictionary, a. v. "A perpetuity is the settle-

ment of an interest descendable from heir to heir, so that it shall not be in the

power of hjm in whom it is vested to dispose of it, or turn it out of the

channel" : Gilbert, Uses, 118.]

\* [Mr. Hargrave's argument in the Tliellusaon, Case, cited in Butler's edition

of Fearne's Cont. Rem. 429 n.j

EXECUTORY LIMITATIONS.

217

[limitations of a common law conveyance. In marriage settle-

ments the estate may be limited to the first and other sons

of the marriage in tail,\* and until the person to whom the last

remainder is limited is of age, the estate is unalienable. In

conformity to that rule the courts have said, so far we will

allow executory devises to be good."t

[It is therefore clear that the rules governing legal con-

tingent remainders were settled long before the modern Rule

against Perpetuities was invented, and that the judges who

invented it had neither the power nor the intention to apply

it to legal contingent remainders.

[There is an overwhelming consensus of opinion to this

effect among the most eminent judges and real property

lawyers of the eighteenth and nineteenth centuries. Thus

Mr. Fearne, after explaining that the necessity for inventing

the modern Rule against Perpetuities arose from the

" privilege of executory devises, which exempts them from

being barred or destroyed,"! goes on to remark that "Future

and shifting uses, and other springing and executory interests

which are not remainders, are to be considered as subject to the

same limits and restrictions as executory devises."§ The Real

Property Commissioners, and also Mr. Preston, Mr. Charles

Butler, Mr. Burton, Lord St. Leonards, Lord Brougham, aad

Mr. Joshua Williams, were of the same opinion.il

[It follows that any judge who now decides that legal con-

tingent remainders are subject to the modern Rule against Per-

petuities can only do so by ignoring the doctrines of the

common law, the clear history of the rule, and the opinion

of the most eminent real property lawyers of the last two

generations.]

\* [ (Jnder the old rule forbidding the creation of " perpetuities," or unbarrable

entails, land cannot be limited to unborn descendants in succession as purchasers

beyond the first generation : Fearne, Cont. Rem. 502 ; Whithij v. Mltcliell, 44

Ch. D. 85, mpra, pp. 115, 199.]

t \\_Per Lord Kenyon, in Long v. Blackall, 7 T. R. p. 102. Mr. Gray remarks

that this statement of Lord Kenyon is " unsupported by the facts " (Perp. § 198).

But this is because Lord Kenyon's statement involves the recognition of the old

rule forbidding the limitation of life estates to successive generations. Mr. Gray

strenuously denies that such a rule ever existed. As the rule in question is

established by the decision of the Court of Appeal in Whitby v. M'dfhell (supra,

p. 116), Mr. Gray's criticism must be disregarded, more especially as the Real

Property Commissioners (third report, p. 32), Mr. Sanders (Uses, 205), Mr.

Barton (Corap. § 784), and Mr. Joshua Williams (Real Property, 12th ed., p. 318)

agree with Lord Kenyon.]

X [Cont. Rem. 429.]

§ [7ft(<i., 441. Mr. Lewis must have overlooked this passage, for he cites

Mr. Fearne as supporting the view that contingent remainders are subject to

the modern Rule against Perpetuities (Perp., p. 412). This singular blunder on

the part of Mr. Lewis is due to his inability to understand that " perpetuity "

was used by Mr. Fearne in the same sense in which it was used by Lord

Nottingham, namely, in the sense of a limitation in the nature of an unbarrable

entail. The same blunder was made by Kay, J., in Re Frost, supra, p. 200 n.]

II Third report of the Real Property Commissioners, 29 ; Preston on Abstracts,

ii., 114 ; Butler's note to Fearne, Cont. Rem. 565 ; Burton's Comp. § 782 ; Cole

T. Sewell, 4 Dr. & W. p. 28 ; 2 H. L. C. 230 ; Williams, R. P. 12th ed., 269, 318.

The passages are cited in Jarmau on Wills, 6th ed., 369-70.]

Not applic-

able to legal

contingent

remainders.

Opinion of

Mr. Fearne,

and others.

Conclusion.

( 218 )

PART III. THE NATURE AND

QUANTUM OF ESTATES.

CHAPTER XV.

OF A FEE SIMPLE.

In the language of the English law, the word fee signifies an

estate of inheritance as distinguished from a leas estate ;\* not, as

in the language of the feudists, a subject of tenure as distinguished

from an allodium. Allodium being wholly unknown to English

law, the latter distinction would in fact have no meaning.

Its *quantum* and incidents.  
A *fee simple* is the most extensive in *quantum*, and the most

and incidents, absolute in respect to the rights which it confers, of all estates

known to the law. It confers, and since the beginning of legal

history it always has conferred, the lawful right to exercise over,

upon, and in respect to, the land, every act of ownership which

can enter into the imagination, including the right to commit

unlimited waste; and, for all practical purposes of ownership, it

differs from the absolute dominion of a chattel, in nothing ex-

cept the physical indestructibility of its subject.

Besides these rights of ownership, a fee simple at the present

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\* " Feodum is the same that inheritance is." (Litt. sect. 1.) Lord Coke ex-

pressly admits that the usage here adopted is the more correct, though he has

not chosen to adhere to it. " Of fee simple, it is commonly holden that there be

three kinds, viz. fee simple absolute, fee simple conditionall, and fee simple

qualified, or a base fee. But the more genubie and apt divimm were to divide fee,

that is inheritance, into three partx, viz. simple or absolute, conditionall and

qualified or base." (Co. Litt. 1 b.) Also in the next page he says : — "And

therefore, seeing fee simple is hfereditas legitima rel pura, it plainly confirmeth

that the division of fee is by his [Littleton's] authority rather to be divided as

is aforesaid than fee simple."

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

OF A FEE SIMPLE. 219

day confers an absolute right, both of alienation inter vivos and

of devise by will.\*

Practical restrictions.   
These remarks must be understood in their general applica-tion, which refers to an individual tenant, as distinguished from

an ecclesiastical corporation, (lay corporations, when entitled to

hold lands in fee simple, having generally the same powers and

rights as individual owners,) seised absolutely to his own use, in

possession, free from incumbrances; in which last word must for

this purpose be included easements and profits dprendi-e. The

legal powers of a trustee are practically restricted by the terms

of the trust ; those of an ecclesiastical corporation, partly by the

common law, and partly by numerous statutes ; and those of the

owner of a servient tenement, by the rights of the owner of the

dominant tenement ; and a similar restriction must be made in

respect to profits *a prendre.*

At the common law, a condition may be annexed to an estate

of fee simple, by a breach of which, if it is a negative condition,

or by the performance of which, if it is a positive condition, a

right of entry accrues to the grantor or his heirs ; and if an

entry be made, the estate to which the condition is annexed is

destroyed ; whereby the fee reverts to the grantor or his heirs,

in the same manner in all respects as before the grant of the

estate subject to the condition. But the benefit of a common

law condition cannot be reserved to a stranger ; nor is the

estate subject to the condition destroyed, until an entry has

been made in pursuance of the right of entry. (Litt. sect.

847, and Lord Coke's comment.)

Moreover, the existence of executory limitations., which are

of recent origin in comparison with the common law, renders

it possible at the present day to vest an estate in fee simple in

a tenant subject to a liability to be defeated, or shifted to

another owner. The liability to defeasance by executory limita-

tion differs in two respects from the liability to defeasance by

a common law condition, — (1) the benefit of an executory

\* For some remarks upon the restrictions affecting alienation hUer riros, during

the interval between Magna Carta and 12 Car. 2, c. 2i, see p. 21, supra. Some

remarks upon the history of alienation by devise will be found at the end of this

chapter.

220 THE NATURE AND QUANTUM OF ESTATES.

limitation may be reserved to a stranger ; and (2) an executory

limitation takes effect without an entry made by the person

entitled to'the benefit of it.

The possibility of the existence of the above-mentioned re-

strictions and liabilities must be taken into account, while

enumerating the powers and privileges of a tenant in fee simple.

These restrictions and liabilities (except trusts, which are

generally destroyed by an alienation of the legal estate to a

purchaser for value without notice of the trust) cannot be got

rid of by alienation or devise, but continue to affect the estate

in the hands of the assign or devisee. The subject is further

complicated by the fact, that courts of equity to some extent

interfere with the common law rights of a tenant in fee simple,

when his estate is subject to an executory limitation, for the

benefit of the person entitled thereunder. Upon this last point,

some remarks will be found at p. 223, wfra.

Its limitation The quantum, or extent of the possible duration, of the estate

to natural jg accurately measured by the express limitation to the qrantee

l)ersons, as \*' ^ .

distinguished and his heirs simply. No greater duration than this can be con-

tions. ceived for an estate as distinguished from absolute dominion. It

is impossible for a failure of heirs to take place by the actual

(as distinguished from the constructive) non-existence (as dis-

tinguished from the non-appearance) of any person standing in

any of the required degrees of relationship to the tenant ; for

failure of heirs even by reason of bastardy, is in this sense only

a construction of law and not a fact of nature. Such a failure

can take place only by some of the means previously enumerated

under the title escheat. These the law does not presume, not

even a mere failure of heirs\* without attainder ; and it therefore

presumes that a fee simple will in fact endure for ever. In this

respect the quantum of a fee simple is greater than the quantum

of all modified fees, which, though they may endure for

ever, are not presumed by the law so to do, and upon

which there is a possibility of reverter, or, in the case of

\* " For the law doth not expect the determination of a fee by his dying with-

out heirs." Pells v. Brown, Cro. Jac. 590, at p. 592. Attainder, as has been

remarked above, does not now cause corruption of blood or failure of heirs. See

33 & 34 Vict. c. 23, s. 1.

OP A FEE SIMPLE. 221

fees tail and base fees, a remainder or reversion, instead of

an escheat.\*

Before the coming into operation of the Conveyancing Act of The word

1881, the word heirs, accompanied, it would seem, by the sary in

possessive pronoun, was necessary to be used in the express i^[^Uong

limitation of all fees, or estates of inheritance, to a natural

person or persons, as distinguished from a corporation. (Litt.

sect. 1.) Lord Coke also lays stress upon the copula and,

(Co. Litt. 8 b. See also Mallory's Case, 5 Rep. Ill, at p. 112 a,

where it is stated, in the first resolution by the court, that " if

a feoffment be made to A tO have and to hold to him, or to his

heirs, then he has but an estate for life, for there want pre-

cedent words to direct the words in the disjunctive.") But it

does not appear, from Lord Coke's observations, that the

copula was necessary,, except in so far as it might be necessary

to prevent the limitation from being void for uncertainty.

And in Wright v. Wright, 1 Ves. sen. 409, at p. 411, Lord

Hardwicke seems to have thought that, even in a deed, the

word or would be treated as a clerical error for and, and be

construed accordingly.

At the common law, the proper words, and the only words

that can with perfect safety be used expressly to limit an estate

in fee simple, are the following : — To A and his heirs ; or, if

there be several grantees, To A, B, &c., and their heirs. In

practice, the additional words, and assigns for ever, are and

long have been, in common use ; but it is beyond doubt that,

though harmless, they are, and always were, superfluous.

(Brookman v. Smith, L. R. 6 Exch. 291, at p. 306. This case

was affirmed on appeal, L. R. 7 Exch. 271).

The doctrine of Hargrave, note 4 on Co. Litt. 8 b, that,

\*•' according to many authorities, heir may be nomen collcctivum,

as well in a deed as a will, and operate in both in the same

manner as heirs in the plural number," is stated by Preston

\* Upon the subordination, in point of quantum, of different species of fees, see

3 Prest. Conv. 169, 170. But in a certain sense, all common law fees are equal ;

in that the grant of a modified common law fee exhausts the whole estate of the

grantor, even though seised in fee simple absolute. See Lord Coke on Litt.

sect. 11. But his language implies that there is some distinction between them,

in point, as he styles it, of " perdurablenesse."

222 THE NATURE AND QUANTUM OF ESTATES.

to be founded upon a mistake ; the authorities cited by.

Hargrave referring only to limitations contained in wills. (2

Prest. Est. 9.)\*

In the limitation of a fee simple, the word heirs always bears

its general meaning, when standing alone and unqualified by

words to restrict it to heirs of the body. Its significance is not

liable to be restricted to any particular class of heirs, by reason

merely of the fact that, under the special circumstances of the

case, only a particular class of heirs is capable of an actual

inheritance by virtue of its use.

A limitation to a bastard and his heirs gives a fee simple,

not a modified fee ; although only the heirs of his body are,

under the circumstances, capable of inheriting. (1 Prest. Abst.

273 ; 2 Prest. Est. 358, 359.) And similarly, even at common

• law, of an alien, and a man attainted of felony ; though at the

common law they could have no heirs. (Co. Litt. 2 b.)

The limitation of an equitable fee simple requires the same

words of limitation as a legal fee simple. {Meyler v. Meyler,

11 L. K. Ir. 522.)t

Cases of But, it must be observed, (1) that the limitation, where it

ofhn^Hed\*°\*^ was necessary, was not always necessarily express; and (2)

limitation. that all limitation whatsoever was, in some cases, unnecessary.

(1) Informal limitation by words of direct and immediate

\* In 1 Roll. Abr. 832, K, pi. 1, it is stated so to liave been held in C'larh^ and

Dayes, per Popham and Fenner ; on which Preston : " In this case, which is

Cheek and Day, the question arose on a will, and the opinions of Popham and

Fenner were extra-judicial." (2 Prest. Est. 9, note). On Cheek V. Day, see

Fearne, Cont. Rem. 150.

But in Dubber y. Trollop, Cas. temp. Hardw. 160, Lord Hardwicke appears

to adopt the opinion of Popham and Fenner, as stated by RoUe. (See p. 161.)

See also O'Kee/e v. Jones, 13 Ves. 413. But there the limitation was in a will,

and to the testator's next heir at law, and was held to be equivalent to a devise

to his right heirs.

By special custom, a copyhold in fee may l)e granted without the word heirs.

(2 Prest. Est. 67.)

It seems that a rent-charge in fee might be granted out of a manor, by any

words implying a right to receive the rent-charge in j^erpetuity. (18 Vin. Abr.

472, pi. 1 = Bent, A. pi. 1.) [As to easements, see L, Q. R., xxiv., 259, 264.]

t [The decision in Meyler v, Meyler was approved in lie Whiston^s Settle-

vwnt, (1894) 1 Ch. 661 ; and see Re Irwin, (1904) 2 Ch. 752 ; but the true

principle is that if the intention is clear, an equitable estate in fee simple or tail

may be created without words of limitation : lie Tringham^s Trugtt, (1904) 2

Ch. •J87 ; Re Oliver' g Settlement, (1905) 1 Ch. 191.]

OF A FEE SIMPLE. 223

reference would suffice. Thus a father might infeoff his son,

habendum to him and his heirs, and the son afterwards infeofif

the father " as fully as the father infeoffed him," (Co.

Litt. 9 b.)

(2) In some cases no limitation was required. Thus, one of

several coparceners, or one of several joint tenants, seised in

fee simple, might release to another without words of limitation.

(Co. Litt. 9 b ; ibid. 273 b ; Litt. sect. 304.) On a partition

between two coparceners seised in fee simple, a rent granted

by one to the other for equality of partition, without words of

limitation, was in fee simple. (Prest. Shep. T. 101 ; Co. Litt.

10 a.) By a bargain and sale for valuable consideration, the

fee simple might pass without limitation (10 Vin. Abr. 235

=■ Estate, K. 2, pi. 2) ; as also by a fine come ceo, and a fine siir

concessit (Shep. T. 4 ; 1 Salk. 340 ; 2 Prest. Est. 51, 52) ; and

by a recovery. (Co. Litt. 9 b ; 2 Cruise, Fines & Rec. 15.)

Sect. 51 of the Conveyancing Act of 1881 enacts, that in statutory

deeds executed after the 31st December, 1881, it shall be suffi- ^T^''.^^?\*

limitation.

cient, in the limitation of an estate in fee simple, to use the

words in fee simple without the word heirs.\*

Both the quantum of the estate, and also the privileges of

user (as distinguished from the right, or capacity, to alienate)

which it confers, are the same when it arises by implied limita-

tion, or without limitation, as when it arises by express limita-

tion. And, generally, it may be said that the rights of a tenant

in fee simple, both at law and in equity, are independent of the

method by which his estate arises. But this proposition is

subject, in equity, to some modification, when his estate is

liable to be defeated by an executory limitation.

It was formerly thought that a tenant in fee simple, whose Restrictions

estate is liable to be defeated by an executory limitation, stood "»posed by

equity, when

in equity in no better position, as regards the right to commit the estate is

waste, than a tenant for life punishable, for waste. (Robinson executory

V. Litton, 3 Atk. 209 ; Stansjicld v. Habergham, 10 Yes. 273.) li^nitation.

But it has more recently been decided that, in the absence of

\* [The words " in fee " are not sufficient : He Ethel and Mitchells and

Butler' t Contract, (1901) 1 Ch. 946.]

224

THE NATURE AKD QUANTUM OP ESTATES.

Statutoiy

powers.

express provision, he is practically in the same position as a

tenant for life without impeachment of waste. {Turner v.

Wright, 2 De G. F. & J. 234 ; see p. 246). Such a tenant in

fee simple may be made punishable for waste by an express

provision contained in the instrument under which his estate

arises. {Blake v. Peters, 1 De G. J. & S. 345.)

Since the liability to defeasance by executory limitation fol-

lows the estate into the hands of an assignee or devisee, it

implies a disability to alienate for an unincumbered fee simple.

But a tenant in fee simple, with an executory limitation, gift,

or deposition over, on failure of his issue, or in any other

event, has, when his estate is in possession, the powers con-

ferred upon a tenant for life under a settlement by the Settled

Land Act, 1882. (See sect. 58, sub-s. 1, ii., of that Act.)

These include powers of sale, exchange, and partition. The

effect of sect. 58, sub-s. (2), and sect. 20, seems to be, that

estates limited by assurances executed by virtue of these

statutory powers, will be valid as against all persons claiming

any estate to which the settlor, who created the fee simple

subject to the executory limitation, was entitled at the time

when the instrument, under which such fee simple arises, came

into operation ; but are subject to all charges and assurances

made for money actually received\* between that time and the

exercise of the statutory power. An executory limitation, in

defeasance of a fee simple, if it be to take effect on default or

failure of all or any of the issue of the person entitled, subject

thereto, will now, by the Conveyancing Act, 1882, s. 10, become

void so soon as there is living any issue who has attained the

age of twenty-one years, of the class on default or failure

whereof the limitation was to take effect.

The limita-

tion of fees

simple to

corporations.

Except in the case of a gift in frankalmoigne, the use of the

word successors is necessary, by the common law, for the limita-

tion of a fee simple to a corporation sole ; and without it only

an estate passed for the life of the existing incumbent. (Co.

Litt. 94 b.) It is uncertain whether, by virtue of the Con-

veyancing Act of 1881, s. 51, the limitation can now be effected

• [This appears to be a misprint for " raised." As to this exception, see Be

Duties and Kent, (1910) 2 Ch. 36,]

OF A FEB SIMPLE. 225

by the use of the words in fee simple. The mention of lieirs in

that enactment suggests that its application is confined to cases

where the use of the word heirs was formerly necessary ; and,

therefore, that it has no application to corporations.

In the case of corporations aggregate, a distinction formerly

existed between corporations of which not only the head, but

also the body, were persons capable in law, as a dean and

chapter, and corporations of which all the members, except the

head, were dead in law, as an abbot and his convent. The

former always took, and still take, a fee simple, by a mere grant

to the corporation under its corporate name, without the use of

the word successors or of any words of express limitation. (Co.

Litt. 94 b.) Corporations of the latter kind no longer exist in

England. Words of succession were needed in order that they

might take a fee simple, to the same extent as in the case of a

corporation sole. But it seems that, in the case of all corpora-

tions aggregate having a head,\* whether the body consists of

persons capable in law or dead in law, the grant of an immediate

estate, during a vacancy of the headship, is void ; but the grant

of a remainder is good, provided that a new head be appointed

during the continuance of the particular estate. (Co. Litt.

264 a.)

On the sufficiency of the word frankahnoigne to pass a fee

simple under appropriate circumstances, vide supra, p. 11.

The nature of an estate is practically ascertained by the Restrictions

privileges of ownership and alienation which it confers. At e^cicsfastlcaT

the common law these were identical in the case of individual corporations,

owners and of lay corporations. The rights of ecclesiastical

corporations, who are only seised in right of their churches,

were less absolute. They could not levy a fine, or bar their

successors by non-claim on a fine levied by others. (Cruise,

1 Fines & Rec. 288.) Ecclesiastical corporations sole could

not alienate, except subject to certain precautionary consents ;

alienation by bishops needing confirmation by the dean and

\* A head is not a necessar}' constituent element of a corporation aggregate

(1 Bl. Com. 478.) He mentions " the CoUegi'ate Church of Southwell in

" Nottinghamshire, which consists only of prebendaries, and the governors of

" the Charterhouse, London, who have no president or superior, but are all of

" equal authority."

C.R.P. Q

226

THE NATURE AND QUANTUM OF ESTATES.

Quantum of

the estate

taken by a

corporation.

History of

the power to

devise by will.

chapter, and alienations by parsons needing confirmation by the

patron and ordinary ; and being, without such confirmation,

good during the life only of the existing incumbent. (Co. Litt.

44 a.) Their power at common law to alienate (including power

to lease) has been greatly abridged by numerous statutes.

That a fee simple limited to a corporation was, as regards the

quantum oi the estate, not precisely identical with a fee simple

limited to a grantee and his heirs, appears from the fact that, as

above mentioned, upon the dissolution of a corporation there

was a reverter to the donor, not, as upon a failure of the heirs

of an individual grantee, an escheat to the lord.\* But the donor

is' deprived of his reverter by the alienation of the corporation ;

and for this reason Preston speaks of corporations as having a

fee simple for the purpose of alienation, but only a determin-

able fee for the purpose of enjoyment. (1 Prest. 'Abst.

272.) By reason of the existence of this possibility of reverter,

a condition against alienation annexed to a fee simple is said

to be good in a limitation to a corporation ; though bad in a

limitation to an individual. (Shep. T. 130 ; 2 Doct. & Stu. c.

35.)t

At common law a fee simple conferred no power to devise by

will. (Co. Litt. Ill b.) But a local custom to devise was

good, and existed in the city of London and in many ancient

boroughs. (Litt. sect. 167, and Lord Coke's comment.) Lands

in the city of London might be devised by the owner, although

he was not a citizen. (Dy. 255 a, pi. 3 ; where note the

usage of the word "foreigner."") The custom does not extend to

a remainder, or reversion, in expectancy upon a fee tail ; be-

cause, by the common law there could be no such remainder or

reversion ; and the statute De Bonis, though it makes such

remainders and reversions capable of existence, does not enlarge

the extent of the custom. (4 Com. Dig. 119.)

\* [Upon the dissolution of a corporation, a term of years then vested in it

is determined, and the land reverts to the lessor : Hastings Corj>oration v.

Letto7i, (1908) 1 K. B. 378.]

t On the connection betwetn the existence of a possibility of reverter and the

validity of an absolute condition in restraint of the alienation of a fee simple, see

Co. Litt. 223 a ; where it is said that the king may still impose such a condition,

becansebe may reserve a tenure in fee simple to himself.

OF A FEE SIMPLE. 227

The 32 Hen. 8, c. 1, explained and amended by the 34 & 35 The statutes

Hen. 8, c. 5, enabled tenants in fee 'simple generally to devise " ' '

the whole of their lands held by tenure in socage, and two-

thirds of their lands held by tenm\*e in knight service ; with

certain disabilities affecting the tenants of the king in capite,

holding by knight service ut de corona ; that is, directly of the

king through the king's grant, and not mediately through an

Honour coming to the king's hands by forfeiture or escheat.

(Vide supra, p. 4, note.) These statutes are commonly referred

to as the Statutes of Wills. Their provisions, which are exceed-

ingly prolix, are thus summarized by Lord Coke : — " These The statutes

statutes take not away the custome to devise whereof Littleton ^ ' ^'

[sect. 167] speaketh : for though lands devisable by custome

be holden by knights service, yet may the owner devise the

whole land by force of the custome, and that shall stand good

against the heire for the whole. But the devise of lands holden

by knights service by force of the statutes is utterly void for a

third, and the same [the third part] shall descend to the heire.

If he hath any lands holden by knight service in capite [that is,

ut de corona] , and lands in socage, he can devise but two parts

of the whole ; but if he hold lands by knights service of the

king, and not in capite [that is, ut de honored , or of a meane

lord, and hath also lands in socage, he may devise two parts of

his land holden by knights service, and all his socage lands. If

he holds any land of the king in capite, and by act executed in

his life-time he conveyeth any part of his lands to the use of his

wife or of his children, or payment of his debts, though it be

with power of revocation, he can devise by his will no more, but

to make up the land so conveyed [to] two parts of the whole.

And if the lands so conveyed amount to two parts or more,

then he can devise nothing by his will. But if he hath land

onely that is holden in socage, then he may devise by his will

all his socage land." (Co. Litt. Ill b.)

The last words show that, upon the abolition by 12 Car. 2,

c. 24, of all lay tenures (at the common law) except socage, com-

plete power was acquired to devise all lands held in fee simple.

The statute took effect retrospectively, as from 24th February,

1645. Ever since hat date, a legal fee simple has conferred

upon its owner, duiing his ownership, an absolute and unfet-

Q 2

228 THE NATURE AND QUANTUM OF ESTATES.

tered power of devise ; but subject, as to the estate in the hands

of the devisee, to any incumbrances, restrictions, and liabiHties,

to which it was subject in the hands of the testator. The sub-

sequent statutory alterations and amendments of the law of

devise, do not seem in any way to enlarge the power to devise

previously possessed by a legal tenant in fee simple. These

statutory alterations and amendments refer, partly to alterations

in respect to ceremonies necessary for the due execution of a

will, partly to fixing the time, from which a will is supposed to

speak, at the date of the testator's death instead of the date of

the execution of the will, and partly to rendering devisable

certain estates and interests other than legal estates in fee

simple.

The Statutes of Wills were repealed by the Wills Act,

7 Will. 4 & 1 Vict. c. 26, s. 2. But sect. 3 of that Act con-

fers upon every person not under special disability, power to

devise all real estate to which he shall be entitled at the time of

his death; and by virtue of the definition clause, the words

real estate extend to any estate, right, or interest, other than a

chattel interest, in any hereditaments, notwithstanding that he

may become entitled thereto subsequently to the execution of

his will.

The same enactment expressly includes within its provisions

'\* all rights of entry for conditions broken, and other rights of

entry." This language is undoubtedly sufficient to include the

possibility of the reverter of an estate of fee simple, upon

breach (or performance, as the case may require) of a con-

dition.\*

Whether the I' ^^ at least doubtful whether the language of the Wills

ixssibiiity of ^q\^ [g sufficiently wide to include the possibilitv of reverter

reverter upon \*\* \_ ^ r ^

a determiu- expectant upon the determination of a determinable fee. But

now dcvis- it is not improbable that, if the question should arise, such

\* a possibility would be held to pass under a will clearly

showing an intention to devise it. The question is not likely

to arise in practice, because the only kind of determinable fee

which occurs in practice, is the kind specified at p. 256, infra,

\* [Adopted by North, J,, in Pemberton v. Barnes, (1899) 1 Ch. 644. There is

a misprint in the passage quoted from the present work.]

OP A FEE SIMPLE. 229

No. 10 of the list there given ; and this kind of determinable fee

is in practice always so limited, as to be replaced by a series of

estates, created by the vesting of a series of executory limita-

tions, in case the intended marriage should take place, while it

would ipso facto be converted into a fee simple absolute, in case

either party to the intended marriage.should die without having

been married to the other. In neither case, therefore, could

the title under the possibility of reverter give rise to a question

of practical importance.

230

THE NATURE AKD QUANTUM OF ESTATES.

CHAPTER XVI.

THE DESCENT OF A FEE SIMPLE.

The same

man may

have several

distinct heirs.

Why special

customs of

descent are

more common

in connection

with copy-

holds.

It ought always to be borne in mind, but it is in fact often

forgotten, that the word heir has no meaning except in reference

to an estate to ichich the person so designated might jMssibly

succeed by inheritance. The same man, if he should be seised

as purchaser in fee simple of lands subject to different customs

of descent, may leave several distinct heirs. If he should die

intestate, leaving sons, his heir, as to lands which are subject

to no special custom, is his eldest son ; his heir, as to borough-

english lands, is his youngest son ; and his heir, as to gavel-

kind lands, will be composed of all his sons taking together as

coparceners. And other special customs may lawfully exist,

affecting lands in particular manors or boroughs, which may

multiply still further his capacity for leaving distinct heirs.

{Vide supra, p. 17.)

Special customs affecting the descent of lands held for a fee

simple, are much more commonly found, in connection with

copyholds held for a customary fee simple, than in connection

with lands held for a fee simple by common law tenure. The

causes of this greater frequency are twofold. In the first place,

custom is the life of copyhold tenure, and peculiarities of custom

in connection therewith have always been much more common

than in connection with common law tenure. In the second

place, customs affecting copyhold tenure have a much stronger

tendency to be remembered and preserved in practice, because

the manorial incidents of copyhold tenure are generally

more valuable, and better worth insisting upon, than the

manorial incidents of freehold tenure. To this must be added

the effect of the statute of Quia Emptores, which is gradually

to extinguish the tenure of freehold lands held for a fee simple of

mesne lords, and to concentrate all such tenure in the crown.

The severance of lands from their local tenure, tends to cause

circumstances of local custom connected therewith to fall into

TFIE DESCENT OF A FEE SIMPLE. 231

oblivion. It may easily happen that several generations may

elapse without the occurrence of a descent ; and in such a case,

when next a descent takes place, it may easily be assumed,

without inquiry, that the law regulating the descent is the

general law relating to the descent of a fee simple. But in the

case of copyholds, where the fact of the tenure is preserved in

memory by the entries on the court rolls, and where the par-

ticular lands are parcel of a class, which may be a large one,

all of which are well known to be subject to the same customs,

the accident that a particular parcel has not for a long time

been the subject of a descent, has comparatively little tendency

to cause oblivion of the special custom of descent, if any such

custom is applicable.

The rules of descent are not dependent solely upon the rules Rules of

, - . ,, ,. PI.,- IP descent un-

of personal status, in respect to questions of legitimacy, and of aflfected by

consequent qualification to inherit. Thus, the law of a man's domicii?^ °

domicil of origin is conclusive as to his legitimacy in respect

to personal status, but such legitimacy is not conclusive in

respect to his right to inherit under the law of descent. A

person may, in respect to personal status, be legitimate though

not born ex justis miptiis ; but, in relation to the law of descent,

birth ex justis nuptiis is an indispensable requisite to heirship.

(Co. Litt. 1 h', lie Don's Estate, 4 Drew. 194.) In that case a

son of Scotch parents, born out of wedlock, but made legiti-

mate under the law of Scotland by the subsequent marriage of

his parents, had died seised by purchase of land in England

after the coming into operation of the Descent Act. On his

death intestate and without issue, the father claimed to be

entitled to inherit to him, by virtue of sect. 6 of the Act. It

was held that he was not so entitled, although, in respect to

personal status, the son to whom he claimed to inherit was

legitimate. The father's claim must have been based upon the

contention that in sect. 6 the word " issue " is not restricted

to the sense of " inheritable issue," according to the meaning

of these words in English law ; and this contention, if acceded

to, might equally well have justified the further conclusion,

that the word issue there includes natural issue, or bastards in

the usual meaning of the term. When a word has several

meanings, one only of which is appropriate to the context, then,

232 THE NATURE AND QUANTUM OP ESTATES.

SO soon as that meaning is rejected as being too narrow, it

becomes a mere question of caprice where the line is to be

drawn for excluding any of the others.

On the Distinction between Seisin in Deed and Seisin in Law.

The bearing By the common law, upon the death of a person entitled to

tinction upon an estate in fee simple, the lands (unless subject to a special

descents, custom of devise) necessarily descended to the person next

entitled as heir. After the passing of the Statutes of Wills, 32

Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5, the effect of which was

completed by the conversion of all lay tenure into socage by

12 Car. 2, c. 24, such descent was liable to be prevented by a

devise to a stranger ; but even then if a devise were made to

the person who would have taken as heir if no devise had been

made, such heir took by descent and not by the devise.

(Watk. Desc. 270.)\* The question arises, given the rules for-

ascertaining the heir to a specified person, from what specified

person ought heirship to be deduced upon a descent cast ; and

by the common law, the person from whom heirship was

deduced was not the person last entitled, but the person who,

under the title, had last had seisin in deed of the lands. (Co.

Litt. 11 b.) Such person wa^ accordingly, at the time of a

descent cast, said to be the stock (more properly, the root) of

descent. A seisin in law did not suflS.ce to make the person so

seised the stock of descent. {Ibid.) This rule of descent has

been superseded by the Descent Act, 3 & 4 Will. 4, c. 106, s. 2,

which enacts that in every case descent shall be traced from

the purchaser, that is, from the person who last acquired the

land otherwise than by descent ; whereby it has now become

superfluous to inquire, who last had seisin in deed of the lands.

By this change in the law, the importance of the distinction

between seisin in deed and seisin in law has been much

diminished ; but it is even now not without some practical

interest, and a correct apprehension of it is very necessary in

examining old titles.

\* But if a man^having several daughters and no sons, devised to one of them,

she took the whole by devise, and not partly (as coparcener) by descent and

partly by devise, (Beading v. BawHerne, Ld. Raym, 829, 1 Salk. 242, Comb. 123.)

THE DESCENT OF A FEE SIMPLE. 233

Seisin in deed is less properly, though conveniently, styled Seisin in deed

actual seisin ; which last phrase properly denotes the seisin of

the person having the immediate freehold as distinguished from

the remainderman and reversioner, who are all said to be " in

the seisin of the fee." (Butl. n. 1 on Co. Litt. 266 b.) With

regard to estates of freehold in corporeal hereditaments, that

is, in lands, seisin in deed is obtained when the person entitled

to possession by virtue of the estate enters actually and

corporeally into possession of the lands, either by himself, or

his bailiff ; and the possession of his tenant for years, or from

year to year, or at will, is in law accounted to be his possession.

Therefore, if at the time of the descent cast, the lands are held

by a tenant for years, the heir acquires the seisin in deed at

once by the descent without entry. (Co. Litt. 15 a ; Watk.

Desc. 66.) The possession of other persons having chattel

interests only, such as tenant by elegit, tenant by statute

merchant, or tenant by statute staple, was also, in contempla-

tion of law, the possession of the person entitled to the free-

hold subject to such chattel interest, and was a sufficient

possession in him to convert his seisin in law into a seisin in

deed. (Watk. Desc. 64, 65.) With regard to incorporeal Astoincor-

hereditaments which admit of estates in possession, such as a jitementsr

rentcharge or an advowson in gross, seisin in deed is evidenced

by, and consists in, the doing of some appropriate act of

ownership, such as receiving the rentcharge, or exercising the

right of presentation to the benefice. With regard to estates As to remain-

in remainder or reversion, upon an estate of freehold, which versions, "^^

are incorporeal hereditaments in which ex vi termini no estate

in possession is possible, and therefore no entry could be made,

a seisin in deed, sufficient to make the person obtaining it the

root of descent, might be obtained by exercising certain acts

of ownership, such as by granting a lease for life, or making a

gift in tail, to take effect out of the remainder or reversion.

(Watk. Desc. 108.)\* Lord Coke evidently inclined to the

\* [The author's references are to the 3rd ed. of Watkins on Descents. The

editor ventures to repeat that, in his humble judgment, it is not accurate to speak

of an estate in remainder or reversion, upon an estate of freehold, as an incorporeal

hereditament (jtupra, p. 52), or to say that seisin in deed of such a reversion or

remainder can be acquired. Mr. Watkins' views on these points seem sufficiently

234 THE NATURE AND QUANTUM OF ESTATES.

opinion, that there was a distinction in this respect between

remainders expectant upon a freehold and reversions expectant

upon a freehold, and that, in the case of a reversion, a seisin

sufficient to change the root of descent might be obtained by

receiving the rent (if any) incident to the reversion, " because

the rent issueth out of the land, and is in lieu thereof." (Co.

Litt. 16 a.) In the case of a remainder, there could not be any

rent incident to the remainderman's estate ; and therefore, if

the above stated doctrine is correct, a distinction would exist

in this respect between remainders and reversions. According

to Lord Hale, it was afterwards adjudged in the King's Bench,

" that in such case seisin of rent doth not make j^ossessio

fratris ,• " which is equivalent to saying, that receipt of the

rent gave no seisin sufficient to change the root of descent.

(Harg. n. 5 on Co. Litt. 15 a.) But see Doe v. Keen, 7 T. R.

386, at p. 390; Doe v. Whichelo, 8 T. R. 211, at p. 213.

Seisin in law Seisin ill law is the seisin of the heir upon whom the estate

defined. . • j j « i.i. • j

in possession descends, or of the remainderman or reversioner

whose estate has become the estate in possession by the deter-

mination of a precedent particular estate of freehold, before

such heir, remainderman, or reversioner, has made an actual

entry upon the lands. And similarly, in the case of incorporeal

hereditaments which admit of estates in possession, such as a

rentcharge or an advowson in gross, the seisin in law is in such

heir, remainderman, or reversioner, before he has done any

appropriate act of ownership, such as receiving the rentcharge

or presenting to the benefice.

Distinction But seisin in law is only a presumption of the law, which is

between a

seisin in law

and a right of clear : he expressly saj's that " a jmuexHo fratris may, generally speaking, be of

^" ^^' all hereditaments, corporeal or incorporeal, as lands, rents, etc. . . . And

although a poxsesnio fratris cannot properly be of a remainder or revei-sion

expectant upon an estate of freehold, yet by the exertion of certain acts of

ownership (as by granting them over for term of life) a possessio fratris of tliem

may be made. . . . For the exertion of such acts of ownership is equivalent

to the actual seisin of an estate which is capable of being reduced into posses-

sion by entry. For, as an actual entry is not practicable in the case of such

reversion or remainder, the alienation of them for a certain estate is sufficient

to turn the descent." (Descents, 85, 110, orig. ed.). In other words, these acta

merely gave the remainderman or reversioner a seisin suflBcient to turn the

descent. If be survived the particular tenant, he only had a seisin in law.]

THE DESCENT OF A FEE SIMPLE. 235

incompatible with, and is rebutted by, the fact that a seisin in

deed, or actual seisin, is, whether rightfully or wrongfully, in

anybody else. If the person actually seised by lawful title, is

disseised by a disseisor, the person disseised has not a seisin

in law, but only a right of entry. So if, before the entry of

the heir, a stranger should (wrongfully) enter in fact upon the

lands, — which wrongful entry was technically styled an abate-

ment, and the stranger so entering an abator, — the heir no

longer has a seisin in law, but only a right of entry. And if,

before the entry of the remainderman, or reversioner, a

stranger should in like manner enter,— which entry was tech-

nically styled an intrusion, and the stranger an intruder, — the

remainderman or reversioner no longer has a seisin in law,

but only a right of entry. The distinction between a right of

entry and a seisin in law is, that a right of entry implies ex vi

termini that the actual seisin is (wrongfully) in somehody else,

while a seisin in law implies that there is no actual seisin in

anybody. But an actual entry, which would suffice to turn a

seisin in law into a seisin in deed, is also sufficient to turn a

right of entry into a seisin in deed.

The existence of a seisin in law is sufficient to prevent the Seisin in law

seisin, or immediate freehold, from being vacant. This is abeyance of

evident from the fact, that the creation of successive estates \*\*\*® frcehoUi.

necessarily contemplates the existence of a seisin in law only,

upon the determination of the particular estate in possession.

For if a seisin in law were insufficient to prevent an abeyance

of the immediate freehold, all creation of successive estates

would, for that reason, be void by the common law. (Vide

supra, p. 104.)

A seisin in law is converted into a seisin in deed by making How seisin in

an actual entry, or entry in deed, upon the lands, such entry acquired.

being intended to be made with that purpose and in that behalf.

Such an entry made u^on any part of the lands will give seisin

in deed of all lands situate in the same county of which the

person making the entry has seisin in law. An actual entry is

made so soon as the person desiring to make an entry has any

part of his body upon the lands ; and such entry is complete

236

THE NATURE AND QUANTUM OP ESTATES.

and effectual, even though he should immediately afterwards be

dragged off by force. (Watk. Desc. 61 : who cites the well-

known decision in such a case, when actual entry had been made

by getting half-through a window : — Et pur ceo qiCil ne purm

entrerper le huis, il cutra 2>cr lejenestre, et quant run moitie de

son corps fuit deins la vieason et Vauter de hors, ilfuit treit hors ;

per q. il port cost assise ,- for which seisin in deed was necessary,

see Booth, Real Actions, 284; et fuit ar/arde q. le pV recovera.

8 Ass, pi. 25, f. 17, b.) If the person entitled be hindered from

making an actual entry by fear of violence, he may make an

entry in law by approaching as near as he safely may, and

there making his claim ; which under such circumstances will

take effect as an actual entry. (Watk. Desc. 62.) Proof must

be given that an entry in deed could not safely be made.

(Booth, uhi supra : — " If one dare not enter, but approach and

is disturbed, this is sufficient seisin: 11 Ass. 11.")

Incorporeal

heredita-

ments.

As has already been remarked, seisin in deed of incorporeal

hereditaments, as a rentcharge, or an advowson in gross, could

be obtained only by exercising some appropriate act of owner-

ship, such as receiving the rent or presenting to the church ;

and if, by reason of the death of the heir before the rent

became due, or before the church became vacant, seisin in deed

could not be obtained, this impossibility did not supply the

want of seisin in deed, and the heir failed to become the root

of descent. (Co. Litt. 15 b.) But seisin in deed of a manor

is also seisin in deed of an advowson appendant or appurtenant

thereto ; that is to say, if actual seisin was obtained of a

manor, this gave actual seisin of the appendant or appur-

tenant advowson, without any exercise of the right of pre-

sentation to the benefice. {Ibid, note 1.) As to seisin in deed

of remainders and reversions, vide suj^ra, p. 233.

Eflfects of the

existence of

a chattel

interest.

When the lands are in the possession, or rather, the

occupation, of a tenant for years, or from year to year, entry

is not necessary in order to convert a seisin in law into a

seisin in deed, or actual seisin. In such a case, seisin in deed

is ipso facto acquired by the heir immediately upon a descent

cast. {Bushby y. Dixon, 3 B. & C. 298, and authorities there

THE DESCENT OF A FEE SIMPLE. 237

cited.) In De Grey v. Richardson, 3 Atk. 469, Lord Hard-

wicke seems, obiter, to have confused the reversion upon a

lease for years with the reversion upon a lease for lives ; of

which only the latter, not the former, needed receipt of rent

in order to give a seisin in deed. (Doe v. Keen, 7 T. E. 386,

at p. 390 ; Doe v. Whichelo, 8 T. R. 211, at p. 213.) The

remark above made, as to the effect of the occupation of a

tenant for years, applies also to the occupation of other

persons having chattel interests. (Watk. Desc. 65, and

authorities cited in note g.) Of these, tenant by elegit is the

only one occurring in modern practice.

A seisin in law suffices, at the common law, to make the Some distinc-

estate assets in the hands of the heir, to answer the ancestor's

bond specifying the heirs. (Watk. Desc. 55.) Seisin in deed

during the coverture is still necessary in order to entitle a

husband to curtesy in his wife's lands; but seisin in law

during the coverture was always sufficient to entitle the wife

to dower out of her husband's lands. (Vide infra, pp. 342,

316.) This distinction was due to the fact that the husband

had power at any time during the coverture to turn his wife's

seisin in law (which was also his own seisin) into a seisin in

deed by his own sole act ; so that if he had lost his curtesy

for want of seisin in deed, the loss would have been due to his

own laches ; while the wife, being disabled at common law by

her coverture, had no corresponding power to convert her

husband's seisin in law into a seisin in deed.

TJie Rides of Descent.

In stating the following rules, such parts of the common

law rules as have been superseded by statute are printed in

italics ; and the existing law is stated in a supplementary rule

where it requires separate statement.\*

\* [The student will remember that in the case of a person dying since 1897,

his real estate devolves to and vests in his personal representative from time to

time, after the fashion of a chattel real, and may be sold for the purpose of

paying his debts, etc. If this should not be necessary, the administrator (in the

case of intestacy) holds the real estate as trustee for the heir, to whom he is

238

THE NATURE AND QUANTUM OF ESTATES.

The common

law rule as

to root of

descent.

3 & 4 Will. 4,

c. 106.

Existing rule

as to root of

descent.

These rules will suffice for ascertaining the line of descent in

all ordinary cases, whether at common law or under the recent

statutes, 3 & 4 Will. 4, c. 106, and 22 & 23 Vict. c. 35, ss. 19, 20.

Rule 1. — By the common law the descent of heredita'

ments is traced from the person who, under the title in fee

simple, last died seised in deed thereof. (Co. Litt. 11 b ;

2 Bl. Com. 208.) Except in the case of one coming in

by purchase, when it is traced from the purchaser;

and therefore in the case of a pm-chase by way of

remainder, so far as regards any descent occurring

during the continuance of the particular estate, the

descent is necessarily traced from one having only a

seisin in law ; because in such a case the descent of

the remainder must be traced from the remainderman,

who is the only person having any title at all ; and he

cannot acquire seisin in deed, because there can be

no seisin in deed of a remainder. (Watk. Desc. 66;

Doe V. Thomas, 3 Man. & Gr. 815.)

The former part of this rule is often summarized by the

maxim, Scisinafacit stijntem, and the person referred to is styled

the stock of descent, or, more properly, the root of descent.

This part of the rule is repealed, or superseded, by the Descent

Act, s. 2. The latter part of the rule is believed to be here

stated for the first time as a part of the formal rules of descent.

The Descent Act, s. 2, as explained by the interpretation

clause, substitutes for the former part of the rule the following

rule with respect to all descents cast on and after 1st January,

1834 :—

EuLE 1a. — In every case descent shall be traced from

the purchaser, that is, the person who last acquired

the land otherwise than by descent, or than by any

escheat, partition, or enclosure, by the effect of which

the land shall have become part of, or descendible in

the same manner as, other land acquired by descent.

bound to convey it (Land Transfer Act, 1897 ; see Carson, Real Prop,

statutes).

[The student will also remember that under the Intestates' Estates Act, 1890,

if a person dies intestate leaving a widow, but no issue, she has an interest in

bis real estate.]

THE DESCENT OF A FEE SIMPLE. 239

The purchaser is, therefore, now the root of descent, and the

maxim sliould now be Perquisitio facit stijiitem.

The last person entitled, who cannot be proved to have come

in by descent, is to be deemed to be the purchaser for the

purposes of the Act. (Sect. 2.)

It will be seen that, under both the old and the new rule,

the descent of a remainder in fee simple is the same ; because

in both cases it is traced from the purchaser.

The following points in which the law has been changed or

ascertained, are very important, in view of the fact that the

purchaser is now the root of descent.

By the common law, if any estate had been limited, whether Heir now

. . -xii i'» may take as

by devise or by assurance inter vivos, to the person who, if no purchaser by

such limitation had been made, would have taken the same "\*™^'

estate, and in the same manner, as heir by descent, then such

person took the estate by descent and not by purchase ; and

he could not elect in which way to take it. (Watk. Desc. 270

— 272.) But now by virtue of the Descent Act, s. 3, under

any such devise, if the testator has died after 31st December,

1833, or under any such limitation in an assurance inter vivos

executed after that date, the heir will, for the purposes of the

subsequent descent, be considered to take by purchase.\*

It is uncertain whether, by the common law, the person who Also under

first came to any estate of inheritance under a limitation to ^Q '^[^g ^g"

the heirs, co nomine, of a specified person, would take as pur- Purchasers,

chaser for the purposes of the subsequent descent ; though it

is, perhaps, the better opinion that he would. By virtue of

the Descent Act, s. 4, under any such limitation to the heirs,

or heirs of the body, contained in an assurance executed after

31st December, 1833, or under any limitation having the same

efi"ect, contained in the will of a testator dying after that date,

the person specified as the ancestor will be deemed the

purchaser for such purposes.

The word land, by virtue of the interpretation clause of the Land includes

Act, includes all hereditaments, whether corporeal or incorpo- meats.

\* [Under such a devise, co-heiresses take as joint tenants, not as co-parceners :

Owen V. Gibbons, (1902) 1 Ch. 636.]

240

THE NATURE AND QUANTUM OF ESTATES.

real, and whether freehold or copyhold, or of any other tenure,

and whether descendible according to the common law, or

according to the custom of gavelkind or borough-english, or

any other custom.

Special cue- But the provisions of the Act, though they apply to customary

scent are still lands, contain nothing to interfere with the custom of gavel-

apphcable. Jjind, 80 far as it relates to equal partition, or to interfere with

the custom of borough-english, so far as it consists in a pre-

ference of the youngest son before the elder sons, or with

other special customs, so far as they relate only to partition,

or to a preference for this or that member of a class. (Mugglc-

ton V. Barnett, 2 H. & N. 653.) These points are foreign to

the alterations introduced by the Act, the most important of

which may be summed up as follows : —

Sammary of

the Act's

chief provi-

sions.

The doctrine

of possetsio

fratrit.

1. The purchaser is the root of descent. (Sect. 2.)

2. The heir, when devisee or grantee, takes by purchase and

not by descent. (Sect. 3.)

3. The heir, taking by purchase in a limitation to heirs eo

nomine, is not a purchaser for the purpose of making a

new root of descent. (Sect. 4.)

This was a moot point at the common law.

4. Brothers trace descent through their parent, instead of

inheriting immediately one to another. (Sect. 5.)

5. Lineal ancestors may take in preference to collaterals

who trace descent through them. (Sect. 6.)

6. Kinsmen of the half blood may inherit. (Sect. 9.)

7. Descent may be traced through an attainted person who

has died before the descent. (Sect. 10.)

This provision was subsequently rendered superfluous by

the abolition of corruption of blood by 33 & 34 Yict.

c. 23, 8. 1. The provision was necessary at the time of

the passing of the Descent Act, in order to prevent the

change in the law thereby effected, whereby brothers

now trace the descent mediately through their father,

instead of inheriting immediately one to another, from

aggravating the hardship of the law of attainder.

Under the common law rule, that seisin in deed makes the

root of descent, taken in connection with the other rule

THE DESCENT OF A FEE SIMPLE. 241

(Eule 6, infra) which forbade collaterals of the half blood to

inherit, it followed that, if a brother had taken as heir by

descent, and had acquired seisin in deed, his sister (if any) of

the whole blood would, on his death intestate and without

issue, have inherited as heir to him, to the complete exclusion

of his and her brothers (if any) of the half blood. (Litt.

sect. 8.) This result of an actual seisin obtained by a brother,

is often referred to as the doctrine of possessio fratris.

The doctrine of possessio fratris applied to the descent of all The doctrine

, . 1 applied in

hereditaments, whether legal or merely equitable, of which a equity,

seisin in deed, or such a possession as in equity was equivalent

thereto, could be had. (Watk. Desc. 106, 107 ; 1 Sand.

Uses, 63.)

But the doctrine was not favoured ; and the claim of the Not favoured

brother to have obtained seisin in deed was weighed very inapplicable,

rigorously. (Watk. Desc. 75.) A seisin which was a good

foundation for a writ of right did not necessarily suffice to

support a possessio fratris. (Co. Litt. 281 a.) The Descent

Act has now deprived the doctrine of all its practical import-

ance ; because, descent being always traced from a specified

root, namely, the purchaser, the mere acquisition of a

possessio fratris cannot have any practical influence upon the

course of descent.

The seisin of a widow, to whom land had been assigned as Effect of

dower, and by that express title, was a continuation of the curtesy, on

seisin of her deceased husband. The heir, therefore, could /J"«f\*\*'''

' ' fratris.

not, by entry, obtain seisin in deed of such land, so long as it

remained in dower ; and even though he had entered into the

whole lands before assignment of dower, yet the assignment,

when made, would have defeated his seisin acquired by the

entry. Therefore, there could be no possessio fratris of land

actually in dower, unless the very unusual step had been

taken, of granting an estate for life, or in tail, to take effect

out of the heir's reversionary estate ; and under ordinary

circumstances, the two-thirds retained by the heir might, on

his death, pass to his sister of the whole blood, while the one-

third assigned as dower, on the death of the dowress, passed

to the younger brother of the half blood, as being the heir to

their common father, the person who had last had seisin in

C.R.P. \* K

242 THE NATURE AKD QUANTUM OF ESTATES.

deed of that one-third. (Watk. Desc. 84, 85.) The acquisi-

tion of a seisin in deed, sufficient to change the course of

descent, by a remainderman or reversioner, was practically so

rare, that Watkins, in the last-cited passage, seems to imply

that it could not happen at all ; but, as above mentioned, he

has elsewhere admitted the possibility of such an acquisition.

(Watk. Desc. 108, 138 ; vide supra, p. 233.)\* In cases where

a tenancy by the curtesy existed, since the sole actual seisin

was vested in the husband immediately, without any interval

or any need for entry, on the death of the wife, there was a

similar obstacle in the way of any possessio fratrls during the

curtesy. (Watk. Desc. 104.)

Escheat, By an escheat of freeholds the lands are united to the

seignory, and by an escheat of copyholds the lands are united

to the freehold vested in the lord of the manor. Thereafter

the descent of such lands (while they remain in the hands of

the lord) is at common law merged in the descent of the

manor ; and this rule is not affected by the Descent Act,

though its provisions affect the descent of the manor in which

the descent of the escheated lands is merged.

Rule 2. — By the common law, hereditaments descend

lineally to the issue of the root of descent in infinitum,

hut they could never lineally ascend. (Litt. sect. 3.) For

defect of such issue, they descend to his collateral relations^

being of the blood of the first purchaser. (2 Bl. Com.

220.)

So far as this rule forbids ascent in heirship, it is altered

by the Descent Act, s. 6. So far as it prescribes that the

collateral heir, in order to inherit, must be of the blood of the

first purchaser (Co. Litt. 12 a), the rule has been rendered

superfluous by the substitution of the purchaser for the person

last seised as the root of descent. The common law rule has

also been altered by the admission of the blood of the person

\* [Seisin so acquired by a remainderman or reversioner is not, as the editor

submits, accurately called a " seisin in deed " ; nor does Watkins so call it ; he

says that it was, under the old law, equivalent to actual seisin for the purpose

of turning the descent ; »upra, p. 233 n.]

THE DESCENT OF A FEE SIMPLE. 243

last entitled to the land, upon a total failure of heirs of the

purchaser, by 22 & 23 Vict. c. 35, s. 19. See Rule 9, infra.

The admission of ancestors to inherit renders appropriate the

enactment, by sect. 5, that brothers and sisters shall not

inherit immediately one to another, but mediately through

their parent.

The existing rule may be stated as follows : —

KuLE 2a. — Hereditaments descend lineally to the

issue of the root of descent in infinitum. But for defect

of such issue, the nearest lineal ancestor shall be heir

in preference to any person who would have been

entitled to inherit, either by tracing his descent through

such ancestor, or in consequence of there being no

descendant of such ancestor ; so that a father shall be

preferred to a brother or sister, and a more remote

lineal ancestor to any of his issue other than a nearer

lineal ancestor or his issue. (Sect. 6.) And every

descent from a brother or sister shall be traced through

the parent. (Sect. 5.)

KuLE 3. — The male issue shall be admitted before

the female. (2 Bl. Com. 212.)

Rule 4. — Where there are two or more males in the

same degree, the eldest only shall inherit ; but two or

more females in the same degree shall inherit all

together. (2 Bl. Com. 214.)

Rule 5. — The lineal descendants, in infinitum, of

any person deceased represent their ancestor; that

is, stand in the place, in the line of descent, in which

the deceased person would have stood if he had been

living. (2 Bl. Com. 216.) Such representatives take,

inter se, in the order, and in the manner, prescribed by

the rules regulating descent among lineal issue.

Therefore there is never any contest between (for example)

several males coming of different stocks, but standing all in

the same degree of consanguinity to the root of descent;

because the eldest stock excludes all the others, as representing

s 2

244 THE NATURE AND QUANTUM OP ESTATES.

the original ancestor with whom the stock commences ; who,

if he had been living would have excluded all the respective

ancestors of the younger stocks.

Rule G. — Btj the common law, the collateral heir, in

order to take by descent, must he the next collateral kinsman

of the whole blood. (Litt. sect. 6 ; 2 Bl. Com. 224.)

Hence sprang the whole doctrine of possessio fratris, which

has already been discussed under Kule 1.

It is evident that questions of the whole blood and the half

blood can only arise in respect to collateral heirs. A man

cannot be of the half blood to his ancestor. This is the reason

why there was no possessio Jratris of an estate tail : the descent

of the estate being always, under the statute De Bonis, traced

from the donee, the issue in tail taking as heir to him per

formam doni, and not as heir to the last actual tenant in tail.

{Doe v. Whichelo, 8 T. R. 211.)

Sect. 9 of the Descent Act has substituted the following

rule : —

EuLE 6a. — A kinsman of the root of descent by the

half blood is entitled to inherit next after the kinsman

in the same degree of the whole blood and his issue,

where the common ancestor is a male, and next after

the common ancestor, where such ancestor is a female ;

so that the brother of the half blood on the part of the

father will inherit next after the sisters of the whole

blood on the part of the father, and their issue ; and

the brother of the half blood on the part of the mother

will inherit next after the mother.

Though the substitution of the purchaser for the person last

seised as the root of descent, deprived the doctrine of possessio

fratris of its practical importance, the rule admitting the half

blood is by no means nugatory. It was necessary in order to

admit the half blood of the purchaser, though it has nothing

to do with the admission into the line of descent of the half

blood of the person last seised, when he is not the purchaser.

THE DESCENT OP A FEB SIMPLE. M5

KuLE 7. — In collateral inheritances the male stocks are

preferred to the female ; that is, kindred derived from the

blood of the male ancestors shall be admitted before those of

the blood of the female : except in cases ivhere the lands

have in fact descended from a female. (2 Bl. Com. 234.)

This rule has partly been deprived of its application by the

rule which makes the purchaser now the root of descent,

because that rule makes it now superfluous to inquire whether

the person last seised came to the lands by inheritance through

the father or through the mother ; and by hypothesis such a

question can have no meaning in relation to a purchaser.

So far as the preference of male stocks is concerned, though

this preference is still continued, the above statement is not

appropriate, because the modern rules of descent admit

ancestors among the possible heirs, while the common law

rules took account of them only as being persons yfhose

descendants might inherit.

The following rule may now be substituted in its place : —

KuLE 7a. — In tracing descent to and through ances-

tors, whether for the purpose of ascertaining which

ancestor is the heir, or of ascertaining which ancestor's

descendants stand next in the order of succession,

every prior male stock must always be exhausted

before recourse is had to 'any subsequent female stock.

Thus :—

(1) Paternal ancestors, and their descendants, must

be exhausted before any maternal ancestor,

or her descendants, can inherit ;

(2) Male paternal ancestors, and their descendants,

must be exhausted before any female paternal

ancestor, or her descendants, can. inherit ;

and

(8) Male maternal ancestors, and their descendants,

must be exhausted before any female mater-

nal ancestor, or her descendants, can inherit.

(Sect. 7.)

It is conceived that this rule accurately states the effect of

sect. 7 of the Descent Act. It does not alter the previous rule

246 THE NATURE AND QUANTUM OP ESTATES.

of the common law, so far as its preference of male stocks over

female stocks is concerned.

The blood of the mother therefore comes next after a total

failure of the blood of the father.

The same rule applies, in tracing descents through a female,

when recourse to a female stock has become necessary.

When recourse to a female stock becomes necessary, the

next following rule shows how this must be done, and in

what order the different female stocks, when a choice between

them becomes necessary, must be taken.

Rule 8. — When the descent can no longer be traced

along the male paternal line, the mother of a more

remote paternal ancestor and her descendants are pre-

ferred to the mother of a less remote paternal ancestor

and her descendants. (Sect. 8.)

When the tracing of the descent has entered upon

the female line, the same rule applies, so often as it

becomes necessary to change from male ancestors to

female. {Ibid.)

This rule declares the law, which had once been much in

controversy, in accordance with the opinion expressed by

Blackstone, 2 Bl. Com. 237, 238. For an account of the

controversy and an acute vindication of Blackstone's view,

see Watk. Desc. 171—199.

Example of The import of the last two rules may thus be illustrated by

of\*the^ast'\*\*" an example. Suppose that in tracing the male paternal line

two rules. ^e can get no further than the grandfather, then the great-

grandmother who was mother of that grandfather, and

her descendants, will come next in the succession, being

preferred to the grandmother, as being the mother of the

more remote paternal ancestor. Suppose the line of that

ancestress to be then entered upon, and that no descendants

can be traced : it will be necessary to have recourse to her

ancestors, beginning with the male paternal stock, that is, the

line through which the surname which wafe her maiden name

descended. Suppose that, in this line, we can get no higher

than her father, and that he has left no descendants. There-

THE DESCENT OF A FEE SIMPLE. 247

upon it becomes necessary to have recourse to a female stock,

the male stock failing. Thereupon the mother of the said

father, that is, the paternal grandmother of the said ancestress,

will be preferred to her mother, because, in accordance with

Rule 7a, the male stock of the said ancestress must be exhausted

before recourse is had to any female stock.

The following rule is due to 22 & 23 Vict. c. 35, s. 19, and

is entirely novel : —

KuLE 9. — If there should be a total failure of heirs

of the purchaser, the descent will thenceforth be traced

from the person last entitled to the land, as if he had

been the purchaser.

The same rule applies, where land is descendible as

if an ancestor had been the purchaser, upon a total

failure of heirs of such ancestor.

The ejfifect of this rule is to prevent escheat, unless there is

a total failure of heirs, both of the last purchaser and also of

the person last entitled. And since the heir of the person last

entitled might be his heir ex parte maternd, who would not be

of the blood of the purchaser, unless the purchaser was the

person last entitled, it follows that this rule may admit into

the line of descent whole classes of persons who were excluded

by the common law.

The following list of steps to be successfully followed in Exempiifica.

tracing a descent may, perhaps, be found useful in illustration successive^

of the above-stated rules :— ^t^P? ^»

tracing a

1. The purchaser's sons, if any, one after another in order descent.

of seniority ; with their respective descendants in

order ; the descendants of an elder son always

excluding the descendants of younger sons, and

among such descendants, an eldest son always

excluding all the other children.

2. If no sons, or descendants of sons, the daughters all

together as co-parceners.

3. If no descendants, the father of the purchaser.

4. The descendants of the father (other than the purchaser

248 THE NATURE AND QUANTUM OF ESTATES.

and his descendants), subject to similar rules as to

primogeniture and coparcenary, as if we were tracing

the descendants of the purchaser himself. The brothers

of the whole blood of the purchaser one after another

in order, and their respective descendants in order, come

next to the father ; then the sisters of the whole blood,

taking together as coparceners; then the brothers of

the half blood of the purchaser on the part of the

father, one after another in order, and their respective

descendants in order ; and then the sisters of the half

blood of the purchaser on the part of the father, taking

together as coparceners.

5. If there be no such descendants of the father, then the

paternal grandfather ; and afterwards his descendants,

subject to the same rules as to primogeniture and co-

parcenary. Thus the paternal uncles, in order, one

after another, and their respective descendants, come

next to the father's descendants (other than the pur-

chaser himself and his descendants) ; and if there be

no such uncles or descendants, then the paternal aunts

taking together as coparceners.

6. If no such descendants, the paternal great-grandfather ;

and then his descendants in like manner.

7. On arriving at the highest ancestor of the male paternal

line (through which the surname descends) that can

be traced, the next heir is the mother of such ancestor ;

and then her descendants.

8. The father of such mother, and his descendants.

9. The father of such father, and his descendants.

10. On coming to the highest ancestor of the male paternal

line of the ancestress, referred to in No. 7 as "the

mother of such ancestor," that can be traced, and on

failure of his descendants, we pass to his mother and

her descendants, similarly to the passage made in

No. 7, and then to the father of such mother and his

descendants, similarly to the passage made in No. 8 ;

and so on till we can trace no further.

11. Upon exhausting the blood of the ancestress referred to

in No. 7, we then have recourse to the stock of the next

THE DESCENT OF A FEE SIMPLE. 249

less remote ancestress in the male paternal line ; that is,

if the former ancestress was a great-grandmother, we •

next proceed to the stock of the grandmother. The

method by which the descent is traced in this stock is

of course exactly like the method by which it was traced

in the former one.

12. By degrees, the whole paternal blood of the purchaser

being exhausted, we proceed to the maternal blood of

the purchaser, and continue our researches, by similar

methods, until that is exhausted in like manner.

Here an escheat would have taken place, before the passing

of 22 & 23 Vict. c. 35, s. 19. But now, by virtue of that

enactment (see Eule 9) we begin again upon —

13. The person who was last entitled to the land ; upon the

hypothesis, of course, that he is not the purchaser him-

self ; or, in other words, upon the hypothesis that

there has been a descent cast since the last purchase.

Thus the person last entitled becomes a new root of

descent ; and the process of tracing the descent from

him begins over again ; but, in proportion to the near-

ness of the relationship subsisting between the person

last entitled and the purchaser, a greater or less portion

of the tracing will have already been accomplished. For

example, if the person last entitled was a son of the pur-

chaser, then, since we have already completely exhausted "

his paternal blood in our former tracing of the descent

through the purchaser himself, we may go straight to

the maternal line of the person last entitled. When

the person last entitled is not identical with the pur-

chaser, that is, when there has been a descent cast since

the last purchase, — and for this purpose, a devise is

now a purchase, though made to the heir, — the result

of taking the person last entitled as a new root of

descent, is to admit into the line of descent his

maternal ancestors and collateral relatives derived

through them, who are not of the blood of the pur-

chaser. Thus the effect of the rule is to admit into

the line of descent many classes of persons who were

altogether excluded by the common law.

250 THE NATURE AND QUANTUM OF ESTATES.

14. The rule admitting kinsmen of the half blood may thus

• be illustrated : —

Only persons related to the root of descent by the half

blood are inheritable. Therefore the issue by the

second marriage of a person who is not a blood relation,

but is placed in the pedigree only by reason of his or

her marriage with a person who is a blood relation, are

altogether excluded. This remark, of course, applies

only to collaterals standing in the pedigree, not to

ancestors ; because all ancestors are blood relations.

Then consider the case of any pair of ancestors, —

say the paternal grandfather and grandmother, — who

are, of course, both of the whole blood to their descen-

dant. In admitting their issue, we must admit first

the issue of both of them, or their issue of the whole

blood. But the issue of either of them, by a second

marriage, will also be admissible ; though at very

different stages of the descent. Issue by a second

marriage of the grandfather, he being a male, will come

in next after the issue of the whole blood. But issue

by a second marriage of the grandmother, she being a

female, must wait ujitil after the grandmother herself

has been reached ; which will not generally occur until

a much later stage.

When we descend to issue more remote than sons,

the question of half blood does not arise. It is

indifferent by what wife the son of a grandfather leaves

issue ; and the issue by the second marriage of such a

wife are altogether excluded, as being strangers to the

pedigree, — unless such wife should chance to be her

former husband's cousin by blood, in which case she

will come into her own proper place in the pedigree, as

such cousin, and her issue by a second marriage will

claim through her in her proper place, as being a blood

relation, not as being the wife of her former husband.

( 251 )

CHAPTER XVII.

DETERMINABLE FEES.\*

Modified fees differ from a fee simple absolute in their limita-

tion, which is to the grantee and his heirs^ not simply, but

subject to some qualification of a kind permitted by the law,

which gives to the inheritance a more restricted character. In

the case of base fees, the restriction is implied in the circum-

stances of their origin ; but in the case of other modified fees,

it is expressed in their limitation.

Such lawful qualification may be of three kinds : — (1) The

succession of the heirs, instead of enduring for ever, may be

liable to be cut short by the happening of a. future event, which

limitation gives rise to a determinable fee ; (2) the heirs to

whom the inheritance can descend may be restricted to the

heirs of the body of a specified person (or persons), which

limitation gives rise to a conditional fee at the common law,

and to a fee tail under the statute De Donis ; (3) the heirs to

whom the inheritance can descend may be restricted to a

particular class, where the word class is to be taken in a

peculiar sense, to be hereafter explained, which limitation

gives rise to the peculiar estate in these pages styled a qualified

fee simiile.

In the limitation of a determinable fee, the limitation is The mode of

expressed to be made to the grantee and his heirs until the tion.

happening of some future event, which must be of such a kind

that it may by possibility never happen at all. For it is an

essential characteristic of all fees, that they may by possibility

endure for ever. (1 Prest. Est. 479.) A limitation to a

grantee and his heirs until the happening of some event,

which must in the nature of things happen sooner or later,

\* A suggestion was made, or rather, revived, since the publication of the first

edition of this work, that the limitation of determinable fees is forbidden by the

Statute of Quia Emptores. The reasons of the present writer for dissenting from

this suggestion will be found in Appendix IV., infra.

252

THE NATURE AND QUANTUM OF ESTATES.

passes DO fee. If the happening of the event, though certain,

is not fixed in point of time — that is, if it depends upon the

dropping of a Hfe or lives — the limitation, as will hereafter be

seen, gives rise to an estate puj- autre vie. If the happening

of the event is fixed in point of time, the limitation gives rise

to a term of years, which, notwithstanding the naming of the

heir, passes to the executor on the death of the tenant. (Litt.

sect. 740.) Similarly, a limitation to a grantee and his heirs

at the will of the grantor, will pass only a tenancy at will.

(Litt. sect. 82.)

The language by which the future event is introduced into

the limitation of a determinable fee may take either of the two

following shapes : (1) until a specified contingency shall happen,

which may by possibility never happen ; or (2) so long as an

existing state of things shall endure, which is such that it may

by possibility endure for ever.

No particular phraseology is necessary to introduce the

future event: until, till, so long as, ivhilst, or any other

equivalent words may be used, provided that they clearly

express the dependency of the duration of the estate upon the

future event. (" Quamdiu, dummodo, dam, qnousque, si, and

such like." Shep. T. 125. " Quamdiu, duminodo, dum, quousque,

durante, &c." 10 Bep. 41 b.) This proposition will best be

illustrated by an examination of the various forms specified

in the list give at p. 255, iyifra.

The happening of the future event ipso facto determines the

estate without any entry or claim by the person entitled to the

possibility of reverter.

Remarks This kind of limitation, where words of express limitation

minaWe\*^'^ are used to mark out an estate, which is by subsequent words

limitations in (being part of the limitation itself) made liable to determine

iTcncnil,

upon the happening of a wholly disconnected future event,

may conveniently be styled a determinable limitation. Preston

sometimes uses the phrase collateral limitation in this sense.

His definitions of a direct, and of a collateral (or determinable)

limitation, will repay careful attention : —

" A direct limitation marks the duration of estate by the life

of a person, by the continuance of heirs, by a space of

DETERMINABLE FEES. 253

precise and measured time : making the death of the

person in the first example, the continuance of heirs in

the second example, and the length of the given space

in the third example, the boundary of the estate or the

period of duration.

" A collateral limitation, at the same time that it gives an

interest which may [by possibility] have continuance

for one of the times [marked out] in a direct limita-

tion, may, on [the happening of] some event which it

describes, put an end to the right of enjoyment during

the continuance of that time." (1 Prest. Est. 42.)

A determinable or collateral limitation is not confined to

the limitation of determinable fees. Any estate, including an

estate for life, and a term of years, may be made liable to

determine in like manner. In the latter cases, the future

event which is to determine the estate, is not necessarily an

event which by possibility may never happen at all ; which

rule, as to fees, arises only from the necessity that the

collateral clause shall not be simply incompatible with the

direct clause, but shall admit, by possibility, of the endurance

of the estate limited in the direct clause to its full extent.

When such a collateral clause is annexed to the limitation of

any other fee than a fee simple, as, for example, to a fee tail

(to A. and the heirs of his body, being lords of the manor of

Dale), it is, of course, equally necessary that the determining

event may be such as by possibility may never happen.\*

Littleton styles such limitations conditions in law. (Litt.

sect. 380. See also, Plowd. 242.) They are not unfrequently

\* Thus it becomes possible to suggest a more elaborate sub-division of fees

than that used in the text as follows : —

1. Fee simple, ~1 (5. Fee simple determinable,

2. Conditional fee, giving rise also, I 6. Conditional fee determi-

! by means | nable,

3. Qualified fee simple, j of a collateral i 7. Qualified fee simple de-

clause, to terminable,

4. Fee tail, j i 8. Fee tail determinable,

and 9. Base fees, which may at the present day take any shape in which a fee

can be limited. (^Vide infra, p. 333.) ' But though there is no reason to doubt

the validity of any of these determinable limitations of different kinds of fees,

the only one of them which has any practical interest or importance is that

above styled jnir excellence a determinable fee. See, however, p. 257, No. 11,

infra.

254 THE NATURE AND QUANTUM OF ESTATES.

styled conditional limitations ; but this last phrase is commonly

nsed ill so many different senses, that to make use of it at all

is only to invite obscurity and confusion.

«

How con- Determinable fees are divisible into two classes, according

fees simple, ^s the future event which may determine them — (1) is an event

which admits of hccomimj impossible to happen ; such as the

marriage of C. D., which may become impossible by C. D.'s

death ; or (2) is an event which must for ever, if it does not

actually happen, remain liahle to happen ; such as the fall of a

particular building. In the former case, if the event has not

happened before the death of C. D., the determinable fee is by

his death ipso facto enlarged into a fee simple. In the latter

case the determinable fee can never be enlarged into a fee

simple, except by a release of the possibility of reverter.

The future event can admit of becoming impossible to

happen, only when it is something to be done or suffered by a

living person. In such cases the event, if it happens at all,

must necessarily happen within the time prescribed by the rule

against perpetuities. Therefore determinable fees of this type

admit of executory limitations to take effect upon their deter-

mination. If any such executory limitation should exist, the

determinable fee cannot, pending the possibility of its deter-

mination, be enlarged into a fee simple without a release of

such executory limitation. This fact has an important practical

bearing upon the form of strict settlements. (See p. 256,

infra, No. 10 of the list there given.)

The following list of determinable or collateral limitations,

which have been actually used, or proposed in books of

authority to be used, in the limitation of determinable fees,

"will be found instructive.

These limitations are partly limitations at the common law,

and partly limitations by way of use and by way of devise.

But in all limitations contained in a deed, however they may

take effect, the words \*\* and his heirs," and also any valid

clause operating by way of determinable or collateral limita-

tion, have, so far as respects the duration of the estate limited,

the same operation; and this is true also of devises which

contain words of strict limitation.

DETERMINABLE FEES. 255

Examples of Determinable Fees.\*

1. Peers of the realm. Preston (1 Prest. Est. 443 ; ibid. 446)

expressly lays it down, that lands may be limited for a

determinable fee under this form. But the passages

which he elsewhere (ibid. 431, note <?) cites in support of

such limitations (Co. Litt. 27 a ; 2 Bl. Com. 109) refer,

not to the limitation of the manor of Kingston Lisle to

a man and his heirs being peers of the realm, but to the

limitation of a peerage to a man and his heirs being

lords of the manor of Kingston Lisle. " By this," says

Lord Coke, " he had a fee simple qualified in the

dignity ; " where by fee simple qualified he means what

is above styled a determinable fee. There does not

seem to be any objection against such a limitation of

lands ; because, though the peerage might not be

limited to the heirs general, and thus a separation

might occur between the heir to the peerage and the

heir to the lands, the only result would be, that the fee

in the lands would absolutely determine. (See p. 112,

Eule 4, supra.)

2. Kings of Scotland. " King Henry the Third dedit inane-

riitm de Penreth ct Sourby AlexamUo rcgi Scotia et

heredibus suis regibus Scotiae." (Lib. Pari. Cited by

Lord Hale, in note 6 on Co. Litt. 27 a.) In the event,

King Alexander died, leaving only daughters, and

therefore not leaving any heir who was King of Scot-

land ; whereupon King Edward I. recovered seisin of

the manor. In limitations of this description, if the

succession should be once interrupted by default of an

^ \* This list is partly founded upon a list given by Preston (1 Prest. Est. 431 —

433) ; the references to which are distinguished by a peculiarly complicated

inaccuracy. Preston cites among his references the case of Cocket v. Sheldon,

Serj. Moore's Rep. 15, whereby he seems to have admitted into the list, as a

true specimen of the limitation now under consideration, the limitation which is

given in that case ; which, however, did in fact (for want of the word heii-s)

limit a determinable estate for life. The present writer, following this example,

has admitted another like instance. (No. 12.)

For some remarks upon the " special limitation " of the patronage of the

hospital of St. Katharine, mentioned by Lord Hale in note 6 on Co. Litt. 27 a,

see p. 113, sujira.

256 THE NATURE AND QUANTUM OF ESTATES.

Examples of heir qualified to succeed, the estate is gone for ever,

determinable . . o »

fees. and will not be revived by the subsequent coming into

existence of an heir fulfilling the description in the

limitation. (1 Prest. Est. 443, 444.)

3. Tenants of the manor of Dale. (Co. Litt. 27 a ; 2 Bl. Com.

109.)

4. Being lords of a particular manor. (Wooddeson, Vinerian

Lectures, vol. 2, p. 9. To this type also belongs the

limitation of the peerage of De Lisle, referred to in Co.

Litt. 27 a and 2 Bl. Com. 109.)

5. As long as such a tree shall grow. (11 Rep. 49 a ; Kitchin,

Jurisdictions, 5th ed., p. 301.) Or, during the time that

such a tree shall grow. (Ld. Eaym. 326.)

6. As long as such a tree stands. (Idle v. Cook, 1 P. Wms. 70,

at p. 75, Ld. Raym. 1144, at p. 1148; Shep. T.

101.)

7. As long as the Church of St. Paid shall stand. (Plowd.

557.)

8. As long as he shall pay 20s. annually to A. (Plowd. 557.)

Here " he " and " A " are loosely used to include their

respective heirs. (And see Shep. T. 101.)

9.\* So long as B. hath heirs, or, issue, of his body, or, as long as

any issue male of B shall live. (Co. Litt. 18 a ; 10 Rep.

97 b ; Plowd. 557 ; Cro. Jac. 593 ; Finch, Law, p. 112 ;

10 Yin. Abr. 233=Esto<c, I. 10, pi. 2 ; Idle v. Cook, ubi

supra; Watk. Desc. 211; Poole v. Nedham, Yelv. 149.)

Here B. must not be the same person as the donee.

For further observations, see p. 330, infra.

10. Till the marriage of a person shall take place. (1 Prest.

Est. 432 ; ibid. 442.) The authorities cited by Preston

(Cro. Jac. 593 ; 10 Vin. Abr. 233) make no mention of

any such limitation; but there is no doubt as to its

validity. In strict settlements of real estate, when

they are made by a settlor in contemplation of his

\* In Oardjier v. Sheldon, Vaugh. 259, at p. 273, Vaughan, C. J., observed :

" An estate to a man and his heirs so long as John Stiles hath any Jieir, which is

" no absolute fee gi/nple, is doaht\eas aa dnT&hle as the estate in fee which John

" Stiles hath to him and his heirs, which is an absolute fee simple." This obiter

dictum must be received with some reserve. Such a limitation would probably

be held to confer a fee simple absolute.

DETERMINABLE FEES. 257

marriage, the limitations regularly begin with a limita- Examples of

tion to the use of the settlor and his heirs until the fees™'"\*

solemnization of the intended marriage. Thereby the

settlor takes a determinable fee, which will ipso facto

become a fee simple if either of the parties to the

intended marriage should die before its solemnization.

Since a determinable fee limited in this form must

necessarily determine, if at all, within the time pre-

scribed by the rule against perpetuities, it admits of,

aud it is in practice always followed by, sundry execu-

tory limitations to take effect upon its determination,

that is, upon the solemnization of the marriage ; and

therefore such a determinable fee will not, before the

solemnization of the marriage and during the joint lives

of the parties, admit of enlargement into a fee simple,

except by the release of these executory limitations;

and these, being partly in favour of the issue of the

marriage, who by hypothesis are not in being, cannot

be released. Therefore, in order to prevent the incon-

venience which would result during the lives of the

parties from the making of the settlement, in case the

intended marriage should not be solemnized, it is

proper to insert into the settlement a proviso that, in

case the marriage shall not be solemnized within a

specified time (usually twelve months) after its date,

the uses of the settlement shall be void and the lands

shall revert to the use of the settlor in fee simple.

It is not necessary that the marriage should be the

marriage of the grantee himself. See Lord Notting-

ham's observations in Howard v. Duke of Norfolk,

2 Swanst. 454, at p. 461.

11. Till C. returns from Rome. (Fearne, Cont. Eem. 12 ;

and Butler's note at p. 13. See also the observation

of Serjeant Maynard, in the Duke of Norfolk's Case, 3

Ch. Ca. 1, at p. 46, that a limitation. To one and his heirs

males, till such a one returns from Rome, is good ; which

is an example of a determinable fee tail.)

12. TiU A. [the grantor] inakes I. S. [a stranger] baili/ of

his manor. (Lord Hale, in Co. Litt. 42 a, note 6.) In

C.R.P. s

258 THE NATURE AND QUANTUM OF ESTATES.

Examples of the case cited, the limitation was not to the grantee

fees.'^'""'\* ® and his heirs, and it therefore passed no fee, but only

a determinable estate for life. There is no reason to

doubt that the clause would be valid in the limitation of

a fee.

13. Until B. [the grantee] go to Rome. (Shep. T. 125.)

14. Until he [the grantee] be promoted to a benefice. (Ibid.)

15. Until such time as [the grantee] his heirs, executors, or

administratoi's, shall make default in payment of any of

the said sums : — viz., certain instalments each of 20Z.,

one such to become payable at Michaelmas in every

year, until the total sum of 8001. should have been

paid. (1 Leon. 33.) This form occurs in a security

taken by the Exchequer in Queen Elizabeth's reign,

from a crown debtor. The form next following was a

part of the same limitation.

16. Until [the Queen] her heirs and successors shall have

received of the issues and profits [of the lands] such sums

of money, parcel of the said debt, as shall then be behind

and unpaid. (1 Leon. 33.) The ultimate limitation

was to the crown debtor in fee simple. The limitations,

to the crown upon default in payment of the instal-

ments, and to the debtor upon satisfaction of the debt

out of the rents and profits, are of course not remainders,

but executory limitations.

17. Until B. [the grantee] pay to A. [the grantor] 20/.

(Shep. T. 125.)

18. Until the feoffor pay 1001. to [the feoffee'] or his heirs. (Co.

Litt. 248 a ; and see 10 Rep. 41 b.)\*

19. Donee et quousque /. S. shall pay to the feoffor,^ or to his

heirs, one thousand pounds. (Dy. 300 b, pi. 39. Com-

pare ibid. 298 b, pi. 30.)

\* [Compare Att.-Gen. v. Cummins, 28th Nov., 1895, reported (1906) 1 Ir. R.

406, where a crown grant of certain quit rents to A. and his heirs " until he or

they should receive and be paid the sum of 5,000?.," was held to create a deter-

minable fee. The judgment of Pallas, C. B., is worthy of attentive perusal.]

t The word feofor seems in the first cited page of Dyer to be twice printed

for feoffee. The mistake makes no difference to the nature of the limitation.

In Dy. 298 b, pi. 30, the words are, " until such time as the said feoffor should

pay to the feoffee or his heirs one hundred pounds."

DETERMINABLE FEES. 259

Upon the view taken in equity of such limitations, see Examples of

^, ^, ^ ,- ^„^ \_, . ,, T 7 determinable

Blagrave v. Cliinn, 2 Vern. 576 ; Thomasinv. Mackwortn, fees.

Carter, 75.

20. For, dunng, and until any gim that the feoffor shall beget of

the body of his said wife shall accomplish the age of twenty-

one years. (Dy. 300 b, pi. 39 ; Cocket v. Sheldon, Serj.

Moore's Kep. 15. See also Lethieullier v. Tracy, 3 Atk.

774, Arabl. 204; Spencer v. Chase, 10 Vin. Abr. 203, 9

Mod. 28 ; Dy. 124 a, pi. 38 ; where a similar limitation

occurred in a will.) The form of the limitation in Dyer

and Moore was. To the use of the wife, until, &c. ; which

only gave her a determinable estate for her own life.

Had it been, To the use of the wife and her heirs, until,

&c., she would have taken a determinable fee.

21. lliat they, or the survivor of them, or the heirs of the sur-

vivor, should, out of the lands by the rents, issues and

profits, or by the sale of the whole or so much as should

be necessary, raise so much as should be sufficient for the

payment of debts, legacies, and funeral expenses ; and then,

&c. {Bagshaw v. Spencer, 1 Ves. sen. 142. This devise

gave a legal fee to the devisees ; per Lord Hardwicke,

at p. 144.) This case seems to have escaped the dili-

gence of Sir G. Jessel, M.R., in Collier v. Walters, L. R.

17 Eq. 252 ; where he is reported to have said, at p. 261,

that he had looked at an enormous number of cases to

see if he could find any authority for a devise to trustees

and their heirs until the payment of the testator's debts,

and had not succeeded in finding any.

22. In trust to pay his sister E. W. an annuity of 100?. till

his debts and legacies were 2^^^^^ : ^^^ after, &c.

{Wellington v. Wellington, 1 W. Bl. 645. The estate of

the trustees is st} led a " base fee, determinable on the

payment of the testator's debts and legacies out of the

profits of the estate ; " see p. 647. And see Murth-

waite v. Jenkinson, 2 B. & C. 357.)

23. In trust, till the rents and pi'ojits of [the lands] sh<dl raise

and pay the several legacies and bequests mentioned in

the testator's will. {Shields v. Atkins, 3 Atk. 560.)

24. To the use of certain persons until they made a good and

s 2

260

THE NATURE AND QUANTUM OF ESTATES.

Examples of

determinable

fees.

sufficient lease [of the lands] hy indenture for a term of

forty years, {Lusher v. Banhong, Dy. 290 a.)

25. William, Earl of Bath, in 6 Jac. levies a fine with pro-

clamations, and "declares the uses of this fine to

William, Earl of Bath, and to his heirs, tmtil he other-

wise should or did dinpose of the sameJ'^ {Earl of Bath' s

Case, Carter, 96. See also Clere's Case, 6 Rep. 17.) If

this limitation had occurred in an assurance made at

the common law instead of under the Statute of Uses, it

is conceived that the addition of the words in italics

would have had no more e£fect than the common, but

superfluous and nugatory, addition of the words, and

assigns, to a limitation in fee simple.

26. " One devised land in London to the prior and convent

of B. ita quod reddant annuatim decano et capitulo

Sancti Pauli 14 marks ; and if they fail of payment,

that their estate shall cease, and that the said dean and

chapter and their successors shall have it." (1 Eq. Ca.

Ab. 186, pi. 3 ; Dy. 33a, pi. 12.) The gift over was

held to be void, on the ground that the first devise

carried a fee and left nothing to be disposed of ; and the

above-cited account remarks, that executory devises had

not yet been recognized by the courts. But even if

executory devises had then been recognized, this gift

over seems clearly to be void for remoteness.

The distinc-

tion between

determinable

limitations

and limita-

tions upon

condition.

When the future event which if it should happen will deter-

mine the estate, is an act to be done by the grantee, or

depends upon the will of the grantee, as his marriage, the doing

of the act under such circumstances bears a close resemblance to

the breach of a condition that the grantee shall not do the act.

These cases of determinable limitation are therefore liable to be

confused with limitations upon or subject to a condition, giving

a right of entry upon a breach by the grantee ; from which they

nevertheless differ very widely. (1) In the limitation of a

determinable fee, the doing by the grantee of the act which is

to determine the estate, is made a part of the limitation itself,

and the doing of the act will ipso facto determine the estate

without any entry or claim on the part of the person entitled to

DETERMINABLE PEES. 261

the possibility of reverter. (" The estate is determined without

entry or claim." 10 Rep. 42 a. See also Anon., '2t Mod. 7 ;

Plowd. 242.) But where an estate is limited in fee simple, and

the limitation contains no qualification, but, externally to the

limitation, though in the same deed, or in another deed

delivered at the same time, is contained a condition by a breach

of which the fee simple is liable to be defeated ; a breach does

not ijjso facto avoid the estate, but only makes it liable to be

avoided by the entry of the person entitled to the possibility of

reverter. No estate of freehold can be made to cease, without

entry, upon the breach of a condition. (Co. Litt. 214 b.)

(2) Conditions which are annexed to or are in defeasance of a

fee simple, are subject to the common law, and are governed

by the learning of common law conditions ; because the statutes

by which the common law learning applicable to conditions

annexed to estates has been modified, are restricted to condi-

tions annexed to estates which are less than a fee. (See 32

Hen. 8, c. 34, s. 1 ; 22 & 23 Vict. c. 35, s. 3 ; the Conveyancing

Act of 1881,. ss. 10, 12.)

The rule against perpetuities forms no part of the common

law ; and the opinion which has been held by some text writers,

that such conditions are within the rule, does not seem to \)e

well founded. (Vide supra, p. 187.)

In Re Machu, 21 Ch. D. 838, the question seems to have a modem

been thought not free from doubt, whether a determinable fee °" \*

could be limited to A. and his heirs until A. shall be declared a

bankrupt. The learned judge expressly declined to give an

opinion upon the question ; and at p. 843, he seems not to have

distinguished the particular question of this particular limita-

tion, from the general question \*' whether an estate in fee

simple can be subject to a conditional limitation, or not ; " by

which he seems to have meant, whether the limitation of a

determinable fee is valid. The limitation upon which the dis-

cussion arose, was held to be a limitation subject to a condition,

and not a conditional (or determinable) limitation ; and the

condition, being in absolute restraint of the alienation of a fee

simple, was held to be void, as being repugnant to the nature

of the estate.

262 THE NATURE AND QUANTUM OF ESTATES.

Alienation of All modified fees confer upon the tenant the same absolute

fees. right of user, and to commit unrestrained and unlimited waste,

as a fee simple. They do not necessarily confer the same right

of alienation and devise.

The power of the tenant of a determinable fee to alienate or

devise cannot, properly speaking, be said to be in any way

restricted ; but his alienation will not create a greater estate

than he himself has. He may aliene at pleasure, and the assign

or devisee takes a like estate of inheritance, determinable upon

the happening of the event which would have determined it in

the hands of the donee or his heirs.

There seems to be nothing in the Settled Land Act, 1882, to

modify in any way the right of alienation incident at common

law to the estate of the tenant of a determinable fee. It is

not improbable that, in sect. 58, sub-s. (1), (vi), of that Act,

the words " conditional limitation " mean a determinable limita-

tion at common law, such as has formed the subject of this

chapter ; but those words are there expressly confined to deter-

minable limitations of estates for life, estates pnr autre vie, and

terms of years \*\* determinable on life."

( 263 )

CHAPTER XVIII.

CONDITIONAL FEES.\*

The law relating to conditional fees which can now subsist

only in hereditaments other than tenements, and (by analogy)

in copyholds of manors in which there is no custom of entail,

is a very obscure subject of research. The most eminent

authorities are sometimes at variance, and the living tradition

of modern practice is almost entirely wanting. But of the

questions which have been raised some, even before the statute

De Bonis, were probably matters of more curiosity than prac-

tical importance ; and others rather illustrate the difficulty of

reconciling the rules governing these estates with general

principles, than throw any doubt upon the rules themselves.

A conditional fee may be defined in limine as a species of Definition,

»• • 7 7 • /ii 1 • T 1. •! 7 1 and mode of

estate limited upon or subject to (that is, defeasible upon breach their limita-

of, or to be confirmed, or enlarged, upon performance of) a ^^°^'

condition ; the nature of the estate, and the nature of the con-

dition, being reserved for subsequent remark. But this defini-

tion is subject to the observation, that the rules governing

these fees rest upon a special basis of their own, and are not

in accordance with the general law applicable to estates upon

condition.

The conditions admissible for the purpose of creating a con-

ditional fee are restricted to a single type, which always takes

the form of a limitation expressed to be to the heirs of the body

of the donee or donees, either generally, or to a special class of

such heirs. The word heirs limits a fee, or estate of inherit-

ance ; while the imposed restriction prevents the fee from

being a fee simple in the proper sense of the term. The

different forms assumed by this kind of limitation, which

\* [As to limitations upon or subject to a condition, see supra, pp. 260-1.]

264

THE NATURE AND QUANTUM OP ESTATES.

Nature of

heirs special.

The special

heir must be

heir of the

body.

require to be noticed as illustrating the law of entail, are as

follow : —

(1) To the heirs of the body ; (2) To the heirs male of the

body ; (3) To the heirs female of the body ;

(4) To the heirs of the body of the donee hy ajiarlicidar wife

(or husband) : the person designated as wife (or

husband) not necessarily being married to the donee at

the time of the gift, but being by possibility capable of

such marriage ; (5) To the heirs male of the body of the

doneeby a particular wife (or husband); (6) To the rteir«

female of the body of the donee by a particular wife (or

husband) ;

(7) To the heirs of the bodies of two persons lawfully married,

or by possibility capable of lawful marriage, the two

persons being both named as donees in the gift ;

(8) To the heirs male of the bodies of two such persons

as aforesaid ; and (9) To the heirs female of the bodies

of two such persons as aforesaid.

The phrase heir male imports not only that the heir must be

a male, but also that he must be able to deduce his descent

solely through males. And similarly of heir female. (Litt.

sect. 24, and Lord Coke's comment.)

Any similar restriction to a single sex, if attempted, in a deed

or on a feoffment, to be imposed upon the heirs general, as by

limitation to the heirs male, is void, and the grantee takes a fee

simple. (Litt. sect. 31.) The law arrives at this construction,

by rejecting the word male, upon the principle, ut res magis

valeat quam pereat. (Co. Litt. 27 a, b.) And upon the same

principle, if gavelkind lands be limited to A. and his eldest

heirs, or if common law lands be limited, in a deed or on a

feoffment, to A. and the eldest heirs female of his body, the

word eldest will be rejected, to give effect to the limitation.

But in a will, a limitation to A. and his heirs male will create

an estate in tail male ; the words, " of his body," being

supplied by construction of law. (Co. Litt. 27 a ; Baker v.

Wall, Ld. Raym. 185.) This is therefore no exception to the

rule, that restrictions in point of sex cannot be imposed upon

heirs general.

CONDITIONAL FEES. 265

The restricted nature of this limitation was, at a period so in what sense

early as to be almost beyond the reach of history, construed by jg conStionai!

the courts as being in the nature of a condition ; and the limita-

tion as being therefore in the nature of a limitation upon

condition. And they seem to have regarded the condition as

to some extent uniting in itself contradictory characteristics :

being partly in the nature of a condition which by its perform-

ance would confirm, or enlarge, the estate, and partly in the

nature of a condition always remaining liable, by a breach, to

defeat the estate. For —

(1°) As soon as an heir of the prescribed class was born (post

prolem suscitatam) this was held to be for some purposes a per-

formance of the condition, so as for some purposes to enlarge

the conditional fee into a fee simple ; namely, so far as to enable

the donee (1) to aliene the lands for an estate of fee simple

absolute ; (2) to forfeit, including under that word escheat by

attainder of felony besides forfeiture for treason ; (3) to charge

with incumbrances which were as indefeasible as if created by a

tenant in fee simple. (Co. Litt. 19 a.) And (4), in the case of

a gift either to a donee and his or her issue by a particular wife

or husband, or to two donees and their joint issue, birth of the

prescribed issue had the effect of enlarging the possible course

of descent, so as to make it include issue of the donee, or of

the survivor of two donees, by another wife or husband ; as

will presently be explained more at large.

If the donee of the conditional fee aliened before such issue

born, his alienation would bar his own issue, if born afterwards,

giving the assign an estate which endured so long as such

issue should exist ; but such alienation would not bar the donor

of his possibility of reverter on failure of such issue. (Co.

Litt. 19 a.)

But this fulfilment of the condition, by having issue of the xhe descent

prescribed class, was not an absolute fulfilment once and for °f \* condi-

■^ \_ tional fee.

all ; the estate was not thereby converted into a fee simple for

all purposes, and the condition for some purposes still

remained on foot ; for —

(2°) If the donee, after birth of the prescribed issue, did not

aliene, but suffered the estate to descend, it followed the

266 THE NATURE AND QUANTUM OP ESTATES.

prescribed course of descent, and none but heirs of the pre-

scribed class could take ; but these could take to the exclusion

of the heir general, in case he (or she) happened not to be of the

prescribed class. (Co. Litt. 19 a ; and Harg. n. 4 thereon.)

That is to say, the special heir per forma m doni is not necessarily

identical with the heir general. This proposition involves an

anomaly, seeing that by this means the course of descent by

the common law could be diverted into a different channel.

For example, if a man should die leaving two sons ; and after-

wards the elder son should die leaving only a daughter, in this

case the daughter is the heir general of the first mentioned

person; but the heir male is the younger son, or (after his

death) his male issue ; and under a limitation to the first men-

tioned person and the heirs male of his body, the younger son

and his male issue would inherit, to the exclusion of the heir

general. Similarly, if a man should die leaving a son and a

daughter, the son, whether elder or younger than the daughter,

is the heir general ; but, under a limitation to the first men-

tioned person and the heirs female of his body, the daughter,

whether elder or younger than the son, would inherit ; in this

case also to the exclusion of the heir general.

This doctrine of descent probably admits of no dispute in

regard to conditional fees ; and it undoubtedly admits of no

dispute so far as fees tail are concerned. (Litt. sects. 21 — 25.)

The heir (of the prescribed class) coming in by descent, had,

whether he had issue or not, exactly the same power or capacity

to alienate, forfeit, and charge, as the original donee had after

birth of the prescribed issue.

If the succession of the special heirs came to an end without

any alienation having been made, the donor's possibility of

reverter became an interest in possession.

The possible As has been briefly mentioned, a conditional fee limited to

descenUs the heirs (whether general or special) of the body of a donee by

condltfona^i ^ particular wife or husband, or to the heirs of the bodies of

fee than for a ^j^q persons lawfully married, or capable of lawful marriage,

had a remarkable characteristic, particularly referred to in the

preamble to the statute DeDoni« by which conditional fees were

converted into fees tail; namely, that, after issue of the prescribed

CONDITIONAL PEES. 267

kind had been horn, the estate might, in default of such issue,

descend to the issue of the donee, or of the survivor of the two

donees, by another wife, or husband, as the case might require.

That is to say, the birth of issue of the prescribed class would

practically convert what might be styled a gift in special tail at

the common law into a gift in general tail at the common law.

This proposition is deduced by Lord Coke as a conclusion from

the doctrine, (1) that, the survivor being the wife, her second

husband, after birth of issue by her, should be tenant by the

curtesy (2 Inst. 336 ; the 4th resolution in Paine' s Case, 8 Eep.

34, at p. 35 b) ; and (2) that, the survivor being the husband,

his second wife should have dower. {Ihid. at p. 36 a.)

According to Lord Hale, this peculiar characteristic did not

apply to conditional fees created by gift in frankmarriage.

(Co. Litt. 19 a, n. 3.) By the statute De Bonis, conditional

fees were deprived of this peculiar quality ; and the descent of

such conditional fees, which were transmuted by the statute

into what are now styled estates in special tail, was thenceforth

restricted solely to the issue of the donee or donees.

With conditional fees as above defined and discussed, certain fees

Preston has also classed limitations made to a man and his ^^"^^^f^ "P°°

condition,

heirs generally, if he shall have heirs of Jiis body. (2 Prest. classed by

Est. 292.) This usage is not peculiar to Preston ; for distinct conditional

traces of it may be found in Lord Coke and other authors. ^^^'

He is, however, more systematic and elaborate in his adoption

of it, and in his treatment of conditional fees as being only

one class of fees limited upon condition. But he expressly

lays it down, that conditional fees of this latter type " are

governed by the general rules of law, as distinguished from

the law applicable to conditional fees properly so deno-

minated." (2 Prest. Est. 292.) From this passage it

appears, both that these limitations are more properly styled

limitations subject to a condition, and are, in fact, governed

by the common-law learning applicable to estates upon con-

dition, and also that Preston fully admitted the diflference

between them and conditional fees properly so called.

The condition annexed to this kind of limitation, is an

express condition properly so called ; and (unlike the quasi-

268 THE NATUBE AKD QUANTUM OP ESTATES.

condition supposed to be implied in the limitation of a

conditional fee proper) it is fulfilled, once for all, and to all

intents and purposes, by birth of the prescribed issue, whereby

the estate becomes ijiso facto a fee simple absolute.

Since these limitations differ so widely from conditional fees

properly so called, it does not seem to be expedient to class

them together. It is superfluous to say that these limitations

do not occur in practice.

( 269 )

CHAPTER XIX.

QUALIFIED FEES SIMPLE.

There remains another kind of limitation allowed by the

common law, in the nature of an express modification of a fee

simple, and giving rise to an estate of inheritance, which,

since, in the opinion of Preston, it is undoubtedly valid,

requires to be mentioned ; and the recent case of Blake v.

Hynes, which is referred to at the end of this chapter, shows

that its possible occurrence in practice is a matter which needs

to be considered. It may conveniently be styled a qualified

fee simple.

It clearly appears from Litt. sect. 354, as explained by Lord Their nature

Coke's comment, that, by the common law, a fee may be iimit™tion.°

expressly limited to a man and the heirs of any ancestor, in

the paternal line,\* whose heir he is. Littleton declares that

a limitation must be made in this form, by a feoffee who is

seised in fee simple, subject to a condition to re-infeoff "many

men" — plusors homes — jointly in fee simple, in case all of

them should die before any feoffment has been made pursuant

to the condition. Under such circumstances he lays it down,

that the feoffment should be made to the heir of the last

survivor, habendum to him and the heirs of the aforesaid

survivor.

The simplest example of this kind of limitation would

occur, if the heir of the last survivor should be his son ; in

which case, by following Littleton's directions, we should arrive

at a limitation to a man and his heirs ex parte paternd, so as

to exclude altogether from the succession the heirs ex parte

\* Some remarks will be found at p. 277, infra, upon the question whether the

person named as the purchaser is necessarily the heir, in the paternal line, of

the person named as the ancestor. It cannot be statetl with confidence, that

the authority of Littleton and Lord Coke is in favour of the Talidity of these

limitations, unless this restriction is inserted ; but they make no express

mention of the restriction, when treating of the subject.

270 THE NATURE AND QUANTUM OF ESTATES.

matcrud ; who, if he had taken a fee simple absolute, since he

would have taken it by purchase and not by descent, would

have been entitled to succeed on a failure of the heirs ex imrte

•pater nd.

The fact that, by the common law, a seisin in fee simple,

which had been acquired by descent from a father who had

come to the estate by way of purchase, excluded the heirs of

the son ex parte maternd, supplies the motive which induced

Littleton to prescribe the adoption of this limitation under

the above-mentioned circumstances. To state the case more

generally, a seisin in fee simple acquired by descent from any

ancestor w ho had come to the estate by purchase, excluded all

heirs of the descendant who were not of the blood of the

ancestor. The change in the law of descent effected by the

Descent Act, 3 & 4 Will. 4, c. 106, s. 2, does not seem to have

made any difference, so far as regards the method prescribed

by Littleton for attaining the object which he had in view.

Under the same circumstances as those supposed by him, it

would still be necessary to make the same limitation in order

to fulfil the condition which he supposes to have been

imposed. The substitution by the Descent Act of the last

purchaser as the root of descent, in the place of the person

who last had seisin in deed of the lands, confines the inherit-

able blood to the blood of the last purchaser quite as strictly

as the rule of the common law. And though a later enact-

ment, 22 & 23 Vict. c. 35, s. 19, has now introduced a

possibility that, under peculiar circumstances, persons might

inherit who are not of the blood, this contingency contains

nothing to affect Littleton's directions. If that contingency

should happen, its effect will be precisely the same in whatever

way the limitation is made.

There seems to be no sufficient reason to suppose that the

Descent Act has in any way affected the validity of these

limitations at common law. And it will presently be shown,

by what are conceived to be irrefragable arguments, that this

statute expressly provided a new method of limitation, by

which precisely such a fee as that described by Littleton could

be limited ; so that, if the statute had, in this respect, any

effect at all, its effects were, at all events, restricted to

QUALIFIED FEES SIMPLE. 271

prescribing a new method of limitation, without affecting the

validity of the estate.

The further question, whether the validity of these limita-

tions was affected by the 22 & 23 Vict. c. 35, s. 19, remains to

be considered ; and some remarks upon this point will be

found at p. 282, infra.

Here the course of descent does not differ, so long as the The course of

estate endures, from the course of descent which would have

been taken by a fee simple absolute, upon the hypothesis that

it had actually descended from the specified ancestor ; but in

a certain sense\* it may be said that the quantum of the estate

differs, the descent being restricted to one class only of the

heirs, and the estate determining with the exhaustion of this

class. Here the word class is used to denote those heirs of the

descendant who are also among the heirs of the specified

ancestor. Where the descendant is the son, such heirs are

frequently classed together as the heirs ex parte paternd ; but

in tlie case of more remote descendants, such classes of

ancestors less often required to be mentioned, and have not

acquired special names. It will appear, however, from some

subsequent remarks, that this language about restriction of the

descent to a class of heirs, is somewhat confusing and mis-

leading. The simplest point of view is to regard one person

as being substituted for another as the root of descent. When

we say that the descent is restricted to the heirs ex parte paternd,

we only mean that the descent is to be traced from the father,

subject to the hypothesis that he has had at least one son.

Preston has treated limitations of this kind with consider-

able detail in the first volume of his Treatise on Estates,

pp. 449 — 475. He makes it quite plain that he intended to

mark off this estate into a separate class, not merely to classify

it among the other fees usually collected under the terms

qualified fee, or qualified or base fee ; which terms, as above

\* In the sense, at all events, in which an estate pur autre vie is said to be less

in quantum than the estate of a tenant for his own life. But Preston thought

that the distinction in quantum was of a much more serious nature. For some

remarks upon his doctrine, see p. 278, infra.

272 THE NATURE AND QUANTUM OF ESTATES.

mentioned, are commonly used to include all fees, except fees

simple (absolute) and conditional fees. He remarks, that a

passage of Blackstone, 2 Bl. Com. 222, may seem to throw

doubt upon the existence of this species of estate ; but

expresses the opinion, " That the authority of Littleton, and

of Lord Coke, establish in the most decisive manner the cer-

tainty of its existence." (1 Prest. Est. 469.) The present

writer formerly entertained some suspicion that this peculiar

estate owes its existence to Littleton's ingenuity in suggesting

a hypothetical case. But the case of Blake v. Hynes rather

suggests the conclusion, that Littleton's observations may

have arisen from the tradition of an ingenious device actually

used to extricate a client from an awkward position, which

would at first sight seem to leave open no course by which he

could precisely fulfil the condition imposed upon him. From

Lord Coke's language it is clear that Littleton's meaning

needed interpretation, and had in fact been misunderstood.

This shows that the device in question could not have been

common.

Distinguished The rare occurrence of this species of estate, if it ever has

fees? ° actually occurred, has prevented it from receiving much notice.

The present writer is not aware of any authorities other than

those above cited,\* who have made it the subject of express

\* Preston cites Fleta, lib. 3, c. 3, as giving a definition of these fees. (1 Prest.

Est. 449, note g.) There is, however, nothing about them in that chapter ; — a

fact which will surprise no one who is familiar with the inaccuracy of the

references in Preston's works. Those deeply-learned treatises seem to have

been issued from the press uncared for except by the printer's devil. There is

probably something about these qualified fees somewhere in Fleta ; but the

present writer, in the course of a somewhat cursory inspection of what seemed

to be the most probable places, has not been able to find any reference to them.

An exhaustive search would hardly have repaid the trouble. Fleta's definition,

in Preston's version of it, is couched in wide and somewhat vague terms ; and it

appears to go beyond what is laid down by Littleton and Lord Coke. In so far

as the author styled Fleta concurs with Littleton and Lord Coke, his authority

seems to be superfluous : in so far as he goes beyond them, he does not seem to

be entitled to extraordinary veneration.

Reeves, 3 Hist. Eng. Law, 342. 343, refers to Litt. sect, 354, as being an

example of the cy pris performance of a condition, when the literal performance

of it had become impossible. He does not appear to have adverted to the

peculiarities of the consequent estate, or to any question in controversy with

respect to it.

Qualified fees simple. 273

discussion ; and this remark is meant to be exclusive of Black-

stone, as will presently be shown more at large. Though it

has no great practical importance, the mode of its limitation

is too remarkable to be passed over in silence ; and it requires

to be separately classed. It differs in a marked manner from

a determinable fee,\* since it is limited by restriction to a

particular class of the heirs, and not by reference to the

happening of a future event. It still more evidently differs

from a conditional fee, because, so long as it endures, the

powers of the tenant are neither enlarged nor abridged by

anything in the nature of the performance of a condition. It

is manifestly quite distinct from a fee tail, because (among

other reasons) the issue had never any claim against the

alienation, by whatever assurance it might be effected, of the

ancestor ; whereas, even at the present day, not all assurances

of the ancestor will bar the issue in tail. And it differs from

a base fee, as defined in these pages, too obviously for the

difference to require particular mention.

The passage of Blackstone above referred to, as seeming to Supposed

throw doubt upon the validity of qualified fees simple, is in derived from

reality foreign to the purpose. Blackstone is endeavouring to blackstone.

account, upon principles of archaic feudalism, for the rule of

the common law, that, though heirship under a fee simple was

deduced from the person last seised, and though heirship, in

respect to a fee simple, included collateral heirship, yet no one

might inherit who was not of the blood of the oiiginal purchaser.

It is evident that, under certain circumstances, this rule might

restrict what would have otherwise been the descent, if the

rule had merely prescribed that descent should be traced from

the person last seised. If a man had acquired a fee simple by

purchase, and this had descended upon his son as heir-at-law,

and the son had subsequently died intestate, leaving no

(known) heir ex parte paternd, then the lands would (at the

common law) escheat to the lord sooner than pass to the heirs

ex parte maternd. (Litt. sect. 4.) These last-mentioned heirs

are among the heirs of the person last seised, but they do not

\* Preston, though he thought that, for purposes of alienation, this kind of

fee has the quality of a determinable fee, nevertheless recognises a material

difEerence between them. (1 Prest. Est. 468.)

C.R.P. T

274 THE NATURE AND QUANTUM OF ESTATES.

fulfil the other prescribed condition, that they must be of the

blood of the first purchaser. Blaekstone remarks, that this

feature of the law of descent was entirely unknown to the

Jews, Greeks, and Romans, and that it is almost (he might

probably have omitted this last word with perfect safety)

peculiar to our own laws and those of a similar original.

(2 Bl. Com. 220.)

In endeavouring to account for the above-mentioned rule,

Blaekstone begins by considering the question of the admis-

sion of collateral heirs. He adduces much learning of a

highly questionable character; and his doctrine is not

perfectly intelligible and consistent with itself. He lays it

down that, when feuds first began to be hereditary (and it

is difficult to guess within several centuries what epoch is

here referred to) no one could inherit except the issue of

the purchaser ; but that, at some subsequent period, \*\* in

process of time, when the feudal rigour was in part abated,"

it became the custom, in the grant of a feud which was in fact

feudum novum (by which Blaekstone means, a feud acquired

by purchase), to express that it should be held ut feudum

antiquum, that is to say (as Blaekstone understands the

phrase), with all the qualities which it would have had, if it

had in fact descended from the grantee's ancestors. He

supposes that by this device the collateral heirs, of any degree

of remoteness, acquired their right of succession ; because, even

under the strictest rigours of feudum novum, after a descent

once cast, some collateral heirs of the person last seised were

let into the succession ; and the longer the descent was con-

tinued, the more extensive was the admission of the collateral

heirs ; so that, if by a feigned supposition it was imported

into the original grant to the purchaser, that he should take

upon the same terms as if the feud bad in fact descended

upon him from his ancestors indefinitely, without specifying

any one in particular, collateral ancestors of any degree of

remoteness might be brought into the succession.

Blaekstone sums this up as follows : — " Of this nature are

all the grants of fee-simple estates of this kingdom ; for there

is now in the law of England no such thing as a grant of

a feudum novum, to be held ut novum : unless in the case of a

^ QUALIFIED FEES SIMPLE. 276

fee-tail, and there we see that this rule is strictly observed,

and none but the lineal descendants of the first donee (or

purchaser) are admitted; but every grant of lands in fee-

simple is with us a feudum novum to be held ut antiquum,

as a feud whose antiquity is indefinite : and therefore the

collateral kindred of the grantee, or descendants from any

of his lineal ancestors, by whom the lands might possibly

have been purchased, are capable of being called to the

inheritance." (2 Bl. Com. 222.)

There is no need- to pursue the further refinements by which

the learned author, having accounted after a fashion for the

admission of collaterals, proceeds to give some semblance of a

reason for the exclusion of all who are not of the blood of the

first purchaser. These speculations, though their ingenuity

may amuse, would scarcely at the present day be gravely

proposed as resting upon a historical basis. And it is evident,

that Blackstone had not in his eye any such limitation as is

now being considered, and that his remarks, whether well or

ill-grounded, contain nothing which is opposed to its validity.

The question is not, to adopt Blackstone's phraseology, whether

a fee can now (independently of the statute De Donis) be

limited ut feudum novum ; but whether, granting that every

fee must be limited ut feudum antiquum, the precise degree of

the antiquity may lawfully be specified. Blackstone's conten-

tion, that where no precise degree is specified, the degree is,

for certain purposes, taken to be indefinite, would not prove

that the degree may not, for certain purposes, and in a certain

sense, be precisely defined.

But the strongest objection against founding any argu-

ment against the validity of qualified fees simple upon these

remarks, is to be found in the nature of the remarks them-

selves. Whether it was judicious in a lawyer, when writing a

treatise for purposes of practice, to enter upon vague «epecula-

tions (for which no sufficient materials at that time existed)

into the primeval origin of the laws, instead of confining his

attention to matters less remote, may be an open question.

But there can hardly be any question, that it would be absurd

to treat these loose and obscure generalisations, chiefly relating

to foreign feudal notions, as indicating the existence of any

T 2

276 THE NATURE AND QUANTUM OF ESTATES.

settled opinion in Blackstone's mind, upon a minute and highly

technical point of English real property law. There is nothing

to show that Blackstone ever at any time directly entertained

in his mind the question of the validity of these limitations.

But there seems to be, in the above-cited remarks themselves,

abundant evidence that when he was writing them nothing

was further from his thoughts than the validity of qualified

fees simple. The question is not whether Blackstone has

individually pronounced against their validity, about which

he was manifestly not thinking at all, but whether his fanciful

perquisitions into feudal antiquities, if they seem to make

against the validity of qualified fees simple, can rationally

be regarded as having any weight for such a purpose. This

question seems to answer itself.

Second objec- A morO serious objection against the validity of these limi-

from'Lord^ tations, Under certain circumstances, is perhaps to be found in

Coke. the following passage of Lord Coke : — " If a man giveth lands

to a man, to have and to hold to him and his heires on the

part of his mother, yet the heires of the part of the father

shall inherit, for no man can institute a new kind of inherit-

ance not allowed by the law, and the words (of the part of his

mother) are voide." (Co. Litt. 13 a.) This language may be

held to import that if, in a case resembling that above

supposed by Littleton, the persons to whom the re-feoffment

must be made should include a woman, who should happen

to be the last survivor and to die leavyig a son, then the

feoffment could not be made in the prescribed form ; since

that would imply a limitation to the son, habendum to him

and his heirs ex parte matemd.

However this question may be answered, in cases where the

last survivor happened to be a woman, it of course imports

nothing,^ against the validity of such limitations when the last

survivor is a man.

Preston understands Lord Coke in the sense above stated ;

and expresses the opinion, that in case the last survivor should

be a woman, the limitation should be made to the son and his

heirs simply, that is, for a fee simple absolute. (1 Brest. Est.

474, 475.) He remarks that, since in this case the law does not

QUALIFIED FEES SIMPLE. 277

permit the limitation to be made in the special form, no breach

of the condition will be incurred by making it in the general

form; and he remarks that, "in Littleton's case, the course

of descent prescribed by the limitation does not vary the course

of descent prescribed by the general rides of law. The course is

bounded only, and not diverted or turned out of its proper

channel." (1 Prest. Est. 474.) He seems to assume that

only males are to be included under Littleton's expression,

plusors homes.

The meaning of this distinction may be explained as follows :

In the limitation of a qualified fee simple two persons are, in

different senses, regarded as purchasers, namely, the person to

whom the limitation is made and the specified ancestor through

whom the descent is to be deduced. If the ancestor is in the

paternal line, the commencement of the descent, according to

the terms of the limitation, will not differ from what would

have been the commencement of the descent upon the hypo-

thesis that the person to whom the limitation is made is for all

purposes the purchaser. But if, in specifying the ancestor,

any divergence from the paternal line were permitted, the

commencement of the descent according to the terms of the

limitation would be different from what it would have been if

the person to whom the limitation is made had been the

purchaser. Thus there would be a discrepancy, or dis-

cordance, at the commencement of the descent, which does not

exist when the specified ancestor is in the male line.

It would be a task of much difficulty successfully to impugn whether the

this view, apparently supported by the general rule laid down n™'^'^l 'to

by Lord Coke, which is accepted in that sense by Preston ; and theheir in the

this is the reason why the present writer, in framing the defini-

tion given at p. 269, ante, inserted the words, in the paternal

line. But the present writer, after mature consideration,

cannot help entertaining a suspicion, that when Lord Coke

wrote the above-cited passage about the heirs ex paHe maternd,

he had forgotten all about qualified fees simple : a subject

upon which, so far as the present writer is aware, he touches

nowhere except in his commentary upon Litt. sect. 854. It

may perhaps not be impossible that, if the point had been

brought to his attention, he might have been willing to allow

278

THE NATURE AND QUANTTJl\* OF ESTATES.

an exception to the general rule, in a case where the limitation

was made in pursuance of a condition which could not be

performed otherwise than by a limitation to the heirs ex

parte inatemd.

Alienation of

qualified fee

simple.

Preston's

opinion.

Another question remains which would be of the greatest

practical importance if these limitations were more frequently

met with.

There is nothing to suggest that the grantee, or the

inheritor, of a qualified fee simple is subject to any restraint

upon his power to alienate the estate. But the question has

been raised, what estate is taken by the person to whom, upon

an alienation, the estate is conveyed, and whether in his hands

the estate becomes a fee simple absolute.

Preston has repeatedly expressed the opinion, that the

grantee, or the inheritor, of a qualified fee simple has, for the

purpose of alienation, only a determinable 'fee ; that he cannot

convey a fee simple ; and that the estate, in the hands of an

assignee, will determine, if and when the particidar class of the

heirs of the grantee, to ivhom it was originally limited, shotdd

come to an end. He also holds that, upon the determination

of the estate, there is no escheat to the lord (which is peculiar

to fees simple absolute) but a reverter to the heirs of the

person by whom the re-feoffment was made. (1 Prest. Est.

471 ; see also, pp. 420, 466, 468, and 469.)

Examination

of Preston's

opinion

These propositions are so startling that, in spite of the

authority of Preston, some hesitation in accepting them is

perhaps not wholly inexcusable.

Lord Coke, as we have seen, informs us, that Littleton's

design in prescribing this form of limitation under the above-

mentioned circumstances, was to prevent the inheritance from

descending upon any persons who would not have been

inheritable if the re-feoflfment had been made strictly according

to the condition. But the condition expressly imported, that

the re-feofifment should be made for a fee simple absolute —

" to have and to hold to them and to their heirs for ever.\*''

(Litt. sect. 354.) And it is difficult to believe that Littleton

would have recommended this device, if he had thought that

QUALIFIED FEES SIMPLE. 279

its adoption would cause a much more serious breach of the

condition — by substituting, for all purposes of subsequent

alienation, a determinable fee for a fee simple absolute — than

the breach which it was designed to avoid. This seems to

show, that Littleton and Lord Coke would not, upon this

point, have concurred in opinion with Preston.

On a descent cast, from a father as a purchaser in fee simple

absolute, to his son as heir-at-law, the heirs ex parte maternd of

the son would be excluded from the succession, both by the

common law and under the Descent Act, 3 & 4 Will. 4, c. 106.

A fee simple absolute was, in this respect, before 22 & 23 Vict,

c. 35, placed in the same position as a qualified fee simple, by

the mere fact of a descent. But it has, of course, never been

suggested by anyone that the heir, succeeding by inheritance

to a fee simple absolute, could not alienate for a fee simple

absolute. The account given by Lord Coke of Littleton's

motive makes it very difficult to doubt that, when he prescribed

or invented the limitation of qualified fees simple, he thought

that his device would place the grantee in every respect — in

respect to the quantum of the estate, as well as in respect to

the persons who might succeed to it — in the same position as

if the re-feofifment had been actually made during the lifetime

of one or more of the plusors homes specified in the condition.

Moreover, it is difficult to see how, unless by the legal

fiction which deems an estate p/r autre vie to be less in

quantum than an estate for the life of the tenant, a qualified fee

simple is generally less in quantum than a fee simple absolute.

It is true that only some, not all, heirs of the grantee are

inheritable ; but it is not therefore generally true, that fewer

persons are by possibility inheritable to a qualified fee simple

than to a fee simple absolute. The persons to inherit are the

heirs of the specified ancestor ; and there is no reason why

these should be less numerous than the heirs of the grantee.

Unless a pedigree is accidentally cut short by bastardy, or

(before the abolition of corruption of blood) by attainder, the

heirs general of any specified person whatever are indefinite

in number. And if a pedigree should accidentally be cut

short in this way, it would be cut short for the purposes of a

limitation in fee simple absolute, precisely in the same way

280

THE NATURE AND QUANTUM OF ESTATES.

Conclasion

against Pres-

ton's opinion.

and to the same extent as for the purposes of the limitation of

a qualified fee simple. There is no question that, for purposes

of limitation, the heirs general of a bastard stand in the same

position as the heirs general of any other person, and that a

limitation to a bastard and his heirs gives rise to a fee simple

absolute. {Vide supra, p. 222.)

This seems also to be a reason for concluding that Preston's

doctrine of the determinable quality, for purposes of alienation,

of a qualified fee simple, even though it were admitted, would

be practically nugatory. For the case of a claim by virtue of

a supposed reverter, is not at all analogous to the case of an

escheat, in which the mere non-appearance of the heir, leaving

thereby a vacancy of the freehold, is sufficient to justify the

entry of the lord. Even granting that there is a possibility of

reverter upon a qualified fee simple, the burden of showing

whether the event has happened which brings the reverter into

operation, must lie upon the person who claims by virtue of the

reverter, not upon the person lawfully in possession who claims

to retain the estate as against the reverter. In general, this

would evidently be impossible, and it follows that the grantee

of the fee would, for all practical purposes, be generally in

exactly the same position as the grantee of a fee simple

absolute.

For the foregoing reasons, the present writer humbly con-

ceives that Preston's doctrine upon this point cannot safely be

relied upon ; and that, if it could possibly become a question

of practical importance, it might not improbably be overruled.

Littleton's

form of limi-

tation seems

to be unaf-

fected by the

Deecent Act.

There also seems to be no sufficient reason to suppose that,

if the form of limitation prescribed by Littleton is valid by the

common law, its validity was affected by the Descent Act, 3 &

4 Will. 4, c. 106. It is true that sect. 2 of that Act provides,

that in every case descent shall be traced from the purchaser ,-

and that by sect. 1, "the purchaser " is defined to mean, " the

person who last acquired the land otherwise than by descent, or

than by any escheat, partition, or enclosure, by the efifect of

which the land shall have become part of or descendible in the

same manner as other land acquired by descent." But the

language of the rest of the Act, and in particular, of the rest

QUALIFIED FEES SIMPLE. 281

of sect. 2, suggests the inference, that this part of the Act was

not designed to affect special limitations, but only to deal with

those limitations which are made to the heirs simply ; and

that the effect of the Act, so far as qualified fees simple are

concerned, is only to regulate the way in which the descent is

to be traced from the ancestor specified in the limitation.

It is difficult to suppose that the general language of the Act

was designed to deprive conveyancers of a legal means to

fulfil a lawfully imposed obligation, which had been provided

by the common law.

Moreover, it would be difficult to contend, that the above-

cited language was intended to apply to qualified fees simple,

in such a sense as to forbid the descent to be traced from the

specified ancestor, without at the same time admitting that it

has the like effect upon the well-known and universally recog-

nized limitations in fee tail, to a man and the heirs of the body

of a specified ancestor. {Vide infra, p. 298.) And it is hardly

possible to suppose that the Act was designed, by the use of

general language which admits of a different interpretation, to

effect a partial repeal of the statute De Bonis.

Here the reader may remark that Blackstone, in the passage

cited at pp. 274-5, supra, says that, in the case of fees tail, " the

rule is strictly observed, and none hut the lineal descendants of

the first donee are admitted.'' It is impossible that Blackstone

can have intended to deny the validity of a limitation to a

man and the heirs of the body of his father ; and the argument

seems to be conclusive, that when he wrote the passage these

peculiar limitations, whether in fee tail or in fee simple, were

entirely absent from his thoughts.

In settlements, especially when made by will, an ultimate Analogous

limitation is not unfrequently found, to the right heirs of a heirs as

specified person who does not, by the same instrument, take P^rc^iasers.

any precedent estate of freehold. The absence of a precedent

estate of freehold prevents the llule in Shelley's Case from

applying ; and the limitation will therefore give an estate of

inheritance to the heirs as purchasers. What is the exact

quantum of this estate, at the common law, is a question that

282 THE NATURE AND QUANTUM OF ESTATES.

perhaps admits of doubt. Fearne seems to have thought that

the estate is, at common law, a fee simple absolute ; and that

it is taken by the person in whom it first vests, and descends

from him in the same manner as a fee simple limited to a

purchaser by name. (Fearne, Cont. Rem. 192.) Preston

admits this to be the opinion generally entertained. (1 Prest.

Est. 453.) But he seems to have thought that, in respect to

its descent, the estate is in the nature of a qualified fee simple ;

that is, that the descent must be traced upon the hypothesis

that the ancestor, not the heir who takes by purchase, was the

purchaser. But he admits that, for the purpose of alienation,

the estate is a fee simple absolute. (1 Prest. Est. 458.)\*

The Descent During the interval which elapsed between the coming into

a no?™rm^ operation of the Descent Act, 3 & 4 Will. 4, c. 106, and the

of limitation coming into operation of the 22 & 23 Vict. c. 35, s. 19, there

for qualified ...

fees simple, can be no doubt that the limitation of a qualified fee simple

was possible. Sect. 4 of the Descent Act provides, with respect

to limitations to the heirs of any ancestor of any person coming

in as purchaser, " The descent .... shall be traced as if the

ancestor named in such limitation had been the purchaser of

such land." It follows that the precise form of limitation

prescribed by Littleton might, by virtue of the above-cited

provision, be effected by conveying the lands to a stranger,

hahendwn to the stranger and his heirs To the use of the heirs of

the last survivor. The validity of this form of limitation is

independent of the question, whether such an estate could have

been limited at the common law ; and it is free from the

restriction to which, in Preston's opinion, such limitations, when

made at the common law were subject, namely, that the person

taking as purchaser must be the heir in the paternal line of the

person named as the ancestor.

Effect of 22 & The question remains to be considered, what is the effect upon

23^vict. c. 35, ^jj^g^ limitations of 22 & 23 Vict. c. 35, s. 19 ; and in consider-

ing this question it is important to bear in mind the distinction

\* In Moore v, Siinkln, 31 Ch. D. 95, Pearson, J., appears to have agreed with

Fcarne's opinion.

QUALIFIED FEES SIMPLE. 283

between limitations made at the common law and limitations

owing their validity only to the Descent Act, sect. 4.

The above -cited enactment provides that where there shall be ^ to limita-

tions under

a total failure of heirs of the purchaser, or where any land shall the Descent

be descendible as if an ancestor had been }mrchaser thereof, and

there shall be a total failure of the heirs of such ancestor, then the

descent shall thenceforth be traced from the person last entitled

to the land as if he had been the purchaser thereof. This

provision undoubtedly deprives qualified fees simple, when

limited under the provisions of the Descent Act, of one of their

peculiar characteristic features ; namely, the occurrence of an

escheat\* rather than that there should be a descent to any

person not of the blood of the person named as ancestor.

But the above-cited provision contains nothing to interfere

with the other paculiar characteristic of a qualified fee simple ;

namely, that, so long as heirs of the specified ancestor are in

existence and known, the descent shall be traced from such

ancestor. It follows that, until a question of escheat arises, the

above-cited provision contains nothing to interfere with the

validity of qualified fees simple when limited under the pro-

visions of the Descent Act. This consideration is very material

to the contention of the respondent in the case of Blake v.

Hynes, shortly to be mentioned.

The effect of 22 & 23 Vict. c. 35, s. 19, upon limitations at As to limita-

the common law, cannot be greater than its effect upon limita- common\*iaw.

tions under the Descent Act ; and therefore, apart from questions

of escheat, such limitations seem to be not affected by the Act.

And it might plausibly be contended that in this respect there is

a distinction between limitations at the common law and limita-

tions under the Descent Act; and that the former are not

affected by 22 & 23 Vict. c. 35, s. 19, in any way. For by

8. 20, the preceding section is directed to be read as a part of the

Descent Act, which seems to apply only to fees simple absolute ;

and though sect. 19 undoubtedly applies to qualified fees simple

limited under the Descent Act, to which its language is

expressly made applicable, it does not follow that this is true

\* Or a reverter to the grantor, in case the above-cited opinion of Preston is

correct, that on the determination of the estate there is a reverter and not an

escheat. Either hypothesis will equally well suit the present argument.

284 THE NATURE AND QUANTUM OF ESTATES.

also of a species of limitation, not included in the Descent Act,

to which the language of sect. 19 is not expressly declared to

apply.

Remarks On a former occasion the present writer expressed some doubt

of BUtke V. whether the species of limitation now under discussion had ever

^"^\*\* occurred or would ever occur in practice. In May, 1884, the

question of its validity for the first time was raised, in a case

before the House of Lords on appeal from Ireland, Blake v.

Hynes, reported before the Irish Courts in L. K. (Ir.) 11 Eq.

417, on appeal, 11 L. K. Ir. 284.

The material circumstances in the case of Blake v. Jlynes were

as follows. Columbus O'Flanagan died in 1857, leaving a will

which was duly proved ; and his real and personal estate was

subsequently administered in the Irish Court of Chancery. His

co-heirs at law were two nieces named Eliza Dowell and Jane

Dowell. In the course of the administration proceedings an

Order was made by consent of all parties, dated 20th May,

1859, by which it was ordered {inter alia) that notwithstanding

the probate, which was declared valid, of the testator's will, the

right of his co-heirs as to certain lands thereby devised should he

the same as if he had died intestate as to the said lands. Jane

Dowell, who was a lunatic at the time of the testator's death,

died insane and intestate as to her moiety in the said lands.

The proceedings out of which the appeal to the House of Lords

arose were instituted in 1873, under the Lunacy (Ireland)

Regulation Act, 1871, s. 55, for the administration of her^eal

and personal estate. At the time of her death her heirs general

were Edward Blake and Thomas Hynes, claiming respectively

under two deceased aunts of the lunatic, who, if they had been

living, would have been her co-heirs ; and at the same time the

heir general of the original testator Columbus O'Flanagan was

Roderick O'Connor. Among other questions the question

arose, whether Jane Dowell had taken her moiety, to which

she was entitled under the terms of the Order of 20th May,

1859, to all intents and purposes as a purchaser ; in which case,

upon her death intestate, it would have descended to her heirs

general ; or whether, by virtue of the said Order, the lands

must be held to descend as though the original testator,

QUALIFIED FEES SIMPLE. 285

Columbus OTlanagan, had been the last purchaser; in which Blake \.

case the moiety in dispute would pass to Roderick O'Connor as

being his heir general at the time of Jane Dowell's death.

The Master of the Rolls in Ireland held that Jane Dowell had

taken as a purchaser, and that her moiety accordingly descended

to her heirs general. This decision was unanimously reversed

by the Court of Appeal in Ireland, consisting of the Lord

Chancellor, the Chief Justice of the Common Pleas, and the

Lords Justices Deasy and Fitzgibbon, who held that the moiety

in dispute passed to Roderick O'Connor as the heir general of

Columbus O'Flanagan.

Hitherto the question as to the validity of a limitation at the

common law in the form above styled a qualified fee simple, was

not explicitly raised ; and the Lord Chancellor of Ireland appears

to have assurhed that such a limitation was impossible ; but the

learned judges referred to the Descent Act as having just

introduced such limitations. The Lord Justice Fitzgibbon, in

the course of his judgment, made the following remarks : —

" If conveyances had been settled [with a view to carry into

" effect the directions of the Order of 20th May, 1859, as to

" the rights of Eliza and Jane Dowell in respect to the said

" lands] it would have been the duty of those carrying out the

" arrangement to see that the descent of the lunatic's [moiety

" in the] lands was not altered from that which was stipulated

" for ; namely, the descent of lands taken by her as co-heiress of

" Columbus O'Flanagan under an intestacy.\* Under the fom\*th

" section of the Inheritance Act, if not otherwise, this object

" might have been attained by a deed ; and, no deed having

'\* been completed, we must see that the lands shall go as if a

" limitation of them had been carried out in accordance with

".the substance of the compromise which conferred, and of the

\*\* decree which declared, Jane Dowell's rights."

Edward Blake, one of the co-heirs of Jane Dowell, appealed

to the House of Lords from the decision of the Court of Appeal ;

and upon this occasion the question of the validity of the limi-

tations under discussion was explicitly raised. The question

was argued before the House, and the respondent's counsel

rested their argument in favour of its validity upon the authority

of Littleton, Lord Coke, and Preston. At the conclusion of the

286 THE NATURE AND QUANTUM OP ESTATES.

Blake V. arguments, the House reserved its judgment ; and the appeal

was subsequently compromised before any judgment had been

delivered.

The question was not very fully argued ; for the distinction

between limitations at the common law and limitations under

the Descent Act was not gone into, though some remarks are said

to have been made by a noble and learned lord upon some

supposed effect of the Descent Act upon limitations at the

common law ; and no notice appears to have been taken of the

restriction to which, in the opinion of Preston, limitations at

the common law are subject, namely, that the person coming in

as purchaser must be the heir in the paternal line of the person

named as the ancestor.

( 287 )

CHAPTER XX.

FEES TAIL, OR ESTATES TAIL.

A FEE TAIL is simply a conditional fee at the common law Definition,

modified in certain respects by the statute De Donis Condition-

alibus, or Stat. West. 2, 13 Edw. 1, cap. 1. The list given

above, of limitations applicable to a conditional fee, does not

contain every limitation which is theoretically applicable to

the limitation of a fee tail ; but it includes every form which

occurs, or ought to occur, in practice, in the express limitation

of a fee tail to a donee, or donees. It also includes some

which, in all probability, have never been actually used. No

motive can be imagined which would be likely to induce anyone

to limit a fee tail to heirs female,\* though nothing is more

common than the limitation of a fee tail to heirs male. The

former kind of limitation was probably suggested by the

latter ; and it probably exists only in the logical imagination

of text writers. But there is no reasonable doubt as to its

legal validity ; which, indeed, is expressly recognized by the

Conveyancing Act of 1881, s. 51.t

The modifications introduced by the statute into a conditional On the opera-

fee, refer chiefly to the power of the donee, or tenant in tail for statute Be

Donis.

\* See Harg. n. 1 on Co. Litt. 25 a, where he makes mention of an attempt to

prove in argument that limitations in tail female are invalid. In Goodtitle v,

jBurtenshaw, Fearne, Cont. Rem. App. No. I., a limitation occurred to the heirs

female, and in Chambers v. Taylor, 2 My. & Cr. 376, a limitation occurred to

the heir female, but in both cases as purchasers. From some remarks made by-

Lord Coke (Co. Litt. 377 a) it may perhaps be inferred that limitations in tail

female, in remainder upon a limitation in tail male, may actually have occurred,

as the work of short-sighted conveyancers, who mistook their effect. Lord

Coke points out the clanger of such limitations, and shows that the proper

limitation to effect the probable intention, is a limitation in tail general, in

remainder upon a limitation in tail male. (See also Co. Litt. 25 b.)

t In Earl of Zetland v. Lord Advocate, 3 App. Cas. 505, at p. 523, Lord

Blackburn obiter expressly states his opinion that limitations in tail female are

valid.

288 THE NATURE AND QUANTUM OF ESTATES.

the time being, by alienation to bar the succession of his issue

and the reverter of the donor. It was observed above, that at

the common law the issue could be so barred even before their

birth, but that the donor's reverter could not be barred until

after the birth of inheritable issue. The statute De Bonis

enacted that in future no such alienation should be a bar

either to the succession of the issue or to the reverter of the

donor. In other respects, a fee tail not only resembles, but

actually is, a conditional fee. In the language of Butler, " this

statute did not create any new estate, but, by disaffirming the

supposed performance of the condition, preserved the fee to the

issue, while there was issue to take it, and the reversion to

the donor when the issue failed." (Butl. n. 2 on Co. Litt.

827 a.)

It is a fact to be borne in mind, that a simple repeal of the

statute De Donis would instantly and ipso facto transform all

fees tail, even those already in existence, into conditional fees

at the common law.

To the above-stated effect of the statute, in restraining

alienation, must further be added its effect in preventing the

descent of the fee to persons not included in the original form

of the gift, which, under certain circumstances, was permitted

by the common law; and also its effect in permitting the

limitation of remainders over in expectancy, which the

common law did not permit.

The precise nature of these several points of difference will

appear from the following short examination.

The statute, having particularly mentioned in its preamble

three examples of conditional fees, whicli examples are men-

tioned by way of specifying the whole class and not by way of

confining the operation of the Act to those examples (2 Inst.

334), and having recited that the construction put by the

common law upon such gifts, being directly repugnant to the

form of the gift, was a grievance calling for remedy, enacts as

follows : —

Form of the " "^^^^ ^^^ ^^^ ^^ \*^® giver, according to the form in the deed of gift mani-

Btatute. festly expressed, shall be from henceforth observed ; so that they to whom the

land (tenementvm^ was given under such condition, shall have no power to aliene

the land (fenementnut) so given, but that it shall remain unto the issue of them

FEES TAIL, OR ESTATES TAIL. 289

to whom it was given after their death, or shall revert unto the giver or his heirs

if issue fail [either by an absolute default of issue, or, after the birth of issue,

by .its subsequent extinction\*].

" Neither shall the second husband of any such woman" (i.e., a female donee

in special tail) " from henceforth have anything in the land (in tenemento) so

given upon condition, after the death of his wife, by the law of England, nor

the issue of the second husband and wife shall succeed in the inheritance, but

immediately after the death of the husband and wife, to whom the land (tene-

vientum') was so given, it shall come to their issue, or return unto the giver, or

his heir, as before is said."

The effect of the first paragraph is to destroy the threefold

capacity which the tenant of a conditional fee acquired by

having issue of the prescribed class, to alienate, to forfeit by

attainder,! and to charge with incumbrances.

The effect of the second paragraph is that, if a gift is made Tenant in tail

either to a donee and his (or her) issue by a particular wife (or biiity.

husband), or to two persons and their issue, then, on the death

of the wife (or husband) of the donee, where there is a single

donee, or, if there be two donees, upon the death of either of

them, without leaving issue of the prescribed kind, there is no

longer under any circumstances any possibility of the birth of

issue inheritable under the entail, even though such issue has

been in existence at some previous time ; whereas, before the

statute there was, under such circumstances, still a possibility

that issue might be born capable of inheriting a conditional

fee limited in like manner. {Vide supra, p. 266.) The

survivor is, therefore, now styled tenant in tail after possibility

of issue extinct ; or, for brevity, tenant in tail after possibility.

The statute also, after prescribing a form for the new kinds

of writ of formedon, which were needed to give effect to its

provisions, continues as follows : —

And if a fine be levied hereafter upon such lands (super hujumnodi teiiementi)),

it shall be void in the law ; neither shall the heirs, or such as the reversion

belongeth unto, though they be of full age, within England, and out of prison,

need to make their claim.

It will hereafter be seen that this last enactment was deemed

\* Per hoc, quod mdlus sit exitus omnifio, vel si aliquis exitHs/uerit,per mortem

dejiciet, herede Itujmmodl exitus dejiciente. The English version (1 Stat. Rev.

p. 42) is here unintelligible.

t As above mentioned, forfeiture by attainder of high treason was restored by

statute, and finally abolished by 33 k 34 Vict. c. 23, s. 1.

C.R.P. U

290

THE NATURE AND QUANTUM OF ESTATES.

Tail male and

tail female.

Special tail.

Suggestion as

to the

epithets

general and

njtecial.

to be repealed, or superseded, by 4 Hen. 7, c. 24 ; and it was

expressly superseded by 32 Hen. 8, c. 36. (Vide infra, p. 307.)

Classification of Estates Tail.

It will appear, upon viewing the limitations which are

applicable to the creation of conditional fees (supra, p. 263),

that there exists a twofold division of fees tail, one founded

upon the fact that the descent might be restricted to one sex,

the other founded upon the fact that the gift might be made

to the issue of more than one body.

The restriction of the line of descent to a single sex, is indi-

cated by the addition of the epithets 7nale or female respectively,

and the absence of such addition indicates the absence of

restriction.

When the gift is to a single donee and his (or her) issue by a

particular wife (or husband), or is to two donees and their joint

issue, the restricted character of the gift, and of the issue

inheritable under the gift, is indicated by the epithet special.

The absence of such restriction is sometimes indicated by the

addition of the epithet general, but more commonly by the

absence of any epithet.

Lord Coke, in his translation of Littleton, indifferently uses

the phrases general tail and tail general, and the phrases special

tail and tail special. (See Litt. sects. 14, 16.) It would be a

very convenient practice to use the phrase general tail to denote

the opposite to «2?eciaZ tail, and the phrase tail general to denote

the opposite to tail male and tail female. This usage will be

adopted in the following pages.

^^ 0° -Jv 00 (J

.1-1 ■!-! QJ .rH M

<D ^^ <o

S: <D 55 -iS

<D O

Thus we have the following divisions of fees tail : —

Tail General ; when the heir per formam doni

is designated as the heir of the body simply,

and therefore coincides with the heir general

in the direct line of descent.

Tail Special, or tail male and tail female ; when

the heir per formam doni is restricted to the

heir male, or the heir female, and therefore does

not necessarily coincide with the heir general

in the direct line.

•T3 ^ S S «2

5 ?^ S OQ >H

FEES TAIL, OR ESTATES TAIL.

291

P^

03 0) n3

"^ ^ (D

•<s> ^

Sot)

TS oq

-J o)

? -is O

S: CO

- o

?^o

e8 '^

>^«.S

cq

03 ,3

Pu

L

General Tail; when a single donee is simply

specified as the body from which the heirs in

tail (whether general, male, or female) must

issue ; so that all the heirs of that person, who

come under the description in the form of the

gift, by whatsoever wife (if the donee is a

male), or by whatsoever husband (if the donee

is a female), are inheritable under the entail.

Special Tail, when the limitation imports that

the heirs per formam doni must issue from

more than one body ; being either (1) to the

heirs of the body (whether general, male, or

female) of a specified donee by a specified wife

(or husband) ; or (2) to the heirs of the body

(whether general, male, or female) of two

specified donees, either married or capable of

lawful marriage.

Tenant in Tail after possibility of Issue extinct.

Upon the death of one of two donees in special tail, or upon Definition,

the death of the appointed wife (or husband) of a single

donee in special tail, the survivor becomes tenant in tail after

possibility of issue extinct. (Litt. sects. 32, 33.) Such a

tenant is, for brevity, styled tenant in tail after jmssihility.

If the estate in special tail is an estate in remainder, which

does not become the estate in possession until after such death

as above mentioned, the survivor is nevertheless tenant in

tail after possibility. (Co. Litt. 28 a.)

But this tenancy can be created only by death, and not by The tenancy

act of the parties ; and therefore, if two donees in special tail ^'Jfged by

be divorced a vinculo matrimonii, they are thenceforward only ^leath.

joint tenants for life. (Co. Litt. 28 a, b.)

Since there is no presumption de jure that any person,

however advanced in years, cannot have issue, no tenant in

tail, except the original donee, or one of the original donees,

in special tail, can be tenant in tail after possibility. (Co.

Litt. 28 a.)

u 2

292 THE NATURE AND QUANTUM OF ESTATES.

The duration of the estate of such tenant does not differ from

the duration of a bare estate for life ; and an exchange between

a tenant after possibility and a tenant for life, is good. (Co.

Litt. 28 a.) But tenant in tail after possibility is not punishable

for waste. {Ibid. 27 b ; Williaim v. Williams, 15 Yes. 419 ; S. C.

12 East, 209.)

The Limitation of Estates Tail.

The word Before the coming into operation of the Conveyancing Act of

fTry'aTSie ^^^^' ^^^ ^^^® ^^^^ obtained, with respect to the need for the

common law. >yord heii's in the limitation of a fee tail, as in the limitation of

a fee simple, by reason of the derivation of a fee tail from a

conditional fee. (Co. Litt. 20 a.)

Lord Coke (Co. Litt. 22 a) cites an old case,\* without express-

ing either approval or disapproval, in which it seems to have

been held that the word heir, in the singular, might be used as a

word oMimitation to create some kind of estate tail. But the

form of the limitation there given is so strange and abnormal

that it cannot safely be regarded as a precedent.

It is clear that in a will, the word heir may, as a word of

limitation, create an estate tail. {Richards v. Lady Bergavenny,

2 Vern. 324 ; Duhber v. Trollope, Ambl. 453 ; aff. on app.

Cas. temp. Hardw. 160 ; Bob. Gav. 122.) In a deed, it seems

that a limitation to the heir, not being by way of purchase, but

as a word of limitation to create an estate, creates only an estate

for life. {Chambers v. Taylor, 2 My. & Cr. 376.) In that case

the heir (female) was held to take by purchase ; but this view

seems only to have been adopted because it was considered

impossible that, as a word of limitation, the word could give an

estate tail to the ancestor.

Also words of Besides the word heirs, words to indicate the procreation of

procreation, ^j^^ heirs by or on the body of the donee were also necessary ;

but such words were not necessarily express. The Latin,

• " Of all the estates taile most coarcted or restrained, that I finde in our

bookes, is the estate taile in 39 Ass. pi. 20, where lands were given to a man

and to his wife and to one heire of their bodies lawfully begotten, and to one

heire of the body of that heire only."

FEES TAIL, OR ESTATES TAIL. 293

de corpore, tie corpore procreatis, or de corpore procreandis, and in

English, of the body, of the body hegott^i, or of the body to be

begotten, with a similar use of the plural number in cases which

require reference to be made to more than one body, were the

most proper and formal words to effect the purpose ; but the

want of them might be supplied by inference, even in a deed.

{Bere8ford.'s Case, 7 Rep. 41 ; Co. Litt. 20 b.)\* With regard to

the use of the particij)le procreatis, or procreandis, it is to be

observed, that the past participle would include after-begotten

issue, and the future participle would include issue already in

being at the time of the gift. (Co. Litt. 20 b.) The use of the

participle seems only to have been necessary in so far as it

might be required to make clear the meaning of the other words

used ; and where this meaning was sufficiently clear without it,

the participle might be, and often was, omitted in practice. It

is evident that, upon these principles, the use of the participle

is much more requisite in limitations in special tail, than in

general tail.

With regard to the question, how far the absence of precise

and formal words to denote the procreation of the heirs might

be supplied by inference, there seems to be this distinction

between a deed and a will, that in a will the inference might be

drawn from the general intention of the testator, but in a deed

it must follow from the language of the limitation itself.

But the words in franJanarriage, ov in liberum maritagium, ov Frankmar-

in liber 0 maritagio,^ will by themselves suffice for the limitation ^'^^\*^"

of an estate in special tail to a man and his wife, or intended

wife ; being for this purpose exactly equivalent to the words

and to the heirs of their two bodies between them begotten. The

nature of this estate is subject to certain restrictions, and the

validity of the gift depends upon the existence of certain condi-

tions. (See Litt. sects. 17, 19, 20, and Lord Coke's comment.)

The wife, or intended wife, must be the daughter, or other near

\* A devise to the right heirs of a man by a particular wife creates an estate

tail ; because all such right heire must also be heirs of his body. Wright v.

Vernon, 2 Dr. 439 ; aff. 7 H. L. C. 35. •

■]• For the accusative, sec Mad. Form. Angl. p. 80, No. CXI.VI. ; for the

ablative, ihid. p. 81, No. CXLVIII.

294

THE NATURE AND QUANTUM OF ESTATES.

blood relation, of the donor. (Dy. 286 b, pi. 46.) The donees

and their issue in lail bold of the donor and his heirs, discharged

of all services except fealty, until the fourth degree in descent

from the original donees is passed ; after which event, the suc-

ceeding issue hold by such services as the donor owes to his lord

next paramount. Gifts in frankmarriage are wholly obsolete

in practice ; but (the requisite conditions being, of course, ful-

filled) they are still perfectly valid.

Forms of

limitation.

Adopting the arrangement above given (p. 263) with refer-

ence to conditional fees, the list of estates tail, and of the forms

of their limitation, is as follows. For the sake of clearness and

convenience, the masculine gender only is used in specifying a

single donee : —

E-i

;^

H

m.

'' 1. General : — To A. and the heirs of his body

BEGOTTEN. (Litt. sects. 14, 15.)

2. Male: — To A. and the heirs male of his

BODY begotten. (Litt. sect. 21.)

3. Female: — To A. and the heirs female of

his BODY begotten. (Litt. sect. 22.)

4. General, one donee : — To A. and his heirs

which he shall beget on the body of

his (specified) wife. (Litt. sect. 29.)

This is the proper form of such limita-

tions. But it was decided in Chudleigh s

Case, or Dillon v. Freine, 1 Eep. 120, at

p. 140 b, resolution (5), that a limitation,

2'o A. and his heirs on the body of Jane S.

begotten, is sufficient for the purpose. This

had previously been doubted, and a very

plausible reason was alleged in favour

of the doubt. (Lord Coke on Litt.

sect. 29.)

It has already been observed, that the

female donee is not necessarily the wife

at the time of the limitation. If not the

wife, she is of course not so styled, but is

named by her proper name.

FEES TAIL, OR ESTATES TAIL.

295

f 5. MaZg, one donee : — To A. and his heirs male

WHICH, &C.

6. Female, one donee : — To A. and his heirs

female which, &c.

7. General, two donees : — To A. and B, and the

HEIRS OF THEIR TWO BODIES BEGOTTEN.

(Litt. sect. 16.) For another form of

limitation, having the same operation,

see Litt. sect. 28 ; but this latter is very

undesirable to be used in practice.

8. Male, two donees : — To A. and B. and the

HEIRS MALE OF, &c. (Litt. sect. 25.)

9. Female, two donees : — To A. and B. and the

V HEIRS FEMALE OF, &C.

The foregoing limitations comprise all those which are

properly used, in deeds, in the direct limitation of. an estate tail,

as a single estate, to one donee, or to two donees, as the case

may require. This restriction excludes from consideration an

immense number of limitations, some of which may be found in

Littleton, Book I., chap. 2, on the general subject of fees tail,

also sects. 283, 284, Lord Coke's comment, and the notes

thereto ; which are partly improper limitations of estates tail to

a donee, or donees, and are partly mixed limitations of particular

estates followed by estates tail. Such limitations, being very

improper to be used in practice, can be of no service to the con-

veyancer, except as examples of what to shun. One specimen

only will be noticed in a subsequent paragraph, for the sake of

the light which it throws upon the limitation of qualified fees

simple. {Vide infra, p. 298.)

The following general propositions relating to the creation of Rules relating

estates tail must also be noticed : —

limitation.

(1) There is no difference, in point of effect, between the

words " the heirs " and the words " his heirs," or (in the

case of a female) " her heirs." (Co. Litt. 26a ad Jin. ,-

and note 1 on 26b.) But in limitations to a single

donee in special tail, the possessive pronoun adds some-

thing in clearness.

296 THE NATURE AND QUANTUM OF ESTATES.

Moreover, the indifferent usage of the two words is

safely permissihle only in formal and direct limitations

such as those above given. In sj)ecial cases, the use of

the word " his " may introduce an absurdity, which may

render the limitation void. For an example, see p. 298,

infra.

(2) The words " the heirs male or female " will amount to

a limitation to the heirs general. (Co. Litt. 26a.)

(3) The word "heirs " is the word which creates the estate,

and the estate tail is in the person, or persons, whose

heirs are specified ; so that, in all limitations in special

tail, if the word is not referable to one donee more than

to the other, the estate tail is in both donees jointly; but

if the word refers to one donee rather than to the other,

the estate tail is only in that one. (Lord Coke on Litt.

sect. 28; Demi v. Gillot, 2 T. R. 431.)

(4) Littleton and Lord Coke commonly repeat the word " to "

before the word " heirs ; " but Lord Coke not unfrequently

omits it. The common practice, of conveyancers sufl&-

ciently shows that the repetition is superfluous.

(5) On a gift to a single donee in special tail, the wife (or

husband) assigned to the donee is not necessarily a

specified individual, but may be one of a specified class ;

for example, may be any person bearing a specified

name. (Page v. Hayward, 2 Salk. 570; more fully

reported in Pigott on Common Recoveries, p. 176.)\*

(6) A limitation resembling a limitation in special tail, if

made to two persons who are neither married nor capable

of lawful marriage — as if they be of the same sex, or

within the prohibited degrees of relationship — and who

therefore cannot have an heir begotten of their two

• bodies, creates neither an estate in special tail, nor a

joint estate tail; but it creates a joint estate for life and

separate estates tail in common in remainder. (Lilt.

\* [Pelltam Clinton v. Duke of Newcastle, (1903) A. C. 111.]

FEES TAIL, OR ESTATES TAIL. 297

sects. 283, 284, and Lord Coke's comment.) And a

limitation to a man and two women, and the heirs of

their bodies begotten, has a precisely similar operation.

(Lord Coke on Litt. sect. 25.)

(7) But the mere fact that, at the time of the limitation,

lawful marriage is, by reason of the circumstances,

impossible between the two donees, — as, for example, if

they be both, or either, already married to another

person, — will not prevent the limitation from taking

efifect to create an estate in special tail, if there is a

possibility that the donees may at a future time

become capable of lawful marriage. (Co. Litt. 20 b.)

The mere fact that the donees are not married at the

time, is, if they are then capable of lawful marriage,

a fortiori no obstacle. But the circumstances may be

such as to create a presumption of law that the parties,

though their marriage is not absolutely impossible, will

never marry ; as, for example, if, having been married,

they were subsequently divorced a vinculo matrimonii.

(Lord Hale, n. 2 on Co. Litt. 25b ; who cites two

decisions from the Year Books.)

Sect. 51 of the Conveyancing Act of 1881, enacts, that in The word

deeds executed after 31st December, 1881, it shall be sufficient, necesiry."'"'^

in the limitation of an estate in tail, to use the words in tail

without the words heirs of the body ; and in the limitation of

an estate in tail male or in tail female, to use the words in tail

male, or in tail female, as the case requires, without the words

heirs male of the body, or heirs female of the body.

A perusal of the foregoing remarks will show, that this

enactment\* is founded upon a superficial view of the nature

of limitations in tail. It is inapplicable to limitations to a

\* Butler made the following remark in reply to a question of the Real

Property Commissioners, to which the form of this enactment may probably be

traced : — " In my opinion there should be a legislative enactment, that in all

"cases the words, 'estate in tail,' estate 'in tail male,' or 'tail female,' should

" have the operation of the words heirs, heirs male, and heirs female, of the

" body." (First Report, p. 117, A. 15.)

298

THE NATURE AND QUANTUM OP ESTATES.

single donee in special tail. Such limitations, though they

were formerly common, do not occur in modern practice ; but

this cannot be the reason of their omission ; for the remark

is still more obviously true of estates in tail female, which are

expressly included in the enactment, although they may

probably never have occurred in practice at all.

The enactment is, however, of some practical use, since it

simplifies certain forms of limitation which are of frequent

occurrence in settlements. •

A fee tail is

a particular

estate.

Upon every gift in tail by a donor seised in fee simple, there

remains in the donor, by virtue of the statute, a reversion

expectant upon the fee tail. (Litt. sect. 19, and Lord Coke's

comment ; Willion v. Berkeley, Plowd. 223, at p. 242.) And,

therefore, a remainder may be limited in expectancy upon a

fee tail, and the latter, though of inheritance, takes effect as

a particular estate.

Heii-s of the

body of an

ancestor, as

words of

limitation in

tail.

Manderilh's

Case, Co.

Litt. 26 b.

For some remarks upon the law of merger in relation to

fees tail, see p. 93, supra.

It plainly appears from Litt. sect. 30 and Lord Coke's

comment that a limitation to A and the heirs of the body of

any ancestor whose heir by lineal descent he is, vests an estate

tail in A, which is descendible, or rather transmissible, not

only to his issue, but (on failure of his issue) to collateral

relatives who are heirs of the body of the specified ancestor.

(See also Dy. 247 b, pi. 76.) Lord Coke expressly lays it down,

that a similar limitation to A and his heirs, &c., is void for

absurdity. If the ancestor is living at the time of the limita-

tion, or if the donee is for any other reason not the heir of

the ancestor, this does not make the limitation void ; but

alters the nature of the estate, or estates, arising under it,

according to the special circumstances. Thus in Mandeville's

Case, reported (nbi supra) by Lord Coke, where the specified

heirs were not the heirs of the body of an ancestor at all, but

were the heirs of the body of the deceased husband of the

person named as donee, the limitation created a good estate

tail, but in remainder upon an estate for life taken by the

FEES TAIL, OR ESTATES TAIL. 299

person named as donee ; the estate tail vesting in the person

who, at the time of the limitation, was the heir of the body

of the deceased husband by his said wife ; which person was

his son ; and this son dying in the lifetime of his mother (the

tenant for life), the estate tail vested in his sister, as the heir

of the body for the time being of the said husband by the said

wife ; and this sister, as Lord Coke informs us, recovered the

lands by writ of formedon after the death of the tenant for

life. Similarly, a limitation to A and the heirs of the body of

his father, during the life of the father, gives rise to two dis-

tinct estates, an estate for life to A, followed by a contingent

remainder in tail to the person who, at the death of the father,

can bring himself within the description of heir of his body.

(3 Prest. Conv. 77—79.) Therefore, if A should die in the

lifetime of the father, this contingent remainder would (at the

common law) be destroyed, by the»expiration, pending the con-

tingency, of the precedent estate of freehold. If the father

should die in the lifetime of A, leaving A as the heir of his

body, the remainder in tail will forthwith be vested in A, and

his life estate will be destroyed by merger, whereby the estate

tail will become itself the estate in possession.

A special custom to intail copyholds may exist in a manor. Entails of

and is a good custom. (Litt. sect. 73 ; Co. Litt. 60 a, b ; Co. l^SyS-

Cop. Supp. sect- 12 = Co. Law. Tr. p. 178 ; 6 Vin. Abr. 197 ^y ^pe^'ai

^ ^^ . . ^ custom.

=Copyhold, F, e.) This proposition is now treated as an axiom

beyond the reach of argument. It was denied obiter by the

Chief Baron, Sir Roger Manwood, in Heydon's Case, 3 Eep. 7 ;

and it might easily be supposed, from the report, that the rest

of the barons concurred in his opinion ; though Lord Coke in

the above-cited passage from the Supplement to his Compleat

Copyholder, says it was "agreed" that by special custom

lands might be intailed. (Co. Law. Tr. 179.) In that case

the question at issue was not whether copyholds are within •

the statute Be Bonis, but whether they were within the statute

31 Hen. 8, c. 13, by which certain ecclesiastical leases are

made void. It was undoubtedly denied by three out of four

judges of the Court of Common Pleas in Rowden v. Maltster,

Cro. Car. 42, that copyholds are intailable ; see pp. 44, 45. In

800

THE NATURE AND QUANTUM OF ESTATES.

Otherwise,

the estate is

a conditional

fee simple.

Difficulty of

accounting

for entails of

copyholds.

this case also the question was not material, because the

special verdict had expressly found, that in the particular

manor of which the lands were parcel, there existed no such

special custom.

In the absence of a special custom, it is clearly settled that

words of limitation which would create an entail in a common

law fee, will, if applied to a customary fee, create a conditional

fee simple, analogous to a conditional fee simple at the

common law. (liowden v. Maltster, Cro. Car. 42 ; Pnllen v.

Lord Middleton, 9 Mod. 483 ; Doe v. Clark, 5 B. & Aid. 458 ;

Sirnpson v. Sivijjson, 4 Bing. N. C. 333.)

The theory laid down by Lord Coke, that the statute De

Bonis without a special custom does not extend to copyholds,

and that a custom alone cannot avail to create an estate tail,

is open to the stringent criticism, that by the hypothesis, a

custom to intail could not, and therefore did not, exist before

the statute, while, by the unquestioned rule of the law, no such

custom could spring up after the statute. Belying upon this

criticism, which was urged with great force by the Chief

Baron, Sir Eoger Man wood, the Court of Exchequer, as above

mentioned, seems to have inclined in Heydon's Case towards

the conclusion, that copyholds "are not within the statute De

Donis, and that all entails of copyholds are impossible.

Watkins, pursuing a similar line of criticism, but being of

opinion that copyholds are within the statute, strongly favours

the opposite conclusion, that all copyholds which may be held

for a customary fee simple, may be intailed without showing

any special custom. (1 Watk. Cop. 215.) These conclusions

are both equally logical. If it were necessary to choose

between them, that of Sir Eoger Manwood might perhaps be

preferred ; because his reasons for holding that copyholds are

not within the statute seem to be decidedly better than those

of Watkins for holding that they are within it. But for all

purposes of practice, it is now settled that neither conclusion

represents the law.\*

\* Lord Coke was, of course, aware of the difficulty involved in his theory,

and he endeavours to meet it with great ingenuity, suggesting that, before the

statute, there might have been a custom to limit remainders over upon such

an estate in copyholds, and that the issue may have avoided alienations made by

FEES TAIL, OR ESTATES TAIL. 301

their ancestor, or have recovered the lands bj writs of fonnedon en descender ;

or rather by plaints in the Lord's Court in the nature of such writs. (Co. Litt.

60 b.) This is repeated out of 3 Rep. 8 b, where the same argument is used

against Sir Roger Manwood's criticism. But hereupon Watkins asks, what else

such a state of things would mean, but that a custom before the statute could

create an estate tail in fact, whether so styled or not : which Lord Coke had

expressly denied. (1 Watk. Cop. 215.) A very learned person once suggested

to the present writer, as a possible explanation of Lord Coke's apparent contra-

diction in terms, that a custom to intail copyholds, with all the incidents of

entail, might possibly have existed in fact before the statute, in the sense that

it was actually observed ; but that it was then a had custom, which might suc-

cessfully have been contested in a court of law, though it was in fact acquiesced

in, and that what the statute did was to make it a good custom by removing the

legal objection. Watkins has cited the custom of the manor of Dymock, inroUed

in Chancery as " old and ancient " in the time of Queen Elizabeth, and which

may, therefore, possibly be older than the statute De Bonis, which imports that

a copyholder of that manor, having an estate to him and the heirs of his body

might lawfully alienate the same by deed to another person and the heire of his

body, which clearly must have been something different from a conditional

fee. (1 Watk. Cop. 208 ; 2 Hid. 488.) Can this be the real form of the missing

custom ? But this is something quite different from what Lord Coke suggests.

The report of Jleydon's Ca.se in Serj. Moore's Rep. 128, which manifestly refers

to the case reported by Lord Coke, does not contain any hint of this discussion

about the statute De Bonis. In Lord Coke's report, the discussion takes the

form of a debate between Sir Roger Manwood and some unnamed person or

persons, whose remarks are introduced hy formnlte of objection ; and it does not

readily appear whether these objections came from the counsel or from the other

judges.

302 THE NATURE AND QUANTUM OF ESTATES.

CHAPTER XXI.

THE ALIENATION OF FEES TAIL.

Fees tail owed their origin to a statute, of which the

Origin of the express intent and policy was to restrain alienation. It is

fines and re- commonly said that for about two centuries they remained

bareutei^s. inalienable. This remark is so far true, that for about that

space of time the tenant in tail was unable by any

assurance to convey an estate which was not liable to be

avoided after his death by the issue inheritable under the

entail. The original motive of the statute is very clearly

explained by the statute itself, which was designed by the

great lords to remedy the injury done to them by the con-

struction placed by the courts of law upon limitations in the

form of a conditional fee. By this construction the tenant of

the conditional fee obtained power, j^ost prolem suscitatam, to

bar the lord's possibility of reverter ; and this possibility of

reverter upon failure of issue, which failure is a by no means

improbable event, was a matter of very practical interest. But

as Lord Coke remarks, rerum progressu offendunt vuilta, qiue

in initio pnecaveri seu prcevideri non possunt ; and the unfore-

seen consequences of the statute exceeded in importance those

which had been designed. The terms of the statute precluded

escheat by attainder and forfeiture for high treason : advan-

tages which interested not only the great lords, but every

landowner in the kingdom ; and therefore, as Lord Coke

informs us, though repeated attempts were made in parliament

to repeal the statute, they never succeeded. The intricacies

of our real property law at length, after the lapse of about

two centuries from the passing of the statute, furnished the

judges with a means to repeal the statute in practice by per-

mitting, or rather encouraging, its perpetual evasion. A lineal

warranty by the ancestor, if accompanied by assets, was a bar

to the issue in tail ; though the bar continued only so long as

the assets continued to accompany it. Upon this fact was

founded, by an ingenious fiction, of which the origin is

THE ALIENATION OF PEES TAIL. 303

commonly attributed to some obiter dicta of the judges in

Taltar mil's Case, the theory of a common recovery as an

assurance by tenant in tail. But it is evident from the

language of Lord Coke, that the idea of using this fiction to

bar entails had for a long time previously engaged the atten-

tion of the judges. (See 6 Eep. 40b ; 10 Eep. 37b.) A

determined effort was made at the bar, in Mary Portington's

Case, 10 Eep. 35, to withstand the then established practice

of permitting entails to be barred by means of common

recoveries ; which took the form of insisting that a condition

of forfeiture, upon doing or concurring in any act to bar an

entail, was a good condition at law. The court was compelled,

unless it would lose all the fruit of its former evasion, to

decide that such a condition was void. The reasons ' of this

decision cannot be brought within the reasons in favour of

common recoveries deduced from .Taltarmii's Case ; which are

in exact accordance with the theory of the law, and are an

evasion of the statute only because the judgment of recovery

pronounced against the common vouchee was well known to

be a sham judgment. Neither can the decision in Mary

Portington's Case be brought strictly within the reasons of

Corbet's Case, 1 Eep. 83, and Mildmay's Case, 6 Eep. 40 ;\* in

which the nature of the condition was rather such as to defeat

the legal effect of a common recovery, than to bind the tenant

in tail not to suffer one. That the court found great difficulty,

in Mary Portington's Case, about taking the further step which

had then become necessary, appears by the fact that the case

depended in court during fourteen terms, and was argued

more than seven times at the bar, and more than once by the

bench. (10 Eep. 37a.) After the decision of that case, until

the abolition of recoveries by the Fines and Eecoveries Act, it

became an axiom of conveyancers, that by no device was it

\* In Brewster v. Kitchin, Comb. 425, at p'. 426, Holt, C. J., observed that

Corbet's Case was only a preparative for Mildviai/s Case, which was the real one ;

meaning that the former was a fictitious case stated only to get the opinion of

the court ; and he added, that he had heard Lord Chancellor Finch say, that its

fictitious character had not been discovered until too late, and that then Ander-

son, C. J., had been veiy angry. The statement of such fictitious cases is a

contempt of court, for which the solicitor is liable to be fined. (Re £lsam, 3

B. & C. 597.)

304 THE NATURE AND QUANTUM OF ESTATES.

possible to restrain a tenant in tail from barring the entail by

means of a common recovery, whenever suffering a common

recovery would have that effect ; and the same rule applies

also to dispositions made by a tenant in tail under the Fines

and Recoveries Act. {Daickins v. Lord Penrhi/n, 4 App. Cas.

51, at pp. 63, 64.) Fines owed their efficacy as a similar

assurance to the statutes 4 Hen. 7, c. 24, and 32 Hen. 8,c. 36,

commonly called the Statutes of Fines. It is a significant

circumstance, that the latter statute was passed to legalise, by

express enactment, a second manifest fraud upon the statute

De Bonis.

The learning of these now obsolete assurances is still needed

to understand old titles. The analogy of their operation has

been in some important respects followed by the Fines and

Recoveries Act, 3 & 4 Will. 4, c. 74, in prescribing new

methods of barring entails, and the remainders and reversions

thereupon ; and in certain cases the person who, under the

former practice, would have been the proper person to have

made the tenant to the precipe, for suffering a common

recovery, must even now concur in the barring of an entail.\*

The following method, also now obsolete, of barring an estate

tail, may be here noticed. During the interval which elapsed

between 43 Eliz. c. 4, which was designed to facilitate the

application of property to charitable uses, and 9 Geo. 2, c. 36,

which prevents land from being devised to charitable uses, it

was held that, in equity, a devise by tenant in tail to charitable

uses was valid, as an appointment within the meaning of the

first-cited statute, without a fine levied, or a recovery suffered,

by the testator. {Attorney -General v. Rye, 2 Yern. 453. And

see cases in note at p. 454, Raithby's ed.)

Nature of A. fine was an action (for the present purpose, but not neces-

a fine. sarily, a collusive action) commenced upon any kind of writ by

\* See the Fines and Recoveries Act, ss. 29, 30, 31. A proof that the opera-

tion at the present day of sect. 29 is not impossible, occurred in a title which

came before the writer in 1880. Such an occurrence will be possible, so long as

there are living any persons who took particular estates preceding estates tail,

created by settlements executed before 1st January, 1834. (^Vlde infra, pp. 320,

321.) In the case referred to, a person was still living, who had been tenant

for life for more than sixty years.

THE ALIENATION OF FEES TAIL. 305

which lands might be either demanded or charged, which was

compromised by leave of the court, the claim of the plaintiff,

or conusee, being acknowledged by the defendant, who was

styled the deforceant, or conusor. According to the common

classification, a fine might be of four kinds, (1) a fine sur

conusance cle droit come ceo, que il ad de son done, which is

often, for brevity, styled a fine come ceo ,• and the word fine,

when used alone, commonly refers to this species ; (2) a fine

sur conusance de droit tantuni; (3) a fine sur concessit; and

(4) a fine sur done, grant et render. (See Shep. T. 4 ; 2 Bl. Com.

ch. 21 ; Cruise, 1 Fines and Eec. 2nd ed. ch. 4 ; 3rd ed. ch. 3.)

Of these four kinds, only two are distinguished by essential

differences ; for the second is a mutilated version of the first,

and the fourth is a combination of the first and third.

The fourfold division of fines above specified refers to what Fines at the

may be styled the individual character of the assurance. In and statutory

respect to the general mode of their operation, or the general ^°\*^^\*

source from which they derive their efficacy, fines are divided

into fines levied at the common law, and fines levied by virtue

of the statute. In both cases, the importance of the assurance

depended upon the degree in which it operated as a bar to all

claims which were not prosecuted within certain limits of time

after the completion of the fine.

By the common law the title conferred by a fine was a bar

to the claims of all persons, whether parties or privies to the

fine or not, who, not being under disability, did not prosecute

their claims within a year and a day. (See 8 Kep. 100 a,

ad init.) This bar by non-claim was abolished by 34 Edw. 3,

c. 16, called the Statute of Non-claim, and was restored with

modifications by 1 Eic. 3, c. 7 ; which statute was soon rendered

practically obsolete (though it was not expressly repealed until

1863) by the first Statute of Fines, 4 Hen. 7, c. 24.

The last-mentioned statute enacted that, proclamation of The first

the fine having been made as therein mentioned, the fine Fines,

should be a final end and conclude as well privies as strangers

to the same, except persons under specified disabilities, other

C.R.P. X

306 THE NATURE AND QUANTUM OF ESTATES.

than parties to the fine ; saving to all persons other than the

parties, such right as they might have at the time of the fine,

so that they should pursue their title by way of action, or

lawful entry, within five years next after the proclamations ;

and saving to all other persons such right as might subse-

quently accrue to them, so that they should pursue their

title within five years of its accruing. The provisions last

specified are commonly referred to as the first saving and the

second saving respectively.

The statute also allows to persons under disability, other

than married woman parties to the fine, five years from the

cessation of the disability during which to prosecute their

claims by action or entry ; but enacts that if they should not

pursue their remedy as aforesaid, they and their heirs should

be concluded for ever, in like form as parties or privies to the

fine. It also saves to all persons, not being parties or privies,

the right (which existed at the common law) to avoid the fine

upon an averment partes finis nihil hahuerunt, if none of the

parties had an estate of freehold in the lands.

The theory of After the Statute of Non-claim, a fine levied merely at the

sumnces^by common law, without the proclamations enjoined by the statute,

tenant in tail, operated only by way of estoppel, and therefore it bound only

the parties thereto and the privies in estate of the parties. At

the common law, the issue in tail were not regarded as being

privy in estate to any preceding tenant in tail, and the estoppel

of the latter was no estoppel to the former. In other words,

the issue in tail were not, as such, bound by a fine levied at the

common law by their ancestor in the entail. (1 Prest. Conv.

213.) The only fines that would bind the issue in tail were

fines levied with proclamations by virtue of the statute ; and

this operation was derived from a strained judicial construction,

subsequently confirmed by legislative enactment.

It seems to have been inferred from the above-stated pro-

visions that the issue in tail, though not parties, were privies

within the meaning of the statute. A majority of the judges

in the year 19 Hen. 8, held, in accordance with this opinion,

that by a fine levied with proclamations by a tenant in tail

under the statute, the issue in tail were immediately and

THE ALIENATION OF FEES TAIL. 307

finally barred, nor were allowed any time to prosecute their

claim upon the death of the tenant in tail by whom the fine

was levied. (Dy. 2 b, pi. 1.) In that case, the five years

mentioned by the statute had in fact expired during the life-

time of the tenant in tail ; and it does not quite clearly appear

from Dyer's report, whether the judges who held that the issue

in tail were barred by the fine, thought that this lapse of the

five years was .material. But it would rather seem, that they

considered the issue in tail to be immediately barred, as being

privies within the meaning of the statute, and as not being

within the saving clauses.

Though this decision was manifestly repugnant to the pro-

vision of the statute De Donis, " if a fine be levied hereafter

of such lands, it shall be void in the law," its principle was

expressly affirmed by the second Statute of Fines, 32 Hen. 8, The second

c. 36 ; which enacts, that all fines levied with proclamations, ^^^^ ^^

whether before or after the Act, by any person of full age, of

any hereditaments intailed to him or any of his ancestors, in

possession, reversion, remainder, or in use, should be imme-

diately after the fine levied, engrossed, and proclamations

made, deemed to all intents and purposes a sufficient bar for

ever against such person and his heirs claiming the same

hereditaments or any parcel thereof only by force of any

such entail.

Some remarks upon the operation of fines as against

strangers, will be found at p. 394, infra.

A warranty was a covenant real annexed to an estate of free- The bearing

hold, arising either by implication of law, or by express upon common

contract. (Prest. Shep. T. 181.) As an express contract, a recoveries,

warranty could be created only by the use of the word

icarrantizo or icarrant. (Litt. sect. 733.) The benefit of the

warranty (if the estate of freehold was also of inheritance)

descended to the heir of the warrantee, and the burden to the

heir of the warrantor. The warranty conveyed no estate, but,

so far as it was effectual, operated as a bar to prevent the heir

of the warrantor from enforcing a claim to the lands as against

the heir of the warrantee. The epithets lineal and collateral,

as applied to warranties, do not refer to the lineal or collateral

X 2

308 THE NATURE AND QUANTUM OF ESTATES.

descent of the heir of the warrantor from his ancestor ; but

solely to the question, whether his claim by inheritance, or

(under an entail) by quasi-inheritance, to the lands, and his

liability to the warranty, were both derived, or might possibly

be both derived, from the same ancestor through the same

line of descent or not. In the former case the warranty was

lineal, in the latter collateral. (1 Prest. Abstr. 410, 411.)

The person to be bound must in either case be the heir of the

warrantor, in order that the burden of the warranty might

descend upon him; and in order to constitute a lineal

warranty, it was necessary that the heir, in deducing his

title, might possibly be obliged to name the warrantor in his

pedigree.\* Thus a warranty made by the donee in tail would

necessarily be lineal in respect to all the issue in tail ; and

the warranty of any subsequent tenant in tail would be neces-

sarily lineal to all the issue in tail inheritable after himself.

The only point in the intricate learning of warranties which

requires to be noticed, is, that a lineal warranty, if accom-

panied in its descent by assets, but not otherwise, was a bar

to the issue in tail, notwithstanding the statute De Bonis, in

respect of the estate tail. (Litt. sect. 712 ; Co. Litt. 374 b.)

The eflScacy of a common recovery, as an assurance by tenant

in tail, depends upon this proposition.

Warranties Warranties made after 31st December, 1833, are, by the

tnai. statute of Limitation, 3 & 4 Will. 4, c. 27, s. 39, made ineffec-

tual (as to lands in England) to toll or defeat any entry or

action for the recovery of land.

By the Fines and Eecoveries Act, s. 14, all warranties of

lands (in England) made after the same date by any tenant in

tail, are made absolutely void against the issue in tail, and all

persons whose estates are to take effect after the determination

\* It was sufficient for the purpose of making the warranty lineal, that the

warrantor should occupy a prior place in the pedigree, so that a descent might

possibly be deduced from him ; although in fact, by reason of the particular

order in which deaths occurretl, the descent might happen not to be so deduced.

Thus, the warranty of an elder brother was lineal to a younger brother, in

respect to lands descending from the father, although it should so happen that,

by the death of the elder brother without issue in the father's lifetime, the lands

descended to the younger son directly from the father.

THE ALIENATION OF FEES TAIL. 309

or in defeasance of the estate tail. The Irish Fines and Re-

coveries Act, 3 & 4 Will. 4, c. 92, s. 11,\* contains a similar

provision as to lands in Ireland.

Taltaruni's Case seems to have been to the following purport. Taitarum's

Hiimfery Smith, being actually seised of certain lands by g^^' ^" ^^

descent, as tenant in tail general, made a feoffment thereof to 25, f. 19 a.

one Tregos in fee simple. By this feoffment he discontinued

both his former estate tail and also all remainders, and the rever-

sion, if any, subsisting thereupon ; so that all persons claiming

under any of such discontinued estates, could thenceforward

prosecute their respective claims only by means of a real action.

Tregos then enfeoffed Humfery Smith and Jane his wife in

special tail general, with remainder to Humfery Smith in fee

simple. Jane the wife died, leaving, as the report states,

Humfery Smith sole tenant in tail after possibility of issue

extinct. One Taltarum, upon some claim of title not material

to be stated, had some time before the bringing of the present

action, sued a writ of right against Humfery Smith ; and the

proceedings had upon this writ were precisely identical with

the proceedings which in later times were followed in a

common recovery with single voucher. Humfery Smith

vouched to warranty one Richard King, who appeared and

admitted the warranty, and subsequently made default.

Judgment was thereupon given, that the demandant, Taltarum,

should recover the lands against Humfery Smith, and that

the latter should recover lands of equal value against the

vouchee Richard King. It would appear, so far as the

rambling obscurity of the report allows anything to appear,

that in the present case the question at issue was, whether a

person claiming under the original entail, which had been dis-

continued by Humfery Smith's feoffment to Tregos, was

barred by this recovery. And it appears to have been held,

that he was not barred ; upon the ground that Humfery

Smith (who was really seised under the tortious seisin

acquired by his own feoffment to Tregos) had not been seised

by force of the original entail, which was now sought to be

barred, at the time when the recovery was suffered. From

\* [The Irish Fines and Recoveries Act is 4 & 5 Will. IV. c. 1)2.]

310 THE NATURE AND QUANTUM OP ESTATES.

this the inference was deduced, that if Humfery Smith had

been so seised by force of the original entail, the recovery

would have been a good bar to the issue in tail claiming there-

under. And this inference, being acted upon in practice, was

subsequently recognized by the courts, and became the founda-

tion of common recoveries.

The nature of A common recovery was a collusive action of recovery, not

recovery. compromised, but prosecuted to judgment by the demandant or

recoverer against the tenant or recoveree.\* In its most usual

form, as an assurance by a tenant in tail, it was brought by a

collusive demandant against a collusive tenant, called the

tenant to the prcecipe, or writ sued out for the purpose of

suffering the recovery, to whom an estate of freehold had been

conveyed by the person in whom the immediate freehold in

the lands was vested, in order to enable him to defend the

action ; for a common recovery was obliged to conform in all

essential points to the real action which it collusively repre-

sented, and by the common law no action of recovery was

well grounded unless brought against the actual tenant of the

first estate of freehold in the lands sought to be recovered ;

for default of which the recovery might be falsified, or set

aside, upon a plea of non-tenure. (Booth, Real Actions, p. 29 ;

ibid. p. 80.)

Statutory The common law rule which required that the tenant to the

preecipe. prcecipe should be the person actually seised of the first estate

of freehold, was found to be very inconvenient in places where

it was the custom to let out lands on leases for lives at a rent ;

in which case the concurrence of the lessees was necessary, in

order to make a tenant to the prcecipe. By 14 Geo. 2, c. 20,

ss. 1, 2, it was enacted, in effect, that all common recoveries

suffered or to be suffered without the concurrence of such

lessees, should be as valid and effectual as if they had con-

curred, provided that the person next in remainder or rever-

sion should convey an estate for life at least to the tenant to

the prcecipe.

\* The terma 2>laint iff and defendant are properly restricted to personal and

mixed actions ; the corresponding terms in real actions being demandant and

tenant. (Co. Litt. 127 b.)

THE ALIENATION OF FEES TAIL. 311

The tenant to the jtrcecipe admitted the claim of the Form of the

demandant, but vouched to warranty (vocavit ad tvarranti- in a recovery.

zandum) the tenant in tail, who admitted the warranty, but

vouched over somebody else, always a man of straw, usually

the crier of the court, who was therefore styled the common

vouchee. .The demandant then " craved leave to imparl "

(petiit licentiam interloquendi) ; which being granted, the

demandant and the common vouchee left the court together.

Afterwards the demandant came into court without the

common vouchee ; and the latter, having been solemnly sum-

moned and failing to appear, was adjudged " to have departed

in contempt of the court and made default." (See the form

of the record, 2 Bl. Com. Appendix, No. V., at p. xix.) There-

upon the demandant recovered the intailed lands against the

tenant to the 2)rcBci'pe, who recovered lands of equal value

against the tenant in tail, who recovered a similar recompense

in value against the common vouchee.\* The recompense in

value supposed to be recovered from the common vouchee, had

the same eifect in law as actual assets to make the warranty good

against the issue in tail. (1 Kep. 94 b.) And since the

recompense, if it had really been recovered, would have

descended according to the descent of the lands for which it

was a substitute, the remainderman or reversioner was equally

within the benefit of the recompense, and was held to be

equally barred by the recovery.]

The above stated reasons were originally brought forward,

at the time when common recoveries were introduced into

practice, to explain their operation in barring remaindermen

and reversioners. Afterwards, when their use for this purpose

had become general, their operation was extended to cases which

did not fall within the original reasons ; for example, a tenant

in tail, who had previously levied a fine and thereby destroyed

his estate as an entail, was allowed to bar the remainder-

men and reversioner by a subsequently suffered recovery.

\* This exactly corresponded with the judgment on a writ of formedon, if the

defendant vouched a stranger to warranty. (See 2 Fitzh. Abr. 87a, pi. 257.)

t " And the reason of a common recovery barring the remainders is, because

he in remainder is entitled to enjoy the recompense." (5 T. R. at p. 108, note.)

812

THE NATURE AND QUANTUM OF ESTATES.

Double and

single

voucher.

The last

known case

in which a re-

covery was

suffered with

single

voucher.

Recovery

with treble

voucher.

Ill 1744 the following definition was given by Lord Chief

Justice Willes : — " A common recovery is a conveyance on

record, invented to give a tenant in tail an absolute power to

dispose of his estate, as if he were tenant in fee simple."

{Martin v. Strachmi, Willes, 444, at p. 451.)

The recovery above described is styled a recovery with

double voucher ; and this was the form most commonly used.

Recoveries might also be suffered in a similar form, mutatis

mutandis, with single voucher only, or with more than two

vouchers. In a recovery with single voucher, the tenant in

tail was himself sued as tenant to the pracipe, and he vouched

to warranty the common vouchee without having been himself

vouched. A recovery with single voucher gave a secure title

only when the tenant in tail by whom it was suffered was

actually in possession, and was not also entitled in right to

the lands under any other estate tail which had been devested

or discontinued. The right under any such devested or dis-

continued estate tail would be barred by a recovery with double

voucher, but not by a recovery with single voucher. (Cruise,

2 Fines and Rec. 245.)

In a case in which an estate tail was subject to a conditional

limitation over in the event of any attempted alienation by the

tenant in tail, Fearne advised that he should bar the entail by

suffering a recovery with single voucher, in order to avoid all

question as to whether he might incur a forfeiture by pre-

viously executing any assurance for the purpose of making a

tenant to the prcecipe. (Fearne, Posth. Works, 336.)

A recovery was sometimes suffered with treble voucher,\*

when one estate tail had been derived out of another estate

tail, and both entails were in existence at the same time and

in different persons. By separately vouching both the tenants

in tail, both the entails were undoubtedly barred ; and it was

\* Probably in practice treble voucher was used only in cases of settlements

made by a father, tenant for life, and a son, tenant in tail, where those estates

had been created upon the barring of an entail under a former settlement, and

it was known, or suspected, that the former bar had not been perfectly effectual,

but had amounted only to a discontinuance. This state of circumstances would

fulfil the conditions specified in the text. The necessity for the additional

voucher was referred to the necessity for a further " recompense in value " to go

in the line of the earlier entail. (See 1 Prest. Conv. 119.)

THE ALIENATION OF FEES TAIL. 313

immaterial in what order they were vouched. (1 Prest.

Conv. 127.) It seems, however, that the more usual practice

was to suffer a recovery with only double voucher, and to

vouch the two tenants in tail jointly, though in theory it

might be doubtful whether a joint voucher was a sufficient

bar to both entails. (Ibid. 128.)

That it was the warranty, not the mere judgment of recovery, importance

which constituted the bar, is proved by the fact, that a judg- voucher,

ment without voucher, obtained by default of the tenant in

tail, did not prevent the issue in tail from prosecuting a

writ of formedon after his death. (Litt. sect. 688.) But

such a covenous judgment was an estoppel to the parties

themselves.

Sect. 2 of the Fines and Recoveries Act enacts, that no fine Fines ami re-

shall be levied or common recovery suffered, except those then abolished.

pending, after 31st December, 1833.

As an assurance by a tenant in tail, a fine had this advantage Effect of fine

over a recovery, that by virtue of the provisions of the 32 Hen. tail.

8, c. 36, it could be levied without the concurrence of the tenant

of the immediate freehold, while a recovery could not be suffered

without obtaining either his concurrence or, in case the imme-

diate freehold was in the hands of a lessee for lives at a rent, the

concurrence of the statutory substitute provided by 14 Geo. 2,

c. 20. Any estate tail, though in remainder, or contingency,

or to arise by way of executory limitation, was barred by a fine

(with proclamations) levied by the person entitled thereto. (1

Prest. Abstr. 402.) This clearly appears by the above-cited

language of the statute; and it indicates a second advantage in

a fine ; for it is the better opinion that a recovery by a person

entitled to a contingent or executory interest in tail, had no

operation to bar the issue in tail. (2 Prest. Abst. 98 ; 1 Prest.

Con\. 142.)

But a fine barred only the issue in tail ; so that a fee simple

could not be obtained by it, unless one of the parties had also a

remainder, or reversion, in fee simple expectant upon the estate

tail. By a mer§ bar of the issue in tail, a base fee was created,

which endured so long as there was in existence either the donee

814

THE NATURE AND QUANTUM OF ESTATES.

Effect of a

recovery.

Tenant in

tail after

possibility.

Woman

tenant in tail

ex jirov'mone

fin.

in tail or any issue who might have inherited under the entail.

{}'\de infra, p. 326, No. 1 of the list there given.) •

A recovery harred as well the estate tail as also all re-

mainders, and the reversion, expectant thereupon ; and

destroyed all executory limitations, determinable limitations,

and conditions, annexed thereto, and all collateral powers by

which the estate tail might have been defeated, whereby the

person entitled to the benefit of the recovery obtained as large

an estate as could by possibility have been made by the settlor

who created the estate tail.\*

But a recovery had no effect upon estates derived out of, or

upon charges existing as incumbrances upon, the estate tail.

(1 Prest. Conv. 141 ; 3 Prest. Abstr. 137. f)

Tenant in tail after possibility of issue extinct could not

suffer a common recovery ; nor can he at the present day make

any disposition under the, Fines and Kecoveries Act. (See

sect. 18.) But he has, when his estate is in possession, the

powers conferred upon a tenant for life under the Settled Land

Act, 1882. (See sect. 58, sub-sect. 1, vii., of that Act.)

By 11 Hen. 7, c. 20, recoveries by women tenants in tail

ex provisione vii-i are made void. This Act is repealed, except

as to settlements made before 28th August, 1833, by the Fines

and Kecoveries Act, s. 17. But by sect. 16 of the same Act,

the same assent is made necessary to the validity of any

\* 1 Prest. E.st. 426 ; 1 Prest. Abstr. 393 ; 3 Prest. Abstr. 137 ; 1 Prest.

Conv. 2 ; ibid. 17. Not necessarily, as is commonly said, a fee simple. He

remarks, however, that the point has never been actually decided. But it seems

to be too obviously true to need decision. It is also to be observed that the

language of the Fines and Recoveries Act, s. 15, which enables a tenant in tail

(subject to certain conditions) to dispose of the intailed lands as against the

issue in tail, and also all persons whose estates are to take effect after the deter-

mination or in defeasance of the estate tail, does not affect persons claiming by

title paramount to that of the settlor. An estate tail may be derived out of a

determinable fee ; and in such a case the estate tail itself, or any base fee into

which it may have been converted, and also any estate, though purporting to be

a fee simple, created by any disposition made by the tenant in tail under the

Act, will, ipso facto, cease and determine upon the determination of the deter-

minable fee out of which they were derived. (^Cessante statu primitivo, cessat

derivatims. Vide svpra, p. 69.)

t Caper s Case, 1 Rep. 61. The reason was, that the fee simple obtained by

the recovery, was the same estate as the fee tail of the person suffering the re-

covery. So a fee simple obtained by a modern disentailing\*assurance, is only a

continuation of the estate tail. (See Lord Lilford v. Att.-Gen., L. R. 2 H. L. 63.)

THE ALIENATION OF FEES TAIL. 315

disposition made under the Act by any such woman tenant

in tail, as would have been necessary, by virtue of the

repealed statute, to a fine levied or recovery suffered by her.

By the 34 & 35 Hen. 8, c. 20, no recovery suffered by any where the

tenant in tail of lands whereof the reversion or remainder is in tecfed by ^^

the liing, shall bind the heirs in tail. Nor can such a tenant in statute.

tail, or any tenant in tail who is by any other Act restrained

from barring his estate tail, make any disposition under the

Fines and Recoveries Act. (See sect. 18.) But when his

estate is in possession, any such tenant in tail can exercise the

powers conferred upon a tenant for life under the Settled Land

Act, 1882 ; and, in case the reversion is in the crown, so as to

bind the crown by such exercise. (See sect. 58, sub-sect. 1, i,

of that Act.)

The analogy of fines and recoveries has been to a considerable Modern disen-

extent followed by the Fines and Recoveries Act,\* which enables ances" 3 &"!

every tenant in tail, whether in possession, remainder, contin- Will. 4, c. 74.

gency, or otherwise, after 31st December, 1833, by any assur-

ance (other than a will) by. which he could have made the

disposition, if his estate were an estate at law in fee simple

absolute, to dispose of for an estate in fee simple absolute, or

for any less estate, the lands intailed, as against all persons

claiming the lands intailed by force of any estate tail vested in

the person making the disposition, and also, with the consent of

the person (if any) who under the Act is ]3rotector of the settle-

ment, as against all persons, including the crown, whose estates

are to take effect after or in defeasance of any such estate tail.

(See sects. 15, 34 and 40 of that Act.) Such consent is not

needed, if the tenant in tail is also entitled to an immediate

remainder or reversion in fee. (Sect. 34.) Here the word fee

means fee simple. \*

The estate tail will not be barred, except in so far as the

disposition effectually passes an estate to the grantee.f In cases

\* [The editor cannot too strongly recommend the student to peruse that part

of Hayes's Introduction to Conveyancing which deals with the Fines and

Recoveries Act. It will enable him to understand the difliculties which the

f ramer of the Act had to meet, and to appreciate the admirable manner in which

he performed his work.]

t [The decision in Jle OUloy's Estate, (1910) 1 Ir. R. 1, seems open to

question.]

816

THE NATURE AND QUANTUM OP ESTATES.

The utmost

eflfect of a

disentailing

assurance.

where the grantee has power to disclaim the estate, his subse-

quent disclaimer will prevent the disposition from having any

eflfect under the Act. {Peacock v. Eastland, L. R. 10 Eq. 17.)

The phrase, whose estates are to take effect after or in defeasance

of the estate tail, is not applicable to persons coming in by

title paramount ; and therefore the utmost operation of every

disentailing assurance is confined to barring estates arising

under the settlement, together with the reversion, if any,

upon such estates. It follows, that no greater estate can be

gained by any disentailing assurance, than could by possibility

have been made by the settlor by whom the estate, tail was

created. In this respect, the operation of a modern disentail-

ing assurance is exactly co-extensive with the operation of a

common recovery.

The disentailing assurance (assuming, of course, that it pur-

ports to convey the lands for a fee simple) will have this, its

utmost possible operation, in each of the following cases : —

(1) If the tenant in tail by whom it is made is tenant in tail

in possession ; or

(2) If, though not in possession, he is entitled to the imme-

diate remainder, or reversion in fee simple upon his

estate tail ; or

(3) If, though he is neither in possession nor entitled to the

immediate remainder or reversion in fee simple, the

disentailing assurance is made with the consent of the

protector of the settlement. Such consent must be

given either by the same assurance, or by a deed to be

executed on or before the day on which the assurance

is made. (Sect. 42.)

In all other cases the assurance will bar only the estate tail,

and thus create a base fee.

The Protector of the Settlement under the Fines and

Recoveries Act.

General In general, the protector of the settlement is the owner of the

the protector. ^^'^^ estate for years determinable on the dropping of a life or

lives or other greater estate — such estate not being held under a

lease at a rent — which is prior to the estate tail, and is subsisting

THE ALIENATION OF FEES TAIL. 817

under the same settlement, or is confirmed or restored by the

same settlement. (Sects. 22, 25, 26.)

It has not actually been decided, but if the case should arise

it probably will be decided, that where the prior estate which

qualifi.es the protector is held by one person upon trust for

another, the person entitled to exercise the powers of protector

is the cestui que trust, and not the trustee. (See Re Ainslie,

Ainslie v. Ainslie, 33 W. E. 148.) This case is to be distin-

guished from the case where all the estates are equitable ; when

the protector of the equitable estate tail is the equitable tenant

for life. {Re Dudson's Contract, 8 Ch. D. 628.)

The protector retains his powers, notwithstanding any in-

cumbrances upon, or absolute disposition of, his estate, and

notwithstanding his bankruptcy or insolvency. (Sect. 22.)

An estate by the curtesy taken by a husband in respect of Estate by the

curt CSV 3>iici

any estate created by the settlement, may be a prior estate by resulting

within the meaning of the preceding paragraph. (Sect. 22.) "^^•

So also may an estate which vests in the settlor by way of

resulting use. (Ibid.)

But no tenant in dower, and (except in the case provided for Tenants in

by sect. 31) no bare trustee, or heir, executor, administrator, or trustees,

assign, can be protector in respect of any estate taken in any toi-r'admi^nis-

of such capacities respectively. (Sect. 27.) trators, and

1 . XI assigns

The case of a bare trustee m sect. 31 refers only to settle- excluded,

ments made before 28th August, 1883.\* The mention of the

heir, executor, and administrator seems to refer to an estate

taken either by special occupancy or by virtue of the Wills Act,

7 Will. 4 & 1 Vict. c. 26, s. 6, upon the death of the owner of

an estate pur autre vie who in his lifetime had been protector.

The enactment respecting the assign imports that no person

who is protector can, by any absolute disposition of his estate

made after the commencement of the Act, convey the protector-

ship to an assignee; which supplements the provision of sect. 22,

that the protector shall continue to be protector although his

estate may have been absolutely disposed of. As to assignments

of the prior estate, made before the commencement of the Act,

see sect. 29.

\* [This is a misprint for 1833.]

818

THE NATURE AND QUANTUM OP ESTATES.

ConcuiTent

owners.

Special pro-

tectors ap-

pointed by

settlor.

Trustee of

executory

settlement

may appoint

protector.

Disclaimers

and appoint-

ments must

be by deed

inrolled.

During a

total vacancy

of the special

protectors,

the general

protector may

act.

In ascertaining which estate qualifies the protector, in any

case coming within the foregoing provisions, the estate which is

thereby exchided is deemed to be non-existent, and the next

subsequent estate (being such as to fulfil the relevant conditions)

is the qualifying estate. (See sect. 28.)

If there are concurrent owners of the prior estate, each is

sole protector to the extent of such undivided share as he

could dispose of. (Sect. 23.)

The settlor may by the settlement appoint any number of

persons in esse, not exceeding three and not being aliens, to be

protector ; and may insert a power to fill up vacancies occur-

ring by death or retirement. (Sect. 32.) The person who would

otherwise (as owner of the prior estate) be the protector, may

be one of such persons. (Ibid.) Any person or persons who

may be appointed under such a power of filling up vacancies,

jointly with any person continuing in the office of protector,

seem together to constitute the protector. (Ibid.)

If a settlor directs a settlement to be made instead of making

it, the trustee upon whom devolves the duty of making the

settlement is the settlor for the purposes of sect. 32 of the Act ;

ftnd the court will not, without good reason, interfere with his

discretion to appoint a protector. {Per Shad well, V.-C, Bankes

V. Le Despencer, 11 Sim. 508, at p. 527-)

A person so appointed may relinquish the office by deed

inrolled in chancery within six calendar months after its execu-

tion. (Sect. 32.) During a partial vacancy the survivors may

act. {Bell V. Holtby, L. E. 15 Eq. 178 ; [Cohen v. Bayley-

Worthington, (1908) App. Cas. 97].) New appointments under

the power must likewise be made by deed inrolled. (Sect. 32.)

If a total vancancy of the persons so appointed shall take

place by death or relinquishment, the person who would other-

wise be protector, may, during such vacancy, act as sole pro-

tector, unless the settlor shall otherwise direct. (Sect. 32.

And see Clarke v. Chamberlin, 16 Ch. D. 176.)

w^here settlor If the Settlor declares in the settlement that the person who,

gcnerar ^ ^^ owner of a prior estate, would be entitled to be protector,

protector and shall not be protector, but omits to appoint any person to be

THE ALIENATION OF FEES TAIL. 319

protector in his stead, then the Court of Chancery (now the appoints no

Chancery Division) is the protector, as to the lands in which

such estate is subsisting and during the continuance of the

estate. (Sect. 33.)

As to the transfer of jurisdiction, see 36 & 37 Vict. c. 66,

ss. 16, 34.

Husband and wife jointly are the protector, in respect of an Married

estate which would have qualified the wife, if sole ; unless it is tector° ^^"^

settled, or agreed or directed to be settled, by the settlement,

to her separate use, in which case she alone is the protector.

(Sect. 24.)

The Married Women's Property Act, 1882, does not seem

to make the concurrence of the husband as protector unneces-

sary, in any case in which it would have been necessary if that

Act had not been passed ; because the only cases specified in

the Fines and Recoveries Act, s. 24, in which the concurrence

of the husband is not required, in respect of a prior estate

which would have qualified the wife, if single, to be the pro-

tector, are cases in which the prior estate is hy the settlement

either settled, or agreed or directed to be settled, to her

separate use. But the question does not appear to have been

foreseen, and it must be answered with some caution.

The concurrence of a husband who is under disability or Husband's

living apart from his wife, may be dispensed with by an order how^may'be'

of the Court of Common Pleas (now the Queen's Bench dispensed

^ ^ ^ with.

Division) unless the Lord Chancellor, or the Court in Lunacy, is

protector of the settlement in lieu of the husband. (Sect. 91.)

As to the transfer of jurisdiction, see 36 & 37 Vict. c. 66,

ss. 16, 34 ; and the Order in Council, dated 16th December,

1880, for the consolidation and union of certain Divisions of

the High Court of Justice.

Special provision is also made for the following cases of Special cases

,.,.,.. of disability.

disability : —

(1) If the protector is a lunatic, an idiot, or a person of

unsound mind, the Court in Lunacy is protector in his Lunatic,

stead. (Sect. 33. And see, as to the jurisdiction, 15

& 16 Vict. c. 87, s. 15 ; 14 & 15 Vict. c. 83, s. 13.\*) If

• [Lunacy Act, 1890, s. 108.]

820

THE NATURE AND QUANTUM OF ESTATES.

Traitor or

felon.

When special

protector is

an infant ;

or his exist-

ence is

uncertain.

one protector out of several becomes incapable, it is at

least questionable whether the Court can act in lieu

of such person without the concurrence of the others.

(Bankes v. Le Dcspencer, 11 Sim. 508, at p. 528.)

(2) If any person —

(i) being protector, is convicted of treason or

felony; or

(ii) not being the owner of a prior estate, is

protector (that is, has been appointed protector by

the settlor, under sect. 32) and is an infant ; or

(iii) if it is uncertain whether any such last-

mentioned person is living or dead : then

the Court of Chancery is protector in such person's

stead. (Sect. 33.) Though the case of a person con-

victed of treason or felony is only referred to in the

section, and no express provision is made to meet it, the

section extends to such cases. (Re Waineic right, 1 Phill.

258 ; Re Gravenor, 1 De G. & Sm. 700.)

Where the

prior estate

has been

assigned, or

mortgaged,

before 3 1 st

Dec, 1833.

An assignment, or mortgage, of a prior estate made before

3l8t December, 1833, will make the assignee, or mortgagee,

protector, if and so long as it makes him the proper person,

if this Act had not been passed, to have made the tenant to the

prcecipe for suffering a common recovery. (See Sect. 29.)

The " proper person " here contemplated is, in general, the

person actually seised of the immediate freehold ; but, in cases

where the lands are held by a lessee for lives at a rent, the

" proper person " seems to be either the person actually seised

of the immediate freehold, or (until after the repeal, in 1867, of

the next-cited statute) the person who, by 14 Geo. 2, c. 20, s. 2,

was enabled, in such cases, to make a substituted tenant to the

prcecipe. (Vide supra, p. 310.)

The Act gives

no fresh

power to de-

stroy charges

and convey-

ances of

remainders

and rever-

sions in fee,

If the owner of a remainder or reversion in fee simple upon a

fee tail, has charged or conveyed away such remainder or rever-

sion before 31st December, 1833, and is the person who would,

by the preceding rules, be the protector of the settlement, and

would be enabled to concur as such protector in barring such

remainder or reversion, but could not have effected the same

THE ALIENATION OF FEES TAIL. 821

end without having become such protector, then the person made before

who, if the Act had not been passed, would be the proper jsss,

person to have made a tenant to the pracipe, is the protector

of the settlement. (Sect. 30.)

But for this provision, it might have happened, that incum-

brances of remainders and reversions upon an estate tail, would

have been prejudicially affected by the barring of the estate

tail, together with the remainders and reversions, under the

Act, under circumstances in which they would not have been

affected if the Act had not been passed.

Under a settlement made before the passing of the Act, Bare trustee,

namely, 28th August, 1833, a bare trustee is protector if and ^if/made^'

so long as he would have been the proper person, if the Act ^^^"^^f^jL^.

had not been passed, to make the tenant to the prcecipe.

(Sect. 31.)

The obscure phrase " bare trustee" was probably meant to Meaning of

refer only to trustees to preserve contingent remainders, in ^"''^ trustee.

cases where the preceding tenant for life under the settlement

took only a term of years without impeachment of waste,

determinable upon the dropping of his own life. In such a

case the immediate freehold would be in the trustees, and

they would, in general, have been the proper persons, if the

Fines and Recoveries Act had not been passed, to make the

tenant to the prcecijje for suffering a common recovery.

The same phrase is also found in the Charitable Trusts Act,

1853, 16 & 17 Vict. c. 137, s. 50, the Vendor and Purchaser

Act, 1874, 37 & 38 Vict. c. 78, s. 5, and the Land Transfer

Act, 1875, 38 & 39 Vict. c. 87, s. 48, where its meaning is

scarcely elucidated by the dicta contained in the cases of

Christie v. Ovington, 1 Ch. D. 279, and Morgan v. Swansea

Urban Sanitary Authority, 9 Ch. D. 582. [See also Re

Docwra, 29 Ch. D. 693 : Re Cunningham and Frayling, (1891)

2 Ch. 567 : Re Howgate and Oshorn, (1902) 1 Ch. 451.]

Assurances not operating under the Act, and Assurances by way

of Mortgage.

No disposition made under the Fines and Recoveries Act by

a tenant in tail (except a lease for not more than twenty-one

O.R.P. Y

822

THE NATURE AND QUANTUM OF ESTATES.

Assurances

not taking;

effect under

the Act create

a voidable

base fee.

years, to commence in possession or within twelve months from

the date, at a rent not less than five-sixths of a rack-rent) has

any operation under the Act, unless it is inrolled in the Court

of Chancery (now the Chancery Division) within six months

after its execution. (Sect. 41.)

It follows that the operation of any assurance by tenant in

tail, wanting inrolment, remains the same now as it would

have been before the Act.

It is now clearly settled that by such conveyance, if purjiort-

ing to convey the whole estate of the tenant in tail, the assign

takes a base fee, liable to be determined, after the death of the

tenant in tail, by the entry of the issue in tail. {Machil v. Clark,

2 Salk. 619, Ld. Raym. 778, 7 Mod. 18, overruling Took v.

Glascock, 1 Wms. Saund. 260. See also Goodright v. Mead, 3

Burr. 1703 ; Doe v. Hirers, 7 T. R. 273 ; Doe v. Whichelo, 8

T. R. 211.) The words in Litt. sects. 613, 650, which seem to

import that the assign takes an estate jnn' autre vie only, must

be understood to mean, that his estate is liable to be deter-

mined upon an event which would ipso facto determine an

estate pur autre vie. (See 3 Rep. 84 b ; Stone v. Newman, Cro.

Car. 427, at p. 429.)

That the estate of the assign is of inheritance, is proved by

the fact that his wife was entitled to dower out of it, during its

continuance ; that is to say, until the base fee was in fact

defeated by the entry of the issue in tail. (3 Rep. 84 b ; 10

Rep. 96 a.)

A defeasible base fee, created in manner aforesaid, by means

of lease and release, might be confirmed by a fine levied by the

releasor after the death of the releasee. (Doe v. Whichelo,

8 T. R. 211. See also, as to a recovery, Stapilton v. Stajnlton,

1 Atk. 2 ; though the question rather referred to the validity

of a covenant to suffer a recovery than to the effect of the

recovery if suffered.)

Assurances

by way of

mortgage.

There was a strong disposition on the part of courts of equity

to restrict the effect of any assurance made by way of mortgage,

to the purposes of the security, and not to permit it to have

any effect upon the rights of the persons entitled to the equity

of redemption, unless there was very clear evidence of an

THE ALIENATION OF FEES TAIL. 323

intention to aifect those rights.\* The question, therefore, was

always liable to arise, when a tenant in tail was a party to a

mortgage, whether the legal estate conveyed by the mortgage

deed should be deemed to be on foot for all purposes, or

whether, upon the redemption of the mortgage, the estate tail

should be deemed to be revived in equity. In order to prevent

these questions from arising, sect. 21 of the Act provides, in

effect, that if the estate conveyed by the mortgage deed is an

estate j^ui' autre vie, or a term of years, or where a mere charge

is created without any estate tp support it, such estate or

charge shall in equity take effect only for the purposes of the

mortgage, but that, in any other case, the estate created by

the mortgage deed shall take effect for all purposes whatso-

ever, and notwithstanding that a contrary intention may be

expressed or implied in the deed.

Modern Statutory Powers.

There is no doubt that a tenant in tail, whether legal or The Settled

equitable, has power, by virtue of sect. 46 of the Settled

Estates Act, 1877, to make such leases of the settled land as

are therein specified. But that enactment confers upon a

legal tenant in tail no power which he might not exercise by

virtue of the Fines and Recoveries Act, without being fettered

by the restrictions imposed by the Settled Estates Act. These

restrictions were designed with a view to leases granted by the

other persons having less estates than a tenant in tail, who

are empowered to grant leases by the same enactment.

A tenant in tail, when his estate is in possession, has the The Settled

powers conferred upon a tenant for life under a settlement by ig82. '

the Settled Land Act, 1882. This provision includes a tenant

in tail after possibility of issue extinct ; also a tenant in tail

who is restrained by statute from barring his estate tail, and

although the reversion is in the crown, but not a tenant in tail

BO restrained in respect of land purchased with money pro-

vided by parliament in consideration of public services. (See

\* Many of the cases upon this subject are cited in Plomleij v. Felton, 14 App,

Cas. Gl,

Y 2

824 THE NATURE AND QUANTUM OF ESTATES.

sect. 58, sub-s. 1, i, and vii, of the Act. [Re Duke of

MarWorouffh's Blenheim Estates, 8 T. L. R. 582.] )\*

A list of the last-mentioned powers will be found at the

close of Chapter XXIIL, wjra.

Although these powers comprise a power of sale, and the

tenant in tail may, by virtue of sect. 20 of the Act, execute

assurances which are effectual to pass to a purchaser the land

discharged from all the limitations, powers, and provisions of

the settlement, and from all estates, interests, and charges

subsisting or to arise thereunder, it must not be supposed

that the provisions of the Settled Land Act, 1882, in any

degree render superfluous or obsolete the provisions of the

Fines and Recoveries Act. Assurances executed by a tenant

in tail by virtue of the Settled Land Act, 1882, have no opera-

tion to bar the entail, so far as the benefit of ownership

conferred by it is concerned ; but only transfer its operation,

by virtue of sect. 22, to the proceeds of the sale, and the

investments representing the same.

\* These statutory powers are in practice exercised only by tenants in tail who,

by reason of special circumstances, are precluded from barring the entail, and by

trustees and committees on behalf of tenants in tail who are infants or lunatics.

The special circumstances which might preclude a tenant in tail from exercis-

ing the power to bar the entail conferred by the Fines and Recoveries Act, are

in practice twofold.

(1) Many estates have been settled by private Acts of Parliament, in which is

inserted a clause prohibiting the tenant in tail for the time being from

barring the entail ;

(2) When the remainder or reversion upon an estate tail was vested in the

crown, a recovery suffered by the tenant in tail would not, at the

common law, have barred the crown's estate ; and by the Act to embar

feigned recoveries, 34 Hen. 8, c. 20, such recoveries were made void

also as against the heirs in tail.

It was at one time a not uncommon practice for tenants in fee simple to

surrender their lands to the crown and to take back only an estate tail, the

reversion in fee simple remaining in the crown. The law distinguished

between these cases, in which the reversion came to the crown practically by the

disposition of a settlor, and cases in which the reversion remained in the crown

by reason of a bond fide grant of a fee tail de novo by the crown ; and cases of the

latter class only, which are presumed by the law to be intended as a reward for

public services, were held to be within the Act to embar feigned recoveries.

(Co. Litt. 372 b, 373 a.) And if a reversion came back to the crown after

having once been severed, it was no longer within the protection of the Act.

(^Earl of Chesterfield's Case, Hard. 409.)

The Act did not extend to Ireland. (Lord Nott. MSS. cited Butl. n. 3 on

Co. Litt. 372 b.) Therefore, in Ireland base fees upon which the reversion is in

the crown are much more common than in England.

325 )

CHAPTER XXII.

BASE FEES.

The earliest (not to say tlie only) attempt to define the term The general

base fee with which the present writer is acquainted, is that a\ase f^ee."

given by Plowden ;\* and his definition is substantially as

follows: — A base fee is a fee descendible to the heirs general,

upon which subsists a remainder or reversion in fee simple.

Here the descent to the heirs general distinguishes it from a

fee tail, where the descent is to the heirs of the body ; and

the existence in expectancy upon it of a remainder or rever-

sion, distinguishes it from all other fees that descend to the

heirs general.

The conditions laid down by this definition can only be

fulfilled! by the conversion of a fee tail into a fee descendible

to the heirs general, by some method which does not destroy

the remainder or reversion previously subsisting upon the fee

tail. For no fee descendible to the heirs general which arises

by mere limitation, can have subsisting upon it any remainder

or reversion. (Co. Litt. 18 a.)

From these considerations it follows that a base fee is

either —

(1) The estate taken by the grantee, under any assurance by

a tenant in tail which is effectual to bar the issue in tail

(or, at least to put the issue in tail, even after his right

has accrued in possession, to a right of entry), but is

ineffectual to bar the remainders (if any) or reversion

' . expectant upon the estate tail ; or

\* " A third estate in fee may be called a base fee, and that is, where A. has a

good and absolute estate of fee simple in land, and B. has another estate of fee

in the same land, which shall descend from heir to heir, but which is base in

respect of the fee of A., as being younger than the fee of A., and not of absolute

perpetuity as the fee of A. is." Plowd. 557. He proceeds to specify the case

of a tenant in tail attainted of high treason.

t Unless the case mentioned at p. 3.33, jw/m, with reference to sect. 65 of the

Conveyancing Act of 1881, is an exception to the rule.

g2Q THE NATURE AND QUANTUM OF ESTATES.

(2) When an estate tail is barred to the same extent, but

by the mere operation of law without the execution of

any assurance, a base fee is the estate taken by the

person entitled to the benefit of such legal bar.

It is believed that the following attempt is the first ever

made to give a complete list of the methods by which a base

fee may now arise, or might formerly have arisen : —

List of Base Fees.

(1) Before the Fines and Eecoveries Act a base fee in lands

might have arisen by the operation of a fine with pro-

clamations, levied by a tenant in tail, who was not also

entitled to the remainder, or reversion, in fee simple

expectant on the estate tail.

The operation of the fine barred not only the i?sueof

the person by whom it was levied, but all issue inherit-

able under the entail. (1 Prest. Est. 437, 438.)

(2) A base fee in lands may now, under the Fines and

Eecoveries Act, arise by the operation of an assurance

made by a tenant in tail, which is insufiicient to bar

the estates subsequent to the estate tail, but is sufiicient

to bar the issue in tail.\* {Vide supra, \). 316.)

(3) Closely analogous to the foregoing, are base fees created

by statutory assurances executed by the commissioners

in bankruptcy with regard to the property of bankrupt

tenants in tail.

\* It is conceived that if the tenant in tail has power to bar not only the estate

tail, but also the subsequent estates — that is, if there is no protector, or if the

tenant in tail is entitled to the immediate remainder or reversion in fee simple —

then he is unable to create a base fee. The base fee is created, by operation of

law, whenever the tenant in tail purports to convey a fee simple, but^ by reason

of the law, the assurance is void except as against the issue in tail. A tenant

in tail, having absolute power as above mentioned, cannot adopt this device,

because the assurance would eflFectually convey a fee simple ; and if he should

convey to the use of another person and his heirs, so long as the tenant in tail

should have heirs of his body, this would not be a base fee, but a determinable

fee. On the distinction between these two estates, ride infra, p. 330.

BASE FEES. 327

By virtue of 21 Jac. 1, c. 19, s. 12, a bargain and

sale, by deed indented and inrolled within six months in

one of the superior courts at Westminster, executed by

the commissioners, or the majority of them, of any real

estate of which any bankrupt was seised for an estate

tail, in possession, reversion, or remainder, would have

barred all claims to the same extent as the bankrupt

might have barred them. Therefore in cases where

the bankrupt might have conveyed a fee simple, such

bargain and sale would convey a fee simple. But

where he could have barred the estate tail, without

having power to bar the remainders and reversion, such

bargain and sale would create a base fee. (1 Brest.

Abst. 172 — 174.) Before this Act there was no power

to make intailed property available for the benefit of

the creditors, further than for the life of the bankrupt.

This enactment was repealed by 6 Geo. 4, c. 16, s. 1 ;

but a similar provision was made by sect, 65 of the

last-cited Act, which was repealed by the Fines and

Eecoveries Act, s. 55, provision being made, in sects. 56

— 73, for the extension of the powers given by the

last-mentioned Act to cases of bankruptcy. Those

sections are incorporated into the Bankruptcy Act,

1883, by sect. 56, sub-s. (5) thereof.

(4) Although a rentcharge is not a subject of tenure, and

therefore is not a tenement in the strictest sense of the

word, yet for some purposes it is in law accounted a

tenement ; and a rentcharge which is already hi esse

under a limitation in fee simple, is a tenement within

the meaning of the statute De Donis, and admits of

being intailed by virtue of that statute. A tenant in

tail of a rentcharge under such an entail might formerly,

by suffering a common recovery, have obtained a fee

simple of the rentcharge, in all cases in which, if the

estate tail had been an estate in lands, he might have

obtained a fee simple of the lands. But a tenant in

tail of a rentcharge may also be made de novo upon the

limitation of the rent itself, and without the crea,tioq

328 THE NATURE AND QUANTUM OF ESTATES.

of any remainder over in fee simple. Such a tenant in

tail stands in a different position from that of a tenant

in tail subsisting under an entail of a rentcharge

which was in esse as a fee simple before the making of

the entail. By suffering a common recovery, he did not

acquire a fee simple, but only barred the issue inherit-

able under the entail ; that is to say, he acquired a

base fee ; and, upon a failure of issue so inheritable,

the rent became extinguished in the land. (Butl. n. 2

on Co. Litt. 298 a ; 1 Prest. Conv. 3.)

(5) It is conceived that, at the present day, any disentailing

assurance executed by a tenant in tail of a rentcharge

created de novo as above mentioned, which purports

to create a fee simple, would create a base fee.

(6) At the common law, before the passing of the Act to

embar feigned recoveries, 34 & 35 Hen. 8, c. 20, a base

fee in lands might have arisen by the ojieration of a

common recovery suffered by a tenant in tail, when

the remainder, or reversion, in fee simple expectant

on the estate tail, was vested in the crown. Under

such circumstances the recovery would have barred

the issue in tail, but not the crown, by reason of the

crown's prerogative. (Dy. 32 a, pi. 1.)

The last-mentioned Act enacted, that such a recovery

should not bind the heirs in tail, nor can such tenants

in tail now make any disposition under the Fines ai^d

Recoveries Act. (For some remarks upon this Act,

vide supra, p. 324, note.)

(7) During the interval which elapsed between the 26 Hen.

8, c. 13, whereby fees tail were made liable to forfeiture

for high treason, and the 33 & 34 Vict. c. 23, whereby

forfeiture was abolished, a base fee in lands would have

arisen, in favour of the crown, upon the attainder of a

tenant in tail for high treason, which endured so long

as there was in existence either the donee in tail or

any issue capable of having inherited under the entail.

BASE FEES.

{Walsingham's Case, Plowd. 547, see p. 557 ; Stone v.

Newman, Cro. Car. 427.)

(8) Before the extinction of villenage, if lands had been

given in fee tail to a villein, the lord of the villein

would have acquired, by entry upon the lands, a base

fee conterminous with what would have been the

duration of the fee tail if it had remained in the

villein and his heirs inheritable under the entail.

(Co. Litt. 18 a.) If the lord had subsequently enfran-

chised the villein, the enfranchisement would not have

affected the duration of the base fee. (Ibid. 117 a.)

(9) Similarly if, before the Naturalization Act, 1870, 33

Yict. c. 14, s. 2, lands had been given in fee tail to an

alien, and had been seized on the part of the crown

after office found, a base fee would have been vested

in the crown. If the alien had subsequently been

made a denizen, this would not have affected the

duration of the base fee. (Co. Litt. 117 a.)

The last-mentioned Act enacts, that real and personal

property of every description may be taken, acquired,

held, and disposed of by an alien in the same manner

in all respects as by a natural-born subject.

This kind of estate, therefore, endures so long only as there is

in existence either the donee in tail or any issue inheritable

by force of the entail.

It has also been suggested (Plowd. 557) that, under certain

circumstances, a base fee might arise —

(10) When the issue in tail was outlawed for felony, and in

the lifetime of his ancestor obtained a pardon. The

result would of course be the same upon an attainder

by judgment. In such a case it has been suggested

that the heir of the donor could not enter, because

there was still living issue of the donee ; and the issue

could not lawfully enter under the entail, for want of

329

330 THE NATURE AND QUANTUM OF ESTATES.

inheritable blood, which was not restored by the pardon.

In the case referred to by Plowden, the issue entered ;

and some thought that he had gained by his entry a

base fee conterminous with the entail, but others

thought that he had gained only an estate for his

own life.

Base fees of any of the kinds above described are not properly

said to be liable to be determined, — which phrase properly

refers to the voluntary assertion of a hostile claim, — though

they are determinable upon the happening of the event which

would have determined the estate tail in which they had their

origin. There exists one other species of base fee, which is

not only determinable in the latter sense, but is, in the proper

sense of the phrase, liable to be determined : —

(11) Any assurance made by a tenant in tail which purports

to convey his whole estate, but is not effectual to bar

the issue in tail of their right, will create a base fee

liable to be determined by the entry of the issue in tail

after the death of the tenant in tail who made the

assurance. (Vide supra, p. 822.)

Determinable An estate of the like duration with a base fee may arise as

mhicms with ^ determinable fee, by an express limitation to A and his heirs

base fee. gQ j^jjg g^g g shall have heirs of his body. {Vide supra, p. 256,

A doubt No. 9.) But it may be doubted whether, if B is living at the

suggested. ^^^^^ ^j ^.j^g limitation, it can take effect in possession until the

death of B ; because, Nemo est heres riventis. If this view

is well founded, such a limitation during the life of B must

be by way either of executory limitation or of contingent

remainder.

Discussion of The authorities do not lend much countenance to this view.

the question. The language of the "apprentice of the Middle Temple" in

Plowden, who was probably Plowden himself, implies, if it is

to be construed strictly, that an estate in possession might be

created under such a limitation during the life of B. He lays

it down that, " if land is given to a man and to his heirs, as

long as J. S. shall have heirs of his body, then he to whom

BASE FEES. 331

the land is given has a fee simple, but his estate is deter-

minable upon the death of J. S. without issue, for then the

fee is ended, and the feoffor shall have the land again."

(Plowd. 557.) This language seems to suppose J. S. to be

living at the date of the limitation ; and if the determinable

fee had been granted by way of contingent remainder, it is

not true that the feoffor would necessarily have "had the

land " upon the death of J. S. without issue ; because this

event might possibly have happened during the continuance

of the precedent estate. Therefore Plowden's language seems

to imply that, in his opinion, such a limitation, though in

possession, made during the lifetime of the person whose

heirs are mentioned, would be good.

It is possible that Plowden's attention was not directed to

the point. But the same assumption seems also to have been

made by Watkins, in his work on Descents, at p. 211 ; where

he discusses a different question ; namely, whether the fee

(which he loosely styles a base fee) would determine abso-

lutely by the death of B without issue born but leaving his

wife enceinte, or whether a subsequent birth of issue would

revive it as against the person entitled in reverter. Here

also, as in Plowden's case, it is not absolutely certain that

Watkins' attention was directed to the point; but the

inference in favour of this view is much stronger, by reason

both of the greater clearness of his language and of the more

direct bearing of the point upon the question which he is

discussing. The other authorities seem to afford no clear

inference.

The argument drawn from the maxim, Nerno est heres viventis,

though, prima facie it is a very strong one, cannot be regarded

as conclusive ; because, in the limitation of conditional fees,

the words heirs of the body were, for some purposes, used to

denote the issue during the lifetime of the ancestor. In so

far as they imported a quasi-condition, the condition was

fulfilled by the birth of issue during the ancestor's lifetime :

a usage which bears a close resemblance to the use of the

words in the limitation of this kind of determinable fees.

At the same time, there seems to be no doubt that a limita-

tion " to A and the heirs of the body of his father," will, if

832 THE NATURE AND QUANTUM OF ESTATES.

the father is Hving, create an estate tail by way of contihgent

remainder, expectant upon an estate for life in A, which

cannot vest until the father's death ; when it will vest in the

person who at that time can bring himself within the descrip-

tion, as heir to the body of the father, and he will take as

tenant in tail by purchase. (3 Prest. Conv. 77 — 79.)

Merger. At the common law, a base fee would merge in the remainder

or reversion in fee simple, both estates being vested in the

same person without the existence of any intermediate estate.

(3 Prest. Conv. 240.) Whence it followed that if a tenant in

tail, having also an immediate remainder or reversion in fee

simple, by a fine vested in himself a base fee, the latter estate

was destroyed by merger, and all incumbrances affecting the

remainder or reversion were let in. They were technically

said to be accelerated. But a purchaser could not, under the

old practice, rely upon this as a valid objection against a title

in fee simple depending upon a fine levied by a tenant in tail,

without showing that the reversion was in fact affected by some

incumbrance. (1 Prest. Abst. 7.)

By virtue of the Fines and Recoveries Act, s. 39, enlarge-

ment is now, in the case of a base fee, substituted in lieu of

merger. (Vide supra, p. 94.)

On the

descent of

base fees.

It will be observed that the theory of base fees, as outlined

in Plowden's definition, assumes the truth of the proposition,

that when a base fee and a reversion in fee simple thereupon

subsist at the same time in the same land, (which can only

be effected by operation of law and not by mere limitation

or conveyance,) the base fee " descends from heir to heir " ;

which language, since there is nothing to suggest special heirs,

must mean that it descends to the heirs general.

Preston has remarked that when an estate tail was turned

to a base fee by a fine, the descent of the base fee followed

the common law, descending to the heir general, not to the

special heir. (1 Prest. Abst. 372 ; ibid. 404.) If the cases

cited by him (Beamnonfs Case, 9 Rep. 138, S Inst. 681, and

Baker v. Willis, Cro. Car. 476) should seem hardly to establish

this proposition, it seems nevertheless to follow from the

BASE FEES. 333

fundamental rule, that the common law heir can be displaced

only by means of special limitations referring to the heirs of

the body ; \* because, in the case supposed, no such limitation

existed. The same doctrine seems necessarily to apply to

all base fees which arise without express limitation. It will

not necessarily apply to base fees arising by express limitation,

including base fees created by the alienation of a tenant in

tail in remainder, without the consent of the protector of the

settlement under the Fines and Recoveries Act, ss. 15 and 34 ;

because a base fee so created might by possibility take the

form of a fee tail vested in another person. But limitations

in this form do not occur in practice ; and perhaps the estate

arising under them might with greater propriety be styled

a fee tail derived out of a fee tail, than a base fee. Such

a secondary fee tail would of course be liable to be determined

by the determination of the primary fee tail out of which it

was derived.

It is remarkable that the question of the descent of base

fees, arising by the barring of fees tail, has been little noticed.

It seems to have been tacitly assumed, without the necessity

for explicit mention, that when the law, whether mediately

or immediately, devests a fee tail by barring the issue in

tail, the novel fee thus created will, in the hands of the

person entitled to the benefit of the bar, follow the ordinary

course of descent prescribed by the common law, namely, to

the heir general.!

Sect. 65 of the Conveyancing Act of 1881, amended by whether a

sect. 11 of the Conveyancing Act, 1882, enacts, that the ^eafersimpie

residue of any such long term of years as is therein specified absolute.

\* " The rule of the common law is, you shall not make a person heir, or give

him the character or the rights of an heir, by a special limitation, unless he be

the heir by the rule of law. The statute De Diynis gave the donor, with reference

to estates tail, the power of making special heirs inheritable under the entail."

(1 Prest. Est. 475.)

t Compare the resolution of the judges, that the Isle of Man, though no part

of the kingdom, yet, being gi-anted under the Great Seal of England to Sir John

Stanley and his heirs, was descendible according to the course of the common

law. (Co. Litt. 9 a ; 4 Inst. 284.)

Impropriate tithes of gavelkind lands do not descend in gavelkind, but by the

rules of the common law. (^Ilougham v, Samlys, 2 Sim, 95, at p'. 154.)

884

Tilfi NATURfi AND QUANTUM OP ESTATES.

Reasons for

the affirma-.

tive conclu-

sion.

may be enlarged into a fee simple, by virtue of the Act, in

the manner therein prescribed. It is perhaps not clear what

will become of the reversion upon the term under such

circumstances. On the one hand, two fees simple cannbt,

by the common law, subsist at the same time in the same

lands ; whence might be drawn the inference, that the

reversion is absolutely destroyed. On the other hand, the

rule of the common law, that a reversion in fee cannot be

expectant upon another fee, may be suspended by force

of a statute, and it has in fact been suspended by the statute

De Donis. The question does not appear to have been fore-

seen. The answer which, by the analogy of the law, it ought

to receive, is doubtful ; and the answer which it will in fact

receive cannot be predicted with conj&dence. If the reversion

is not destroyed by the enlargement, the fee simple obtained

by the enlargement will subsist as a base fee. No other

example can be suggested of a base fee which is a fee simple

ahsolnte. This fact might perhaps be thought to afford a suffi-

cient reason for holding that the reversion is destroyed by

the enlargement. But the case is by no means analogous

to the enlargement of a base fee effected by sect. 89 of the

Fines and Recoveries Act; because in the case of a long

term it is expressly enacted by the Conveyancing Act of 1881,

s. 65, sub-s. (4), that the fee simple acquired by enlargement

shall be subject to all the same covenants and provisions

relating to user and enjoyment as the term would have been

subject to if it had not been so enlarged. It is possible that,

in the view of its framers, this provision was intended to apply

only to covenants and provisions imposed upon the term subse-

quently to its creation ; and no doubt the modes in which

such long terms have commonly arisen, make it improbable

that hitherto such covenants and provisions have been

imposed upon them at the time of their creation. But the

enactment contains nothing thus to restrict its meaning ;

which cannot, without gratuitously importing into it some-

thing which it does not in fact contain, be made to exclude

covenants and provisions imposed upon a long term at the

time of its creation. The present writer has been informed

that, in reliance upon these considerations, the enactment

BASE FEES; 385

has been used by some conveyancers as a device whereby to

annex to a fee simple certain covenants which would not " run

with the land " at the common law. If this view (which

seems to be more than plausible) should be supported, the

person formerly entitled to the reversion, and his heirs, will

bo entitled to the benefit of such covenants ; and this might

afford a reason for holding that the reversion remains still on

foot, notwithstanding the enlargement of the term.

Enlargement of Base Fees.

If a tenant in tail created a base fee by levying a fine, he At the com-

. mon law.

nevertheless retained the power, by suffermg a common

recovery, to bar the remainders and reversion.\* (2 Prest.

Abst. 46.) The present writer apprehends that the effect

of such a recovery was to enlarge the base fee into as great an

estate as the tenant in tail could, before the fine, have obtained

by a recovery ; that is, in general, a fee simple.!

Since the 28th August, 1833, a base fee has ijiso facto Under the

become enlarged, by virtue of the Fines and Eecoveries Act, Recoveries

s. 39, whenever the base fee, and the remainder or reversion '^^\*-

\* In Barton v. Lever, Cro. Eliz. 388, it was held that such a subsequent

recovery, when the fine had been erroneous, was a bar to a writ of error by the

issue in tail to reveree the fine ; and the reason given by the Court, at p. 389,

was, that the recovery would have barred the entail itself, and therefore would

bar the writ of error. This doctrine seems in reason to be equally applicable to

the remainders and reversion. The proposition in the text is expressly stated,

though formerly doubted, to be settled law, by Lord Hardwicke, in Rohinsou v.

Gee. 1 Ves. sen. 251, at p. 253 ; and Fearne, Posth. Works, 442, makes the same

statement.

t Because the eflFect of a recovery was to enlarge the estate tail, or rather, to

free it from all restrictions : not to substitute for it the ultimate reversion in fee

simple which existed before the recovery ; which is the reason why it let in all

prior incumbrances made by the tenant in tail. And as the tenant in tail him-

self and all the issue in tail were for ever precluded by the fine, so that the

recovery could not enure to the benefit of the tenant in tail as recoveree, while it

precludetl all subsequent claimants, the result seems to be, that the title under

the base fee became for ever unimpeachable ; which is the same thing as to say,

that it was enlarged into a fee simple.

Fearne seems to have been of opinion, that after the death of the tenant in

tail who had himself levied the fine, the issue in tail could not suffer a recovery.

(Feaino, Posth. Works, 442 — 4(>6.) But he admits that the courts would be

very likelj' to decide in favour of the recovery.

336 THE NATURE AND QUANTUM OP ESTATES.

in fee simple, have been united in the same person, without

any intermediate estate. The estate gained by the enlarge-

ment is as large an estate as the tenant in tail, with the con-

sent of the protector, if any, might have created by any

disposition under the Act, if such remainder or reversion had

been vested in any other person ; that is, in general, a fee simple.

When a base fee has been created by a disposition under

the Act, the power of disposition by which the remainders and

reversion could have been barred, remains still capable of

being exercised by the person who would have been tenant in

tail if the estate tail had not been barred, but, by sect. 35,

only with the consent of the protector, if any. It follows

that such person (with the consent of the protector, if any)

might enlarge the base fee into as large an estate as could by

possibility have been created under the Act at the time when

the base fee was created.

The tenant in tail who created the base fee is not prevented

from enlarging it merely by the fact that he has conveyed it

away to another person. {Bankes v. Small, 36 Ch. D. 716.)

Under the By virtue of sect. 57, the commissioner in bankruptcy has

Taseoi bank- power, by a disposition for value, to enlarge a base fee, vested

ruptcy. jjj ^^Yie person who would have been tenant in tail if the estate

tail had not been barred, when such person becomes bankrupt,

provided that there exists no protector of the settlement.

By virtue of sect. 58, where there exists a protector, the

commissioner with his consent can enlarge the base fee.

By virtue of sect. 60, a base fee created by a disposition,

under the Act, of a commissioner in bankruptcy, is ipso facto

enlarged, in case at any time during the continuance of the

base fee there should cease to be a protector of the settlement.

By virtue of sect. 61, a base fee vested in the person who

would have been tenant in tail if the estate tail had not been

barred, is ipso facto enlarged, if sold as therein mentioned, in

case such person becomes bankrupt, and during the continu-

ance of the base fee there ceases to be a protector of the

settlement.

These powers exerciseable by the commissioners in bank-

ruptcy seem to have been transferred to the Chief Judge in

BASE FEES. 337

bankruptcy by the Bankruptcy Act, 1869, s. 128 ; and to be

now vested in the bankruptcy judge of the High Court by the

Bankruptcy Act, 1888, s. 94.

The Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 23, is as Under

, „ statutes of

follows :— Limitation.

That when a tenant in tail of any land or rent shall have made an assurance

thereof, which shall not operate to bar an estate or estates to take effect after or

in defeasance of his estate tail, and any person shall by virtue of such assurance,

at the time of the execution thereof, or at any time afterwards, be in possession

or receipt of the profits of such land, or in the receipt of such rent, and the same

person, or any other person whatsoever (other than some person entitled to such

possession or receipt in respect of an estate which shall have taken effect after or

in defeasance of the estate tail), shall continue or be in such possession or receipt

for the period of twenty years next after thecomniencement of the time at which

such assurance, if it had then been executed by such tenant in tail or the person

who would have been entitled to his estate tail if such assurance had not been

executed, would, without the consent of any other person, have operated to bar

such estate or estates as aforesaid, then at the expiration of such period of

twenty years such assurance shall be and be deemed to have been effectual as

against any person claiming any estate, interest, or right to take effect after or

in defeasance of such estate tail.

It was the apparent intention of this enactment, ijJso facto

to enlarge a base fee, whenever and so soon as any person

had, under the base fee, been in possession for twenty years

after the date at which there ceased to be a protector of the

settlement.

This enactment was repealed, but substantially re-enacted,

with the substitution of iivelve years for twenty, by the Eeal

Property Limitation Act, 1874, 37 & 38 Vict. c. 57, s. 6.

The scope of these enactments does not seem to be restricted Extended

to the enlargement of base fees, which is, in effect, to make emwtments.

any assurance, purporting to convey a fee simple, valid as

against the persons claiming after or in defeasance of the

estate tail : they seem to be equally efficacious to make valid,

in like manner, other assurances purporting to convey any

less estate. For example, if a tenant in tail should, during

the life of the protector and without his consent, purport to

make" a lease for 1,000 years, then, unless the estate tail

should determine before the expiration of (formerly twenty,

now) twelve years after the death of the protector, the lease

would become ipso facto valid, for the whole of the term, as

C.K.P. z

838

THE NATURE AND QUANTUM OP ESTATES.

against not only the issue in tail, (against whom it would be

valid in any case,) but also as against all persons claiming

after or in defeasance of the estate tail.

Specific per-

formADce of

covenant to

enlarge.

The Court of Appeal has decided, in Banlies v. Small, 36

Ch. D. 716, that the court has jurisdiction, as against the

covenantor, to decree specific performance of a covenant to

enlarge a base fee at a future date, entered into by a tenant in

tail at the time when he created the base fee. As above

mentioned, it makes no difference, for the purpose of enlarge-

ment, whether the base fee remains in the hands of the

(former) tenant in tail who created it, or whether it has been

conveyed to another person.

If the covenantor should die before the arrival of the time

specified, there would of course be no jurisdiction to decree

specific performance of the covenant against any of the

subsequent issue in tail.

Moreover, it is conceived that the decree could be enforced

only by attachment for contempt, in case of disobedience ;

and that the court has no jurisdiction to appoint another

person, under the Supreme Court of Judicature Act, 1884,

47 & 48 Vict. c. 61, s. 14, to execute the requisite deed on

behalf of a recalcitrant covenantor.

339

CHAPTER XXIIL

AN ESTATE FOR THEJjIFE OF THE TENANT.

Under the phrase tenant for term of life, Littleton includes

both a tenant for the term of his own life and a tenant for the

term of another's life, or pur autre vie. (Litt. sect. 66.)

But the latter tenancy is distinguished by some peculiar

characteristics, which make its separate treatment desirable.

To these, says Lord Coke, may be added a third, namely,

for the lives of the tenant himself and of another person or

persons, which limitation creates a single estate of freehold.

(Co. Litt. 41 b.) If the other person or persons die in the

lifetime of the tenant, this estate becomes thenceforward an

estate for his life simply ; but otherwise this estate becomes

subject, at his. death, to the peculiar characteristics of an

estate pur autre vie.

The following is a complete list of estates for life or lives: — Division of

estates for

life or for

1. An estate for the life of the tenant himself, including lives.

(i) Estates arising by express limitation ;

(ii) Estates arising only by implication ;

(iii) The estate of tenant in tail after possibility of

issue extinct ;

(iv) The estate of a tenant by the curtesy ; and

(v) The estate of a tenant in dower ;

2. An estate for the life of another person, or pur autre vie ;

3. An estate for the joint lives of several persons ; and

4. An estate for the life of the longest liver of several

persons.

Every tenant for life has by the common law, as incident Right to

to his estate, and without express grant, the right to take in ^^\*<''^^\*^'

reasonable measure three kinds of estovers — housbote (which

z 2

340 THE NATURE AND QUANTUM OF ESTATES.

includes firebote), ploughbote, and haybote ; unless he bo

restrained from taking them by special covenant. (Co. Litt.

41 b.) Such a covenant did not make the cutting of estovers

waste, but only rendered the tenant liable in damages on the

covenant. (Dy. 198 b, pi. 53.) To cut timber so far as may

be necessary for these purposes, is not waste ; provided, of

course, that the timber is in ^ct so used accordingly. (Co.

Litt. 53 b.) If the tenancy arises under a settlement, the

tenant's rights of user are always expressly provided for by

the settlement; and in practice the tenancy for life is

commonly declared to be without impeachment of waste. If

the tenancy arises under a lease, the rights of the tenant are

in practice provided for in the lease.

Tenant for By the common law, a tenant for life under a settlement

sLuieme^nt^as ^^^ ^^ rights of user, or power to deal with the land, other

distinguished ^jj^ajj tliose possessed by a lessee for life holding merely under

for life under a lease at a rent. But modern social arrangements have

rent. firmly established a very great difference, as to their relation

to the land, between a tenant for life under a settlement and a

lessee for life or lives at a rent ; of whom the former is in

practice the beneficial owner of the property, whose interest,

either with his own consent or by the settlement of an

ancestor, has been cut down to a life estate, while a tenant for

life under a lease at a rent, is merely a farmer holding under

a lease for life instead of a lease for years. This distinction

in status was recognized by 14 Geo. 2, c. 20, which enabled

the consent of a tenant under a lease to be dispensed with on

occasion of suffering a common recovery. {Vide supra, p. 310.)

The same distinction has been enforced by several subsequent

statutes, and most strongly by the Settled Land Act, 1882 ;

by which extensive powers of alienation, enfranchisement,

exchange, partition, leasing, and for other purposes, are con-

ferred upon every person beneficially entitled to possession

(which in that Act includes receipt of income) of settled land

under a settlement, as defined in sect. 2, sub-s. (1) of that

Act. The definition there given of a settlement accords with

the usual meaning of the phrase; and the definition of a

tenant for life obviously includes a legal tenant for his own

AN ESTATE FOR THE LIFE OF THE TENANT. 841

life, beneficially entitled in possession. A list of these statu-

tory powers will be found at p. 349, iiifi-a. The following

remarks will, in the absence of express mention, be restricted

to such points connected with estates for life as do not seem to

be affected by the statutes above referred to.

An estate for life may arise in any of the following ways : — i^ow tenancy

for life may

arise.

(1°) By express limitation to a grantee during his life ;

(2°) By implication of law ; where a grant is made to a

grantee by name, either without any words of limita-

tion, or accomjDanied by words intended to take effect

as words of limitation, but not by law capable of so

taking effect as to limit any greater estate ;

(3°) By the assignment of an estate pur autre vie to cestui

que vie; and

(4°) By operation of law, on the arising of a husband's

right to curtesy, or of a widow's right to dower.

Any conveyance, otherwise valid and capable of taking effect. Estate for life

which nominates a grantee, but neither limits nor purports to tion.

limit any estate, will, in the absence of any further indication,

operate by implication of law to pass an estate for the life of the

grantee. (Co. Litt. 42 a ; see also Litt. sect. 283.) Similarly,

if the limitation is/o7- term of life, without saying for whose life.

(Co. Litt. 42 a.) But, in the latter case, an estate for the life of

the grantor will pass, if the grantor might rightfully grant that

estate, but could not rightfully grant for the life of the grantee.

(Ibid. See also 183 a.) And the implication of law upon

which the estate arises is liable to be rebutted by the manifesta-

tion of a contrary intention. For example, if the words which

would generally give rise to the implication should be in the

premisses of a deed, the hahendum may rebut the implication

and ex[)ressly limit an estate for years, or at will ; and this

restriction of the implication may be effectual, even though the

hahendum itself should be technically void as a limitation, and

therefore not capable of taking effect otherwise than as a

manifestation of intention. (See the 1st resolution in Buchier's

Case, 2 Rep. 55. For further observations upon the relation

between the premisses and the hahendum, see p. 411, infra.)

The addition to the narne of a grantee of any words designed

342 THE NATURE. AND QUANTUM OF ESTATES.

to serve as words of limitation, not being such asj either by the

common law or by sect. 51 of the Conveyancing Act of 1881,

are appropriated to the limitation of a fee, will not enable the

assurance to pass any estate of inheritance ; and in general, will

not enable the assurance to pass any greater estate than would

have passed by the mere nomination of the grantee. But it has

been held, by the Court of Exchequer, that the addition to

the name of the grantee of the words, "his executors, adminis-

trators, and assigns," in the premisses of a deed, will, when the

grantor has an estate for his own life, expressly pass the whole

estate of the grantor to the grantee, so as to make the habendum,

if purporting to grant a less, or an impossible, estate, void for

the inconsistency. (Boddinfiton v. liobinson, L. R. 10 Exch. 270.)

For some remarks upon this case, see p. 108, supra.

Curtesy.

To entitle the husband to be tenant by the curtesy of the

wife's lands of inheritance after the death of the wife, the

following circumstances are necessary : —

(1) That the wife be seised during the coverture of an estate

of inheritance to which issue of the marriage may

possibly succeed as heir to the wife (Litt. sects. 35, 52);\*

(2) That the estate be, or become during the coverture, an

estate in possession ;

(3) That seisin in deed (less properly styled actual seisin) be

obtained during the coverture ; and

(4) That issue be born alive.

For some remarks upon the distinction between seisin in deed

and seisin in law, see p. 232, siqn'a.

If the lands be subject to the custom of Kent, the curtesy is

of a moiety only, and ceases on the re-marriage of the husband ;

but such curtesy attaches without birth of issue. (Co. Litt. 30a;

ibid. Ill a : and see on the subject generally, Rob. Gav. bk. ii.

ch. 1.) Special custom may assign a different proportion, or the

whole, to the husband.

\* [As to the necessity of the wife being solely seised, see Palmer v. Rich,

(181)7) 1 Ch. at p. 140. As to seisin in deed under a statutory deed of grant,

ride infra, p. 415.]

AN ESTATE FOR THE LIFE OF THE TENANT. 343

The rule, that seisin in deed must be acquired during the As to seisin

coverture, applies in its full rigour only to lands. As regards

other realty of which there is curtesy, a seisin in law suffices if

circumstances make seisin in deed impossible : thus, of a rent, if

the wife dies before it becomes due, or of an advowson, if she

dies before the church becomes vacant. (Co. Litt. 29 a.) Entry

is not necessary to acquire seisin in deed of land, if there be a

tenant for years of the land ; because his possession is the pos-

session of the husband and wife, even before the receipt of rent

from him. (Harg. n. 3 on Co. Litt. 29 a ; and see p. 233, supra.)

Lord Coke (Co. Litt. 40 a) refers the necessity for actual

seisin to Littleton's words (sect. 52), that the issue must be such

as may by possibility inherit as heir to the ivife : descent being

traced before the Descent Act, 3 & 4 Will. 4, c. 106, from the

person last seised. It would seem to follow, if he is right, either

that there is now curtesy only of lands coming to the wife by

purchase, or else that actual seisin has ceased to have any

relevancy to the matter.

In Eager v. Furnivall, 17 Ch. D. 115, it seems to have been

assumed that the alteration of the rules of descent has not

affected the necessity for actual seisin ; but the point was not

raised.\* It was also assumed, that a seisin in law of lands would

suffice, when a seisin in deed could not by any possibility be

had. It is to be observed, that, in Eager v. Furnivall, the im-

possibility arose out of a peculiar state of circumstances caused

by sect. 33 of the Wills Act, and was an absolute impossibility ;

whereas, upon an actual descent at the common law, there could

never be an absolute impossibility to obtain seisin in deed, but

only a certain degree of difficulty which, however great in prac-

tice, could not in theory be said to be insuperable.

With regard to tenure, there is this difference between curtesy

and dower, that tenant by the curtesy holds immediately of the

superior lord, while tenant in dower holds immediately of the

heir, and is attendant on him for one-third of the services.

(Watk. Desc. 104, 105.)

The Court of Chancery allowed to the husband a right, analo- Equitable

gous to curtesy, which may be styled equitable curtesy, in curtesy.

\* [See Mr. Joshna Williams's remarks on the question, Real Prop., App. C]

844 THE NATURE AND QUANTUM OF ESTATES.

V

respect of equitable estates having the same nature and quantum

as legal estates which confer the right. (Harg. n. 6 on Co. Litt.

29 a.) The phrase equitable estates here includes an equity of

redemption, see Coshornc v. Scarfe, 1 Atk. 603 ; also trust

money held upon trust for investment in laud, see Sweetapple v.

Bindon, 2 Vern. 636. The doubt expressed in the last-cited

case, whether curtesy should be allowed if the trust arose under

marriage articles, is disposed of by Cunninyhain y. Moody, 1 Ves.

sen. 174.

Effect of a If the wife is entitled to her separate use, not only as regards

for the wife, the income but also as regards the corpus, this does not prevent

the right of the husband from attaching, though it will be

defeated by the wife's alienation, whether i/ite/- vivos or by will.

{Cooper \.Macdonald,7 Gh.D. 288; overruling Moorev. Webster,

L. E. 3 Eq. 267.) An express declaration contained in the

settlement, that the husband " shall not be tenant by the cur-

tesy," will exclude his right altogether ; even though the legal

estate be in the wife. {Bennet v. Davis, 2 P. Wms. 316.)

\*^"- So far as alienation is concerned, the power of a wife entitled

for an estate of inheritance to her separate use, to defeat her

husband's curtesy, seems to be the same as the power of a

husband under the Dower Act, 3 & 4 Will. 4, c. 105, to defeat

his wife's dower. But it does not appear that a wife could, by

a mere declaration of intention, without making any disposition

of the estate, defeat her husband's curtesy.

The Married By the Married Women's Property Act, 1882, ss. 2, 5, all

Property Act, property of women married after the commencement of the Act,

1882. g^j^j property of women married before that date, the title to

which shall accrue after that date, is placed uponanovel footing^

But it does not appear that these provisions make any further

change in the law affecting curtesy, than to put all curtesy

(except of estates the title to which may have devolved upon a

married woman before the Act's commencement, which remain

unaffected) upon the same footing as equitable curtesy in cases

where, before the Act's commencement, the wife was entitled to

both income and corpus to her separate use. The Act seems to

aim at raising a separate use for a married woman by implica-

tion of law and without the intervention of a trustee : which

AN ESTATE FOR THE Ll^E OF THE TENANT. 345

has not necessarily any wider operation than a separate use

raised by contract. But the question does not appear to have

been foreseen ; and, so far as regards estates belonging to

women married after the Act's commencement, and estates

coming towomen previously married by a subsequently-accruing

title, it must be answered with some caution.\*

A tenant by the curtesy is enumerated among the persons statutory

upon whom, when their respective estates or interests are in '^ ^ \*^'

possession, the statutory powers of a tenant for life are conferred

by the Settled Land Act, 1882. (See sect. 58, sub-s. 1, viii, of

that Acti) But sub-s. (2) of the same section enacted, with

regard to each of the persons thereinbefore mentioned, that the

provisions of the Act referring to a settlement, and to settled

. land, should extend to the instrument under which such person's

estate or interest arises, and to the land therein comprised. The

enactment seems therefore to have no meaning in relation to

tenants by the curtesy, because the estate of a tenant by the

curtesy does not arise "under" any "instrument," but hw^

virtue either of the common law or of a special custom. '""'The

Settled Land Act, 1884, s. 8, enacts that, for the purposes of

the Settled Land Act, 1882, the estate of a tenant by the

curtesy shall be deemed to be an estate arising under a settle-

ment made by his wife. This enactment does not say when the

settlement shall be deemed to have been made, or what it shall

be deemed to comprise. Probably the date of the supposed

settlement will be taken to be the date of the marriage, and it

will be taken to comprise the estate of inheritance under which

the tenancy by the curtesy arises.

Doiver.

There formerly existed three kinds of dower other than dower Various

at the common law ; including under the phrase, dower at the jower! °

common law, dower out of lands held by common law tenure,

but of which, by special custom, some other proportion than

one third part is assigned for dower. Two of the three, dower

ad ostium ecclesice {sive monasterii) and dower ex assensu patris

(Litt. sect. 38), were abolished by the Dower Act, 3 & 4 Will. 4,

c. 105, s. 13. The third kind, dower dc la pluis bcale (Litt.

\* [See Iloj/e V. //«/«?, (1892) 2 Ch. .S3i!, stated in/rti, p. 474, where the effect

of motlern legislation on the law of curtesy is discussed.]

846

THE NATURE AND (QUANTUM OF ESTATES.

Dower at the

common law.

By special

custom.

Freebench.

Joint tenants

and tenants

in common.

Wife of mort'

gagee not

entitled to

dower after

redemption.

sect. 48), which depended for its existence upon the distinction

between tenure in chivah-y and tenure in socage, was practically

abolished with the abolition of tenure in chivalry by 12 Car. 2,

c. 24.

Dower at the common law is of a third part of all tenements

of which the husband was solely seised, whether in deed or in

law, at any time during the coverture, for an estate of inheri-

tance to which issue of the wife by the husband might by

possibility inherit ; but such issue need not be born. (Litt.

sect. 30.) The wife is dowable of a fee tail, even though it

should be determined by the death of the husband without

issue. (Perk. sect. 317.) By local custom dower may be of a

half, or the whole. (Litt. sect. 37.) In that case, it is more

properly styled dower by local or special custom. (2 Bl. Com.

132.) If the lands be subject to the custom of Kent, the dower

is of a moiety, and ceases on re-marriage or fornication.

(Rob. Gav. pp. 205, 206.) But dower by special custom must

be carefully distinguished from dower out of lands held by

customary tenure for customary estates of inheritance, usually

styled freebench.

A wife is not dowable of a fee of which the husband was

seised as joint tenant with others. (Co. Litt. 31 b.) But the

undivided shares of tenants in common are, for all purposes

except physical possession, separate tenements, of which they

respectively are solely seised ; and therefore dower may be

claimed of such undivided shares. And for this purpose the

estate of a coparcener is a separate tenement, and dower may

be claimed of it. (3 Prest. Abst. 368.)

Although the husband was allowed equitable curtesy of

equitable estates, the wife was not allowed equitable dower.

{Chaplin v. Chaplin, 3 P. Wms. 229 ; Godwin v. Winsnwre, 2

Atk. 525.) This doctrine applied to an eq-uity of redemption.

(2 Bac. Abr. 715.) But by the Dower Act, 3 & 4 Will. 4,

c. 105, as hereinafter mentioned, dower may now be claimed

of equitable estates of inheritance in possession.

For some time after that the right of the mortgagor to

redeem a mortgage in fee simple had been established in equity,

it was considered that, when the mortgagee's estate had become

absolute at law by default of payment on the stipulated day,

AN ESTATE FOR THE LIFE OF THE TENANT. 347

the mortgagor could not, by redeeming, defeat the right of the

wife of the mortgagee to dower; because her right had attached

at law immediately upon her husband's estate becoming abso-

lute at law. This was one reason of the introduction of mort-

gages for long terms of years instead of in fee simple. (Butl.

n. 1 on Co. Litt. 205 a.) It is now regarded as an axiom in

equity, that redemption defeats the claim of the mortgagee's

wife to dower.

When the husband's fee, by virtue of which the wife claims

dower, is liable to be defeated by the exercise of a power vested

in the husband, such an exercise of the power will defeat the

wife's right to dower. {Hay v. Pung, 5 Madd. 310, 5 B. &

Aid. 561.)

The Statute of Uses, 27 Hen. 8, c. 10, contained, inter alia, Jointures,

certain provisions to enable husbands to bar dower by assigning

a jointure ; as to which, see Co. Litt. 36 b. These were repealed

by the Statute Law Kevision Act, 1863.

The dower of all women married after 1st January, 1834, is Provisions of

. 3& 4 Will. 4

now regulated by the Dower Act, 3 & 4 Will. 4, c. 105, which c. 105.

gives the wife, in addition to her common law dower, a right to

dower out of equitable estates of inheritance in possession

(sect. 2),\* and also out of estates as to which the husband had

only a right of action (sect. 3). But it makes the wife's claim

to dower subject to all partial estates and interests, and all

charges created by any disposition or will of her husband, and

all debts, incumbrances, contracts, and engagements to which

his land is subject or liable (sect. 5) ; and subject also to any

conditions, restrictions, and directions contained in his will

(sect. 8) ; and it enables the husband wholly to defeat her right

to dower, whether at the common law or by virtue of the

statute, by any of the following means : —

1. By absolutely disposing of the lands in his lifetime. How husband

(Sect. 4.) \_ ^ Sef-^

2. Or absolutely disposing of the lands by his will. (Ibid.)

\* [See lie Micliell, (1892) 2 Ch. 87.]

848 THE NATURE AND QUANTUM OF ESTATES.

3. By a declaration contained in the deed by which the land

was conveyed to him, that his wife shall not he entitled

to dower out of such land. (Sect 6.)

4. By a like declaration contained in any deed executed by

him. {Ibid.)

5. By a like declaration contained in his will. (Sect. 7.)

6. By devising to or for the benefit of his widow, any land,

or any estate or interest therein, out of which she would

otherwise be entitled to dower. (Sect. 9.)

But a gift of personal estate, or of land not subject

to dower, does not prejudice her right. (Sect. 10.)

The provisions of this Act do not extend to copyholds.

{Powdrell V. Jones, 2 Sm. & Giff. 407 ; Smith v. Adams, 5 De G.

M. & G. 712.)

Tenant in dower is perhaps the only "limited owner" upon

whom no powers are conferred by the Settled Land Act, 1882.

Settled Es-

tates Act,

1877.

Statutory Powers.

Certain powers of leasing are conferred upon a tenant for life,

beneficially entitled to possession or receipt of rents and profits,

by the Settled Estates Act, 1877, 40 & 41 Vict. c. 18, s. 46 ;

but it is not probable that these powers will in future be often

used in practice. Larger powers of leasing are conferred by the

Settled Land Act, 1882, 45 & 46 Vict. c. 38, ss. 6—12 ; and

the latter powers are now, by the Settled Land Act, 1884, s. 5,

in a very great measure freed from tlie inconvenience attending

the provisions respecting the giving of notices, contained in the

Settled Land Act, 1882, s. 45. There seems now to be gene-

rally no motive for resorting to the powers conferred by the

Settled Estates Act, 1877, in preference to those conferred by

the Settled Land Act, 1882.

Settled Laud

Acts.

The following powers are, by the Settled Land Act, 1882,

45 &, 46 Vict. c. 38, conferred upon, or made exerciseable by, a

variety of persons, or classes of persons, described or enumerated

AN ESTATE FOR THE LIFE OF THE TENANT. 349

in sect. 2, sub-s. (5), sect. 58, sub-s. (1), and sects. 60 — 63,\* of Settled Land

that Act. The typical donee of these powers is " the person

who is for the time being, under a settlement, beneficially

entitled to possession of settled land, for his life." (Sect. 2,

sub-s. 5.) t

(1) A power to sell the settled land, or any part thereof, or Sale.

any easement, right, or privilege of any kind, over or in

relation to the same. (Sect. 3, sub-s. i.)t

But the principal mansion house, and the lands usually

occupied therewith, could not be sold, or leased, under

the provisions of the Act of 1882, without the consent of

the trustees or an order of the court. (Sect. 15.) This

enactment was repealed by the Settled Land Act, 1890,

53 & 54 Vict. c. 69, s. 10, sub-s. (1); but re-enacted,

and made applicable also to exchanges, by sub-s. (2) ;

subject to the declaration contained in sub-s. (3), that

" where a house is usually occupied as a farm-house, or

\*' where the site of any house and the pleasure grounds

" and park and lands (if any) usually occupied therewith

\*' do not together exceed 25 acres in extent, the house

" is not to be deemed a principal mansion house " for

the present purpose.

(2) A power, where the settlement comprises a manor, to sell Release of

the seignory of any freehold land within the manor, or eufianchisc-

\_ ment.

\* The provisions of sect. 63 are amended by the Settled Land Act, 1884,

ss. 6, 7. These provisions do not refer to a tenant for life in the ordinary

meaning of the phrase.

t [In interpreting the Settled Land Act, (he court has regard to the mischief Policy of the

against which it is directed, namely the evils which wei"e in many cases pro- Settled I-antl

duced by strict settlements of land. The main object of the Act is to make

settled land marketable, and to benefit all persons interested in it, not merely

the persons taking under the settlement : Bruce v. MarqviK of Ailesbury,

(1892) A. C. 356 ; Re Mundy and Eoper, (1899) 1 Ch. at p. 288.]

I [This cannot have reference to existing easements included in the settle-

ment, for an " easement over the settled land " must necessarily be vested in

the owner of the adjoining land. The section is, it is submitted, intended to

authorize the creation de novo, by way of sale, of an easement, right, or

privilege, over or in respect of the land remaining subject to the settlement.

A tenant for life, therefore, can sell a field or house forming part of the settletl

land, with the benefit of a right of way, or the like, over the unsold portion

of the settled land. If the settlement includes an existing easement over land

adjoining (he settled land, this, it is submitted, is an incorporeal hereditament,

and therefore "land" within the definition clause (sect. 2), Consequently such

an easement can be sold under sect. 3. See supra, p. 56.]

Act.

850

THE NATURE AND QUANTUM OF ESTATES.

Settled Land

Acts.

Exchange.

Partition.

the freehold and inheritance of any copyhold or cus-

tomary land, parcel of the manor, with or without the

minerals and mining rights, so as, in every such case, to

effect an enfranchisement. (Sect.3,sub-s.ii.) This seems

to mean, that he may enfranchise copyholds, parcel

of the manor, and release the tenure (thereby extin-

guishing the services) of freeholds, held of the manor.

An enfranchisement may be made with or without a

re-grant of any right of common or other right, easement,

or privilege theretofore enjoyed with the land enfran-

chised. (Sect. 4, sub-s. 7.) Rights of common in the

wastes of the manor are extinguished at law by enfran-

chisement, unless specially preserved by the use of terms

equivalent to a re-grant of the common. (1 Watk. Cop.

451.) They are not extinguished in equity. (Sti/aiity.

Staker, 2 Vern. 250.) Nor will an enfranchisement

effected under 4 & 5 Vict. c. 35 (see s. 81), and 15 & 16

Vict. c. 51 (see s. 45), [see now Copyhold Act, 1894,]

deprive the tenant of any commonable right to which

he may be entitled.

(3) A power to make an exchange of the settled land, or any

part thereof, for other land, including an exchange in

consideration of money paid for equality of exchange.

(Sect. 3, sub-s. iii.)\*

Settled land in England cannot be given in exchange

for land out of England. (Sect. 4, sub-s. 8.)

As to exchanges affecting the principal mansion house

see the Act of 1890, s. 10, cited above, under para. (1).

(4) A power, where the settlement comprises an undivided

share in land, or, under the settlement, the settled land

has come to be held in undivided shares, to concur in

making partition of the entirety, including a partition

in consideration of money paid for equality of partition.

(Sect. 3, sub-s. iv.)

Money required for enfranchisement, or for equality of

• [As to the decision of Joyce, J., in Re Jirotherton, 97 L. T. 880, see an

article by the editor in the Law Quarterly Review, xxiv., at p. 262 ; and ftrfe

supra, p. 56. As to the grant of an easement over the settled land de novo by

way of exchange, under sect. 5 of the Settled Land Act, 1890, see Re BraclterCs

Settled Estates, (1903) 1 Ch. 265.]

AN ESTATE FOR THE LIFE OF THE TENANT. 851

exchange or partition, may be raised by mortgage of the Settled Land

settled land or any part thereof. (Sect. 18.)

(6) A power, with the consent of the incumbrancer, to charge Shifting of

an incumbrance affecting land sold, or given in exchange brances.

or on partition, on any other part of the settled land,

whether already charged therewith or not, in exoneration

of the part sold, or so given. (Sect. 5.)

(6) A power to lease the settled land, or any part thereof. Leasing.

or any easement, right, or privilege of any kind, over or

in relation to the same, for any purpose whatever,

whether involving waste or not, on building lease for

any term not exceeding ninety-nine years ; on mining

lease for any term not exceeding sixty years ; and on

any other kind of lease, for any term not exceeding

twenty-one years. (Sect. 6.)

With permission of the court, to be given under special

circumstances, a building or mining lease may be made

for any term, or may be granted in perpetuity. (Sect. 10.)

But the principal mansion house, and the lands

usually occupied therewith, could not, under the Act of

1882, be leased without the consent of the trustees or an

order of the court. (Sect. 15.) See now the Act of

1890, s. 10, cited above under para. (1).

Leases made under the statutory power must comply

with the following conditions (sect. 7) : —

(i) Every lease must be made by deed, to take effect

in possession not later than twelvemonths after

its date ;

(ii) And must be at the best rent, regard being had

to any fine taken and other circumstances ;

(iii) The lessee must covenant to pay the rent, with a

condition of re-entry upon default for a time

not exceeding thirty days ;

(iv) A counterpart must be executed by the lessee.

(7) A power (sect. 12) : — Confirmation

(i) To give effect to a contract for a lease entered

into by any of his predecessors in title, where

such lease, if made by the predecessor, would

have bound the successors in title ;

352

THE NATURE AND QUANTUM OP ESTATES.

Setddl Land

Acts.

Accepting

surrenders.

Licences to

lease copy-

holds.

Appropria-

tion of

streets, kc.

Cutting

timber.

Contnicts,

(ii) To give effect to a covenant for renewal, per-

formance whereof could be enforced against

the owner for the time being of the settled

land ;

(iii) To confirm, " as far as may be, a previous lease,

being void or voidable ; but so that every lease,

as and when confirmed, shall be such a lease as

might at the date of the original lease have

been lawfully granted under the Act or other-

wise as the case may require."

(8) A power to accept, with or without consideration, a sur-

render of any lease, whether made under the Act or

not ; and such surrender may relate to the whole, or any

part, of the land comprised in the lease. On a partial

surrender, the rent may be apportioned ; and on the

grant of a new lease, the value of the lessee's interest

under the surrendered lease may be taken into account

in fixing the rent. (Sect. 13.)

(9) A power to license copyholders of any manor comprised

in the settlement, to make any such leases of their copy-

hold lands as the tenant for life is by the Act empowered

to make of freehold land. (Sect. 14.) It is conceived

that the leasing powers of the tenant for life extend to

copyholds only so far as their exercise accords with the

custom of the manor.

(10) A power, in connection with a sale or lease for building

purposes, to cause to be appropriated and laid out, for

the general benefit of the residents on the settled land,

any parts thereof for streets, gardens, or other open

spaces, with drains, fencing, paving, or other works

necessary or proper in connection therewith ; and also

to make arrangements for their continued repair and

maintenance. (Sect. 16.)

(11) A power, if impeachable for waste in respect of timber,

on obtaining the consent of the trustees or an order of

the court, to cut and sell timber ripe and fit for cutting.

(Sect. 35.)

(12) A power to make, vary, or rescind, with or without

consideration, and accept surrenders of, contracts for

AN ESTATE FOR THE LIFE OF THE TENANT. 363

carrying into effect any of the purposes of the Act. Settled Land

(Sect. 31.) ^'^'•

(13) A power, where personal chattels are settled on trust to Sale of quasi-

devolve with land so as ultimately to vest in some person

attaining an estate of inheritance therein, to sell such

chattels on obtaining an order of the court. (Sect. 37.)

(14) Under the Act of 1890, s. 11, money may be raised by Raising

mortgage for the discharge of incumbrances. The only mor^^ge.

purposes for which, under the Act of 1882, money might

be raised by mortgage, were (I) for enfranchisement, or

for equality of exchange or partition, by sect. 18 ; and

(2) for the payment of costs ordered to be paid by the

court out of the settled property, by sect. 47.

It is the general effect of the foregoing powers, to liberate

the settled land, so far as the exercise of any particular power

extends, from the limitations and trust of the settlement, and

to transfer their operation to the money, investments, lands, or

other net proceeds, obtained by exercising the power. Thus

the Act does not in general destroy the settlement, but only

alters the subject upon which it operates.

[In order to carry out this object, the Act provides (s. 22) Trustees for

that when a tenant for life\* exercises his statutory power of ^^ u^^'^^Ta

sale, the purchase money must be paid either to the " trustees Land\cts.^

of the settlement for the purposes of the Settled Land Acts,"t

or into court, and must be apj)lied or invested as capital

money : thus it may be applied (s. 21) in purchasing other

land, or in discharging incumbrances or paying for improve-

ments on the unsold part of the settled land ; or it may be

invested on securities, in which case the beneficial interest in

them devolves in the same way as the settled land..

["Settlement," for the purposes of the Settled Land Acts, What is a ^

means any instrument, or any number of instruments, under for^the""^^'

■- purposes of

\* [It will be remembered that the statutory powers can be exercised by the Settled

certain limited owners who are not tenants for life — such as tenants in tail : Land Acts.

Settled Land Act, 1882, sect. 58.]

t [In modern settlements it is usual expressly to appoint trustees for the

purposes of the Settled I^and Acts ; in the case of a settlement executed before

1883, there are generally trustees who are empowered to sell or consent to a

sale, and this makes them trustees of that settlement for the purposes of the

Acts, As to a future trust or power of sale, see Settled Land Act, 1890, sect. 16 ;

ReJ/icknon's Settled Estates, (1902) 1 Ch. 258.]

C.R.P. A A

settlement."

354 THE NATURE AND QUANTUM OF ESTATES.

which land stands limited to or in trust for any persons by

way of succession.\* It follows that there may be at the same

time a more comprehensive " settlement " consisting of several

instruments, and a less comprehensive " settlement " con-

stituted by only one of those instruments.! Where a tenant

for life sells settled land under the powers of the Settled

Land Acts, it is important to ascertain under what " settle-

ment " he is tenant for life in possession, partly because his

conveyance cannot overreach any interests except those exist-

ing under that settlement,! and partly because he cannot sell

at all unless there are trustees of that settlement for the pur-

poses of the Settled Land Acts.§

Compound [Where a family estate has been the subject of several deeds

'"' ' q£ re-settlement and appointment, executed at different times,

and under which jointures and other interests are still subsist-

ing, these various deeds together constitute a " settlement "

within the meaning of the Settled Land Acts, (or, as it is often

called for convenience, a " compound settlement,") and the

tenant for life in possession can by exercising his statutory

powers overreach the jointures and other interests existing

under the compound settlement, even if they were created

before his life interest, provided there are S. L. A. trustees

of the compound settlement. || In such a case there are

probably S. L. A. trustees of the last settlement, but it rarely

happens that there are S. L. A. trustees of the whole group of

deeds which together constitute the compound settlement, 1i

and if there are not, it is necessary to have such trustees

appointed by the court.\*\*

[The expression " compound settlement " is also applied to

the case of two estates being settled at different times upon

the same limitations and trusts : thus where A by deed conveys

Blackacre by way of settlement, and by his will devises White-

acre to the subsisting uses or trusts of that deed, the deed and

the will together constitute a "compound settlement. "tt In

\* [Settled Land Act, 1882, sect. 2.]

t [Re Mtmdy and Roper's Contract, (1899) 1 Ch. 275.]

X [Including those created by any derivative settlement : Re Knowlet'

Settled Estates, 27 Ch. D. 707, and including incumbrances created by a

remainderman : Re Bavlvs and Kent, (1910) 2 Ch. 35.]

§ [ WlveelwrigU v. Walker, 23 Ch. D. 752.]

II [Re Marquis of Aileshury and Lord Iveagh, (1893) 2 Ch. 345 ; Re Mundy

and Roper, (1899) 1 Ch. 275 ; Re Philliniore's E-itate, (1904) 2 Ch. 460.]

H [See Re Wimhorne and Browne, (1904) 1 Ch. 537 ; Re Sj^earman Settled

Egtates, (1906) 2 Ch. 502.]

\*• [Unless, of course, the persons entitled to the prior jointures and other

interests are willing to release them, in which case the tenant for life can sell

under the settlement creating his life estate, if there are S. L. A. trustees of

that settlement.]

ft [Re Mundy's Settled Estates, (1891) 1 Ch, 399 : Re Monson's Settled

Estates, (1898) 1 Ch. 427. The same principle applies where the property

AN ESTATE FOE THE LIFE OF THE TENANT.

such a case it often happens that the persons who are S. L. A.

trustees of the earlier instrument have by reference a power

of sale (or trust for sale) over the land added to the settle-

ment by the second instrument, and then it seems clear that

they are S. L. A. trustees of the whole settled estate without

being expressly appointed S. L. A. trustees of the compound

settlement.\*]

settled by one of the iustruments is money directed to be laid out in the purchase

of land: Re Byng's Settled Edates, (1892) 2 Ch, 219: Re Lord Stafford's

Settlement, (190i) 2 Ch. 72.]

\* [See Re Mwidy'g Settled Estates, (1891) 1 Ch. 399 ; Re Byng's Settled

Estates, (1892) 2 Ch. 219 ; Re Monson's Settled Estates, (1898) 1 Ch. 427 ; Re

Moore, (1906) 1 Ch. 789, In Re Coull's Settled Estates, (1905) 1 Ch. 712,

Kekewich, J., laid it down as a general principle that in every case where land

is added to an existing settlement, the tenant for life cannot exercise his

statutory powers unless trustees of the " compound settlement " are expressly

appointed. It is submitted that this is not so, and that the statement of the

learned judge is merely a dictum, for in Re Coull's Settled Estates the trustees

of the original settlement were not S. L. A. trustees ; it was therefore clearly

necessary to appoint S. L. A. trustees, and it was convenient and proper to

appoint them trustees of the compound settlement.]

855

A A

856 THE NATURE AND QUANTUM OF ESTATES.

CHAPTER XXIV.

ESTATES PUR AUTRE VIE.

So far as regards its quantum, an estate jwr autre vie\* may be

limited to endure (1) during the life of a single person ; or

(2) during the joint lives of several persons ; or (3) during the

life of the longest liver of several persons.f In the following

remarks the word life will, for brevity, be used to include lives.

Every tenant j^ur autre vie has, by the common law, the same

right to estovers as a tenant for his own life. (Co. Litt. 41 b.)

By the common law, a tenant j?9wr autre vie holding under a

settlement has no rights of user, or power to deal with the land,

other than those possessed by a lessee jmr autre vie holding

\* [The correct spelling is ]mr aider He. The phrase does not mean "for

another life," but " for the life of another person."]

•f [In Me Ashfurth, (1905) 1 Ch. 535, a testatrix devised real estate to trustees

and their heirs upon certain trusts during the lives of A., B., and C, and the

survivors and survivor of them, and after the death of the survivor upon trusts

for the children of A. and B. and C, bom in the testatrix's lifetime or within

twenty-one years after her death ; and after the death of all such children,

except one, the testatrix devised the real estate to such surviving child.

Farwell, J., said that the case was " undistinguishable from Garland v. Brown "

(10 L. T. 292) ; he therefore seems to have thought that the limitation to the

last surviving child was equitable ; but the learned judge went on to say :

" Then it is said that this is a legal contingent remainder supported by a

particular estate vested in trustees during the lives of the grandchildren and of

the survivor of them, and this was not disputed." No doubt the limitation to

the last surviving child was legal, but it is diflScult to see how it can have been

a contingent remainder. There is, so far as the present writer is aware, no

authority for the proposition that a devise to X. and Y. and their heirs, during

the lives of living persons and their unborn children, gives X. and Y. a " particular

estate " capable of supporting a contingent remainder. The description of an

estate ji^wr auter vie, as given by Littleton and Lord Coke, clearly implies that

cestui que vie must be alive when the estate is created ; moreover, the notion

that there can be an estate ^«r autcr vie during the lives of living persons and

their unlwrn children seems inconsistent with the well-known doctrine that an

estate for a man's own life is higher than an estate ju«r auter vie (Co. Litt. 42 a),

which is the reason why an estate for a man's own life cannot merge in an

estate pur auter vie. (3 Prest. Conv. 225.) See an article by the present writer

in 49 Sol. Journal 793, referred to in Gray on Perpetuities, 2nd ed., addenda.

The vdtimate limitation in Re Aghforth was, it is submitted, an executory

devise, and clearly void for remoteness. The case is therefore no authority

on the question whether contingent remainders are subject to the modem

Rule against Perpetuities. Vide supra, p. 214, n.]

ESTATES PUR AUTRE VIE. 357

merely under a lease at a rent. But by the Settled Land Act,

1882, s. 58, sub-s. (1), (v.), a tenant pur autre vie, not holding

merely under a lease at a rent, has, when his estate is in pos-

session, the powers conferred by that Act upon a tenant for life

under a settlement.

So far as regards its origin, an estate pur autre vie may arise Methods by

, , 1 1 which the

m any of three several ways : — j.gtate may

arise.

(1) By express limitation, which is either to a grantee simply,

during the life of cestui que vie, or to a grantee and his

heirs, during such life.

When the Statute of Frauds had (as hereinafter men-

tioned) cast the estate, in default of a devisee or special

occupant, upon the executors or administrators of a

deceased tenant pur autre vie, a practice sprang up of

limiting the estate to the executors or administrators

instead of to the heirs.

(2) By the assignment to another person of an existing estate

for life, which latter estate may have arisen either by

act of parties, or by operation of law, as curtesy or dower ;

and the assignment is, like the express limitation above

referred to, either to the grantee simply, or to him and

his heirs, or to him and his executors or administrators,

during the life of cestui que vie.

(3) By operation of law, when, before the abolition of for-

feiture by 33 & 34 Vict. c. 60, an estate for the term of

the life of an attainted traitor, who was entitled to an

estate for his own life, was by forfeiture cast upon the

king ; or when, before the practical abolition of general

occupancy by the Statute of Frauds, an estate for the

term of the life of another person was, upon the death

of a tenant pur autre vie, cast upon the general occupant

in manner hereinafter mentioned ; or, since that statute,

when the estate is cast upon the executor or adminis-

trator of a deceased tenant jmr autre vie.

For the purpose of creating an estate pur autre vie by assign-

ment, the estate of tenant in tail after possibility of issue

extinct does not differ from an estate for life. (3 Prest. Conv.

171, 172.) The assign is punishable for waste. (Co. Litt.

28 a ; 2 Inst. 802.)

359 THE NATURE AND QUANTUM OF ESTATES.

Heirs as When an estate piir autre vie arises either de novo by express

occupants. limitation, or by the assignment of an existing estate for life,

the omission to specify the heirs in the grant has still an

important influence upon the transmission of the estate upon

the death of the tenant j>m7' autre vie in the lifetime of cestui

que vie.

It will be observed that, in external form, the limitation to a

grantee and his heirs, during the life of ceshd que vie, resembles

the limitation of a determinable fee, but because the event

which is to determine the estate is not such as may by possi-

bility never happen, no fee arises. In a determinable limitation,

the determining clause must not be radically inconsistent with

the preceding limitation, which is subject to it ; that is to say,

the determination must be only possible, not certain, so that by

possibility the preceding limitation may endure throughout its

whole possible extent.

It follows, that the word heirs when used in this sense is not

properly a word of limitation. By virtue of the grant, the heir

of the tenant jpnr autre vie has, on the death of his ancestor in

the lifetime of cestui que vie, a right of entry ; but the right does

not descend to him as heir. It devolves upon him by the

peculiar title styled occupancy ; which in the case of the heir is

styled special occupancy, to distinguish it from i\iQ general occu-

pancy which formerly existed upon the death of a tenant pur

autre vie, leaving no special occupant. This title accrues to the

heir by reason of his being named in the grant, and not by any

title of inheritance.\* And similarly, when an estate pur autre

vie is made the subject of a quasi-entail, purporting to be limited

to one and the heirs of his body, such special heirs do not take

by descent, and the words are not properly words of limitation,

but only words nominating a succession of special occupants.

{Low V. Burron, 3 P. Wms. 262.) Until the Statute of Frauds

made the estate in the hands of the heir as special occupant,

assets to the same extent as a fee simple, no action lay against

the heir upon his ancestor's bond specifying the heirs.f

[As to dower, see Be Michell, (1892) 2 Ch. 87.]

t " Such estates certainly are not estates of inheritance. They have been

sometimes called, though improperly, descendible freeholds. Strictly speaking,

they are not descendible freeholds, because the heir-at-law does not take by

descent. If an action at common law had been brought against the heir on

the bond of his ancestor, he might have pleaded rien\* per descent : for these

ESTATES PUR AUTRE VIE. 359

But when the heir is not named in the grant, he has no better General

title by occupancy than any one else ; and, by the common law,

if the possession was vacant at the death of the tenant ^^wr autre

vie, any stranger who first entered gained the freehold for the

residue of the life of cestui que vie, by the title of general occu-

pancy, and he was styled the general occupant.\* (Co. Litt. 41 b.)

If the possession was not vacant, the law cast the freehold, with

the like title and style, upon the person in possession (1 Prest.

Est. 259) ; such as the tenant for years, or at will, of the tenant

pur autre vie. The object of this general occupancy was to

prevent a vacancy, or abeyance of the freehold. (Bacon, Uses,

38.) There was no general occupancy of copyholds, because

the seisin of them is in the lord. (Zouch v. Forse, 7 East, 186.)

But there might be special occupancy of a copyhold. (Doe v.

Martin, 2 W. Bl. 1148.) And a custom of a manor that, on

the death intestate of tenant j)?n- autre vie during the life of

cestui que vie, the copyhold shall go to the latter for life, is a

good custom. (Doe v. Goddard, 1 B. & C. 522.)

Though the heir took as special occupant by the nomination who may be

of the grantor and not by inheritance, it seems to be the better p^^^\* ^^^^'

opinion that the heir alone, and not the executor or adminis-

trator, could be named as special occupant in the grant. (Harg.

n. 4 on Co. Litt. 41 b ; Com. Dig. tit. Estates, F. 1 ; Lord

Redesdale in Camphell v. Sandys, 1 Sch. & Lef. 281, at p. 289.

See, however, 1 Sugd. Pow. 8th ed. p. 193, note.) If the heir

and the executor are both named in the grant, the heir has the

special occupancy. (Atkinson v. Baker, 4 T. R. 229.)

estates were not liable to the debts of the ancestor before the Statute of Frauds."

Lord Kenyon, in Doe v. Luxton, 6 T. R. 289, at p. 291. Lord Hardwicke, in

Ripley \. Wafenoorth, 7 Ves. 425, at pp. 437, 438, says : — "for though he is

described as heir, he does not take it as such, but as a special occupant named

in the grant." In Sei/mor's Cane, 10 Rep. 95, at p. 98 a, they arc said to be

descendible, but not of inheritance. See also Northen v. Carnegie, 4 Drew. 587,

at p. 590.

• " He that can first hap it, shall enjoy out the term." Finch, Law, p. 115.

But the possession of land held jmr autre vie is not more likely to be left vacant

by the death of the tenant, than the possession of land held for any other

estate; and the cases in which anyone could "hap it" and acquire a title

subsequently to the death of the tenant pvr autre iv>, must have been extremely

rare. The aim of sect. 12 of the Statute of Frauds was to make the lands assets

for the payment of debts, not, as has often (but absurdly) been said, to prevent

" scrambling for the lands."

860

THE NATURE AND QUANTUM OF ESTATES.

Effect of

naming the

heirs of the

body as

special occu-

pants.

The heirs of the hody may be named as special occupants ;

and the naming of them afTects the quantum of the estate, which

is less than the quantum of a similar estate limited to the heirs

general. If a tenant for his own life makes a lease to the

immediate reversioner and the heirs of his body during the life

of the tenant for life, this will be no surrender. (3 Prest.

Conv. 22.) The possibility that there may be a failure of the

heirs of the reversioner's body, by his death without issue during

the lifetime of the tenant for life, gives to the latter a reversion

upon his own grant, so that the last-mentioned grant is only

the grant of an under-lease, which is therefore incapable of

merger in the reversioner's estate.\*

Whether per-

sonal repre-

sentatives

may be

special

occupants.

After the Statute of Frauds, as hereinafter mentioned, the

question, whether the executor or administrator might be named

as special occupant, had no practical importance so far as free-

• The case of Re Michell, Moore v. Moore, 1891, M. 787, was decided on

28th January, 1892, by Stirling, J., too late for inclusion in the text. The

principal point decided was as follows. Under the will, executed in 1843,

of Anne Michell, who died in 1844, in the events which happened, A became

tenant for life of certain freeholds and copyholds, with remainder to trustees to

preserve, with divers remainders to his issue, which failed for want of such

issue, with remaindsr to B for life, with remainder to trustees to preserve,

with remainder to C, the only son of B, in tail male, with divers remainders

over. The will contained a clause of forfeiture, in the usaal terms, upon

neglect for one year after coming into possession to assume a certain name and

arms. In 1872, A and B being both alive, C with their consent barred his

estate in tail male, limiting the lands, subject to the prior estates, to the use of

himself, his heirs and assigns. A died in 1883 without issue. Upon the expira-

tion of a year, B incurred a forfeiture by neglecting to assume the name and

arms. Thereupon C became entitled to an equitable estate pur autre vie,

during the life of B, and subject thereto in fee simple. C died in 1890

without issue, leaving B his heir at law and customary heir. The learned

judge held that the equitable estate /;?<?• autre vie had by the terms of the

will been limited to C and the heirs male of his body ; and that the effect

of the disentailing deed was to turn this to a limitation to him and his

heirs general ; and that B as heir general took the estate pur autre vie

(which, B being cestui que vie, became in his hands an estate for his own

life) as special occupant for his own use and benefit. It follows, that an

Qst&te pur autre r<e, limited in its inception to a man and the heirs male of

his body, may by the act of the tenant be turned to an estate pur autre

vie limited to him and his heirs general ; and that the heir general may

then take as special occupant. There is no reason to suppose that in this

respect there is any difference between equitable and legal estates, or between

freeholds and copyholds, provided that the copyholds are capable of being

intailed. [The case is reported, (1892) 2 Ch. 87.]

ESTATES PUR AUTRE VIE. 361

hold lands are concerned ; because, if there was no special

occupant, he would take the estate by force of the statute.

And he would take it as an estate of freehold. (Oldham v.

Pickering, 2 Salk. 464 ; this point is stated more fully in Carth.

376.)

Before the case of Ripley v. Waterworth, 7 Ves. 425, the

opinion that personal representatives might be named as special

occupants seems to have appeared only by way of casual surmise.

(See 2 Vern. 719 ; 2 Atk. 466.) In the last-mentioned case

Lord Eldon seems to have inclined towards the same opinion.

But since the question did not call for decision,\* this opinion

was obiter dictum ; and the question had so long been deprived

of nearly all its practical importance by the Statute of Frauds,

that the principles upon which its solution depends seem to

have fallen into complete oblivion. The question is now

purely a matter of historical criticism.

Of things which at tlie common law lie in grant, and of Occupancy of

which therefore no possession could be taken, there was no hemii^a-

general occupancy. (Co. Litt. 41 b.) But of such things there

might at the common law (and still may) be special occupancy.

(Litt. sect. 739, and Lord Coke's comment, where the word

occupant evidently means general occupant ; 16 Vin. Abr. 71 =

Occupant, D.) It was held that neither an executor nor an

administrator could be special occupant of a rent, in Salter v.

Butler, Yelv. 9, Cro. Eliz. 901. In Northen v. Carnegie, 4 Drew.

587, it was laid down, apparently obiter, that an executor

may be special occupant both of land and of incorporeal

hereditaments,!

• In Ripley v. Waterwoi'th there could be no doubt that the executor was

entitled to the estate, either as special occupant, or, if an executor cannot be

a special occupant, then under the Statute of Frauds, as mentioned below. The

question was, wliether he held the estate for the benefit of the heir, or for the

benefit of the residuary legatees. Lord Eldon decided that, in either case, he

held the estate for the benefit of the latter ; therefore it was not necessary to

express any opinion as to the means by which he came to the estate.

t [Under the old law, if a rent was granted to A daring the life of B, and A

died, living B, the rent determined ; so if a rent was granted to X during his

life and he granted it to Y, and Y died during X's lifetime, the rent determined ;

but after the Statute of Frauds it was held that in such a case the rent passed

to the executor of A or Y, as the case might be : Bear park v. Hutchhuon,

7 Bing. 178.]

meuts.

862

THE NATURE AND QUANTUM OF ESTATES.

Assignable at

the common

law.

The tenant pur autre vie had, at the common law, an absohite

right of alienation inter vivos, whether his heir was entitled as

special occupant or not; and, in the latter case, the estate of the

assign was not affected by the death of the assignor. (Co.

Litt. 41 b; Utty Dale's Case, Cro. Eliz. 182.) Estates pur

autre vie were not made deviseable by the Statutes of Wills,

82 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5.

Ma<le devise-

able by the

Statute of

Frauds.

And distri-

butable as

assets.

By the Statute of Frauds, 29 Car. 2, c. 3, s. 12, it is enacted

that any estate pvr autre vie shall be deviseable ; and, if no

devise be made, shall be chargeable in the hands of the heir, if

it shall come to him by reason of a special occupancy, as assets

by descent, as in ca^e of lands in fee simple ; and in case there

be no special occupant thereof, it shall go to the executors or

administrators of the party that had the estate thereof by

virtue of the grant, and shall be assets in their hands.

It is commonly said, that this enactment made tenancy by

general occupancy for the future impossible. (Harg. n. 5 on

Co. Litt. 41 b.) But Preston has suggested that general occu-

pancy might still be possible, during the interval between the

death intestate of a tenant pur autre vie and the grant of admi-

nistration. (1 Brest. Conv. 44.)

In Oldham v. Pickering, 2 Salk. 464, Carth. 376, it was

decided that the estate in the executor's hands was assets only

for the payment of debts, and that, these being satisfied, the

executor, being "as it were the occupant," could not be com-

pelled to make any distribution. In consequence of this

decision, it was enacted by 14 Geo. 2, c. 20, s. 9, that (if there

be no special occupant) estates jjj^j- autre vie, so far as not

devised, should be applied and distributed in the same manner

as the personal estate.

The Statute of Frauds, s. 12, and the 14 Geo. 2, c. 20, s. 9,

are repealed by the Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 2 ;

but they are substantially re-enacted and extended to copyholds

and incorporeal hereditaments by sects. 3 and 6.

Quasi-entails This kind of estate, though a tenement, is not intailable by

futrTS.^""^ virtue of the statute De Bonis, not being a hereditament.

{Grey v. Mannock, 2 Eden, 339.) But it is susceptible of limi-

ESTATES PUR AUTRE VIE. 363

tations in the nature of a quasi-entail, which, if they are not

destroyed by some act of the quasi-tenant in tail, will give rise

to a quasi-descent resembling the descent of an estate tail ;

that is to say, an estate pur autre vie does not, as a mere

chattel or chattel interest does, vest absolutely in a tenant in

tail by purchase. (For a remarkable example, see Mogg v. Mogg,

1 Mer. 654, where see note at p. 688.) If the estate pur autre

vie is conveyed subject to limitations which would create an

entail in an inheritable tenement, any person entitled as quasi-

tenant in tail in possession can, without otherwise barring the

quasi-entail, convey the whole estate by any assurance which

would pass an estate p?M' autre vie. (Fearne, Cont. Kem. 10th

ed. 496, and cases there cited in margin.)\* It seems to have

been thought by Lords Northington and Kenyon, that, since

these estates have been made deviseable, quasi-entails of them

might be barred by will. (See Doe v. Luxton, 6 T. R. 289, at

p. 293.) But quasi-remainders limited over upon the quasi-

estate tail cannot be barred by will. {Dillon v. Dillon, 1 Ball

& B. 77 ; Campbell v. Sanchjs, 1 Sch. & Lef. 281 ; Allen v.

Allen, 2 Dr. & War. 307. )t And a quasi-tenant in tail in

remainder cannot, by conveyance inter vivos, bar the quasi-

remainders over, without the concurrence of the person entitled

in possession. {Allen v. Allen, uhi supi'a.) If the estate is

suffered to descend, it will descend according to the form of the

quasi-entail ; and any quasi-remainders which may be limited

over will take effect, if they become interests in possession

during the life of cestui que vie, unless previously displaced by

any such conveyance as aforesaid.

• [See Re Michell, aide, p. 360, n.]

t [The question is discussed in Jaiman on Wills, 6th ed., pp. 74 xeq,'\

364 THE NATURE AND QUANTUM OF ESTATES.

CHAPTER XXV.

OF CONCURRENT OWNERSHIP.

An estate, whether in possession or in remainder, admits of

being so limited that several distinct individuals may be

entitled to concurrent and simultaneous interests. Moreover,

several persons may take the same estate concurrently by

descent ; either at the common law, in the case of a descent to

several sisters, or the representatives of several sisters ; or by

a descent in gavelkind among several brothers, or their repre-

sentatives ; -or by other special custom, among several brothers

and sisters, or their representatives. The several individuals

so entitled will, according to the nature of the relation sub-

sisting between their interests, be (1) joint tenants, (2) tenants

in common, (3) parceners, also styled coparceners, or (4)

tenants by entireties.

This arrangement is the most convenient for the purpose of

discussion, though it is not the most logical. According to the

degree of the intimacy uniting the interests of the concurrent

owners, the order of the arrangement should be as follows :

tenants by entireties, joint tenants, coparceners, and tenants in

common. But joint tenancy and tenancy in common are of

frequent occurrence in practice. Assurances are always made

to trustees as joint tenants, in order that the survivor or sur-

vivors may retain the whole estate ; and assurances, especially

devises, are frequently made to beneficial owners as tenants in

common. Coparcenary is not common, because the descent of

lands is not common ; and in the majority of the cases which

happen, the descent is not among coparceners. Tenancy by

entireties, from the circumstances under which it arose, was

always rare ; and recent legislation may perhaps have made it

for the future impossible.

Some remarks upon cross remainders are added to the

remarks made upon tenancy in common, by reason of the

intimate practical connection between the two subjects.

OF CONCURRENT OWNERSHIP. 365

(1) Joint Tenancy.

Littleton's definition of joint tenancy is founded upon the Definition

mode in which an estate is limited to joint tenants. If lands limitation,

are limited to several persons by name, Jiahendum to them for

life, or lives, those persons are joint tenants during that life or

those lives. (Litt. sect. 277.) They have an estate pur autre

vie in joint tenancy. Similarly, if lands are limited to several

persons by name, hahendnm to them and their heirs, those

persons are joint tenants in fee simple.\*

By virtue of the provisions of the Conveyancing Act of

1881, 8. 51, a joint tenancy in fee simple may be created by

employing the words, " in fee simple," in lieu of the words,

"and their heirs," in the last-mentioned limitation. {Vide

supra, p. 223.)

Joint tenancy is equally applicable to fees (except fees in

general tail, as mentioned in the next following paragraph),

to estates of mere freehold, and to chattel interests. (Litt.

sect. 281.)

An estate in general tail cannot be limited in joint tenancy, Estates tail,

because (except under the circumstances which would make the

estate an estate in special tail) there cannot be a single heir of

the bodies of the donees ; and the right of the several heirs in

tail of the several donees to inherit, secundum formam doni,

which is expressly conferred upon heirs in tail by the statute

De DoniSy would be repugnant to the right of the surviving

joint tenants, upon the death of one, to enjoy the whole estate,

which is the most prominent characteristic of joint tenancy.

A limitation to several persons and the heirs of their bodies,

other than a limitation to two persons capable of lawful

marriage and the heirs of their bodies, gives them a joint life

estate, followed by remainders to them severally, in general

tail, as tenants in common. (Litt. sect. 283, and Lord Coke's

comment.)

• [Corporations are now capable of acquiring and holding real or personal

property in joint tenancy with others : Bodies Corporate (Joint Tenancy) Act,

1899.]

366

THE NATURE AND QUANTUM OF ESTATES.

An estate in special tail, if limited to a man and a woman

not married but capable of lawful marriage, and the heirs of

their two bodies, will be an estate in joint tenancy. If the

parties had been married at the time when the limitation

took effect, they would, at the common law, be tenants by

entireties. As hereinafter mentioned, it is uncertain what is

the operation, in this respect, of the Married Women's Property

Act, 1882.

J%is accres-

cendi.

Does not

necessarily

confer equal

advantage

upon all.

The distinguishing characteristic of joint tenancy is styled

jus accrescendi, or the right by survivorship. Upon the death of

one out of several joint tenants, the survivors hold the whole

estate, and nothing passes to the representatives in title

(whether real or personal) of the deceased tenant. (Litt. sect.

280.)

But the practical advantage of the jus accrescendi is not neces-

sarily equal for each of the joint tenants ; for two men may

have a joint estate for the life of one of them ; in which case, if

that one who is cestui que vie should die in the lifetime of the

other, the estate is determined, whereas, if the other should die

in the lifetime of cestui que vie, the latter has the whole estate,

and becomes thenceforward sole tenant for his own life. (Co.

Litt. 181 b.) It still remains true, that each upon the death of

the other takes the whole estate ; but in the one case, the whole

estate which he takes is reduced to nothing.

The right by survivorship is liable to be defeated by any act

which severs the joint tenancy and turns it to a tenancy in

common.

Identity of

their interest

and title.

Joint tenants must claim an equal interest by the same title

and in the same right. (Co. Litt. 189 a ; ibid. 299 b.) There-

fore they can only take by purchase. And under limitations at

the common law, they must all take simultaneously. But in

limitations by way of use, if the use is declared jointly to several

persons, some of whom are not yet ascertained or not yet in

being, such last-mentioned persons, if and when they are ascer-

tained or come into being, will be joint tenants with the others ;

and the same rule holds good, when the interests arise by devise.

(Co. Litt. 188 a, and Harg. n. 13 thereon ; 2 Prest. Abst. 56.)

OF CONCURRENX OWNERSHIP. 367

The identity of the interest and title of joint tenants is com-

monly analysed into the "fourfold unity " of interest, title, time,

and possession. (2 Bl. Com. 180 — 184.) This analysis has

perhaps attracted attention rather by reason of its captivating

appearance of symmetry and exactness, than b}' reason of its

practical utility. It means only, that each joint tenant stands,

in all respects, in exactly the same position as each of the others ;

and that anything which creates a distinction either severs the

joint tenancy or prevents it from arising. Blackstone seems

not to have adverted to the fact, that the " unity of time" is

not, under the learning of uses and devises, an indispensable

requisite.

Joint tenants are said to be seised per my et per tout ; which For purposes

1 , i 1 , 1 • i 1 1 0\* alienation,

expression properly refers to two only, two being taken as a type their interests

or pattern for two or more. In one sense each has nothing, and ^^^ separate.

in another sense each has the whole, nihil per se separatim et

totum conjunctim. (Co. Litt. 186 a.) In another sense, each

has an equal aliquot share ; namely, for purposes of alienation,

whether total or partial, and for purposes of forfeiture. (Ibid.)

Each can alienate his aliquot share, and can thereby sever the

joint tenancy and turn it to a tenancy in common.\* Herein

joint tenants differ from tenants by entireties, who are seised

per tout only, and not per my ; and of whom, accordingly,

\* With regard to the question, whether a partial alienation, that is, an aliena-

tion of the joint tenant's share for less than his whole estate, will completely

sever the joint tenancy, or will only suspend it during the continuance of the

less estate, there seem to be some distinctions, according to the estate of the

joint tenants.

If one joint tenant in fee makes a lease /«;• life or lives of his share, it seems to

be at least the better opinion, that this is a complete severance ; and that, if he

should die during the lease, the reversion in his share will descend to his heir

instead of accruing to the other joint tenants. But there seems to be no reason

for extending this doctrine to the case of a lease for years made by a joint tenant

in fee simple.

If a joint tenant of a term of years makes a lease of his share for a less term,

this is a complete severance.

See Litt. sect. 302 and Lord Coke's Comment, and Sym'g Case, Cro. Eliz, 33.

But in order that a grant by one joint tenant may bind his fellows, it must be

the grant of an estate, and not the grant of a mere incumbrance or burden on

the estate, such as a rent-charge or a right of common ; for it is the maxim of

the law, that though alienatio rei prafertur juri accresce>idi, yet jus accres-

cendi prafertur onerihus. (Co. Litt. 185 a.)

368

THE NATURE AND QUANTUM OF ESTATES.

Effect of

severance on

a lease for

lives.

Partition.

neither can prejudice the right by survivorship of the other to

succeed to the whole in severalty. (2 Bl. Com. 182.)

The following point is practically important. When two or

more persons are joint tenants for their lives, whether by express

limitation or by implication of law, and although the limitation

be expressly to the suriivor of them, then, on a severance of the

joint tenancy, the share of each will afterwards be held for his

own life only. (Co. Litt. 191 a; 2 Prest. Abst. 63.) This

is because the words in italics are mere surplusage, which

express nothing which the law would not without them have

implied. Hence it appears, observes Lord Coke, that a sever-

ance of the joint tenancy of a lease for lives is beneficial to

the lessor.

In the limitation of a fee simple in joint tenancy, the words

above placed in italics, instead of erring from mere superfluity,

are highly pernicious. They turn the limitation to a joint free-

hold for lives, with a contingent remainder in fee simple to the

survivor. (Butl. n. 1 on Co. Litt. 191 a.)

At the common law, one or more joint tenants could not be

compelled by the other or others to make partition. (Litt.

sect. 290.) Voluntary partition between them can be made

only by deed. (Co. Litt. 169 a ; ibid. 187 a.) By the statutes

31 Hen, 8, c. 1, and 32 Hen. 8, c. 32, the same right of parti-

tion as appertained at common law to coparceners, is given both

to joint tenants and to tenants in common. By the Partition

Act, 1868, 31 & 32 Vict. c. 40, and the Partition Act, 1876,

39 & 40 Vict. c. 17, the Court is empowered, subject to certain

conditions, to substitute a sale for an actual partition.

Is a sole

ownership.

(2) Tenancy in Common.

A tenancy in common, though it is an ownership only of an

undivided share, is, for all practical purposes, a sole and several

tenancy or ownership ; and each tenant in common stands,

towards his own undivided share, in the same relation that, if

he were sole owner of the whole, he would bear towards the

whole. And accordingly, one tenant in common must convey

his share to another, by some assurance which is proper to

OF CONCURRENT OWNERSHIP. 369

convey an undivided hereditament ; and he cannot so convey

by release.\* (2 Prest. Abst. 77.)

A title by tenancy in common may be claimed by prescrip-

tion. (Litt. sect. 310.) This proves the severalty of the

interest.

A man who, in his official capacity, is a corporation sole, as a

bishop, may be tenant in common, with himself, in respect of

his two capacities, as an individual and a corporation, (Co.

Litt. 190 a.)

arise.

Tenancy in common may arise in any of the following How it may

ways : —

(1) By express limitation.

At the common law a gift or limitation contained in the

premisses of a deed, which standing by itself would have

created a joint tenancy, might be turned to a tenancy in

common by express words in the habendum ,- such as,

habendum the one moiety to the one and the other moiety

to the other of them. (Co. Litt. 183 b.)

In modern assurances, which are commonly made

under the Statute of Uses, tenancy in common is limited

in the habendum, by declaring the use " as to one equal

undivided moiety," or other fractional part, to one of the

persons, with similar declarations in favour of the others

respectively.

(2) By the severance of a joint tenancy. (Litt. sect. 292.)

(3) Similarly, by severance, through alienation, without

partition, of the interests of coparceners. (Litt. sect.

309.)

(4) By construction of law.

(i) If a (contingent) remainder be limited to the

heirs of two living persons, not being husband

and wife, which remainder must therefore vest in

\* " One tenant in common may infeofEe his companion, but not release, because

the freehold is severall. Joyntenants may release, but not infeofEe, because the

freehold is joynt ; but coparceners may both infeofEe and release, because their

seisin to some intents is joynt, and to some severall." (Co. Litt. 200 b.) But

any kind of assurance by a joint tenant is construed to be a release. (^Eustace

V. Scawen, Cro. Jac. 697 ; Cliester v. Willan, 2 Wms. Saund. 96, where see the

notes, on the general doctrin^is to construing words, whenever it can possibly

be done, so as to give cfEect l^he intention.)

C.R.P. B B

370

THE NATURE AND QUANTUM OF ESTATES.

interest at different times, the respective heirs

will take as tenants in common. {Windham's

Case, 5 Rep. 7, at p. 8 a, resolution 3 ; Roe v.

Qmrtlcy, 1 T. R. 630.)

(ii) Under a limitation, in the form of an estate tail,

to two persons neither married nor capable of

lawful marriage, or to three or more persons,

they will take in common. {Windham's Case,

uhi supra, resolution 4.)

Other instances might be specified ; but in the present

state of the law, they are not material in practice.

The shares

may be

unequal.

Cross re-

mainders ;

how con-

nected with

tenancy in

common.

In separate

parcels, or in

undivided

shares.

There is nothing in the nature or origin of tenancy in

common to import any necessity that the shares taken by the

different tenants must be equal ; because they hold by several,

or different, titles, not by a joint title. (Litt. sect. 292.)

Their shares will, accordingly, be unequal, whenever the cir-

cumstances under which their titles arose were such as to

institute any diversity between them. On an express limitation,

unequal shares may be expressly limited ; and then the shares

will be unequal from the commencement of the tenancy. When

the origin of a tenancy in common is by the severance of a joint

tenancy, or by a change in the title of coparceners, the shares

will in their inception be equal ; but inequality may be subse-

quently introduced, by more than one of such equal shares

becoming united in the same hands.

The subject of cross remainders is intimately connected with

tenancy in common ; because the cross remainders are neces-

sarily, and the particular estates upon which they are limited

may be, and frequently are, limited by way of tenancy in

common.

The following remarks will be confined to particular estates

tail, followed by cross remainders in tail ; which is the only

form in which cross remainders are material to be considered in

practice.

The particular estates upon which the cross remainders

depend may either be estates tail in separate parcels of land, or

OF CONCURRENT OWNERSHIP. 371

may be estates tail in several undivided shares of the same

parcel of -land. In other words, a man having several

distinct farms, or other parcels, may limit them separately in

tail to separate persons, with cross remainders between them ;

or having one parcel only, may limit that parcel in tail to

several persons as tenants in common, with cross remainders

between them of their several undivided shares.

When cross remainders are limited in respect of undivided

shares of the same parcel, these shares are in practice always

equal, and the limitation of the remainders is also in equal

shares. The following remarks will be confined to equal

cross remainders between equal undivided shares of the

same parcel.

Cross remainders between two persons only present no To two

difficulty to the imagination. Lands are limited as to one \*\*^''®°"^"

undivided moiety to A in tail, with remainder to B in tail ;

and as to the other undivided moiety to B in tail, with re-

mainder to A in tail.

The general result of a similar limitation, when made to To more than

more than two persons, expressed in somewhat colloquial ^^'^ persons,

language, is, that upon the failure of each stock, its share is

divided equally among the other stocks ; and so often as another

failure of a stock occurs, the share held by that stock, whether

original or accrued, is divided equally among the still subsist-

ing stocks ; so that, when the stocks have been reduced to two,

each will have obtained a moiety ; and finally, the last sub-

sisting stock will get the whole.

This process of accruer is, of course, liable at any stage to be

interrupted in respect to each stock, by such stock barring the

entail in its share.

The more formal definition given by Preston is as follows : — Preston's

" Cross remainders, as between three or more persons, are

several remainders limited to each of three or more persons, in

lands, or the parts of lands, previously limited to each of them,

and operating by way of successive accumulated remainders on

the several aliquot parts, which each takes in the shares of the

others ; so that, in the first place, or by way of immediate

estate, each person is to have a parcel of land, or a part of a

B B 2

372

THE NATURE AND QTANTHM OF KSTATKR.

parcel of land, and the others, as tenants in common, are to

have an estate in remainder in the lands or part of this person;

and the persons taking each part under each successive gift of

remainders, are to liave remainders, in like manner, in the part

limited to each other, till every subdivided part is divisible

between two persons only ; and then each of these persons is

to have a remainder in the share of the other ; so that, ulti-

mately, by small undivided parts, the entirety of the lands may

centre in one person." (I Prest. Est. 96.)

Each person under the original limitation will have a vested

estate in the whole of the lands, made up of separate estates in

separate fractions. The first estate will be an estate in posses-

sion in his own aliquot undivided share ; and the others will be

remainders, of successively increasing degrees of remoteness,

in fractions of the other aliquot shares.\*

Cross re-

mainders by

implication.

It is settled law, that in a deed cross remainders cannot

arise by implication, but only by express words. {Cole v.

\* Suppose a single parcel of land to be limited in equal shares between » persons

as tenants in common in tail general, with cross remainders between them. Then

the original share of each is - ; and upon the extinction of the first stock, each

n

obtains, as an accruing share,

1

And as the whole is always divided

equally, it follows that, after the extinction of r stocks, the total share of each is

; and therefore, after the extinction of (/•+!) stocks, the accruing share of

11

each is

1

Therefore the series of accruing shares, consequent

(« — ?•)(«— r—1)

upon the successive extinctions, is .is follows : —

\_1 1 1 1

7<(«-l)' (/t-IX«— 2i)' C«— 2)(«-3)' (rt-rXrt— r-l) '

Where the last fraction represents the share accruing by the (r-|- 1)"' extinction.

Each, therefore, in addition to his original share, -, has a series of fiactional

II

shares in remainder, each remainder being of a different order of remoteness,

depending respectively upon the extinction of the stocks successively, the

fractions being shown by the above series.

These remainders are all vestetl ; because the mere fact that, so far as coming

into possession is concerned, they might be defeated by the previous occurrence

of death without issue, does not make them contingent ; for every remainder is

to this extent liable to be defeated ; and if this alone could make a remainder

contingent, there could be no such thing as a vestetl remainder.

OF CONCUHRENT OWNERSHIP. 37S

LevingstofiflYent^^i; Doe y. Dorvdl, 6 T.JX. 518.) In a will

cross remainders may arise by implication ; but a stronger

ground of presumption, or evidence of the testator's intention,

is required when the limitation is to three or more persons,

than when it is to two only. (See notes to Cook v. Gcrrard, 1

Wms. Saund. 170, at p. 185 ; Poirell v. Iloicells, L. R. 3 Q. B.

654 ; Re Ridge's Trusts, L. R. 7 Ch. 665 ; Hannafordy. Haniia-

ford, L. R. 7 Q. B. 116; Hudson v. Hudson, 20 Ch. D. 406.)\*

On the question, whether cross remainders should be inserted

among the limitations of an executory settlement, see Surtees

V. Surtees, L. R. 12 Eq. 400.

Although in a deed express words are required to create cross What express

remainders, yet any words will suffice which distinctly express sufficient.

the intention, and the expression, " with cross remainders be-

tween them in tail," is quite sufficient for the purpose.! That

expression is used in the short form of marriage settlement

contained in the Fourth Schedule of the Conveyancing Act of

1881, which circumstance may be regarded as giving to it some

legislative sanction ; but such sanction seems not to be neces-

sary.J

(3) Coparcenary.

Parceners, or coparceners, are two or more persons who to- Definition

gether constitute a single heir ; as the daughters, where there is ^JJarf^^^^^^

no heir male, in respect to common law lands, and the sons, in istics.

respect to gavelkind lands. (Litt. sect. 241, 265. As to

gavelkind, see more at large Rob. Gav. 138 et seq.) The same

rule holds of sisters, aunts, and other groups of female kinsmen

\* [The notion that the implication of cross-remainders is easier when the

limitation is to three or more persons, than when it is to two, is now exploded

gee Jarman on Wills, 6th ed. pp. 661, 668.]

+ " No technical precise form of words isnecessarj' to create cross remainders :

it is sufficient to say that there shall be cross remainders ; though, in the verbose-

ness of conveyancers, an abundance of words is generally introduced in deeds

for this purpose." (^Per Lord Kenyon, C. J., in Doev. Wainewright, 5 T. R.427,

at p. 431.)

\ Section 57 of the Act, which declares the sufficiency of the forms in the

Fourth Schedule, is restricted by the words, " as regards form and expression

in relation to the provis'ums of this Act" and therefore cannot be taken to affect

any expression relating to cross remainders, because the Act contains no provi-

sions relating thereto.

374 THE NATURE AND QUANTUM OF ESTATES.

in the same degree, there being no prior heir male. (Litt.

sect. 242.) But with respect to gavelkind lands, it is to be

observed that, though by the custom of Kent the rule of

coparcenary extends to collateral descents (Rob. Gav. 115),

this is not necessarily true of gavelkind lands situated else-

where ; and a custom to that effect must be proved as a special

custom. (Co. Litt. 140 a, b.) The rule of representation holds

good in descents in coparcenary ; so that the issue of a person

who, if living at the time of the descent, would have been a

parcener, will take in coparcenary along with the other like

persons. But such issue, as respects the amount of their share,

take 2i€i' stirpes and not j^t^r capita. (Co. Litt. 164 b.)

Parceners hold a position intermediate between joint tenants

and tenants in common. Like joint tenants, they have among

them only one single freehold, so long as no partition is made.

Like tenants in common, they have among themselves no jus

accrescendi ; but upon the death of one parcener, a descent

takes place of her aliquot share. And one parcener may at

common law convey to another by an assurance proper to

convey a several estate, as a feoffment. (Co. Litt. 164 a.)

But such conveyance might also be made by release. (Co.

Litt. 9 b.)

A female who, having no sisters, stands in the position of

heir, is of course styled the heir and not a parcener. (Litt.

sect. 242.)

To sum up the foregoing points, it will be observed that for

some purposes parceners constitute a single person and have

but one single estate between them, while for other purposes

they are regarded as being several persons and as having

several estates.

1. They make together but one heir to their ancestor. Yet

they were separate persons for the purpose of escheat by

attainder. If a man had died, leaving no sons but two

daughters living, one of whom had been attainted of

felony, one moiety would have escheated. (Co. Litt.

1C3 b.)

2. They can convey intei- se either by assurances proper to

convey several estates, or by release.

OF CONCURRENT OWNERSHIP. 375

3. If one daughter (or other presumptive coparcener) should

die in the lifetime of her father, her issue, if any, take

by representation the share which she would have taken

if she had survived the father. If, after inheriting as

coparcener, she should die leaving issue, such issue take

her share. This rule of the common law is not altered

by the Descent Act. {Vide infra, p. 376.) Of course,

the mode in which the issue will take, is regulated by

the ordinary canons of descent. If there are several

sons, and the lands are descendible at the common law,

the eldest son takes the whole share ; but if the lands

be subject to the custom of gavelkind, all the sons take

equally.

One parcener was, even at the common law, entitled as Partition,

against the others to a compulsory partition. (Litt. sect. 241.)

The intrinsic union between the shares of parceners is shown

by the fact that, on a partition, nothing was held to pass from

one parcener to another, and therefore a partition between them

was no purchase to make an alteration in the course of descent.

(2 Prest. Abst. 471 ; ihid. 431.) This rule extends even to

partitions made between some of the parceners and the

assignees of the others, so far as the shares taken by the par-

ceners are concerned, {poe v. Dixon, 5 Ad. & E. 834.) A

rentcharge granted for equality of partition is descendible in

the same manner as the land. (Co. Litt. 169 b.)

Voluntary partition might be made between parceners by

mere parol agreement, or by drawing lots, or by reference to

the award of arbitrators agreed upon beforehand by all the

parties. (Litt. sects. 243, 244, 246.) Lands which had been

given in frank-marriage to one daughter must be brought by

her and her husband into hotchpot. (Litt. sects. 266, 267.)

By 8 & 9 Vict. c. 106, s. 3, a partition made after 1st

October, 1845, is void at law unless made by deed.

After judgment upon a writ of partition at the common law,

a writ was directed to the sheriff, ordering him to make the parti-

tion by the oath of twelve lawful men of the county. (Litt.

sect. 248.) But the men of this inquest must be chosen from

the neighbourhood of the lands. (Co. Litt. 168 b.)

376 THE NATURE AND QUANTUM OF ESTATES.

The Court of Chancery from very early times exercised juris-

diction in respect to partition, when land holden of the King in

capite descended upon parceners, one or more of them being

under age. (Fitzh. N. B. 256 F ; ibid, 260 B.) This jurisdic-

tion, being incident to the tenure, and a consequence only of

the necessity for livery of the lands out of the King's hand, was

practically abolished by 12 Car. 2, c. 24. Suits for partition

were also frequently instituted and entertained under the court's

equitable jurisdiction, when this had grown into general recog-

nition ; and under this jurisdiction a decree for partition was

regarded as a matter of right, upon proof of title. (2 Com.

Dig. 762.)

Descent, At the common law, upon the death of one parcener, her

whole share descended to her issue. (Litfc. sect. 280 ; Co. Litt.

164 a.) This rule is not altered by the Descent Act. (Cooper

V. France, 19 L. J. Ch. 313 ; Paterson v. Mills, 19 L. J. Ch.

310 ; [Re Matsou, (1897) 2 Ch. 509].)

[Devise.] [Under a devise to a person's " right heirs," if he leaves

co-heiresses, they take as joint tenants, and not as coparceners,

by virtue of sect. 3 of the Inheritance Act, 1833.\*]

Definition

and mode of

limitation.

(4) Tenancy by Entireties.

Tenancy by entireties occurs, at the common law, when a

gift or conveyance, which, if made to two strangers, would

create a joint tenancy, is made to a husband and wife during

the coverture. (Litt. sect. 291, and Lord Coke's comment ; t

2 Prest. Abst. 39. See Co. Litt. 326 a :— " Where the husband

and wife are jointly seised to them and their heires of an estate

made during the coverture")

The peculiarities of this kind of tenancy arise out of the

identity which the common law imagines to exist between hus-

band and wife. (Litt. sect. 291.) It is equally applicable to

\* [Owen V. Gibhom, (1902) 1 Ch. 636.]

t Lord Coke does not use the phrase " by entireties." He speaks of cases in

which " the husband and wife fthall have no vioieties" That is to say, he regards

tenancy by entireties as being a species of joint tenancy, with the distinguishing

characteristic that it confers no power of sercrance. This accords with the

definition above given.

OF CONCURRENT OWNERSHIP. 377

estates in fee simple, in fee tail, for the lives of the parties, and

pur autre vie. (2 Prest. Abst. 39.)

It constitutes the most intimate union of ownership known Distinguished

to the law. A husband, being tenant by entireties of free- tenancy.

holds with his wife, cannot by any alienation bar her right by

survivorship in any part. (Co. Litt. 326 a ; Doe v. Farratt, 5

T. R. 652, at p. 654.) They are accordingly said to hold -per

tout et non per my. (2 Bl. Com. 182.) The same rule formerly

applied also to forfeiture. (Co. Litt. 187 a.)

Preston affirms that this kind of tenancy is applicable to As to chattels

a term of years. (2 Prest. Abst. 39.) But he also states that,

unless the term is a provision for a wife under some ante-

nuptial agreement, the husband alone can assign the term.

{Ihid. 43, 57.) If this doctrine is correct, it is difficult to see

in what a tenancy by entireties of a term of years differs from

a joint tenancy. The case of Grute v. Locroft, Cro. Eliz. 287,

cited by him as an authority in support of this doctrine, is by

no means conclusive, for it is distinctly stated that there the

tenancy was a joint tenancy.

The case of Martin v. Mowlin, 2 Burr. 969, seems to show, Equities of

that in a tenancy by entireties of an equity of redemption, and personal

the husband in his wife's lifetime can convey the whole. As <^hattels.

regards money and personal chattels, the husband alone can

give a good discharge therefor, and can alienate after reduc-

tion into possession ; and the wife has no equity to a settle-

ment thereout. (Ward v. Ward, 14 Ch. D. 506 ; Godfrey v.

Bryan, ihid. 516.) But it would seem that, if the court gets

hold of the property, it will practically prevent the husband

from exercising his right of alienation, by retaining the fund

in court ; thus preserving to the wife her chance of taking the

corpus by survivorship. (Atcheson v. Atcheson, 11 Beav. 485.)

Husband and wife might be tenants by entireties, as between

themselves, of an undivided share ; and might, as regards the

owners of the other undivided shares, be either tenants in

common or joint tenants.\*

\* [As to the construction of gifts to husband and wife, and one or more other

persons, see WarHtigton, v. Warrington, 2 Ha. 54 ; Re Dixon, 42 Ch. D. 306.]

378 THE NATURE AND QUANTUM OF ESTATES.

The Marrietl It is difficult to Say what is the effect, upon tenancy l)y

Women's

Pro|)erty Act, entireties, of the Married Women's Property Act, 1882, 45 & 46

1882. yj^|.^ g^ yg^ rpjjjg jg ^^^ ^j ^y^^ questions, which seem to have

escaped the attention of the legislature when that statute was

enacted. In Re March, Maiider v. Harris, 24 Ch. D. 222,

Mr. Justice Chitty seems to have thought that the effect of the

Act is to destroy the status of coverture, so far as this status

affects mutual rights, or incapacities, in respect to the owner-

ship of property. His judgment was af terw^ards reversed upon

appeal ; but upon special grounds which do not affect the

above-stated opinion. (27 Ch. D. 166.)

Preston was of opinion that, by express words, a husband

and wife might, at the common law, be made tenants in

common under a gift to them during the coverture. (2 Prest.

Abst. 41.) This would seem to imply that, in his opinion,

the creation of this tenancy was a question of intention ;

though, in the absence of an express intention to the contrary,

the law presumed the intention to be in favour of the tenancy

by entireties. If this view is correct, it would seem that the

effect in this respect, of the Married Women's Property Act,

1882, is simply to reverse the rule, or implication, of law.

Where, at the common law, an express intention was required

to prevent tenancy by entireties from arising, an express inten-

tion will now be required in order that it may arise. Though

the Act enables certain things to be done, which could not

be done at the common law, it does not seem to disable

the parties from doing anything which was formerly lawful.

If, on the other hand, the origin of the tenancy at the

common law was not due to intention, but was due solely

to the incidents of what may be called the proprietary status

of coverture, and if Mr. Justice Chitty was right in thinking

that this status has no longer any existence, then it would

follow that this tenancy can no longer be created. The former

seems to be the more plausible view.\*

\* Since the publication of the first edition of this work, Mr. Justice (now

Lord Justice) Kay, in Re Jupp, Jvpp v. Buckwell, 39 Ch. D. 148, at pp. 153, 154,

expressed his dissent from the above-stated opinion of Mr. Justice Chitty.

[In lie Marck and Re Jnpp the gift was to husband and wife and a third

peiBon, and the question was whether each took a third, or whether the husband

OF CONCURRENT OWNERSHIP, 379

[Where husband and wife are tenants by entireties, a decree

absolute for dissolution of the marriage makes them joint

tenants.\*]

and wife took one half between them, the other half going to the third person.

In Re Jupp, Kay, J., adopted the latter construction, and held that the wife took

her quarter as her separate property under the Married Women's Property Act.

On the other hand, in lie Dixon, 42 Ch. D. 306, where the gift was to A and B

his wife, F and G his wife, and three other persons, North J. held that each

took a seventh ; he followed Warrington v. Warrington (2 Hare 54) in prefer-

ence to Re Jupp. In cases like these, therefore, it seems that the Married

Women's Propert}' Act has not made any difference, except in the nature of the

wife's interest, and that the question of shares is still one of construction.

But if, since the coming into operation of the Married Women's Property Act,

1882, land is purchased by a husband, or by husband and wife jointly, and con-

veyed to them in terms which would have given them, if not married, a joint

estate (even if they were married before the Act), they take as joint tenants, the

wife's interest belonging to her for her separate use : Thornley v. Thornley,

(1893) 2 Ch. 229. The head-note seems to go beyond the actual decision.]

• \\_Thornley v, 7'hornleg, (1893) 2 Ch. 229.]

( 380 )

PART IV. ON ASSUIUNCES.

CHAPTER XXVI.

ASSURANCES IN GENERAL.

General re- ASSURANCES (other than wills and testaments) are commonly

influence of divided into assurances operating by the common law, and

statutes upon assurances operating by the Statute of Uses. But it must

assurances. "j ./

be remembered that many of the latter assurances derive part

of their operation from the common law. It must also be

remembered that the Statute of Uses, though its influence

upon assurances in general is greater than that of any other

statute, is not the only statute upon which certain kinds of

assurances depend for their operation or validity. The

following examples are worthy of notice.

(1) Modern disentailing assurances and assurances by

married women and their husbands derive their opera-

tion partly from the Fines and Recoveries Act. And

because that statute, for the purpose of barring an

entail, only superadds inrolment to the assurances

otherwise appropriate to the conveyance of a fee

simple, it follows that disentailing assurances may

also derive part of their operation from the common

law and from the Statute of Uses.

(2) It has been remarked by Butler, and is indeed obvious,

that in the old-fashioned assurance styled " by lease

and release," the lease alone derived its operation from

the Statute of Uses : the bargainee for a year under

the lease, so soon as his possession was executed by the

statute, being capable at the common law of taking a

release of the reversion. The conveyance could be

made without the help of the Statute of Uses, by

making a lease to take effect as a common law lease,

ASSURANCES IN GENERAL. 381

instead of as a bargain and sale for a year, and causing

the lessee to take actual possession under it, instead of

relying upon a constructive possession executed by the

statute : a method which was sometimes employed in

conveyances by corporations, who, not being capable of

being seised to a use, could not, by means of a bargain

and sale, raise a use capable of being executed by the

statute.\* For the same reason, corporations not unfre-

quently conveyed freeholds in possession by feoffment,

appointing an attorney under their common seal to give

livery of the seisin. The 4 & 5 Vict. c. 21, s. 1, enabled

an assurance to be made by a single deed, having the

same operation as the two deeds formerly used in

assurances by lease and release. It superseded the

need for the preliminary lease, by giving to the release

alone, if expressed to be made in pursuance of the Act,

a purely statutory operation as a conveyance of estates

of freehold in possession. This Act was in force from

15th May, 1841, till 7th August, 1874, having been

repealed by the Statute Law Revision Act, 1874 (No. 2).

But it was seldom used in practice, after the coming

into operation of 8 & 9 Vict. c. 106, on 1st October,

1845. The present writer has met with an example of

its use in a deed dated August, 1852.

(8) During the time that 7 & 8 Vict. c. 76, remained in force —

from 31st December, 1844, to 1st October, 1845 — another

statutory method existed of conveying estates of freehold

in possession. This was not confined to a release, and

was not expressed to be made in pursuance of the Act.

(4) The last-mentioned Act was repealed by 8 & 9 Vict,

c. 106, which, without repealing 4 »fe 5 Vict. c. 21,

practically superseded it by providing a more con-

venient form of assurance. Sect. 2 enacts that after

1st October, 1845, all corporeal tenements and heredita-

ments shall, as regards the conveyance of the immediate

\* Conveyances effected by means of a common law lease, followetl by a release

of the reversion, have been known so far back as the reign of Henry IV.

(2 Sand. Uses, 74.) Such a conveyance was a good performance of a condition

to make a feoffment. (5 Vin. Abr. 143, pi. 4 = Oniditioti, Q. a, pi. 4.)

382 ON ASSURANCES.

freehold thereof, be deemed to lie in grant as well as in

livery. All modern assurances made by the owners of

estates of freehold in possession, except a feoffment

and a bargain and sale inrolled, depend for their

validity upon this statute.

Conveyances of estates of freehold in possession, taking

effect by virtue of any of the above-mentioned statutes, 4 & 5

Vict. c. 21, 7 & 8 Vict. c. 76, or 8 & 9 Vict. c. 106, owe all their

efficacy to the particular statute and at the common law would

be wholly inoperative ; unless by reason of peculiar circum-

stances they can be construed to take effect by some means

foreign to their purport. (See the notes to Chester v. Willan,

2 Wms. Saund. 96.)

Sect. 49 of the Conveyancing Act of 1881 declares, that the

use of the word grant is not necessary in order to convey

tenements or hereditaments, corporeal or incorporeal. Since

no substitute is mentioned, it is not clear what would have

been the effect of this enactment, if the word grant had been

otherwise necessary to pass things lying in grant. Until the

coming into operation of 8 & 9 Vict. c. 106, the word grant

was neither necessary nor appropriate to pass corporeal here-

ditaments. Since that date, corporeal hereditaments (which

phrase includes corporeal tenements) have been numbered

among things lying in grant ; and the word grant has been

appropriate to pass them, but not necessary. {Shove v. Pincke,

5 T. E. 124 ; Haggerston v. Hanhury, 5 B. & C. 101.) It is

probable that the word convey, which occurs frequently in the

Conveyancing Act of 1881, will in future be often used ;

though it would be difficult to give any reason for preferring

this substitute.

Before the coming into operation of 8 & 9 Vict. c. 106,

remainders and reversions were capable, at the common

law, of being conveyed by grant ; but that mode of assurance

was not commonly used in practice, because it was essential

to the validity of the assurance that the existence of the

particular estate should be proved. For this reason it was

the common practice to convey remainders and reversions

either by lease and release or by bargain and sale inrolled.

(1 Prest, Ahst. 85.)

ASSURANCES IN GENERAL. 383

(5) Sect. 65 of the Conveyancing Act of 1881, amended by

sect. 11 of the Conveyancing Act of 1882, enacts that,

under certain circumstances and subject to certain

restrictions, the unexpired residue of a long term of

years may be enlarged into a fee simple, by some one

or other of sundry persons entitled in right of the

term. Such enlargement is in no way dependent upon

the concurrence of any person entitled in reversion.

(6) Sect. 15 of Lord Cranworth's Act, 23 & 24 Vict. c. 145,

enables the person exercising the power of sale conferred

by the Act upon mortgagees, to vest in the purchaser

all the estate and interest which the mortgagor had

power to dispose of ; but in the case of copyholds, only

the beneficial interest. This enactment was repealed

by the Conveyancing Act of 1881. Its meaning and

effect are doubtful ; but if its language has any mean-

ing and effect, it seems to have created a statutory

power, by which mortgagees were sometimes enabled to

convey a greater estate than was vested in them.\*

[To the list of statutory assurances described by Mr. Challis

(which does not profess to be exhaustive) may be added three

kinds, one of which is now rarely met with, namely : —

[(7) A bargain and sale under a common law power created Bargain and

by will. After the Statute of Wills (32 Hen. 8, c. 1), if t'^^^^'^^^i;

a testator directed his executors to sell his land, they

could convey it by way of sale, by deed without livery

of seisin, the conveyance taking effect as an executory

devise under the statute. This was called A common

law power, apparently because such a power could be

created at common law in the case of lands deviseable

by custom.! (See Litt. sect. 169 ; Co. Litt. 112 b ; and

the interesting extracts from the Year Books given by

,\* The language might without any straining be taken to import, that a

mortgagee by demise for a long term might convey the fee simple. On the other

hand, it might be so whittled away as to import no more than an "all the

estate " clause, or a covenant for further assurance. In Hlatt v. Hillinan, 19

W. R. 094, it was held by Lord Komilly, M. 11., that the section enabled a mort-

gagee by demise to convey the property for the whole of the original term ; and

in Re Solomon and Meagher's Contract, 40 Ch. D. 508, it was held by the Court

of Appeal that under the section an equitable mortgagee in fee simple might

convey the legal fee.

t [As to bargains and .sales of copyholds under common law powers, .see

Williams' R, P. 493 ; Davidson's Prec, Vol. II. pt. i. 374.]

common law

power.

384 ON ASSURANCES.

[Mr. T. C. Williams in the recent editions of Williams

on Real Property, p. 398 n., 2l8t ed., p. 388 n., 19th ed.)

Before 1844, this kind of conveyance was not infre-

quently used for appointing new trustees in cases

where the trust was created by will, if the will con-

tained a direction that on the appointment of new

trustees the old trustees should convey the land to

them. The conveyance was made in consideration of 10«.

paid by the new trustees to the old trustees. (Byth. &

Jarman, Conv. 2nd ed. v. 497 ; viii. 61 n.) The editor

has met with several deeds of this kind in old titles.

VQsting [(8) Since 1881, when new trustees are appointed, the

declaration. appointor may, by a declaration contained in the deed

of appointment, cause any land subject to the trust

to vest in the new trustees ; but this power does not

extend to the legal estate in copyhold land, or in any

land mortgaged to the trustees. A vesting declaration

may also be made on the retirement of a trustee.

(Conveyancing Act, 1881, sect. 34, repealed and re-

enacted by the Trustee Act, 1893, sec. 12.) This

mode of conveyance is analogous in its operation to

the vesting orders which courts have power to make

under various modern statutes.

Fefistered [(9) A transfer taking effect under the Land Transfer Acts,

transfer. 1875 and 1897. Such a transfer when perfected by

registration takes effect by virtue of a statutory over-

riding power, and not by virtue of any estate in the

registered proprietor. (Per Cozens-Hardy, L.J., in

Capital and Counties Bank v. Rhodes, (1903) 1 Ch. at

p. 655.) If made for valuable consideration, such a

transfer overrides all outstanding estates and interests

created by unregistered disposition, with certain excep-

tions, the most important of which are short leases and

tenancies, and easements.]

The above-mentioned enactments, and also all enactments

creating statutory powers, which give to the deeds to which

they relate an effect or modus operandi which could not have

been given to them by the mere act of the parties, do not stand

lipon the same footing as 8 & 9 Vict. cc. 119, 124 ; Lord

Cranworth's Act, with the exception of sect. 15 above men-

tioned ; or sects. 6, 7, 18, 19, 34, and 63 of the Conveyancing

Act of 1881, and similar enactments : which merely aim at

dispensing, either wholly or partially, with the actual expres-

sion by the parties of something which they were competent

to effect without any legislative assistance.

ASSURANCES IN GENERAL. B85

Excepting only their capacity of being executed into legal General

estates, uses \* were in all respects the same before the statute the nature of

as afterwards. Our earlier jurists regarded the legal estate in "®^^-

fee simple, and the conterminous use, as being two separable

things, commonly found together, and j>i'imd facie presumed

to be united in the legal tenant ; but capable of separation,

and having definite characteristics when separated. When

such separation took place, the use conferred the right,

both to take profits of the lands, and also to call upon the

person having the legal estate to make such conveyances

thereof as the person having the use should think fit.

The following propositions were clearly established from

early times : —

(1) Eegarded as a descendible entity, the descent of the use

followed the descent of the thing of which it was the

use. So that, (i) the use of lands which were subject to

no peculiar local custom, held for an interest analogous

to a common law fee simple, descended to the heir

general ; (ii) the use of gavelkind lands descended

according to the custom of gavelkind ; (iii) of borough-

english lands, according to the custom of borough-

english ; (iv) other peculiar local customs affecting

common law lands, when good in law, had the like effect

upon the descent of the use of them ; and (v) the use

of copyholds descended according to the custom of the

manor.

And it was as impossible to change the course of the

descent of the use as to change that of the legal estate.

(1 Prest. Est. 448 ; Bob. Gav. 98, 99.) So far as the

law permitted new estates to be created and taken by

way of imrchase, the use (like the legal estate) could

of course be made to go to any person whatsoever;

but by purchase " only, not by descent, unless such

\* [The student will bear in mind that the " use" here referred to has nothing

to do with the Latin nsm. It is derived from the Norman French oes or iwps

(Brilton 34 a, 112 a, stat. 15 Rich. II. c. 5), which in its turn comes from the

Latin opus, meaning benefit. See Law Q. R., xxvi. 196. " Use," therefore,

before the Statute of Uses, simply meant a beneficial interest in land.]

C.R.P. C 0

^86 ON ASSURANCES.

person was the next in the order of descent prescribed

by the law.

(2) The person entitled to the use (cestui que use) might

alienate the use, by conveyance inter vivos.

(3) So also he might devise the use, before the Statutes of

Wills, although the use was of lands which were not

themselves deviseable.

(4) By the statute 1 Eic. 3, c. 1 (which was not positively

repealed until 1863, when it had for ages been quite

obsolete) cestui que use was enabled to make conveyances

inter vivos of the lands themselves, which were good,

not only as against cestui que use to convey the use, but

also as against his feoffee to uses, so as to convey the

legal estate. This statute never had any extensive

operation. For an instance of its use in practice, see

Dy. 283 a, pi. 30.

In all essential characteristics these uses resemble what we

now call equitable estates, differing from them mainly by reason

of the greater complexity of limitation to which the ingenuity

of conveyancers has gradually subjected the latter. This

greater complexity has proceeded pari passu with the increas-

ing complexity in the limitation of legal estates; and both

these developments are due, in a great measure, to the influ-

ence of the statute 27 Hen. 8, c. 10, commonly called the

statute for transferring uses into possession, or more briefly,

the Statute of Uses.

General effect It seems strange that the legislature, when it enacted that

of Uses. uses should be transformed into legal estates, should not have

foreseen that, unless at the same time people were forbidden

to raise or declare uses, they would soon take to raising and

declaring uses as a method of creating and conveying legal

estates.

The result has been that the easy plasticity which the Court

of Chancery from early times permitted to the declaration of

uses has been, in a great measure, imported into the methods

ASSURANCES IN GENERAL. 387

of creating legal estates. Instead of the land stifling the

activity of uses, the latter have imparted their mercurial

properties to the land.\*

Mo'reover, since it was decided soon after the passing of the Origin of

mfKiGm

statute, that no use could be limited upon a use (Bacon, Uses, trusts.

43; 2 Bl. Com. 335) it was only necessary to interpose a

second seisee to uses between the feoffee or grantee and the

cestui que use, in order to restore the old system of equitable

estates or trusts : a device which gave occasion to Lord

Hardwicke's celebrated remark, that " a statute made upon

great consideration, introduced in a solemn and pompous

manner, by this strict construction, has had no other effect

than to add at most three words to a conveyance." (1 Atk.

591.) But this lively rhetoric must not be taken quite

seriously ; nor is it quite clear whether he wished that equity

had refused to enforce the trust, or that the law had consented

to execute the seisin.

The above-mentioned doctrine relating to uses upon a use,

which only imports, when it is rightly understood, that a use

is not a hereditament within the meaning of the statute, has

been subjected to much petulant, if not ignorant, censure. In

the opinion of the present writer, it has been well defended by

Eowe, in his edition of Bacon on Uses, note 74, p. 134.t

[A rent-charge may be created de novo by way of a use upon

a use. (Gilhertson v. Richards, 4 H. & N. 277 ; 5 H. & N.

453 ; Hanhj v. Carroll, [1907] 1 Ir. R. 166).]

The question, whether the Statute of Uses applies to wills, w^hether the

has given rise to much difference of opinion. The objection uses applies

(Butl. n. 1 on Co. Litt. 272 a, VIII. 1) that the Statute of \*« ^''"^•

Uses was passed before the first Statute of Wills, 32 Hen. 8,

c. 1, seems to be intrinsically futile ; and at the present day it

might lead to the awkward inference that grants of freeholds

in possession, made by virtue of 8 & 9 Vict. c. 106, s. 2, are

also not within the statute. But since it is the unquestioned

\* "And because uses were so subtle and ungovernable, as hath been said, they

have with an indissoluble knot coupled and married them to the land, which of

all the elements is the most pondei'ous and immovable." 1 Rep, 1:^4 a.

t [See the explanation given by Air. T. Cyprian Williams, in Williams, Real

Prop. (21st ed.) 178.]

c c 2

888

ON ASSURANCES.

fact that the intention of the testator by itself avails to convey

the legal estate, and that this intention may be made effectual

by any language which is clearly intelligible, it follows that

the machinery of the Statute of Uses cannot be necessary to

carry into effect the intention of a testator ; that he might

dispense with it if he thought fit to declare such an intention ;

and that, in so far as the machinery of the statute has

practically been applied to the interpretation of wills, this has

been done only because their language gave rise to the infer-

ence that the testator intended to follow the analogy of the

statute. This analogy has been applied when the limitations

in the will, by following in detail those which would be

appropriate in a deed, suggest a corresponding intention. In

particular, it is clearly settled that the doctrine of a use

limited upon a use applies to wills, and that, where such a

double use occurs, the legal estate is fixed in the person who

takes the first use, though he be only a trustee without any

active duties to perform. (2 Jarm. Wills, 4th ed. 290.) But

in general, and apart from the indication of intention supplied

by the existence of a use upon a use (that is, a use followed by

a trust), the estate taken by trustees is generally restricted in

wills to what is required for the fulfilment of their trust. This

doctrine of cutting down the estate taken by trustees has no

application to settlements effected by deed. {Cooper v. Kynoch,

L. R. 7 Ch. 398.)

The first and most important section of the Statute of Uses,

abbreviated by the omission of what is not necessary to the

consecutive construction, is as follows : —

The form of

sect. 1 of the

statute.

" That where any person or persons .... at any.time hereafter shall .... be

seised, of and in any .... hereditaments, to the use confidence or trust of any

other person or persons or of any body politic, by . . . any . . means whatso-

ever, ... in every such case all and every such person and persons and bodies

politic that . . . shall have any such use confidence or trust shall ... be

. . . deemed and adjudged in lawful seisin estate and possession of and in the

same .... hereditaments, .... to all intents constructions and purposes in the

law, of and in such like estates as they had or shall have in use trust or

confidence of or in the same."

Principal

points.

The statute is expressly made applicable both to uses then

in existence and to those subsequently created. The following

propositions respecting the uses which are contemplated by it,

ASSURANCES IN GENERAL. 389

follow naturally from its language, and have always been

taken as indisputable ; unless the case of Holland v. Boins or

Bonis, 2 Leon. 121, at p. 122, 3 Leon. 175, at p. 176, be

thought to cast any doubt upon the 2nd: —

1. A person must be seised to the use.

2. Here person does not include body politic ; as is shown by

the repeated omission of body politic when speaking of

the person seised and the repeated mention of body

politic when speaking of cestui que use. A corporation

cannot be seised to a use. (Bacon, UseSj 42, 57 ; and

Kowe, note 118, p. 178, see p. 184; 1 Eep. 122a, 127a;

Fulmerston v. Steward, Plowd. 102, at p. 103 ; and see

at p. 588 ; Shep. T. 508 ; 1 Bl. Com. 477 ; 2 Prest.

Conv. 255, 256 ; 2 Sand. Uses, 27, note.) But a natural

person may be seised to the use of a corporation. And

a natural person, who is also a corporation sole, as a

bishop, may be seised in his natural capacity to the use

of himself and his successors in their corporate capacity.

(Bacon, Uses, 64.)

But though a corporation cannot be seised to a use

within the meaning of the statute, it may be seised

upon trust, and will be compelled to execute the trusts.

(See Case of Sutton's Hospital, 10 Eep. 23 ; Mayor of

Coventry v. Att.-Gen., 7 Bro. P. C. 235.) This is now

regarded as an axiom.

3. Since the person is seised, his estate must be of freehold.

4. But the quantum of the interest contained in the use is

not necessarily equal to a freehold.

5. The person seised cannot in general be identical with the

person entitled to the use. The common forms, haben-

dum unto and to the use of the grantee do not take effect

by the Statute of Uses, but by the common law. (Doe

V. Passingham, 6 B. & C. 305 ; Orme's Case, L. R

8 C. P. 281 ; [Savill, Bros., Ld. v. Bethell, (1902) 2 Ch.

523.])

But such a declaration of a use to the grantee

himself, though it is not a use which is capable of

being executed by the statute, and though it has no

890 ON ASSURANCES.

effect upon the seisin which would be in the grantee

by the common law without it, nevertheless avails to

make any subsequent use limited upon it, incapable of

being executed by the statute. Such a subsequent use

would be a " use limited upon a use," and would take

effect, if otherwise valid, as a trust. {Doe v. Passing-

ham, QB.&C. 305.)

And in certain cases, in which it is held that there is " a

direct impossibility or impertinency for the use to take effect

by the common law," the seisee to uses may himself take by

the statute. (Bacon, Uses, 63.) Bacon goes on to enumerate

the following examples, which are thus summed up by Sanders

(1 Sand. Uses, 92) :—

(1) Where the use is limited to the feoffee (or other seisee

to uses) in tail out of his own seisin in fee simple, and

the remainder over to another ;

(2) "Where the whole seisin in fee simple is conveyed to the

feoffee, and many estates in the use are carved out of

such seisin, one of which estates the feoffee takes ;

(3) If the feoffee be seised to the use of himself and another

jointly ;

(4) If a feoffment be made to a bishop and his heirs to the

use of himself and his successors. This, if a case in

point, is not precisely on a level with the other

instances, because the moiety of the use is here en

autre droit.

The uses above specified are executed by the statute. But

if A be infeoffed to the use of B for life, and afterwards to the

use of himself and his heirs, the latter use is not executed by

the statute ; but A is in by the common law, retaining the

residue of his original estate ; and therefore he takes by way

of reversion and not of remainder. (Bacon, Uses, 64.)

Preston, in summing up his statement of the case of Goodhill

v. Brifiham, 1 Bos. & P. 192, treats it as having decided that

" a person cannot be seised to his own use, when there is not

any other purpose to be served." (3 Brest. Conv. 269.) This

proposition seems well to express the general rule, subject to

the above-stated exceptions.

ASSURANCES IN GENERAL. 391

It results from the foregoing considerations, that the main Assurances

question, upon which depends the theory of the raising of under the

estates by way of use, is as follows : — Under tvhat circumstances, s\*^\*\*^"^-

and by ichat methods, can a use he so connected ivith a seisin,

that the person having the seisin can be >^aid to be seised to the

use ivithiii the meaning of the Statute of Uses ; so that the use

U'ill be executed into a legal estate by the statute ?

The outline of the reply to this question is contained in the

following propositions : —

(1°) Any person capable of transferring by conveyance a

seisin vested in himself to another, may, upon the

making of such conveyance, declare any use or uses

upon the seisin in the transferee, to or in favour of any

person or persons other than the transferee: which

uses, if valid as uses, will be executed by the statute.

The proviso, if valid as uses, imports that the declaration of

uses is subject to restriction. Any use which contravenes the

rule against perpetuities is void. Moreover, no estate can be

raised by way of use except such as, in point of quantum,

might be conveyed at the common law; and no course of

devolution except that prescribed by the law can be prescribed

by way of use.

(2°) Under certain circumstances, a person having the seisin

in himself may raise or declare uses upon that seisin

while remaining in himself, which uses are capable of

being executed by the statute.

These propositions explain the meaning of the common

dictum, that conveyances which take effect under the statute

operate sometimes with transmutation of the possession, and

sometimes without transmutation of the possession.

The following is a list of the principal assurances by which Assurances

witiii trSiiiS"

a seisin may be, or might formerly have been, conveyed to mutation of

another person within the meaning of the first of the foregoing possession,

propositions : —

1. A fine ; and

2. A recovery ; until these assurances were abolished by the

Fines lind Recoveries Act,

892

ON ASSURANCES.

Assurances

without

transmuta-

tion of

possession.

3. A feoflfment.

4. A release of the reversion on an estate, less than a free-

hold, to the person having the less estate.

The above-mentioned assurances convey the seisin by

the common law. From the fourth, by engrafting upon

it a bargain and sale for a year, taking its effect by the

statute, was derived the old assurance by lease and

release.

5. Since the 8 & 9 Vict. c. 106, a grant of the seisin\* :

which is the method now almost universally used by

absolute owners. And under this head may also be

placed conveyance executed by tenants for life by

virtue of the statutory powers conferred by the Settled

Land Acts ; which conveyances, so far as regards their

form, are usually similar to conveyances executed by

absolute owners.

The seisin being conveyed by any of the aforesaid methods,

the uses declared thereupon, if otherwise valid, are within the

statute.

The assurances which may take efifect by the statute without

transmutation of the possession, — that is to say, by which,

under peculiar circumstances, a person may raise or declare a

use, capable of being executed by the statute, upon a seisin

vested in himself, are as follows : —

1. A bargain and sale.

2. A covenant to stand seised to uses, in consideration o

blood or marriage : commonly styled, for brevity, a

covenant to stand seised.

\* [See infra, p. 41 5. J

( 393 )

CHAPTEE XXVII.

OF FINES AND RECOVERIES.

Since fines and recoveries now not only are obsolete, but do

not exist, it is unnecessary to add much to the remarks above

made upon the operation of these assurances when levied, or

suffered, by tenant in tail. (See Chapter XXI., supra.)

These assurances were reckoned among the " common as-

surances of the realm " ; and the use of them was by no means

confined to their operation to bar estates tail. By reason of The effect of

the statutory title gained against strangers to the fine under a fine,

the 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, by a non-claim of

five years' duration, fines were extensively used to strengthen

doubtful titles ; and even, by a species of fraud, to manufacture

fictitious titles which, by a non-claim of five years' duration,

became indefeasible as against all persons who might have

made their claim at the time when the fine was levied. From

this point of view it may be said that a fine operated to abridge

to five years the period allowed by the Statutes of Limitation

for the prosecution of an adverse claim. A fine had also the

further advantage, that it gave an actual title ; whereas the

Statutes of Limitation previous to the 3 & 4 Will. 4, c. 27,

gave no title, but only barred the remedy of the claimant.

The operation of a fine, levied with proclamations by force Three rules

of the statutes 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, was Er^'"^

regulated by these cardinal principles : —

(1°) Since strangers might, at the common law, avoid a fine

upon a plea partes Jinis nihil habuerunt, which right

was saved by the last-mentioned statutes, it was

necessary to the validity of the fine that one of the

parties should be entitled to an estate of freehold in

the lands. But any estate, whether in possession,

remainder or reversion, would support a fine ; and

394 \* ON ASSURANCES.

generally, even tliough it had been gained by dis-

seisin or tort.

(2°) A fine would not bar any estate which was not so far

devested as to be turned to a right of entry. If it

were so far devested as to be discontinued, that is,

turned to a right of action, such discontinuance,

would, a fortiori, suffice. The devestment or discon-

tinuance might be effected either previously to the

line or by force of the fine itself. (See Butl. n.

1 on Co. Litt. 332 b ; 2 Prest. Abst. 306; 3 ibid. 135.)

(3°) When several distinct rights, under several distinct

titles, by virtue of which he might impeach the fine,

accrued to the same person at different times, he had

several and distinct periods of five years allowed to

him, commencing respectively from the respective

times of accruer, within which to prosecute them

respectively. (Cruise, 1 Fines & Eec. 237.)

How fines It follows from these principles, that any person having any

nmnt titles, ^uch possession of land as would qualify him to make a feoff-

ment, though a tortious feoffment,\* could simultaneously

convey a sufficient estate to support a fine against the plea

partes finis nihil habuerunt, and also sufficiently devest the

estates rightfully subsisting under the former seisin, which

was displaced by the feoffment. A fine so levied would there-

fore bar all those estates (so far as regards persons not under

disability) upon the expiration of five years after the completion

of the fine. The bar would not be complete, as against persons

under disability, until the expiration of five years from the

cessation of the disability. If the feoffment were made by a

tenant for life or years, the remainderman or reversioner

would, after the death of such tenant or the expiration of the

term, as the case might require, have a fresh period of five

years to prosecute his claim. For though the tenant for life

or years had incurred a forfeiture of his estate, the remainder-

man was not bound to take advantage of the forfeiture.!

Upon the determination of the particular estate, whether for

life or years, a new right accrued to the remainderman ; and,

\* Dpon the tortious operation of a feoffment, see p. 405, infra.

t Per Lord Hardwicke, in Kemp v. Westbrook, 1 Ves. sen. 278.

OF FINES AND RECOVERIES. 395

by consequence, a new period of five years within which it

might be prosecuted. (See Fermors case, 3 Rep. 77 ; Whalcy

V. Tankard, 2 Lev. 52, 1 Vent. 241 ; Brandlyn v. Ord, 1 Atk.

571 ; Cruise, 1 Fines & Rec. 239.)

Uses might be declared upon the seisin obtained by means Uses declared

of a tine or a recovery, in the same way as they might be recovery.

declared upon the seisin which passed by a feoffment; and

such uses, since they caused the conusee, or the recoveror, to

be " seised to the use " of the person entitled to the benefit of

the use, were within the language and intent of the Statute

of Uses and were executed by the statute. The uses of a fine

were declared by the person by whom it was levied ; and the

uses of a recovery were declared by the person by whom it

was suffered. The uses were in practice commonly declared

previously ; but they might be declared subsequently, at any

time during the lives of the parties. (Doivman's Case, 9

Rep. 7.) If no uses were declared, and the fine was levied, or

the recovery suffered, without valuable consideration, the use,

and with it, by virtue of the statute, the legal estate, resulted

to the person entitled to declare the use. (Ibid.)

Owing to the last-mentioned circumstance, a doubt at one

time existed, whether a tenant to the iwacipe could be made

by levying a fine without any declaration of use ; for it was

thought that the seisin might be forthwith devested out of the

tenant to the j^necipe by the resulting of the use, instead of

remaining in him to enable him to serve the purposes of the

recovery. But it was decided that the use would not result

contrary to the intention of the parties. (Altham v. Anglcsea,

11 Mod. 210, 2 Salk. 676.)

Since a married woman might always, at the common law, Fines and

be joined as a co-defendant with her husband in an action at assurances by

law, it follows that she could concur with him in levying a ""amed

fine or suffering a common recovery ; because, for all technical

purposes, these stood in exactly the same position as the

actions at law which they simulated. Before the Fines and

Recoveries Act, a fine was the assurance commonly used by

married women to release dower or convey estates of inheri-

tance. A recovery had the like effect ; but it was not commonly

women.

896

ON ASSURANCES.

Origia of

" separate

examina-

tion."

used in practice for these purposes, unless it was also intended

to be used to bar an estate tail. (1 Prest. Conv. 4, 5.) For

these purposes a fine was effectual without proclamations

(3 Prest. Abst. 133) ; because it was sufficient for these

purposes that the parties should be bound inter se by estoppel,

there being no need to have recourse to the peculiar properties

of a fine levied under the statutes 4 Hen. 7, c. 24, and 32

Hen. 8, c. 36, or to the doctrine of non-claim ; and, at the

common law, even after the Statute of Non-claim, 34 Edw. 3,

c. 16, a fine bound the parties themselves, including the

married woman, by estoppel. For the same reason, a recovery

was for these purposes effectual, although it was suffered

without a proper tenant to the lircecipe. The separate exami-

nation of married women arose from the provision of the

statute Modus Icvandi fines — " And if a woman covert be one

of the parties, then she must first be examined by four of the

said justices; and, if she doth not assent thereunto, the fine

shall not be levied." (2 Inst. 510.) And when a married

woman joined in suffering a common recovery, she was always

separately examined by the practice of the Court. (Cruise, 2

Fines & Rec. 179.

Assurances It may also be remarked that, by the Custom of London and

womra under of many othsr cities and boroughs, married women might bind

'^f\?"d^'" their real property by deed inrolled, with acknowledgment.

(See, for a very similar custom of the town of Denbigh, Dy.

363 b, pi. 26.) This custom is expressly confirmed by 34 & 35

Hen. 8, c. 22 ; which statute remained in force until 1863.

Though this custom was recognized by the statute, it did not

depend upon the statute for its validity, and there is no reason

to suppose that the repeal of the statute has destroyed the

custom. But at the present day this form of assurance would

have little practical utility. It would enable a woman who is

neither entitled in equity to her separate use, nor entitled as

a feme sole under the Married Women's Property Act, 1882,

to alienate or charge lands situate in the City of London,

without obtaining the concurrence of her husband, which

would be necessary to the validity of any assurance made by

virtue of the Fines and Recoveries Act.

( 397 )

CHAPTER XXVIII.

OF A FEOFFMENT.

A FEOFFMENT, the iiiost Venerable of assurances, survives to this Function of

day, but is now little used. It is believed that certain old cor- the common

porate bodies still retain, at all events to some extent, the ^\*^"

ancient practice of conveying by feoffment.\* It is the only

assurance (not being matter of record, as a fine or recovery) by

which, at the common law, legal estates of freehold in possession

can be conveyed to a person having no subsisting interest in the

land and no privity with the person making the assurance.! It

consists simply and solely in the livery of the seisin ; and some

phrases in common use, which seem to imply a distinction

between the feoffment and the livery, are so far incorrect.^

Under the following special circumstances the immediate In what cases

the

freehold might at the common law be acquired without livery immediate

of seisin and without any assurance of record : — wht pass

without

(1) The tenant of the immediate freehold might surrender livery,

to the immediate remainderman or reversioner. (Co.

Litt. 50 a.) Before the Statute of Frauds, the surrender

might have been effected by mere parol, without any

writing. {Ibid. 338 a.) By the Statute of Frauds,

s. 3, surrender must be by deed or note in writing,

\* The present writer remembers that about a dozen years ago he drew a

power of attorney to deliver seisin on behalf of a corporation. [Feoffments are

still occasionally used to convey the land of infants under the custom of gavel-

kind : see Law Q. R. xii. 240, and infrii, p. 402.]

t [But in the technical sense of the word, " feoffment " means a conveyance of

the fee simple by livery of seisin ; where an estate for life was created by livery

of seisin, the ceremony was formerly callSd a " lease " and not a " feoffment" ;

so where an estate in tail was created by livery, the person making the livery

was called the "donor," and not the " feoffor " (Litt. sec. 57). " And yet some-

times improperly it is called a feoffment when an estate of freehold [that is, an

estate for life] only doth passe " (Co. Litt. 9 a).]

J " In a feoffment, the livery is the material part, and transfers the posses-

sion." {Baddeley v. Leppingicell, .S Burr. 1533, at p. 1544.)

398 ON ASSURANCES.

signed by the surrenderor or his agent lawfully autho-

rized by writing ; and by 8 & 9 Vict. c. 106, s. 3, a

surrender of any estate of freehold is void at law unless

made by deed.

(2) The immediate remainderman or reversioner, upon a term

of years or a tenancy at will, might release by deed to

the tenant for years, or at will. (Co. Litt. 50 a.)

(3) An exchange might be made, without livery of seisin, of

lands held for a freehold in possession, all the exchanged

lands being situate in the same county. And before the

Statute of Frauds, such exchange might have been by

mere parol. (Litt. sect. 62.) A deed is now necessary.

(See 8 & 9 Vict. c. 106, s. 3.)

(4) Partition between coparceners might be effected without

livery. (Doct. & Stu. 17th ed. p. 23.) For example, by

drawing of lots. (Litt. sect. 246.) A deed is now

necessary. (See 8 & 9 Vict. 106, s. 3.)

(5) Lands or tenements which are appurtenant to an office,

would pass in possession on a grant by deed of the office.

(Co. Litt. 49 a ; Shep. T. 90.)

(6) Similarly of lands or tenements which are appurtenant

to a corrody. (Co. Litt. 49 a.)

The last two instances are not, strictly speaking, examples

of a conveyance of the freehold in the lands, which passes only

as appurtenant to the subject of the grant.

Lord Coke adds, as further examples, assignment of dower

ad ostium ecclesice, or otherwise (meaning also dower ex asscnsu

patris), and the surrender of customary freeholds. (Co. Litt.

49 a.) But though the assignment of dower forthwith gave the

wife an indefeasible claim, this can hardly be called an imme-

diate claim, and still less can the assignment be said to have

vested in her an immediate freehold ; and as to customary free-

holds, Lord Coke's opinion that the mere omission of the words

" at the will of the lord," in ar grant of lands held by copy of

court roll, is enough to show the lands to be properly freeholds,

must now be regarded as quite exploded. {Vide supra, p. 29.)

Usage of the Any livery of the seisin for an estate of freehold is commonly

"^^^ ' styled a feoffment; but in strict propriety the word, being

OiF A FEOFFMBl^r. 399

equivalent to donatio feodi, denotes livery for a fee or estate of

inheritance. (Co. Litt. 9 a.) Since estates of mere freehold in

possession will at the common law pass by livery of seisin as well

as estates of inheritance in possession, it was convenient, when

feoffments were in common use, to have only a single name to

denote the appropriate assurance.

Livery of seisin is divided into livery in deed, and livery

in law.

Livery in deed (or actual delivery) is made upon the land itself, Requisites

and in the absence\* of every person, other than the feoffor or deed.^'^^ ''^

feoffors, having any lawful estate and possession in the thing

whereof livery is made. (Shep. T. 213.) But it seems that a

lessee for years may be present, if assenting to the livery (Dy.

33 a, pi. 13) ; and the livery is good if made in his absence

without his assent. (Co. Litt. 48 b.) The absent lessee must

not leave behind him any servant, or other representative.

Otherwise the livery is void, even though such servant should

assent. (Roll. Abr. Feffment, L., 15. See also Dy. 363 a, pi. 22.)

Indifferent persons, having and claiming no estate or posses-

sion, nor representing anyone who does, may be present.

{Doe v. Taylor, 5 B. & Ad. 575.)

It seems that the ceremony in which livery in deed consists The ceremony

may be merely the utterance by the feoffor of express words, deed,

unaccompanied by any action, declaring a present intent that

the feoffee shall immediately have the seisin ; but in practice

the utterance of appropriate words was commonly accompanied

by " the delivery of anything upon the land in name of seisin

\* It seems to have been held in Metteforde' s Case^ Dy. 362 b, pi. 20, that the

presence on the land of the reversioner, if he raises no objection, would not, at

the common law, have hindered' a tenant for years from making a (tortious)

feoflEment. But it is not clear that this was more than obiter dictum, for it was

doubted in that case whether the effect of the particular deed of feoffment was

not to convey the term itself previously to the livery of seisin, in which case the

livery would, it is conceived, have been void. The authority of the Touchstone

is express, that the persons above referred to in the text, if present, must actually

join in the livery : in which case they would of coui-se be counted among the

feoffors. Preston, in his additions to the text of Sheppard, seems to support this

view, as to freeholders ; but he remarks that a mere assent by lessees for years

is sufficient.

400 ON ASSURANCES.

of that land, though it be nothing concerning the land." (Co.

Litt. 48 a.) Words to signify the intent are necessary to

perfect the livery of seisin, though they are not necessary to

perfect the delivery of a deed. (Co. Litt. 49 b.) An exception

to this rule seems to exist in the case of a dumb feofifor. (Co.

Litt. 42 b, 43 a.)

Remarks The reports of Sharj^s Case, 6 Rep. 26, Cro. Eliz. 482,

upon ,\_ larps g^^,^ Moore's Rep. 458, if they all refer to the same case, are

utterly at variance.\* According to Moore, a certain man, in-

tending to deliver seisin of a house and land, merely {soJement)

delivered a deed of feoffment within the house; which was

held to be no livery of the land, but only a delivery of the

deed. If this account is both correct and complete, the case

would be clear and undoubted law ; but Moore's account

of the facts, if he is referring to the same case, is expressly

contradicted by both of the other reporters. They affirm

that the man who meant to make the feoffment used words

which, in the apprehension of ordinary persons, would leave

no doubt of his intention. Lord Coke gives the words, with

peculiar minuteness of circumstance, as follows : — " Brother,

I here demise unto you my house as long as I live, paying

twenty pounds by the year to me, and finding me my board and

washing and keeping of a horse." Croke plainly represents the

case as having decided, that mere words, unaccompanied by the

symbolical delivery of something, like a turf, a twig, or the ring

or handle of the door of a house, are insufficient to effect livery

of seisin. Towards the beginning of Lord Coke's report, which

is apparently confused and certainly obscure, the reader is

inclined to think that he is being told the same thing ; but

Lord Coke afterwards explicitly affirms that the words, Enter

into this land and enjoy it during your life, would alone have

constituted a good livery of seisin. Therefore it would seem

\* Lord Coke's editors seem for several generations to have treated these reports

as referring all to the same case ; nor is there any reason, from the factsstated, to

doubt the identity of the case in Croke with that of Lord Coke, But the dates

and names are different, being in Lord Coke Sharp v. Swan, 42 Eliz., and in

Croke Sharp v. Sharp, 38 Eliz., both in the Common Pleas. At the end of

Croke's report is the following remark : — " Note, that Serjeant Glanvil said,

such a case was between Stvan and Sparks." In Moore the case is given as

38 & 39 Eliz., Sharpe v. Swaine, in the King's Bench.

OF A FEOFFMENT. 401

that, according to Lord Coke, the case only decided that the

word demise is not an apt word to make livery of seisin for an

estate pur autre vie.

In practice the safest course is undoubtedly to make a sym- Course to be

bolical delivery, upon the land or in the house, of some appro- practke.''^

priate object in the name and as a symbol of the land or house,

and to accompany this act with words, desiring the feoffee to

hold the land or house according to the limitations contained in

the deed of feoffment, by which, under the statute 8 & 9 Vict,

c. 106, hereinafter mentioned, the livery must now be evidenced.

Feoffor or feoffee may both, or either, be represented by their Livery by, or

respective attorneys, duly appointed for the purpose by deed, attorney.

(Co. Litt, 48 b.) A parol attorney will not suffice. An infant

may appoint an attorney to receive livery of seisin on his behalf ;

and this is an exception\* from the general rule, that an infant

cannot execute a deed. (1 Prest. Abst. 293.)

Livery in law differs in its ceremony from livery in deed only Livery in law

in being made in sight of the land instead of actually upon it.

(Co. Litt. 48 b.) It does not require the same absence of hostile

claimants ; and it was in fact seldom used unless the presence

on the land of such claimants made livery in deed dangerous or

impossible ; though such danger is not essential to the validity

of livery in law. (Co. Litt. 253 a.)

But livery in law passes no estate without entry by the feoffee When it

during the joint lives -of himself and the feoffor. Such entry ^^^in.

must be actual entry (entry in deed), unless the feofl'ee be

hindered from making actual entry by fear of violence ; in

which case he may make an entry in law instead, by approaching

as near as he dares, and in words claiming the land to be his.

Under such circumstances, an entry in law will operate to perfect

the livery, and cause the estate to pass, in the like manner as

entry by deed. (Litt. sect. 419 ; Townsend v. Ash, 3 Atk. 336,

at p. 340.)

\* By 9 Geo. 1, c. 29, s. 1, infants not having guardians and femes covert are

empowered, by writing under hand and seal, to appoint an attorney to take

admittance to copyholds. This is repealed by 11 Geo. 4 & 1 Will. 4, c. 65,

s. 1, but re-enacted by s. 4.

C.R.P. D D

102 ON ASSURANCES.

Parcels in the The law imagines such an intimate union between different

same coun y. pg^j.^g ^f j.Jjq game county (Finch, Law, p. 79) that livery of

seisin of one parcel suffices to give seisin of all other parcels in

the same county, to which the livery relates. (Litt. sect. 61.)

Feoffments At the common law, a feoflfment made by an infant, proprid

inanu and not by attorney, is voidable only and not void ; and

the age of the infant is not material. (13 Vin. Abr. 174 =

Feoffment, E, pi. 1, 2 ; 1 Prest. Abst. 323.)

Customary By the custom of the county of Kent, an infant, whether

infants. male or female, not being below the age of fifteen\* years, seised

in fee simple in possession of lands subject to the custom of

gavelkind, may indefeasibly alienate them by feoflfment ; at all

events for valuable consideration. (Rob. Gav. pp. 248, 249.)

It is doubtful whether, in the absence of consideration, such

a feoffment would be unavoidable. {Ihid. pp. 276, 277.) It

would not be void ; because if it should fail as a customary

feoffment, it would be in the position of a feoffment made by an

infant at the common law. The alienation is not necessarily for

a fee simple, but may be for a fee tail, or for life. (Rob. Gav.

p. 280). But (independently of 8 & 9 Vict. c. 106, s. 4) a feoff-

ment made by an infant could not have any tortious operation.

(Rob. Gav. pp. 279, 280.) It is doubtful whether this custom

extends to lands taken by the infant otherwise than by descent.

{Ihid. pp. 277, 278, and p. 279, note c.) But infants so rarely

take lands in fee simple by purchase, that the question is of

little practical importance. The custom is construed strictly

\\_Re Maskell and Goldfinch, (1895) 2 Ch. 525.]; and therefore

the infant must deliver seisin proprid manu, and not by

attorney. ([Rob. Gav.] p. 249.) The Statute of Frauds, s. 1,

whereby no feoffment can convey any greater estate than a

tenancy at will, unless it is " put in writing," signed by the

feoffor or his agent thereunto lawfully authorized by writing,

seems to apply to feoffments made under a custom by an

infant. But such feoffments are expressly excepted from 8 & 9

Vict. c. 106, s. 3, whereby feoffments in general are declared

to be void unless evidenced by deed.

• In Dy. 262 b, pi. 33, ibid. 301 a, pi. 41, the age mentioned is sixteen years.

OF A FEOFFMENT. 403

This custom is not necessarily confined to gavelkind lands in

Kent. It might lawfully be alleged to exist in manors and

boroughs elsewhere. (Rob. Gav. p. 287. See Co. Litt. 110 b,

and Harg. n. 2 thereon.) In respect to lands not within the

county of Kent, its existence would require to be specially

proved.

At the common law, a deed, or charter of feoffment, was Livery secun-

necessary only in the case of a feoffment made to a corpora- carta"^""^^"^

tion aggregate. (Co. Litt. 94 b.) But though livery of the

seisin was itself the feoffment, and nothing else than livery

was generally necessary to a perfect feoffment, yet the limi-

tation of the estate or estates for which the livery was

made might be contained in a deed, executed for the purpose

previously to the feoffment ; and if the livery were afterwards

made without any formal limitation, but expressed to be made

with reference and according to the deed (secundum formam,

or formam et effectum, carta), such livery would enure to effect

the limitations contained in the deed.

If livery of seisin be made secundum formam carta, the How the

operation of the livery, so far as regards the quantum of the troirthe^^'

estate passed by it, is controlled by the import of the deed ; livery,

so that (1) if the deed should limit an estate which cannot

pass, or which cannot be created, by livery of seisin, as a

remainder de novo in fee simple expectant upon the death of

the feoffor, or a term of years followed by no remainder of

freehold, the livery is void; (2) if the livery purport to be

secundum formam carta, but the feoffor should also verbally

limit an estate which is less than the estate limited in the

deed, the estate limited in the deed passes by the livery. (Co.

Litt. 48 a, b ; ibid. 222 b.)

An estate of freehold having any quantum, in remainder

expectant upon a term of years created at the same time,

may be passed by making livery of seisin to that intent to the

termor for years. (Litt. sect. 60.) But such livery cannot be

made after the termor has entered into possession by virtue of

his term ; it being, of course, understood that his entry upon

the land for the purpose of receiving livery, does not, being

made with that intent, amount to an entry into possession so

P P 2

404

ON ASSURANCES.

as to defeat the livery. (Co. Litt. 49 b.) And for this purpose

the livery must be ivery in deed, not livery in law ; which

latter can only be made to the person who is himself to take

the freehold. (Ibid.)

Statutory

requisites.

Writing.

Deed.

Signing not

essential to

the deed's

validity.

Since the Statute of Frauds, 29 Car. 2, c. 3, s. 1, no feoff-

ment can convey any greater estate than a tenancy at will,

unless it is "put in writing," signed by the feoffor or his

agent thereunto lawfully authorized in writing.

By the 8 & 9 Vict. c. 106, s. 3, a feoffment, other than a

feoffment made under a custom by an infant, is void unless

evidenced by deed.

Except in special cases by virtue of special enactments, a

deed does not need signing in addition to sealing and delivery.

{Taunton v. Pepler, Madd. & Geld. 160 ; Cherry v. Heming,

4l Exch. 631.) Blackstone seems to have thought that the

above-cited section of the Statute of Frauds had made signing

necessary to every deed by which any estate or interest

specified in that section is granted or evidenced. (2 Bl. Com.

306.) But he seems for a moment to have forgotten, that all

transactions not by deed are in contemplation of law by parol.

The statute seems only to aim at restricting (in the specified

cases) the latitude of parol transactions, forbidding parol

transactions by mere words, permitting parol transactions by

written words without deed. There is not any reason to

believe that the " many fraudulent practices, which are

commonly endeavoured to be upheld by perjury and suborna-

tion of perjury," against which the statute is aimed, were

common in transactions by deed ; or that, if they had been,

the remedy applied by the statute would have been efficacious

in such cases ; or that the makers of the statute thought it

would. Transactions by deed seem wholly outside the

language, as well as the intention, of the statute. (See Prest.

Shep. T. 256, note 24 ; 3 Pres. Abst. 61 ; Aveline v. Whisson,

4 Man. & Gr. 801 ; Cooch v. Goodman, 2 Q. B. 580, at p. 597.)

It is therefore conceived that there is nothing in the Statute

of Frauds to make signing necessary to the deeds contemplated

in 8 & 9 Viet. c. 106, s. 3. Such deeds ought nevertheless to

be signed in practice.

OP A FEOFFMENT. 405

By the common law, any person having actual possession Tortious

(not necessarily actual seisin), of lands, could, by a feoffment, fe^ff^'nt at\*

give to any person, other than the person having the next or the common

the immediate estate of freehold in the lands,\* an immediate

estate of freehold, having any quantum. If the feoffor was

actually seised, and the estate which passed by the feoffment

was no greater than the estate of the feoffor, the feoffment

took effect rightfully ; but if the feoffor was not actually seised,

or if the estate which passed by the feoffment was greater

than his estate,t the feoffment was styled a tortious feoffment,

and was said to take effect by wrong.

In accordance with the maxim that no one can qualify his

own uirong, a tortious feoffment devested the whole fee simple

out of the rightful owner or owners. It does not follow that

the tortious feoffment was necessarily a feoffment in fee

simple ; and it might in fact be for a less estate. In such a

case, the feoffee took only the less estate, but the whole fee

simple was devested out of the rightful owner or owners, and

such part of it as was not disposed of by the feoffment became

vested in the feoffor by way of a tortious reversion upon the

tortious particular estate created by the feoffment.

The tortious operation of feoffments made after 1st October, Now pre-

1845, is prevented by 8 & 9 Vict. c. 106, s. 4. ItTtSl^^

The possession of a termor for years, or tenant at will, or Who could

by sufferance, sufficed to enable the termor, or tenant, to make tortious

a tortious feoffment ; and thus to convey an immediate estate feoffment,

of freehold which fulfilled many of the purposes of a rightful

estate, though it afforded no defence against the title of the

rightful owner. Upon the subject generally, and especially

upon the case of Doe v. Horde, 1 Burr. 60,t in which Lord

\* If the feoffment had been made to the person lawfully seised in possession

it would have been void, as purporting to give him what he already had ; upon

the principle of the maxim, Quod meum est, ampl'ius esse ?iteum nun potest . (Co.

liitt. 49 b.) If it had been made to the next remainderman, it would have

operated rightfully as a surrender of the estate of the feoffor, thus accelerating

the remainder. (I Prest. Abst. 353.)

\ "Where a greater estate passeth by livery than the particular tenant may

lawfully make." (Co. Litt. 251a,) Upon the whole subject of disseisin by

tortious feoffment, see Litt. sect. Gil, and Butl. n. 1. thereon.

J The history of the case was briefly as follows : — A, being tenant in tail in

remainder, and being entitled also to the benefit of certain outstanding terms,

406 ON ASSURANCES.

Mansfield, striving after an unattainable equity {to /x^ y(v4(T$ai

bvifaroi' biCw^fos) did his best to throw the law into confusion,

see Butl. n. 1 on Co. Litt. 330 b.

in 1710 brought an action of ejectment against the tenant for life, and recovered

judgment, apparently on the ground of the outstanding terms. Going into

possession under this judgment, he made, as was alleged, a feoffment to a

stranger, in order that he might serve as the tenant to iheprcecipe, and suffered

a common recovery. He appears at the time to have believed himself to be

tenant in tail in possession, and to have intended the feoffment to take effect by

that title. But it was afterwards decided that he was only tenant in tail in

remainder, and therefore the feoffment could only take effect, if at all, by tort.

The question was, whether the recovery was valid.

In 1752 an action of ejectment was brought in the King's Bench to impeach

the title under the recovery ; but it was held that the action was barred by the

Statute of Limitations ; which fact made it unnecessary to decide the question

of law. This action is reported 1 Burr. GO ; and upon this occasion Lord Mans-

field delivered himself of those disquisitions, which no one has ever been able to

understand. A writ of error was brought to the House of Lords, briefly reported

1 Burr. 126, more fully 6 Bro. P. C. 633 ; when the judgment of the King's

Bench was affirmed upon the same ground.

In 1777 aright accrued in possession to a reversioner, who had title on the

hypothesis that the recovery was bad, and he brought a fresh action of ejectment

in the Kings Bench to impeach the title under the recovery, which action is

reported 2 Cowp. 689. Lord Mansfield, who had fully stated his opinion in the

action of 1752, took no part in the action of 1777.

The first question considered was whether A, at the time when he suffered

the recovery, had been tenant in tail in possession or tenant in tail in remainder ;

because, if tenant in tail in possession, he would of course have had the right to

suffer the recovery. The Court held that, upon the true construction of the title,

he was tenant in tail in remainder ; and no more needs to be said upon this head.

Then the question arose, whether there had been a good tenant to WiQprcPcipe ;

for in default of a good tenant to the precipe, the recovery was of course

irregular.

It seems to have been contended, that when A went into possession under

the judgment which he obtained in his action of ejectment in 1710, this entry

was a disseisin of the tenant for life, whereby A obtained a freehold by disseisin.

This contention, which seems to be absurd, was overruled by the Court.

Then came the question, whether the tortious feoffment had vested an estate

of freehold (by tort, of course) in the feoffee.

There seems to be good ground for the decision at which the Court arrived.

There seems to have been no sufficient evidence that any feoffment was ever

really made ; for it is certain that the feoffor remained in possession after the

alleged feoffment, and there was nothing, except the common-form indorsement

on the deed, to show that the feoffee ever received livery in fact. The Court

was justified in treating this part of the proceeiliug either as a mere sham,

pretended to be gone through for the sake of giving foundation to a fraudulent

recovery, or else as a feoffment which, being intended to take effect by right,

could not take effect by wrong.

Moreover, assuming that an estate of freehold acquired by disseisin is techni-

cally a sufficient qualification for the tenant to the praecipe, it does not follow, if

such an estate by disseisin has been created by the fraudulent act of the recoveree,

OF A FEOFFMENT. 407

If a tortious feoffment was made by any person other than its effect,

a tenant in tail actually seised, the person rightfully entitled made by

(or any other person acting in his name, even though without ^c°uaUy° ^'^

his assent) might at common law destroy the tortious estate of seised,

the feoffee by mere entry (Co. Litt. 258 a) ; but if the feoffee's

heir had succeeded by inheritance before entry made, the

heir's estate could not be affected by entry, and the rightful

claimant was put to his action. (Litt. sect. 385.) His entry was Entry tolled,

technically said to be tolled by descent cast. Entry was tolled

by a descent cast in fee tail (when the disseisor made a gift in tail)

as well as in fee simple. {Ibid. sect. 386.) But on the extinction

of the entail by failure of issue, the entry was revived against

the remainderman or reversioner. (Co. Litt. 238 b.)

The 3 & 4 Will. 4, c. 27, s. 39, enacts that no descent cast Entry now

after 31st December, 1833, shall toll any right of entry. This ^ifj^^t^ ^^

enactment made the learning of descents cast, and also of

continual claim whereby rights of entry might be protected

therefrom, equally obsolete.

A feoffment, made by a tenant in tail actually seised, Discontinu-

operated as a discontinuance of the estate tail, and devested \*"^®'

all remainders, and the reversion, expectant upon it, unless

they were vested in the king. (Stone v. Newman, Cro. Car.

427, at p. 428.) By such discontinuance the persons entitled

under the entail, and in remainder or reversion, were barred

of their right of entry, and respectively put to their action as

the only means to enforce their claims.

The learning relating to discontinuance, though obsolete in

respect to the common practice, is still sometimes of practical

that tlie recovery must be good. The conclusion seems to be more than plausible

that such a recovery would be void under the general law relating to fraud and

covine. If a tenant in tail in remainder had been allowed to manufacture a

tenant to the praicipe by tort, this would have been nearly the same thing as to

allow him to suffer a recovery without any tenant to the jireecipe at all.

The' Court, perhaps unfortunately, did not confine their attention to these

grounds, but served up a watered version of Lord Mansfield, who had entered

into long disquisitions relating to the original nature of feoffments, the nature

of feoffments at that day, the law relating to disseisin in general, and the

doctrine of disseisin at the election of the person disseised. This has given rise

to the impression, that Lord Mansfield, and (following him) the Court of King's

Bench, considered the law relating to the tortious operation of feoffments to be

inequitable, and fit to be pruned away by modern enlightenment.

408 ON ASSURANCES.

importance. In 1884 a case was litigated in the House of

Lords in which the validity of a claim partly depended upon

the properties at the common law of a tortious fee simple,

which had been gained by a discontinuance effected in the

preceding century, by a feoffment made by the survivor of two

joint donees in special tail.

Right of In all cases where the right of entry was tolled or barred,

to realaction. ^^^ needful action to recover the seisin was a real action. An

action of ejectment {cjectioncjirmce) would not suffice. (2 Prest.

Abst. 328.)

There were two degrees of remoteness in a right of action,

the first being said to be founded upon a right of j^ossession,

and the second being styled a mere rigid ; and there were two

kinds of real actions corresponding thereto, possessory actions,

grounded upon writs styled tvrits of entry, and droitural actions,

grounded upon writs styled icrits of right. A right of possession

might be turned to a mere right, either by suffering such a

time to elapse as would be a bar to a writ of entry, or by

suffering adverse judgment by default in an action on such a

writ. (See, on this subject, Butl. n. 1 on Co. Litt. 239 a.)

But the discontinuance of an estate tail by the tortious feoff-

ment of the tenant in tail in possession, forthwith turned the

right of the issue in tail to a mere right, without passing

through any intermediate stages.

Feoffment as The feoffment hitherto contemplated is a strictly common

unde^statute ^^^^ Conveyance. But uses capable of being executed by the

of Uses. statute may be declared upon the seisin of the feoffee ; and in

such case the conveyance takes effect partly by the common

law and partly by the statute.

( 409 )

CHAPTEE XXIX.

OF A KELEASB.

A RELEASE has sGveral modes of operation ; but of these only

two, strictly speaking, entitle it to be styled an assurance of

lands — (1) its operation by way of enlargmg an estate (enlarger

testate), when a remainderman or reversioner releases his

estate to a particular tenant ; and (2) its operation by way of

passing an estate (mitter Tes/a^e), when one joint tenant releases

his estate to another. The following remarks will be confined

to releases by way of enlargement.

A mere interesse termini does not qualify the person entitled Who may

. . take a release

thereto (the mtended lessee) to take a release (Litt. sect. 459) ; eniarger

for there does not exist a reversion upon an interesse termini. ^' ^ '

(Co. Litt. 270 a.) The lessee must be in possession either by

actual entry or by force of a bargain and sale under the Statute

of Uses. But he remains qualified to take a release, if he parts

with the possession to a sub-lessee of his own ; and a termor for

years in remainder upon another term which is an interest in

possession, is sufficiently qualified to take a release, without

being or having been in possession, by the possession of the

termor under the prior term. (Ihid.) There is a sufficient

reversion upon a tenancy at will to qualify the tenant to take

a release (Litt. sect. 460) ; but not upon a tenancy at sufferance,

which is a bare possession without any privity of estate. (Co.

Litt. 270 b ; Butler v. DucJcmanton, Cro. Jac. 169.) The

general principle which sums up and explains the foregoing

observations is this, that the releasee must have in him a

vested estate or interest to which the releasor is privy.

By a release in fee, the estate of the particular tenant is its effect,

enlarged, and, if his estate is only a chattel interest, his mere

possession is turned to an actual seisin (Litt. sect. 546) ; and

uses capable of being executed by the statute may be declared

upon the seisin so acquired.

410 ON ASSURANCBS.

Lease and Upon the foregoing proposition was founded the now obsolete

assurance by lease and release. The lease was a bargain and

sale for a year, which, being made by a person having the

seisin in him, raised a use capable of being executed without

transmutation of the seisin, whereby the bargainee acquired a

lease for a year, and was held to be constructively in possession

under the statute without actual entry. Thereby he became

qualified at the common law to acquire the seisin in fee by

means of a release of the reversion.\*

New uses capable of being executed by the statute might be

declared upon the seisin so transferred in fee to the releasee.

Thus this kind of assurance might serve, and was in fact

employed to serve, two different purposes, accordingly as the

use was declared to the releasee himself, or as new uses were

declared upon his seisin. (1) If the use was declared to the

releasee himself, the latter remained seised ; and, since he was

seised to his own use, he was in by the common law, and not

by the statute. In this case the lease and release operated

merely as a conveyance, and its operation is divisible into two

stages : first, the bargain and sale for a year, which took effect

by the statute ; and, secondly, the release, which took effect

by the common law. (2) If new uses were declared upon the

seisin of the releasee, these (if otherwise valid) were executed

by the statute, whereby the seisin was devested out of the

releasee to serve the uses. In this case the lease and release

might operate as a settlement ; and its operation was obviously

divisible into three stages, of which the first and third were

due to the statute, and the second was due to the common law.

\* This mode of assurance is said to have been invented by Serjeant Moore not

long after the passing of the Statue of Uses. (2 Bl. Com. 339.) It was not

accepted without much opposition ; see 2 Prest. Conv. 208 ; Rowe, Bac. Uses,

p. 146, note 87. A sufficient reply to the technical objections urged against it

seems to be found in the sixth resolution in Ispham v. Morrice, Cro. Car. 109, at

p. 110 ; which decided that, when a lease had been made under the statute, the

reversion would pass by a grant before entry by the lessee. From this it follows

that the reversion would pass to the lessee himself by release. The distinction

between the common law lease and the lease under the statute is, that in the

former case, until the lessee enters, the lease has no existence as a lease, but

only as an, Interesse tervihii, a possibility to come into existence, and is not sepa-

rated from the reversion, or rather from that which, when the lease comes into

existence, will be the reversion ; see Lord Coke on Litt. sect. 459 ; but in the

case of a lease under the statute, the lease is immediately and before entry sepa-

rated from the reversion.

( 411 )

CHAPTER XXX.

OF A STATUTORY GRANT.

The several stages by which the form of assurance by lease All heredita-

° ments now he

and release was superseded, have been traced above ; the last in grant.

of them being the 8 & 9 Vict. c. 106, s. 2, which enacts that,

after 1st October, 1845, all corporeal tenements and heredita-

ments shall, as regards the conveyance of the immediate

freehold thereof, be deemed to lie in grant as well as in

livery.

The disuse in practice of feoffments, and the abolition by Relation

the above-cited statute of the necessity for livery of seisin, is premisses of a

connected with some remarkable modifications in the practical )|^j^,,X,;\* ^

effect of conveyances, so far as regards the relation between

the premisses and the habendum. The following statement of

the chief points which require to be noticed in this relation

may be found useful, since very confused, and even erroneous,

ideas are now current upon the subject. It must be borne in

mind that in early times deeds contained no recitals, and that

the premisses are deemed to commence with the operative

words.

A careful examination of the authorities seems to establish

the following propositions : —

(1) Effect must be given to every part of the premisses ; and

therefore, though the habendum may enlarge an estate

expressly contained in the premisses, and capable of

taking effect, it may not make void any such estate,

or abridge any such estate, unless the abridgment is

consistent with the expressions contained in the pre-

misses. (Co. Litt. 299 a ; Lilley v. Whitney, Dy. 272 a,

pi. 30; Carter w. Madgwlck, 3 Lev. 339; Germain v.

Orchard, 1 Salk. 346, 3 Salk. 222 ; Goodtitle v. Gibbs,

412

ON ASSURANCES.

True

criterion

whether

/id be lid It III

nipy control

premisses.

5 B. &, C. 709; BoddingUm v. Robinson, L. R. 10

Exch. 270.)

It follows from the above-stated proposition, that the

habendum cannot in general abridge any estate contained

in the premisses, unless such estate either is not

expressly contained, or else is not capable of taking

effect ; because such abridgment would not in general

be consistent, in such a case, with the expressions in

the premisses. And it accordingly appears, from an

examination of the authorities, that all the usually cited

cases in which the habendum has been held to abridge

an estate in the premisses, are referable to one or the

other of these two heads, and are divisible into two

classes, which are summed up in the two next following

propositions.

(2) Where an estate in the premisses arises, not expressly,

but by mere implication, an express estate in the

habendum, if repugnant, may abridge the implication

of the premisses. (Buckler's Case, 2 Rep. 55 ; Hogg v.

Cross, Cro. Eliz. 254 ; Co. Litt. 183 a ; ibid. 190 b.)

The language in which this rule is often referred to

as being an example of repugnancy between the

habendum and the premisses, and of the controlling of

the latter by the former, is not very happily chosen,

though it is sanctioned by high authority. For, since

it is not only unnecessary, but even improper, that the

premisses should contain any mention of the estate to

be granted (Shep. T. 75), there is no reason, under

such circumstances as above mentioned, to suppose that

any estate by implication arises by the bare mention of

a grantee in the premisses. In such cases, instead

of saying that the implied estate in the premisses is

controlled by the express estate in the habendum, we

should more properly say that there is no estate in the

premisses at all.

(3) Where, under the old law, an estate was contained in

the premisses, which could not take effect without

OF A STATUTORY GRANT. 413

livery of seisin, and such livery was not duly made,

then, if an estate was contained in the habendum which

could take effect without livery of seisin, the latter

estate would take effect by mere delivery of the deed,

though the former would not. (Baldwin's Case, 2

Eep. 23.)

In these cases also there is little propriety in speaking

of the habendum as controlling the premisses. It would

be more correct to say that two limitations are con-

tained in the same deed, one of which (that in the

premisses) is void, while the other (that in the

habendum) is capable of taking effect.

It follows that, strictly speaking, the habendum does

not control the premisses in any of the foregoing cases,

because either there is no estate in the premisses, or

else the estate in the premisses is already void, inde-

pendently of the operation of the habendum.

Moreover, the introduction into common practice of

assurances by which an immediate freehold can be

conveyed without making livery of seisin, such as a

bargain and sale inrolled, a lease and release, or a grant

under 8 & 9 Vict. c. 106, has rendered impossible, in

modern practice, any such seeming conflict between the

habendum and the premisses as appears in the cases

referred to under proposition (3) ; because in modern

assurances all estates whatsoever can pass by delivery

of the deed without livery of seisin.

The conclusion seems to follow, in all cases like those

above referred to, that in modern assurances by grant,

the habendum, though it may enlarge, yet may not

abridge, any estate previously contained in the premisses,

unless the estate in the premisses arises by mere impli-

cation. In strict propriety of speech it should rather

be said that the habendum only seems to abridge, when

in fact there is no estate in the premisses at all.

(4) But a modification introduced by the habendum is per-

mitted to take effect, if it is so far consistent with the

language of the premisses, that its admission does not

414 ON ASSURANCES.

make any part of the language simply void or nugatory.

In such cases there is not, properly speaking, a repug-

nancy between them.

Thus, there is, for the present purpose, no repug-

nancy between a fee simple and a fee tail. If the

former be limited in the premisses, and the latter in

the habendum, the grantee undoubtedly takes a fee

tail ; but whether he also takes a remainder thereupon

in fee simple is doubtful. (Co. Litt. 21 a ; Harg. n. 2

thereon, and the cases there referred to.) Some

further evidence of intention, beyond the bare limitation

in the premisses, is perhaps necessary to pass the

remainder also.

So, also, when there is a grant in the premisses to

several grantees, such as, if standing by itself, would

import a joint tenancy, there is no repugnancy if

the limitation in the habendum should be such as to

import a tenancy in common ; and in such a case the

effect of the habendum is to sever the joint tenancy.

(Litt. sect. 298 ; Co. Litt. 183 b.) And if the limita-

tion be to two, habendum to one for life, remainder to

the other for life : the first takes a life estate in posses-

sion, and the other a life estate in remainder. (Co.

Litt. 183 b ; Dy. 160 b, pi. 43; ibid. 361 a, pi. 8.)

And if the grant in the premisses be to a man and

his heirs, habendum to him and his heirs during a

life or lives, there is no repugnancy, and the grantee

takes only an estate j9»r autre vie. (2 Prest. Est. 4.)

And if a lessor being seised of the reversion in fee

simple upon a lease of life, makes a lease which

purports to be of the reversion, habendum the land for

twenty-one years, there is no repugnancy, and the lease

creates a good term in the land for twenty-one years

after the death of the lessee for life; the habendum

showing that the assurance was intended to be a lease

of the lands and not a grant of the reversion. {Throg-

morton v. Tracey, Dy. 124 b.) The significance of this

distinction lies in the fact, that in that case the lessee

for life had died without having attorned to the grantee,

OF A STATUTORY GRANT. 415

and, at that day, the attornment of the person havhig

the particular estate, durmg the lives of the grantor

and grantee, was necessary to the validity of a grant of

the reversion. (Litt. sect. 551, and Lord Coke's com-

ment.) But now, by 4 Ann. c. 16, s. 9, the grant of a

reversion is good without the attornment of the tenant.

The remarks at p. 410, supra, as to the declaration of uses Grant, as

in assurances by lease and release, whether to the releasee mider statute

himself, or upon his seisin, are exactly applicable to the case °^ ^^^^'

of a grantee by virtue of the 8 & 9 Vict. c. 106. A modern

conveyance by way of grant may therefore, to the same extent

and for the same reasons, serve either as a conveyance or as

a settlement ; and it is the assurance now most commonly

employed to serve those purposes.

NOTE ON THE OPERATION OF SECT. 2 OF THE

REAL PROPERTY ACT, 1845.

(By the Editor.)

[The main object of this enactment (as its framers them-

selves tell us\*), was to give to a simple deed of grant the same

effect as that of a conveyance by lease and release, or a

statutory deed of release under 4 & 5 Vict. c. 21. The efficacy

of the enactment, from the conveyancer's point of view, has

never been doubted : it has always been assumed that a

statutory deed of grant, by a person entitled to an immediate

estate of freehold in possession, gives the grantee seisin of

the land in the same way as if it had been conveyed to him

by lease and release. (Williams, Real Prop., 3rd ed. p. 146 ;

Seisin of the Freehold, p. 147 ; Sugden, Real Prop. Stat. 285 :

Leake, Prop, in Land, 1st ed. p, 51 and supra, p. 411.)

[It seems equally obvious that if land is conveyed to a

married woman by statutory deed of grant, and she dies

intestate before entry, her husband is entitled to an estate by

the curtesy.

\* [Thelieal Property Act, 1845, was drawn by Messrs. Hayes, Christie, and

H. B. Ker. Its provisions were explained in a letter from Mr. Ker to tlieljord

Chancellor which is printed in the early editions of Mr. Davidson's Concise

Precedents, and extracts from which will be found in Shelford's Real Property

Statutes.]

416 ON ASSURANCES.

[An interesting question as to the operation of the section

arose in Copestake v. Hopcr, (1907) 1 Ch. 366 ; (1908) 2 Ch.

10. In that case R. Hoper was seised of land of freehold

tenure, held of the lord subject to certain incidents of tenure,

including a heriot of the best beast of the tenant on his death.

Hoper mortgaged the land by a deed operating under sect. 2

of the Real Property Act, 1845, and died while the mortgage

was still on foot. The mortgagee had never taken possession.

The lord claimed a heriot, on the ground that Hoper was

" seised " of the land at the time of his death. Kekewich, J.,

held that as Hoper was in possession under a freehold title

he was seised of the land, and that a heriot was therefore due.

The grounds of the decision were obviously wrong, first because

Holder's title was equitable, and therefore had no bearing on

the question of heriot-right, which is an incident of tenure ;

and secondly because the decision ignored the effect of sect. 2

of the Real Property Act, 1845. But the result of holding

that a mortgagee of land, who has never taken possession, is

seised within the meaning of such a custom as that in question

in Cojyestake v. Hoper, is so inconvenient that the present

writer, in pointing out the error into which Kekewich, J. had

fallen (51 Sol. Journ. 288), ventured to suggest that sect. 2

of the Real Property Act, 1845, is capable of a stricter con-

struction than that usually accepted. The argument is this.

At common law, a reversioner or remainderman expectant on

an estate of freehold, is not, strictly speaking, seised of the

land ; the seisin is in the particular tenant (Co. Litt. 15 a.) ;

consequently if the reversioner or remainderman conveys his

estate by deed of grant at common law, the grantee takes the

legal estate, but he is not seised until the particular estate

comes to an end, and even then (unless the land is in the posses-

sion of a lessee for years), he has only a seisin in law : to

obtain actual seisin he must enter on the land {supra, p. 234.)

Now sect. 2 of the Act of 1845 says in effect that land shall,

as regards the conveyance of the immediate freehold thereof,

be deemed to lie in grant, and if this means that a grant of

the immediate freehold is to have the same effect as the grant

of a reversion or remainder, it follows that a grant of the

immediate freehold does not give the grantee seisin until he

enters : in the meantime he merely takes the legal estate. If

this construction were correct, the effect of the section would

be to enable land to be conveyed without regard to the

provision of the statute of Quia Emptores, which makes it a

condition of the right of a tenant in fee simple to sell his

land that the feoffee shall hold it of the same lord. It is quite

clear that the framers of the Act of 1845 did not intend this

result, and that all they meant to do was to make it possible

to convey, not merely the " immediate freehold " of land, but

the actual seisin of it, by deed of grant as well as by feoffment

{supra, p. 415 n.). This is the construction which has been

OF A STATUTORY GRANT. 417

put on the section by the most eminent real property lawyers

ever since the Act of 1845 was passed, and it was adopted by

the Court of Appeal when the case of Copestdke v. Hojie r cdme

before them ([1908] 2 Ch. 10). A mortgagee by grant is .

therefore seised of the land immediately on the execution of

the deed, without taking possession.

[The decision was probably inevitable, but it is not alto-

getlier satisfactory. Its practical result is inconvenient (for

no mortgagee expects to be subjected to the burden of heriot-

custom), and it involves an anachronism, because, as Mr. T.

H. Carson has pointed out (Real Prop. Statutes, 2nd ed.

p. 520), it construes an ancient custom by the light of a

modern statute which was never intended to apply to it.

But whether this can affect the construction of the statute is

doubtful. Historically the matter seems to stand thus.

[The custom in question must be assumed to have been

formulated not later than the reign of Edward I. Seisin, as

then understood, was a comparatively simple matter, and

might be defined, with sufficient accuracy, as the possession

of land by a person entitled to an estate of freehold. At

common law, there were various methods of acquiring seisin,

but the only one M^hich is of interest with reference to the

present question is the mode by which, in ordinary cases, a

tenant in fee simple in possession conveyed his land to

another person, namely feoffment with livery of seisin. Then

came the Statute of Uses and the Statute of Inrolments, and

the ingenious contrivance known as the lease and release

{supra, p. 410). Now suppose that R. Hoper had mortgaged

his land by lease and release : would he thereby have trans-

ferred the seisin to the mortgagee ? It seems clear that he

would. In a conveyance by lease and release, the bargain

and sale, or lease for a year, takes effect under the Statute of

Uses, so as to transfer to the bargainee (or lessee for a year),

without entry, the possession of the land, which is enlarged

by the release into an actual seisin {supra, p. 409), and this

operation of the statute cannot be affected by the fact that the

statute, so far from having been passed with any intention

of dispensing with livery of seisin, was intended to abolish

those " subtle inventions and practices " known as uses, and

to restore tlie old practice, under which lands could not be

transferred by one to another but by solemn livery of

seisin, or matter of record. The preamble of the statute

expressly recites, that one of the evil results produced by

the conveyance of land to uses was that lords lost their

heriots. It seems clear, therefore, that if the land in ques-

tion in Copestake v. Hoper had, after the Statute of Uses

and before the Statute of Inrolments {infra, p. 421), been

bargained and sold to a purchaser, he would have been seised

of the land without entry, and on his death the lord would

C.R.P. E B

418 ON ASSURANCES.

[ha^e been entitled to a heiiot. After the Statute of Inrol-

ments, the same effect would have been produced by a lease

and release. And it seems impossible to contend that a

deed of grant under sect. 2 of the Real Property Act, 1845,

can have a more restricted operation. It is true that that

Act differs widely from the Statute of Uses. The object of

section 2 was not to protect the rights of feudal lords ; its

object was to simplify the jiractice of conveyancing, and in

all probability its framers never intended it to affect the

operation of such a custom as that which was in question in

Copcstakc V. Hopt'v. But it is clear that their " general

intention " was to give to a simple deed of grant the same

operation as a conveyance by lease and release, and if the

latter mode of conveyance was (as above suggested), sufficient

to give a purchaser or mortgagee seisin within the meaning of

the custom in Copestakc v, Hoper, it seems to follow that a

deed of grant under the Act of 1845 must have the same

operation.

[It has been contended that a deed of statutory grant of

land by a freeholder in possession, gives the grantee only a

seisin in law, and not a seisin in deed (Law Q. li. xxiii. 251 ;

51 Sol. J. 478, 496) ; but this view is contrary to that held by

all the most eminent real property lawyers of the last genera-

tion, and is, as the editor ventures to submit, erroneous.

(Law Q. R., xxiii. 361 ; 51 Sol. J. 612.)]

( 419 )

I

CHAPTER XXXI.

OF ASSURANCES BY WAY OF USB WITHOUT TRANSMUTATION OF

POSSESSION.

It was a principle of equity, that the courts of equity would

not enforce a mere voluntary use, as against any person who

was not himself a volunteer ; though, if an owner parted with

the seisin and declared a voluntary use upon the seisin in the

hands of his feoffee, equity would enforce the voluntary use as

against the voluntary seisin of the feoffee.\* Voluntary uses,

therefore, did not interfere with the legal rights of any person

whose seisin did not depend upon a voluntary title. It follows

that no effectual use could, without consideration, be raised in

favour of another person upon the seisin of a person who also

had in him the beneficial title, while he retained the seisin in

himself ; because he could exercise all his legal rights unfettered

by the voluntary use.

The considerations which sufficed to raise a use upon the By what con-

seisin of a person who was also benefically entitled, were use^maybe\*

(1) valuable consideration, (2) the consideration of relationship raised.

by blood or marriage. A use so raised was capable of being

executed by the statute. In the first case, the transaction,

styled ahargain and sale, was complete upon the payment of the

purchase-money, and nothing further was absolutely necessary

in order that the use might effectually be raised. In the second

case, the consideration was such that it was no consideration at

all, unless and until the person to be affected by it elected to

regard it as such ; and therefore a formal declaration of his

intention was necessary. This was usually done by a covenant,

whence came the assurance briefly styled a covenant to stand

seised. But a covenant was not necessary : a declaration of

intention made by deed poll would serve equally well. (Shep.

\* " That no court of conscience will enforce donum gratvitum, thoagh the intent

appear never so clearly, where it is not execiite<l, or sufficiently passed by law."

(Bacon, Uses, 14.)

E E 2

420 ON ASSURANCES.

T. 508.) A mere parol promise was not sufficient. {ColUml v.

Collard, Popb. 47, Serj. Moore's Rep. 687, 2 Anders. G4 ; Pof/r

V. Moidtoii, Dy. 296 a, pi. 22.)

A bona fide valuable consideration was necessary to the rais-

ing of a use by means of a bargain and sale operating as a

conveyance, and a hond fide relationship of blood or marriage

was necessary to a covenant to stand seised.

The fact that the bargain and sale for a year, which was the

foundation of the conveyance by lease and release, was expressed

to be made for a nominal consideration that was in fact never

paid, does not form any exception to the rule, that a bargain

and sale must, in order to take effect as a bargain and sale, be

made for valuable consideration. The lease did not operate as

a conveyance until it was perfected by the release ; and both

stages formed together one transaction. The acknowledgment

of the fictitious consideration in the lease operated as an estoppel

at law, and by the release, even though it were made for no

consideration, the assurance became complete at law, without

any need to resort to the equitable doptrine of bargains and

sales. This assurance is therefore no exception to the rule,

because it did not take effect by the means contemplated by

the rule. If the validity of the use declared by the lease could

have been raised in equity, as a substantive question, upon

general principles it would have been permissible in equity to

adduce evidence of the fictitious character of the consideration,

and this might in equity have been fatal to the validity of the

use. But the whole transaction was complete at law, where

0 the doctrine of estoppel precluded all evidence touching the

consideration ; and when it had been completed at law, there

existed no equity (except under special circumstances, such as

fraud, which are not in contemplation) to disturb the trans-

action.\*

Statute of After the passing of the Statute of Uses, the use which was

men s. j.^iged upon the seisin of the vendor in favour of a purchaser

who had paid his purchase-money, was forthwith executed by

the statute and became a legal estate ; and thus, by means of

• [A bargain and sale under a common law power can be made for a nominal

consideration on the appointment of a new trustee, supra, p. 383.]

BARGAIKS AND SALES AND COVENANTS TO STAND SKISED. 4^1

mere parol bargains and sales made for valuable consideration,

it was possible, until the passing of the statute next hereinafter

mentioned, for vendors and purchasers to convey and acquire

the freehold and the inheritance in lands with no more cere-

mony than was needed for the purchase of a chattel. The 27

Hen. 8, c. 16, called the Statute of Inrolments, enacted, that

from the 31st July, 1536, no manors, lands, tenements or

other hereditaments, should j)ass from one to another, whereby

any estate of inheritance or freehold should take effect in any

person, or any use thereof to be made by reason only of any

bargain and sale thereof, except the same bargain and sale

be made by writing, indented, sealed, and inrolled as therein

mentioned.\*

It will be observed that the statute did not extend to interests

less than a freehold ; and therefore that the bargain and sale

for a year, which was used as the foundation of the release in

assurances by lease. and release, needed no inrohnent.

Bargains and sales for valuable consideration, if duly inrolled. Bargain and

are still perfectly valid, and perhaps they are still sometimes advantages."

employed. But they can conveniently serve only to convey,

not to settle, legal estates ; for since the bargainee comes in

only by a use, any further use limited thereupon will be a use

limited upon a use, which is not capable of being executed by

the statute, and will exist only as a trust. f For the same

reason, this kind of assurance does not permit the insertion of

powers intended to take effect at law by declaration of use.

\* "The Statute of Inrolments requires that the bargain and sale should be by

deed indented, and that the itirolmcntof the deed should be in parchment, within

six lunar months from the date, if the deed have a date ; but if not, then from

the delivery. The inrolment may be made either upon the day of tiie date, or

uppn the last day of the six [lunar] months, reckoning the day of the date

exclusively." (2 Sand. Uses 64.) For most purposes the deed, when duly

inrolled, took effect as from the delivery, to which it related back. {Ibid. 65.)

t But the uses raised were not necessarily in favour only of the person himself

who paid the consideration : they might be to himself with remainder to other

persons, or to other persons alone, by his direction. (2 Roll. Abr. 784, pi. 6, 7.)

Therefore, though uses executed by the statute could not be i-aiscd upon the

seisin of the hargalnee, successive uses might be raised upon the seisin of the

bargainor ; and by this means a bargain and sale might to a certain extent give

rise to a settlement ; and the citation from RoUe shows that this was not entirely

unknown.

422 ON ASSURANCES.

Covenant to The covenant to stand seised has long been quite obsolete.

Its only function was to carry into effect family settlements ;

and as the frame of these became more complex, usually com-

prising trustees to preserve contingent remainders, convenants

to stand seised were necessarily abandoned, because the trustees

were not within the consideration, and could, therefore, take no

estate by virtue of the covenant. (2 Sand. Uses, 100.)

This insuj^erable obstacle does not now exist, since trustees

to preserve contingent remainders are no longer needed ; but

there is no motive for reviving the defunct assurance.

It has long been the practice of the courts to allow an assur-

ance, technically invalid in the shape in which it was intended

by the parties to operate, to take effect as a convenant to stand

seised, when the circumstances of the parties are such that the

last-mentioned assurance would have been valid. Thus an

assurance by lease and release made by a man to his brother,

which was void as a lease and release because it purported to

convey a freehold in fiituro, was held good as a covenant -to

stand seised. {Roe v. Tranmarr, Willes, 682, 2 Wils. 75.) It

is sometimes necessary at the present day to have recourse to

this doctrine in order to defend a title.

APPENDICES.

Appendix I. — Are Leaseholds Tenements ?

IT. — On Eemainders after Conditional Fees.

III.^ — The Squatter's Case.

IV. — Determinable Fees.

V. — Witham v. Vane.

( 424 )

APPENDIX I.

[Reprinted from the Law Quarterly Keview, Vol. VI., p. 69.]

ARE LEASEHOLDS TENEMENTS?

Some remarks appear under this heading in the July number of

this Review, bearing the signature " H. W. E.," which is

expanded on the title-page into the name of a highly-esteemed

friend. They seem to afford a peculiarly apt occasion for

making a few further remarks upon the subject. During the

last seven years I have been on the look-out for the public

appearance of the passage which he cites from Litt. sect. 132.

If its existence had not been a widely-spread secret in the

learned world, it would certainly have appeared sooner ; and

I was unwilling to refer to it myself, because it seemed more

likely to prove a cause of stumbling than of edification.

It seems to me that three separate questions are involved,

where my friend has perhaps shown signs of a tendency to find

only one. (1) Are terms of years tenements ? (2) Is the

phrase, " leasehold tenure," a proper one to be used with

respect of terms of years ? (3) Can the phrase, " land of any

tenure," in a modern Act of Parliament, be taken to include

a term of years ? It would be quite possible to answer the

third question in the afiirmative, while answering the first

two in the negative ; and it would be quite possible to meet

the first with a firm and uncompromising denial, while extend-

ing a qualified recognition to the practice contemplated by the

second. Something like this is in fact my own case. In my

humble opinion it cannot be, or at least ought not to be,

seriously mantained that terms of years are tenements. I

also think that the phrase, " leasehold tenure," as applied to

terms of years, is both useless and misleading ; but if people

like to use it, they can do so without being either absurd or

ARE LEASEHOLDS TENEMENTS ? 425

unintelligible. As to the question, whether in a modern Act

of Parliament, the words " land of any tenure," can include

terms of years, I should prefer, considering what sort of things

modern Acts of Parliament usually are, to leave that to the

decision of their lordships the judges.

On the first point I rely upon a very short argument. In

England the legal definition of a tenement has for centuries

been by universal consent, " whatever is intailable under the

statute De Bonis." I leave it to my friend to say whether

this applies to terms of years.

It applies, as has often been remarked, to two distinct classes

of things : — (1) Things which are strictly the subject of common

law tenure ; and (2) things, like rent-charges, which, though

not strictly the subject of common law tenure, are so closely

connected with things that are, that they are admitted to the

privileges of the statute. The word "tenement" affords a

highly convenient expression for compendiously referring to

both these classes of things in a single word. What is the

use of increasing the confusion of Babel by dragging in some-

thing else, which has confessedly nothing to do with the statute,

and which can never for any practical purpose require to be

classed along with the things that have to do with it?

As to the question about " leasehold tenure," the case is

different. The phrase is not, in my opinion, a judicious one ;

but it can be understood, and its introduction does not tend

directly to the confusion of speech. Littleton no doubt lends

some countenance to the practice ; but, after perusing the

following remarks, I will beg my friend to say how much.

I take the matter to stand as follows : — By the time of Little-

ton, terms of years had acquired great practical importance,

and, under the Statute of Gloucester, they conferred for most

purposes a secure title. The custom had long obtained in

practice, of admitting termors for years to do fealty. Nothing

can be more evident than that Littleton was intensely puzzled

when he wrote that part of sect. 132 which refers to terms of

years. He knew that a term of years was no estate at all,

but a mere contract, at the common law ; yet he found termors

allowed to do fealty. In very cautious language, redolent

of doubt and bewilderment, he permits himself, as I view the

42G

APPENDIX I.

matter, to infer from the fact of the fealty, that there must be

some sort of tenure or another ; and he backs this up by refer-

ring to the writ of waste. Compare his style on this occasion,

which reminds one of a blind man feeling his way, with his

usual clear and unhesitating statement of facts ; and the differ-

ence between the two will be apparent.

In my humble opinion, the illustrious author was not clearly

justified in his conclusion. As a term of years is a mere con-

tract at the common law, there could not possibly be any

tenure of it. The Statute of Gloucester did not make it an

estate, but only prevented the reversioner from destroying his

contract under pretence of suffering a recovery. The common

practice of admitting termors to do fealty could not do what

had not been done by the common law or the statute. I

humbly conceive that the practice was a mere voluntary

proceeding on the part of reversioners, and could not create

a tenure which the law had not created ; and that the

language of the writ of waste admits of the same answer ;

and that Littleton's conclusion would have been more closely

in accordance with the theory of the law, if he had concluded

against the existence of any kind of tenure.

However, it is too late now, in the face of Littleton and

Lord Coke, to adduce these arguments ; and those who like to

talk about " leasehold tenure " must be permitted to do so

without very urgent remonstrance from their friends. But

the case is quite different if they propose also to call terms of

years tenements.

It must be remembered that the words tenant, tmere, tenen,

tenure, and tenement, are not strictly correlative : the classes

to which they refer are not conterminous. This sufficiently

appears from the remarks of Lord Coke at the beginning of

his commentary, and his " five significations." It is true

that he says that they all " doe properly belong to our tenant

in fee simple." But this is only his playful way ; and even

if true, it would not be inconsistent with the overlapping of

the different classes; and I leave it to my friend to say

whether Lord Coke's own remarks do not prove that the

terms are not strictly correlative.

In sect. 132 Littleton does not say that a term of years is

ARE LEASEHOLDS TENEMENTS ? 427

a tenement ; in the phrase cited from the writ of waste, " the

lessee holds his tenements " \\_tient les tenements] " from the

lessour for terme of yeares," the word " tenements " is

synonymous with " lands " ; and the statement is quite true,

though its language perhaps admits of improvement. Fitz-

herbert uses the word " lands " {cle terris) in a similar writ.

(Fitzh. N. B. 57 B.).

As to that jSb^Xvyixa eprjixcoaeoo^, Lord Brougham's Act, I would

fain hope that some day, when the Irish are pacificated like the

tailors,\* it may cease to adorn the statute-book.t

\* "The tailors are now entirely pacificated." — Sartor Regartus.

t These remarks were written before the publication of 52 & 53 Vict, c, 63,

by which Lord Brougham's Act has been repealed and substantially re-enacted,

without any of the improvements for which there was room.

( 128 )

APPENDIX II.

ON REMAINDERS AFTER CONDITIONAL FEES.

Professor Maitland knows so well how to touch the rim of

the cup with the honey of agreeahle flattery, that in his case

it is easy to subscrihe to the maxim, Corrif/e sapientem et

amah'it te. He has satisfactorily proved by examples that in

early times it was a not uncommon practice in settlements

to insert what purported to be limitations of remainders in

expectancy upon conditional fees ; and it follows that I had

attributed insufficient importance to the passage from Bracton

which assumes the validity of such limitations.

If I have not misunderstood Mr. Maitland's expressions, he

seems to think that at some early period such limitations

were not only of common occurrence in documents, but were

in fact valid or good in law. Upon this question I respectfully

submit to his notice the following observations.

My own hypothesis, founded upon Mr. Maitland's facts,

would rather be, that in early times, before the Inns of Court

had been founded and consolidated as Schools of Law, when

there was little litigation, no reports, and no professional

criticism and interchange of opinion, the law was in a fluid

state, which permitted clever people to give a free rein to their

fancies ; and that under those circumstances the practice of

inserting such limitations became common, with a view to

giving wider effect to the intention which had originally

prompted the invention of conditional fees ; but that, when

the circumstances changed in the manner above indicated,

these limitations were subjected to strict scrutiny, and at

once seen to be so utterly indefensible, that they sank down,

without any serious struggle being made to assert their

validity. I should gather from Mr. Maitland's remarks, that

ON REMAINDERS AFTER CONDITIONAL FEES. 429

he is not aware of the existence of any evidence to prove that

any struggle was made, in the course of litigation, to assert

the validity of these limitations.

Upon any other hypothesis than mine I am unable to

explain the remarkable fact, stated by Lord Coke, that at

some time subsequent to the passing of the Statute Be Bonis,

there was a doubt whether any reversion could subsist in

expectancy upon a fee tail. (Co. Litt. 22 a, 22 b.) If there

could be remainders upon a conditional fee, how could it be

doubted whether there might be remainders, or a reversion,

upon a fee tail ?

The Statute Be Bonis was so far from containing anything

to introduce such a doubt, that the people who strenuously

denied the previous existence of such remainders, admitted

them to be afterwards legal by virtue of the statute.

" I cannot but believe," says Mr. Maitland, " that the con-

" veyancers of the time knew their own business, and were

" not devising futilities when they limited remainders after

" conditional fees." But I would desire him to consider the

question whether, in the days to which he refers, there were

any conveyancers in the sense in which we now use the word.

Everybody who could write was expected to act as a con-

veyancer when the occasion demanded his services. I am, of

course, well acquainted with Mr. Maitland's highly interesting

paper\* on " A Conveyancer in the Thirteenth Century." But

that sort of collection of precedents bears to what we now

mean by the phrase, about the same relation as is borne by

the old wives' recipe-books of the 16th century to the modern

Pharmacopoeia.

Next, as to the question about the existence of a.formedon

en remainder at the common law. I am disposed to conclude

that there was no such thing, because I find Fitzherbert,

Lord Coke, and Booth all apparently consenting in that

opinion, and holding that the writ had its origin in the

equitable construction of the Statute Be Bonis. Mr. Maitland

hesitates to accept this conclusion, remarking that there exist

many copies of the Eegistrum Brevium as it stood before the

\* Law Quarterly Review, Vol. VII., p. 63.

430 APPENDIX ir.

statute, and that he does not like to speak confidently as to

their contents. I would not for a moment presume even to

hazard a guess ; and I respectfully await whatever informa-

tion Mr. Maitland may hereafter extract from those venerable

documents. But in the meantime I would humbly observe,

that he seems to be suggesting a very extraordinary state of

affairs. It appears that, in his view, remainders upon condi-

tional fees were common ; and therefore, that the rights

which they conferred would need a means to enforce them ;

and yet that, somehow or another, nobody has ever heard

for certain of the existence of this indispensable writ ; while

the persons who were the most likely to have heard of it, if

there was such a thing, deny its existence. Can any other

example be pointed out, of the existence of an important class

of rights, founded upon the existence of a class of estates in

real property, without any writ to enforce them '? or, at the

least, with a writ of which the existence is so obscure, that

nobody can testify to it, while Mr. Maitland can only urge,

that negative evidence is not absolutely conclusive. All this

is in remarkable contrast with the circumstances surrounding

the writ of formedon en reverter. There we find an equal

certainty about the existence of the right, and also about the

existence of the writ to enforce it.

It can hardly be maintained that rights under a remainder

were less likely to mature into possession than rights under

a reverter. Mr. Maitland, I think, will admit that in this

respect remainders and reverters stand in exactly the same

position. Whence, then, comes this remarkable difference, in

point of prominence, between the two writs ? Is it not a

plausible inference, that the one writ did exist and the other

did not ?

Next we come to the fact, that by reason of the reading out

of fines to the Court, the limitations contained in them must

have been familiar to the justices; and along with this is to

be considered the argument derived from the settlement made

by Thomas Weyland when a justice of the Common Pleas ;

which, as Mr. Maitland observes, shows that he assumed not

only to create remainders upon conditional fees, but also to

play some tricks with tenures which seem very odd in our

ON REMAINDERS AFTER CONDITIONAL FEES. 431

ej'es. Here I will venture to express a feeling of mild surprise

at the excessive moderation of Mr. Maitland's language. It

is like saying that Dick Turpin sometimes swerved from the

path of strict integrity, or that Thurtell and Weare have been

suspected of complicity in crimes of violence. It surely cannot

be maintained that there ever was a time when this bewilder-

ing nightmare gave a correct picture of the law. It rather

seems to prove one of two things : either that some justices

of the Common Pleas knew nothing about the law, and might

safely be trusted to swallow without protest anything that was

put before them ; or else (which is my hypothesis) that legal

notions in those days were in a vague and ill-ascertained con-

dition, under which things could easily be taken for granted,

which at a subsequent period came to be scouted by universal

consent as wholly inadmissible.

Justices of the Common Pleas seem to have had a constitu-

tional tendency towards the making of odd settlements. It will

be remembered that the " invention devised by Justice Eichel

in the reigne of King Richard the Second " was " full of imper-

fections." The same learned person would also appear to have

drawn a demurrable pleading in an action brought by himself.

(Co. Litt. 377 b.).

Historical inquiry into the origin of the law is a subject of

which I can readily understand the fascination. To style it

profoundly interesting is to use inadequate language. But

I think that this subject should be kept quite apart from

the law as it is administered in practice. There may possibly

be some points on which historical research not only can throw

light, but can throw such a light as might reasonably appear,

to men conversant with the administration of practical affairs,

to afford a sufficient ground for judgments and opinions

touching the decision of rights of property at the present day.

But in my opinion these points are at least not numerous.

I do not think, for example, that any Court, in deciding

questions on the nature of customary freeholds, ought to pay

any attention to arguments about socmanni and liberi tenentes,

and so forth. Nor do I think it permissible, unless under

the most extraordinary circumstances, to cite in Court any

authority older than Littleton. The most profound real

432 APPENDIX II.

property lawyer now living holds tluH opinion so strongly, that

he once even apologized to the Court of Appeal for citing Fitz-

herbert's Natura Brevimn, because, though late enough in date,

it is too unfamiliar to be properly intelh'gible except to people

of unusual research ; and he was afterwards so kind as to

explain to me why, under tlie peculiar circumstances, he thought

himself justified in citing that particular passage.

( 433 )

APPENDIX III.

\\_Ilt'}mnted from the Law Quarterly Review, Vol. Y., p. 185.]

THE SQUATTER'S CASE.

The recent case of Afji'iicij Companij v. Short, 13 App. Cas.

793, is of a sort to afford sincere ]>leasiire to every rightly con-

stituted mind. It appears that somebody in New South Wales

had, many years ago, acquired a good title, under the system

of Crown grants prevalent there, to a tract of open bush or

waste land near Botany Bay. For a long time he seems to have"

played the part of an absentee proprietor ; and when, about

1885, he began to think of turning the land to some use, he

found somebody else in possession of a part of it. In New

South Wales, the Imperial Statute 3 & 4 Will. IV. c. 27 was

adopted en hloc by a Local Act in 1837, and the period of

twenty years (our Act of 1874 not having been locally adopted)

is there the common period for the limitation of actions for

recovery of land. Upon inquiry it appeared that the other

somebody above mentioned had not been in possession of his

plot for anything like twenty years ; but it also appeared that

the rightful owner might perhaps have been out of possession

for a much longer period. Forty years ago a third person had

entered into possession ; after some years he had gone away,

apparently with no intention of returning ; after a further

interval, the somebody above mentioned had entered ; and

within twenty years from the last entry, the action was

brought. The question was, whether this action was barred by

the statute. The Supreme Court of New South AVales held

that the action was barred : the Privy Council have now decided

that it was not. Even the people who do not understand the

grounds of the decision must feel a pious satisfaction at the

C.R.P. P F

434 APPENDIX III.

disappointment of the interloping rogue who has been turned

out.

Some reference is made in their lordships' judgment both to

the general law of disseisin and to the statute of limitations ;

but the question, upon which of these grounds the decision was

intended to rest, seems to require what has been styled " con-

siderable consideration." The decision cannot be treated as a

combined result of both these grounds taken together, because

what is said about each of them separately would be quite

sufficient for the purpose. On the other hand, the decision

cannot easily be supposed to rest upon each of these grounds

separately, because there is nothing to show that any idea of

such multifariousness was present to the minds of their lord-

ships ; and it may safely be said, that judges who are of opinion

that they have two separate indefeasible grounds for their

decision are never so self-denying as to talk as though they

thought they had only one.

Upon the first point their lordships appear to have held that,

if a disseisor goes off the land without the intention of returning,

this restores the seisin of the disseissee : in other words, it

operates whnt is technically styled a remitter. This is not the

place for criticism, but the observation may be made that this

particular doctrine of remitter bears about it a strong flavour of

never having been heard of before, and that (to use a remark of

the late Master of the Rolls) the year 1888 is rather a modern

time at which to invent new law of real property. The pro-

position, or the idea which it embodies, is very appropriate to

another branch of the law : a domicil of choice is lost by leaving

the country without any animus rcdenndi ; but its appropriate-

ness to the law of seisin might be open to question if this were

the place for the discussion. Here it suffices to point out that

the proposition is by itself an ample ground to support the

decision. If the plaintiff, at the time of the defendant's entry,

had been remitted to his original seisin, it was quite superfluous

to discuss the Statute of Limitations, which (on that hypothesis)

had no more to do with this case than it had to do with any

other case.

But even suppose that the original owner had not been

remitted as aforesaid : it is nevertheless quite possible that

THE squatter's CASE. 435

bis action might not be barred by the statute. That is a

question, not of the general law of disseisin, but of the

language of the statute itself. Upon this question it is not

necessary here to express any opinion. The points to be

noticed are, firstly, that the learned judges discussed the ques-

tion evidently upon the above-slated hypothesis ; and, secondly,

that their conclusion in favour of the plaintiff supplies a

second and quite independent ground, which amply suffices to

support the decision.

If anybody were asked why he supposed that the question

as to the statute was discussed upon the hypothesis that the

original owner had not been remitted to his original seisin, he

would probably reply : Because otherwise the question does

not admit of discussion. 'J'he point is much laboured by the

learned judges, and is handled in cautious and circumspect

language : a proceeding which would be quite inappropriate

to the discussion of something loo obvious to admit of a

moment's doubt. If the plaintiff really was remitted to his

original seisin, he was actually seised ; and in that case, if

disseised, he could at any time within twenty years bring his

action, without hindrance from the statute 3 & 4 Will. IV.,

c. 27. It would have been quite out of i)lace to cite the judg-

ment of Baron Parke, in Smith v. Lloyd, to prove this point.

That learned and most acute lawyer is a great authority upon

nice quillets of the law ; but his opinion that two and two

make four, or that fifteen years are not twenty years, carries

no greater weight than the opinion to the same effect of

anybody else.

For these reasons it seems to be somewhat doubtful what

precisely is the point which the case has decided, or whether

it has decided more points than one. As New South Wales

has enjoyed since 1863 the blessings of the Torrens system of

registration of titles, it is a matter for some disappointment

that no mention is made in the case of the relation of that

system to statutes of limitation.

[It is not easy to say how far Mr. Challis intended his

brilliant article on the Squatter's Case to be taken seriously.

He knew, as well as anyone, that the decision had nothing

whatever to do with the doctrines of disseisin and remitter,

F F 2

486 APPENDIX III

and that the only question in the case was : When did the

Statute of Limitations hegin to run against the true owner?

In other words : When did a right of action for the recovery

of the hind iirst accrue to the true owner against the defen-

dant or anyone through whom he chiimed title ? With all

respect for the Court helow, the answer was ohvious. (See

Saviitel Johnson <C- Sons, I A. v. Bvoch\ [1907] 2 Ch. 533.)

[In 1890 the present writer, in an article published in the

Law Quarterly Review, xii., 239, put forward the view that

the Statute of Limitations, and the other acts relating to real

property passed in the reign of William IV., were passed for

the express purpose of getting rid of the doctrines of seisin,

disseisin and remitter, so far as relates to remedies for the

recovery of land, and that since the statute, the question

whether the true owner of land has lost his rights depends

not on the question of seisin, but on the question of possession.

He sent a copy of the article to Mr. Challis, and shortly

afterwards received a letter in which Mr. Challis said : " I am

"very much obliged to you for sending me a copy of the

" Law Quarterly with your article. I hope you will accept it

" for a compliment if I say that I had already read it ; but

\*\* I am very glad to have a copy. I even had thoughts of

" coming out with bell, book and candle against the heretic."

Not long afterwards, in conversation, Mr. Challis said, in

effect, that he did not wish to be understood as asserting that

the decision in Agency Co. v. Short was erroneous ; he thought

it could be supported on another ground than that of the

doctrine of remitter. But his health liad already begun to

fail, and he was obviously disinclined to discuss the matter.]

( 437 )

APPENDIX IV.

[lleprinted Jroni Law Quarterly Review, Vol. III., p. 403.]

DETERMINABLE FEES.

I HUMBLY conceive that the learned and ingenious arguments

of Professor Gray\* against the validity of determinable fees

might be separately answered in detail. But for the saving

of time and space, I will on this occasion confine myself to a

single argument, which certainly calls for some consideration.

That a cardinal result of the Statute of Quia Emptures

should be left to be discovered by Sanderst in the nineteenth

century seems to me, I confess, what Chillingwovth calls

" extremely improbable, and even cousin-german to impos-

sible." That Lord Coke, Plowden, Croke, Sir Henry Finch,

Lord Nottingham, the author of the " Touchstone," Serjeant

Maynard, Vaughan, Treby, Powell, Lord Hardwicke, Preston,

Fearne, Butler, Watkins (to put together at random the

names of a few men who have believed with unquestioning

faith in the existence of determinable fees since the Statute)

should have passed their lives in intimate familiarity with the

statute, without any one of them lighting or stumbling upon

what, if it were true, would be a fairly obvious truth, is not a

hypothesis to be accepted, unless no other rational explanation

of. the language of the Statute can be found.

Another and to my mind a simpler explanation presents

itself. The third chapter of the Statute contains the following

words : — " And it is to wit, that this Statute extendeth but

\* Professor John Chipman Gray, of Harvard Univeisity : a learned friend of

the present writer and the author of several highly esteemed works.

t " Mr. Sanders was the fir-st author to distinctly recognise, or at any rate to

distinctly state, that the Statute ^aia Emptoret put an end to qualified fees."

(Gray on Perpetuities, § 86, p. 25.)

438 ■ APPENDIX rv.

only to lands holden in fee simple." The suggestion is at

least plausible, that here " fee simple " means " fee simple

absolute."

That is, in fact, the proper meaning of the words ; according

to the maxim, Verba ccqukoca et in duhio poslia intcllignntiir in

digniori et potentiorl scnsu. (Co. Litt. 73a.) So Littleton

(sect. 293), as translated by Lord Coke, says : "And it is to

be understood, that when it is said in any hooke that a man is

seised in fee, without more saj^ing, it shall be intended in fee

simple ; for it shall not be intended by this word (in fee) that

a man is seised in fee tayle, unless there be added to it this

addition, fee tayle, &c." By this " &c." he means here, as

he often does elsewhere, to extend his words to other like

cases ; which is as much as to say that, as fee means fee

simple, so fee simple means fee simple absolute. So in

Metcalfe's Case, 11 Rep. 38, at p. 39a, it is said, "If fee is

mentioned, it shall be intended fee simple ; " and this is put

as one example of a class. The same idea is elaborated in

Gregory's Case, 6 Rep. 19.

The Latin, which is of course the actual original of the

statute, is still more evidently to the purpose ; for the words

are infeodo sinipliciter, not in feodo simplici. A gift to A and

his heirs so long as J. S. shall have heirs of his body, cannot

with nmch propriety be styled simj)liciter the gift of a fee.

It is worthy of notice that Lord Coke in 2 Inst. 504, 505,

misquotes the Statute, giving the words as in feodo simplici.

Yet, even with this assistance towards the conclusion advocated

by Sanders, it is plain that no such idea ever occurred to his

mind.

In vigour and acuteness of reasoning, and in what is

commonly but somewhat vaguely styled "grasp of general

principles," Sanders is, if I may express an opinion, inferior

to no legal writer of this or the last century. But it is a

perhaps not wholly insignificant fact, that in reading his

writings I have always felt like a traveller in a strange land,

where everything wears an odd and unexpected appearance.

Fearne, Butler, Watliins, Preston, sometimes differ and even

dispute ; but they nil talk the same language, and one feels

equally at home with all of them : even with the subtle and

DETERMINABLE FEES. 439

dogmatic Watkins, some of whose perquisitions and conclu-

sions are quite as bold as anything that is to be found in

Sanders. But the paradoxes of Watldns have about them a

sort of capacity for soon looking like familiar propositions,

while in the mouth of Sanders the most obvious truth

acquires some new and startling aspect. This shows the

originality of his intellect, but it does not prove him to be the

safest of guides. He should be followed with caution in cases

where he happens to differ from the whole civilised world

before him.

[Mr. Gray's answer to Mr. Challis's argument will be found

in the second edition of his " Rule against Perpetuities "

(pp. 556 seq.). The question is not one for a dogmatic and

positive expression of opinion, but the present writer thinks

that the weight of authority and argument is against Mr.

Challis. Many of ns share his distrust of Sanders ; on ques-

tions of history and principle, apart from decided cases,

Sanders is often a misleading guide, but in this particular

instance he appears to have been right.

[There can still be a possibility of reverter in a rent.\*]

\* [Ait.- Gen. v. Cum minx, 1895, reported (1S)0()) 1 Ir. K. 40G.]

( 440 ) •

APPENDIX V.

THE CASE OF

WITHAM V. VANE,

[1879.— W.— No. 104]

BEFORE THE

1bou6c of Xorb6,

26th, 27th Ajml, 1883.\*

A covenant by a purchaser of lands in fee simple, contained in the convey-

ance made to him by tlic vendor, that the purchaser, his heirs, appointees, and

:issigns, will from time to time and at all times pay, or cause to be paid, to the

vendor, his heirs, executors, admiuistratoi-s, or assigns, the sum of sixpence for

every chaldron of coals wrought and gotten out of the lands conveyed, and

which shall be shipped for sale, is not restricted to refer only to coal put on

shipboard by or on behalf of the colliery proprietor for the purpose of subsequent

sale by him, but refers also to all coal sold by or on behalf of the coUiery pro-

prietor for the purpose of shipment and actually shipped.

Such covenant is restricted to refer only to coals actually put on board ship,

and cannot, by reason of subsequent changes in the customary modes of carry-

ing coal, be extended to refer also to other modes of carrying coal, such as by

railway transport, which have grown into use since the date of the deed con-

taining the covenant.

Such a covenant confei"s upon the vendor no interest in the land conveyed,

and it is accordingly not open to any objection on the ground of remoteness, or

as tending to create a perpetuity.

In default of production of a counterpart of the conveyance executed by the

purchaser, after due search made for such counterpart by the representatives of

the vendor, secondary evidence of the execution of the conveyance by the pur-

chaser is admissible ; and a recital of the covenant contained in a subsequent

indenture execute by the r&spective representatives in title of the vendor and

the purchaser, and a like recital contained in a private Act of Parliament

obtained by the representatives of the purchaser, is sufficient evidence, in

\* [See S. E. R. v. Associated Portland Cement Manufacturert (1900) Zrf.,

(1910) 1 Ch. 12, referred to mpra, p. 184, n.]

WITHAM V. VANE. 441

addition to the antecedent probability of the matter, to prove the execution of

the conveyance by the purciiaser.

Held &\so, by the Court of Appeal, that the mere fact that the land conveyed

had been enjoyed under the title obtained by the conveyance, and that the con-

vej'ance purported to contain such a covenant, would not, in the absence of ■

proof of the execution of the conveyance by the purchaser, suffice to I'ender the

purchaser and his representatives liable, either at law or in equity, to perform

the covenant.

The principal question in this case turned upon the validity,

and the construction, of certain stipulations, contained in

certain articles of agreement in writing, dated 24th June,

1823, and in a conveyance, dated 21st Januaiy, 1824, made

between the predecessors in title of the plaintiffs, who were

also the appellants, and the predecessors in title of certain of

the defendants, who were also the respondents, respectively.

By the said articles of agreement, dated 24th June, 1823,

and made between George Silvertop of the one part, and

"William Harry Earl of "Darlington (afterwards Duke of Cleve-

land) of the other part, the said G. Silvertop agreed to sell

and the said earl agreed to purchase the manor of Hutton

Henry and other hereditaments in the County of Durham,

containing in the whole 3,200 acres or thereabouts, at the

price of 42,000/. And it was thereby agreed that, in the

conveyance of the said hereditaments to the said earl, there

should be inserted a covenant from the said earl that he, his

heirs and assigns, should from time to time pay to the said

G. Silvertop, his heirs, executors, administrators, or assigns,

the sum of sixpence for each chaldron of coals of the New-

castle measure, which should be wrought and gotten out of the

said hereditaments and which should be shipped for sale.

The said articles of agreement were signed by the said

G. Silvertop and the said earl respectively.

' In the conveyance of the said hereditaments to the said earl,

made in pursuance of the said articles of agreement, and dated

21st January, 1824, was contained a covenant in the following

words : —

"And the said William Harry Earl of Darlington doth

" hereby, for himself his heirs executors and administrators,

" covenant with the said George Silvertop, his heirs executors

" administrators and assigns, that he, the said "William Hany

442 APPENDIX V.

" Earl of Darlington, his heirs appointees and assigns, shall

" and will from time to time and at all times hereafter pay or

" cause to be paid unto the said George Silvertop, his heirs

" executors administrators or assigns, the sum of sixpence of

" lawful money current in Great Britain, for each and every

" chaldron of coals of the Newcastle measure which shall be

" wrought and gotten from and out of the said hereditaments

" hereby released or otherwise assured or intended so to be,

•' and which shall be shipped for sale."

The lands to which the present action related were comprised

in the above-stated conveyance of 21st January, 1824, and are

by Lord Selborne in his judgment styled the Hart Estate.

The representatives in title of the Earl of Darlington had

parted with all his estate in the said lands before the com-

mencement of the present action.

The plaintiffs, as the representatives in title of the said

G. Silvertop, were entitled to the benefit of the said covenant,

and certain of the defendants, as the representatives of tlie

said earl, were liable to the burden of the said covenant, if

and so far as the same was a valid and subsisting covenant,

for the purpose of imposing a valid and subsisting liability

upon the said earl and his representatives in title.

The original of the indenture of 21st January, 1824, which

was produced by the defendants, was duly executed by all

parties whose concurrence was necessary to pass the estate

agreed to be sold to the purchaser, the Earl of Darlington,

but it was not executed by the purchaser. Diligent search

had been made by the plaintiffs for the counterpart supposed

to have been executed by the purchaser and delivered to the

vendor ; but no such counterpart was found. From the

number of the seals affixed to the original, and from certain

pencil marks written against them, it appeared to have been con-

templated that the original would be executed by the purchaser.

The purchaser, the Earl of Darlington, was created Duke of

Cleveland in the year 1841, and died on 29th January, 1842.

In the judgments delivered he is commonly named by his

later title.

By an indenture dated Ist March, 1843, to which the

persons then entitled to the benefit of ^;he covenant, and the

WITHAM r. VANE. 443

persons then liable to its burden, were both parties, certain

arrangements, not material to be stated, were made in relation

to the premises ; and the said indenture contained a full

recital of the above-stated conveyance of 2l8t January, 1824,

in the course of which recital it was stated to be the fact, that

the said Duke of Cleveland had, by the said conveyance,

entered into the covenant above specified.

The indenture of 1st March, 1843, was executed by the

persons then entitled to the benefit, and by the persons then

liable to the burden of the said covenant, upon the hypothesis

of its validity.

In a private Act of Parliament passed in the year 1846, to

amend a prior Act which had been passed for the purpose of

vesting certain powers of management in the trustees of the

will of the Duke of Cleveland, was contained a recital that,

upon the purchase of the said hereditaments in the year 1824,

the said duke had entered ijito a covenant in the terms above

sjjecified. The Act which contained this recital was promoted

by the persons who, as representing the said duke, would then

have been liable to the burden of the said covenant upon the

hypothesis of its validity.

The principal questions which arose for discussion, and

which are dealt with in the judgments, are as follows : —

(1.) Whether there was any, or sufficient, evidence that the

purchaser, the Duke of Cleveland, had executed the

covenant.

(2.) Whether, on the hypothesis that the covenant had

never been executed by the purchaser, it was neverthe-

less binding upon his personal representatives.

(8.) Whether, supposing the covenant to be binding on the

purchaser, the words, " coals . . . which shall be . . .

gotten from and out of the said hereditaments . . .

and wliich shall be shipped for sale," must be restricted

to refer only to coals shipped by the colliery proprietor

for the purpose of being subsequently sold by him or on

his behalf.

(4.) Whether in the said covenant the word " shipped "

must be restricted to refer solely to coals actually put

444 APPENDIX V.

on board ship, or whether it might be extended to refer

also to other modes of carrying coal which hud come

into common usage since the execution of the covenant,

and had to a considernble extent taken the place of the

then existing custom of shipment.

(5.) Whether, supposing the covenant to be otherwise valid

and binding upon the purchaser, it was not void, as

tending to a perpetuity.

The original action came on for trial before Mr. Justice Fry,

on 5th June, 1880. The trial lasted until 7th June, when

judgment was given for the plaintiffs. The learned judge

seems to have held that, partly by reason of the undoubted

execution of the articles of agreement of 24th June, 1823, and

partly by reason of the fact that the lands had been enjoyed

under the title acquired by tlie conveyance of 21st January,

1824, it was not material to inquire whether the purchaser had

in fact executed the conveyance, and that the covenant was,

upon either hypothesis, binding upon his estate. He also held,

that the covenant was not void as tending to create a perpetuity ;

that it referred only to coals put on board ship by or on behalf

of the colliery proprietor for the purpose of subsequent sale by

him ; and that it could not be extended to refer to any other

method of carrying coals than by shipment.

Omitting the formal parts, and the part relating to costs, the

order dated 7th June, 1880, drawn up in pursuance of Mr.

Justice Fry's judgment, is as follows: —

" This Court doth declare that according to the true con-

" struction of the covenant in the deed of the 21st January,

" 1824, in the pleadings mentioned \* coal shipped for sale '

" means coal put on shipboard by or on behalf of the colliery

" proprietor for the purpose of subsequent sale by him and hucli

" coal only And doth order and adjudge that an inquiry be

" made having regard to the declaration aforesaid what number

" of chaldrons of coal of the Newcastle measure wrought and

" gotten out of the Hutton Henry Colliery have been shipped

" for sale."

And certain of the defendants who were executors of the

Duke of Cleveland's will were ordered to pay to certain of the

WITH AM r. VANEi. "445

plaintififs, in whom was vested the power to give a discharge for

moneys becoming payable under the covenant, out of the assets

of the said duke, sixpence for every such chaldron as should be

certified to have been so shipped for sale as aforesaid ; with

certain farther directions in case the last -mentioned defendants

should not admit assets for the purpose.

The plaintiffs appealed from the above-stated order. The

appeal was heard by the Lords .Justices James, Baggallay, and

Lush. Their lordships appear to have held, that there was no

evidence that the Duke of Cleveland had in fact executed the

covenant ; that upon that hypothesis, the covenant was not

binding upon him, although he had held the lands under the

title acquired by the conveyance in which the covenant purported

to be contained ; and that the only remedy of the plaintiffs was,

tohave brought an action (before such action had become barred

by the Statutes of Limitation) for the breach of the agreement,

contained in the articles of agreement of 24th .June, 182B, to

execute such a covenant. They accordingly reversed the judg-

ment of Mr. Justice Fry, and ordered the action to be dismissed

out of Court.

The plaintiffs appealed from this decision to the House of

Lords. Tlie appeal was heard on 26ih, 27th April, 1883, by

the Lord Chancellor, Lord Blackburn, Lord Bramwell, and

Lord Fitzgerald.

The counsel for the appellants were Sir Farrer Herschell,

Q.C., S.-G., Mr. Cookson, Q.C., Mr. Trevelyan, and Mr.

Dunning.

The counsel for the respondents were Mr. Whitehorne, Q.C.,

Mr. Wolstenholme, and Mr. Smart.

At the conclusion of the arguments for the respondents,

their lordships retired for consultation ; and upon their return

to the House, the following judgments\* were delivered : —

Lord Chancellor: My lords, I quite feel that this covenant Earl of Sd-

11-. L' borne, L. C. :

is one of a somewhat unusual character, and that its operation judgment,

may be in some respects inconvenient to the persons interested

in the estate of the covenantor. Neither, however, of those

reasons can be sufficient to prevent your lordships from giving

\* Such parts of the judgments as refer only to costs have been omitted.

446 APPENDIX V.

Karl of Sol- to it its proper legal effect. They explain, perhaps, the perti-

judgnient. nacity with which this action appears to have beeu defended,

and I must, for my own part, say that, but for the respect which

I feel for every opinion, even when contrary to my own, of the

learned judges of the Court of Appeal, I should have thought

that there was no question in this case susceptible of serious

difficulty or argument, excepting the question upon the con-

struction of the covenant. The Court of Appeal, however,

thought that th'e existence of the covenant was not sufficiently

proved, and because they thought so it is impossible for your

lordshijis not to regard that as a question requiring to be

seriously examined.

Now the matter stands in this way. There is a sale of land,

not merely for a certain sum of money to be paid down at the

time, but also in consideration partly of this peculiar covenant,

under which, though the vendor, as I understand its effect and

operation, retains no interest in the land, yet he may in a certain

event which is provided for, the event of the working of the

minerals under that land which he has sold, have a right to

receive sums which may be of considerable amount and value

from the purchaser or his representatives. My lords, this trans-

action was to be carried into effect by an indenture, and we

have produced to us an indenture executed by the vendor, and

coming out of the purchaser's possession, which, upon the face

of it, shows plainly on what terms and under what contract the

purchaser, out of whose possession that deed comes, held and

was in enjoyment of the land. The only question is whether

the covenant was executed under seal by the covenantor ; but

that there was a contract for such a covenant, of importance and

value to the vendor, is perfectly clear, because, as I say, the

title deed, coming out of the purchaser's muniment room, con-

tains upon the face of it the terms of that covenant, about

which, therefore, if the covenantor was ever liable, there can be

no controversy whatever.

Now what would be the natural course of such a transaction ?

Would it be that one part only of the indenture would be

executed by both parties and left in the hands of the purchaser ?

Can your lordships suppose that such a transaction could natu-

rally or reasonably take that course ; that the person who was

WITHAM r. VANE. 447

to have the benefit of this covenant would not have in his power Earl of Sei-

ancl in his own hands the covenant of which he was to have the jiuigment.

benefit, and that the deed which alone could prove it would be

delivered by him, acting by a solicitor, in a matter of business,

over to the purchaser? Your lordships will find it stated in

the books of law, and it is a familiar proposition, that when an

indenture contains provisions in which each party retains and

will have a continuing interest, one part of that is delivered by

each party to the other. An indenture bi-partite is supposed

not only to be between two parties, but to be in two parts ; and

the natural, proper, and ordinary course would be that each

party would have a part executed by the other party which

would secure to him his own interest. It may be, and I think

it is, so stated by Mr. Hargrave,\* in a note to the passage

about indentures in Coke upon Littleton, that the more modern

practice has been for all tbe parts to be executed by all the

parties; and it seems in this particular case tliat the deed pro-

duced from the muniment room of the purchaser was prepared

by the solicitor in such a form as to show that he contemplated

that it would be executed by both the parties ; and the fact that,

on the face of it, it shows some preparation for execution by the

Earl of Darlington, who was the covenantor, as well as by

Mr. Witham and those who joined with him in conveying as

vendors, has been relied upon in the Court of Appeal as evidence

that no other execution by the earl, the covenantor, can have

been contemplated, except the execution of that particular piece

of parchment, which the earl did not execute.

My lords, it certainly seems to me that that ground is most

insufficient for the argument which is founded upon it. I can-

not but believe that if the earl had executed the part which he

retained in his own possession, the necessity for the execution of

ft counterpart would have been exactly the same, and that the

business would not have proceeded in the natural and ordinary

course of such a transaction unless a counterpart retained by the

vendors had been executed by the earl. All reason, presumption,

and probability are in favour of it. I do not say that a priori

reason, presumption, or probability would have been by itself

\* Not Hargrave, but Butler, n, 3 on Co. Litt. 229 a. See also 2 Bl. Com.

296.

•14^ AppElNbix V.

Karl (»f Sti- eiiougli if there Were no evidence of any kind, properly receiV'

jmigmcni. ^^6, that there was in point of fact a covenant duly entered

into and executed by the earl.

But, my lords, there is, as it seems to me, upon that subject

evidence, not only admissible, but of the strongest possible

character, and such that it is difficult to believe that its effect

could have been rebutted without very strong and clear

evidence indeed of a kind not at all likely to have been pro-

ducible, and which certainly has not been produced in this

case. What, my lords, is the evidence to which I refer ? It

is this : an admission, under seal, by the duke's legal and

personal representatives and devisees of this particular

purchased estate, that he did enter into such a covenant.

That admission your lordships find in the deed\* bearing date

the 1st March, 1843, which is made, observe, my lords,

between the persons then representing the vendors entitled

to the benefit of this covenant of the first and second parts

and between certain persons described as " the trustees and

" executors named in and by the last will and testament of

" the Duke of Cleveland " (for the earl had become the first

Duke of Cleveland) " deceased, of the third part;" and they

were in point of fact devisees in trust of that particular

property, and also executors.

The substance of that agreement is for the reduction upon

certain terms of the payments which might be exigible under

this very covenant, a reduction which would operate for the

benefit, both of the persons interested in the estate, if they

were in any way liable for those payments, and in that way

for the benefit of the trustees of the duke as devisees in trust,

and also for the benefit of the duke's personal estate, as bound

by the covenant, by reducing the amount which might be

exigible against the estate under the covenant if it should

come into force. Therefore, the executors of the duke, as

such, were directly interested in the arrangements made by

this deed. All the parties interested are brought together —

the covenantees, the Withams, the devisees in trust of the

estate to which the covenant related, and the personal repre-

— ^,

• See p. 442, ante.

WITHAM V. VANE. 449

sentatives of the duke, who was personally bound by the Earl of Sel-

covenant, and it is a bargain concerning the subject-matter judgment,

of the covenant. In that deed it is solemnly recited, under the

seals of all those persons, that " by an indenture of release,

" dated on or about the 21st of January, 1824 " (being evi-

dently the very same deed of which a part executed by the

vendors was produced in evidence in the case), "William

"Harry, Duke of Cleveland" (his later title — he had been

Earl of Darlington at the time he executed it) " did, in and

" by the indenture now in recital, for himself, his heirs

" executors and administrators, covenant and agree with and

" to George Silvertop, his heirs executors administrators

" and assigns, that the said William Harry, Duke of

\*\* Cleveland, his heirs appointees and assigns, would from time

" to time and at all times thereafter pay or cause to be paid

" to the said George Silvertop, his heirs executors adminis-

" trators or assigns, the sum of sixpence for each and every

" chaldron of coals of the Newcastle measure, which should be

\*' wrought and gotten from and out of the said hereditaments

" and premises thereby released or otherwise assured, and

" which should be shipped for sale." Then there was a further

covenant as to accounts, and so on, exactly corresponding

with the terms of the covenant embodied in the part executed

by the Withams, which is now produced from the muniment

room of the duke.

My lords, can there be better secondary evidence than this

distinct admission under the seals of the parties bound that

the duke did covenant ? Can those w ho now represent the

estate as it was then represented by the parties to that admis-

sion be heard now to say that he did not covenant merely

because they produce from the duke's muniment room a part

of this indenture which the duke did not execute, of which,

although, no doubt, it was contemplated by the solicitors that

he should execute it, his execution would have been wholly

immaterial, if there were, as, unless this recital is untrue,

there must have been, an execution of a counterpart of that

indenture by the duke, which counterpart would naturally

be in the custody of the vendors or those representing them ?

The two parts of an indenture, when there are two parts, are

C.R.P. G G

460 APPENDIX V.

Earl of Sel- one and the same indenture. It is not that there are two

judgment. deeds or two indentures; there is one indenture, but that is

in two parts. Therefore the reason and probabihty of the

case, and the ordinary course of business in such a case,

agree with the express admission on record of these parties,

an admission made upon the footing of the existence of such a

covenant and for the purpose of varying the effect of it by

contract for valuable consideration.

That, my lords, has superadded to it a subsequent Act of

Parliament obtained at the request, as it recites, of the

representatives of the duke and containing exactly the same

recital of the existence of such a covenant.

The remarkable thing, which I am unable after the argu-

ment we have heard to explain to my own mind, is that in the

judgment of the Court of Appeal, in which the learned judges

agreed in holding that there was a failure of evidence to prove

the existence of such a covenant, there is not the least allusion

to this secondary evidence, to these admissions in the one

case by Act of Parliament, and in the other under seal, no

attention apparently having been directed to the question

whether they are not enough under the circumstances to

prove the existence of such a covenant, and to repel any

presumption, if otherwise there could have been a presumption,

that because the signature of the duke was intended to have

been placed upon the part which he produces and is not there,

therefore it could not have been put upon any other part

which is not produced. Of course, my lords, the non-production

of the counterpart bearing the signature of the duke, and his

seal, was a thing to be accounted for, but it is not in dispute

that there is abundantly sufficient evidence of search and that

it has not been found in the proper custody. Under those

circumstances, my lords, I cannot entertain the least particle

of doubt that we must proceed upon the footing that these

recitals are true. Of the terms of the covenant there is no

doubt or question, for they are set forth in both the recitals,

and we have the counterpart of the deed before us. The only

question, therefore, is, what is the effect of such a covenant if

it is assumed to have been duly executed by the duke ?

Now, my lords, some ingenious arguments were offered to

WITHAM V. VANE. • 451

your lordships which I own, notwithstanding the great Earl of Sel-

ingenuity with which they were urged, I had difficulty in judgment,

following, to the effect that this action is improperly brought,

supposing that there was such a covenant ; that the primary

liability was upon the holders for the time being of the Hart

Estate, and that, if so, the contract was objectionable on the

ground of perpetuity, or some other grounds, into the details

of which I really do not think it necessary to enter. My lords,

if there had been, as between the owners of the estate and

the general representatives of the covenantor, the relations

which are described by the words " primary and secondary

liability," which may very possibly have been the case by

means of contracts between the purchasers of the estate, when

it was sold by the duke's representatives, and those who sold

it, it appears to me that it would not have had the least efifect

upon the present question. It would have been res inter alios,

a matter with which the covenantees had nothing to do. The

only remedies they could enforce were remedies against the -

persons liable to them ; and, in my opinion, upon the

construction of this covenant, it is a mere personal covenant,

binding only and only purporting to bind the covenantor, his

heirs, executors, and administrators. Whatever be the thing

which it covenants to be done, it cannot be in any way

whatever a reservation of an interest in the land, nor is it

susceptible of any construction which would postpone the

liability under the covenant until some application or attempt

had been made to obtain payment against somebody else,

which in this case has not been done. There is not a word in

the covenant to justify such an idea. Eeference was made to

the case of Hemingway v. Femandes,\* a case of lease between

a lessor and a lessee, in which a certain covenant to make

certain payments was held by the Vice-Chancellor of England

to run with the land. But this is not a covenant which by

any possibility can run with the land upon the alienation out

and out in fee simple of the estate, nor has any authority

whatever been cited to your lordships in favour of such a

proposition. I am not sure what the result might have been

• 13 Sim. 228 ; 12 L. J., Ch. 130 ; 7 Jui-. 888.

G G 2

452 APPENDIX V.

Karl of Sci- if it had been so. Most certainly it is not so, and therefore

judgment. we need not trouble our minds with it.

"With regard to the question of perpetuity, as far as I can

make out, it was put wholly on these alternative grounds by

Mr. Whitehorne, upon the ground with which I have already

dealt, that it was in the nature of a reservation of an interest

in land to arise at an indefinite time. As I think that it was

not a reservation of any interest in land, the foundation of

that argument fails. Being a mere personal covenant

Mr. Whitehorne contended that it was a covenant to pay

money in an event which might only arise at a distant period

of time ; that can make no difference. In point of fact the

case I mentioned during the argument of the Clive Fund of

Walsh V. The Secretary of State for India \* is a remarkable

illustration of the inapplicability of the doctrine of perpetuity

upon any such grounds ; for the covenant there of the East

India Company was this (the covenant being made f in the

year 1756), that " if they should at any time thereafter by

any means otherwise than by the fate of war be dispossessed

of their territorial acquisitions in Bengal, and the revenues

arising thereby, so that the jaghire granted to Lord Clive

should cease to be paid to him or his assigns, or in case they

should at any time before 1784 cease to employ and maintain

in their immediate pay and service a military force in the

East Indies," they should pay him this money. Then " if

after the year 1784 it should so happen that the Directors

and Company should have no military force in their actual

pay or service in the East Indies " certain other payments

should be made. Of course that was a thing which might

not have happened for centuries. In point of fact it did not

happen till more than a century or about a century after the

date of the covenant — a very long time indeed after the year

1784. But although I remember perfectly well that this

notion of perpetuity was thrown out tentatively in the argu-

ments in that case, it met with no countenance — the money

was held to be payable.

The other argument was as to the inconvenience of tying up

♦ 10 H. L. C. 367. t The date, according to the report, is 1770.

WITHAM r. VANE. 453

to a certain extent the administration of the duke's estate. All Earl of Sel-

I can say uj)on that is, that that was a matter which the Earl of judgn'ient.

Darlington, who entered into this covenant, should have thought

of at the time when it was entered into. The convenience of

persons beneficially interested in the estate before the Court

cannot prevent the covenant from having its proper legal effect.

That brings me, my lords, to the question which alone

really appears to me to be a serious question in this case,

namely, the construction of the covenant ; and as to that, the

large construction contended for by the learned counsel for the

appellants, that " shipped " is to be a flexible term which

would be applicable to every mode of transport, and not only

to the transportation of coal by sea, appeared to all your

lordships to be one which on ordinary principles of construction

we could not adopt. Therefore that must be taken to be

excluded. Shipment, we think, means shipment, and the

covenant must be construed so.

But then the question is, what is the meaning of the words

" which shall be shipped for sale " ? Mr. Justice Fry thought

that they meant, and he has so expressed it in his Order,\*

" put on shipboard by or on behalf of the colliery proprietor

for the purpose of subsequent sale by him." My lords, that, I

believe, appears to your lordships, and certainly it does to me,

to be too narrow a construction. On the other hand, if the two

circumstances of shipment and sale happened qnocunque modo,

and without any connection between them with which the

colliery proprietor was concerned, I think it would be too large

and wide and too unreasonable a construction to bring every

such case as that within the covenant. To me it seems that

it was happily put in argument by Mr. Cookson when he said

" sale" means for " sale purposes " ; it must be shipped, and

it must be for sale purposes. As far as reason is concerned, I

cannot conceive why it should make any difference whether

the sale was negotiated or made before or after the shipment,

in point of time, so long as a sale and shipment are brought

together in the transaction of the colliery proprietor. My

lords, I believe that that opinion commends itself to your

\* See p. 444, ante.

454

APPENDIX V.

Earl of Sel-

borne, L. C.!

judgineot.

lordships generally, and that you will be prepared to agree to

the restoration of Mr. Justice Fry's Order, with this modifi-

cation, which I will now read to your lordships. I shall

propose that these words be omitted from Mr. Justice Fry's

Order,\* " put on shipboard by or on behalf of the colliery

proprietor for the purpose of subsequent sale by him," and

that instead of them these words should be introduced, '\* sold

by or on behalf of the colliery proprietor for the purpose of

shipment and actually shipped, and coal shipped by or on

behalf of the colliery proprietor for the purpose of sale by him

or on his account." It will run, therefore, thus, " This Court

doth declare that, according to the true construction of the

covenant in the deed of the 2l8t January, 1824, in the plead-

ings mentioned, \* coal shipped for sale ' means coal sold by

or on behalf of the colliery proprietor for the purpose of

shipment and actually shipped, and coal shipped by or on

behalf of the colliery proprietor for the purpose of sale by

him or on his account, and such coal only." That excludes, of

course, coal which is the subject of land transport as distinct

from sea transport. And, my lords, I am bound to say that,

while I think the words will fairly bear that construction, and

the reason of the thing strongly points to it, I am glad that it

should be possible to put upon this instrument a construction

which will in some degree mitigate the severity and incon-

venience of its operation upon the persons representing the

duke, because, if they have taken proper care of themselves

in their transactions with those to whom they have sold the

estate (and of course it is their own fault if they have not)

they will have an indemnity against that which they may

have to pay, which, of course, the present appellants have

nothing to do with, and the proprietors for the time being of

the estate will not have it made useless to them, because it will

only be necessary for them to dispose of tiieir coal in a different

way ; for example, to send it to other markets by railway, and

then they will be free from any burden under this covenant.

Lord

Blackburn :

judgment.

Lord Blackburn : My lords, I entirely agree in what the

noble and learned Lord Chancellor has proposed, and I will

• See p. 444, ante.

WITHAM V. VANE. 456

only say a few words upon the one point on which the Court of Lord

Appeal went. Mr. Justice Fry had decided that in his opinion judgment,

the counterpart of this indenture (as there was undoubtedly

an indenture at the time of sale) was sufficiently proved, and

that in equity it would be enforceable just as if it had been

produced, because the estate had been enjoyed under it. The

Court of Appeal thought that the mere fact of the estate being

enjoyed under an indenture which only one side had executed,

would not in- equity have that effect. Upon that point I say

nothing whatever, as it is not a point upon which we have

now to decide. They further said what amounts to stating

that although this was an indenture which in the old times, no

doubt, would have been an indenture, of which by terms

expressed it was meant that there should be two counterparts

origin alTy cut in a wavy line to separate them from each other,

one of which should be executed by one party and given to

the other, and the other executed by the second party and

given to the first, in order that each might keep one counter-

part for his own, — that although that would be the meaning

of the word " indenture," yet in modern times it has very

often been the case that an indenture has been drawn up in

one part and one part only. There is no doubt that that is

true ; and, consequently, the mere fact that this was an

indenture does not by itself raise a presumption that there

was another counterpart, or at least not so strong a pre-

sumption as would be necessary for acting upon. But I think,

looking at the nature of the transaction, where there was a

very considerable estate, and where there was a very impor-

tant covenant such as this, — I do not know what its pecuniary

value amounts to, but from the great degree of force and

vehemence with which the defence has been conducted I

suppose that the sum is large, — I say that I think, where

there was such an important transaction as that, the legal

advisers of the vendor of this estate would have been exces-

sively to blame and guilty of the grossest negligence if they

had not seen that the Earl of Darlington affixed his seal to

the covenant, and they would also have been guilty of very

great negligence if they had not seen that that seal of the

Earl of Darlington which was affixed to the covenant was put

456 APPENDIX V.

Lonl upon the counterpart which would be kept l)y them for their

judgment. client. No (loubt, they have been guilty of very great negli-

gence ; and although all this tends very much to make it

antecedently probable that there would be a counterpart

executed and seaHed, I do not very much differ from the Court

of Appeal (indeed I may go further than that, and say that I

agree with the Court of Appeal) that if it had stood on that

and that only, there would have been no reason to say that

the parties had not been guilty of gross negligence. That they

were guilty of negligence afterwards in losing the counterpart

if there ever was one, is perfectly plain ; and I cannot say

that they were not guilty of some negligence previously : they

may have been.

But then (and it is singular enough that the Court of Appeal

do not seem to have noticed it) we are not without evidence

that the counterpart did exist, quite independently of this

presumption. The Earl of Darlington, who had become Duke

of Cleveland, died in 1842. Immediately after his death his

devisees in trust were brought into contact with those who

represented the original covenantees, who at that time, if

there was a counterpart, ought to have had it in their posses-

sion ; and as early as 1843 the devisees in trust of the Duke

of Cleveland came to make an agreement. They discussed

and considered the effect of this covenant, and made an agree-

ment relating to this covenant, and in 1843 they executed

that agreement. There was an argument which I could not

really understand (I am afraid that I may be doing it injustice

because I could never apprehend it) to this effect — it was said

that if the Duke of Cleveland's trustees in 1843 admitted under

their hand and seal that there was a counterpart existing, and

that it had been sealed by the late duke, it would not be evidence

against the trustees of the Duke of Cleveland, the devisees,

in this action, for some reason which I was not able to

understand. They are not the same identical people, because

we know that Henry, Lord Brougham, is dead, and that

"William, Lord Brougham, seems to have become one of the

trustees since ; but they represent the same trustees — they

represent the same estate ; and why it should not have been

admissible evidence I do not understand. That fact being

WITHAM V. VANE. 457

admitted, it seems to me, for reasons which I need not repeat Lord

over again, as strong and as clear as can be. They admit judgment,

that " the said William Harry, Duke of Cleveland, did, in and

by the indenture now in recital, for himself, his heirs, executors,

and administrators, covenant and agree," and then the docu-

ment proceeds to recite the very covenant which is now in

question, that being the very indenture. It was endeavoured

to be argued that we should understand that to mean, not that

he had covenanted by it, but that they thought he was bound

as much as if he had covenanted by it. I cannot say that I

put that construction upon the words. I think the conclusion

to be drawn from them is that in 1843, the indenture, the

counterpart, with his hand and seal to it, did exist, and that

the trustees knew that it was in existence, and that they made

this agreement under their hand and seal, admitting that it

was existing. And that is a great deal strengthened when

you come to what took place a few years afterwards, in 1846,

when a private Act of Parliament was passed, promoted for

this purpose, to which the trustees were consenting parties ;

indeed, they were the very parties who promoted it. In that

private Act there are certain statements : amongst other things,

they put this as a recital, that " the said William Harry, Duke

of Cleveland, on the purchase of the Hutton Henry and Hur-

worth Estates, in 'the year 1824, covenanted to ptiy to the said

George Silvertop, his heirs, executors, administrators, and

assigns," and then they proceed to state this covenant, which,

I may observe, was one of those things for the purpose of deal-

ing with which that Act was obtained in respect of the very

property in question.

Now what I cannot understand is why all this should not be

good evidence to lead to a conclusion as to the existence of

the counterpart. In the case of the private Act it is further

strengthened by this consideration, that there was every

reason why the committee should require proof of these allega-

tions upon which they were asked to proceed : and therefore

the statement that the Duke of Cleveland had covenanted

is much stronger evidence there than even the prior one ;

because it is just possible, though it is not very likely, that

the trustees of the Duke of Cleveland might have taken it for

458 APPENDIX V.

Lord granted that a counterpart was existing in 1843, but it

judgment! ^^ liardly probable that both the trustees of the Duke of

Cleveland and a committee of the House of Lords should

take it for granted that there was one if it really did not

exist.

I can, therefore, come to no other conclusion than that the

counterpart containing this covenant was actually executed

and did really exist, but has been lost, I know not how, but

by some negligence probably ; and that being so, secondary

evidence can be given. The question therefore comes. What

was the effect of that covenant ? First, I may say, that

several points were put which I do not think it necessary to

deal with, because I think that they have been sufficiently

dealt with by the noble and learned lord on the woolsack. It

was said that this covenant of the Duke of Cleveland, or rather

of the Earl of Darlington as he then was, is not enforceable

now. I am afraid to deal with these points, because I did not

understand what they were; but I can only say that they

were none of them such as I could advise your lordships to

give effect to. I think that this covenant is just as much

enforceable as any other promise or contract made to pay a

sum of money. It is said that that would be a perpetuity.

It is not a perpetuity in the sense in which the law aims

at perpetuities. The person who is entitled to receive this

sixpence a chaldron, whatever the amount may be, and the

person who has now got the estates in question, or the Duke

of Cleveland's personal representatives, or whoever it is, can

come to an agreement for releasing it. Those who are entitled

to it would sell it readily enough if a sufficient consideration

were offered for it. The parties could settle the matter that

way : it is no perpetuity.

Then it is said (and it is very true) that it was very unwise

in the Duke of Cleveland to enter into an agreement which

would have the effect of binding him, and his estate after his

death, to pay a sum of money which would go on to be payable

until the coals, in fact, were worked out, which might be a

vast number of years hence : and so it was ; it was not a

wise bargain, but that was his fault. If he has brought an

inconvenience upon himself and his estate, there it is, and

WITHAM V. VANE. 469

those who have the estate must take the consequences resulting Lord

t„^,^ :\*. Blackburn :

fj^omit. ^ ^ judgment.

The only remaining question is, What is the meaning of the

contract? It is not very artificially drawn, but we have to

construe a contract made in 1824 in relation to the working

of a colliery in Durham, having regard to the words which are

used in that contract, but putting a sense upon those words

which they will bear, as used with reference to the subject-

matter; that is to say, with reference to the subject as to

which the parties were contracting. I think, therefore, that .

evidence is admissible to show what was the ordinary course

of things in 1824 (not as they are now) in the di&trict round

these coal-pits, or in the county of Durham (you may say

generally) where these coal-pits lie, and what was the ordi-

nary course of dealing there ; and having that before us, we

have then to see what these words mean when used by the

parties contracting with regard to that state of things. It

is quite true that this colliery was not then opened : it was

not opened till some time afterwards ; but still the parties

were thinking of the ordinary state of business, and what was

ordinarily done in coal-pits and coal mines in that neighbour-

hood when they were at work ; and the words used in the

contract are, I think, to be understood in the sense in which

such words would be understood when used with reference to

such a course of dealing.

Now there is not much evidence here as to what was done

in 1824 ; but it is quite intelligible to this extent. Coals

which were raised in that district at that time were sometimes

sold to country customers, people who came to carry them

away in carts — a good deal of the coal was disposed of in this

way : and more was carried down to the river and put on

board keels — those keels took the coals up the river to inland

places where they were wanted ; some was taken down the

river in keels and sold to people along the banks of the river

for local consumption. But the bulk of the coal was ulti-

mately sold to be consumed by people to whom it was sent

by sea ; and the mode in which it was the common custom

to sell it is explained in this way — the coals were sent down

by the coal proprietor in trams or keels, and the fitter, who

460 APPENDIX V.

Lord seems to have been a sort of intermediate broker between the

judgment. ' persons who had sent their ships there to be loaded and the

owner of the coal or the occupier of the collieries, made an

arrangement by which so much of these coals was put on

board a ship, and the ship sailed off, and the person who had

the ship paid for the coals. I do not understand that the

fitter was liable to the person who sold the coals, but the

purchaser paid for them to the colliery owner through the

fitter : that was the ordinary course of business.

Then we come to this covenant. The covenant is that the

Earl of Darlington " shall pay sixpence for every chaldron of

coals of the Newcastle measure which shall be wrought and

gotten from " the premises, and which shall be " shipped for

sale." What does " shipped for sale " mean? Mr. Justice Fry

put a very limited meaning upon it. He thought it meant this,

namely, where the coal owner himself hired a ship and put the

coals on board the ship, and sent away the ship with the coals

to be sold somewhere else, they being the coals of the coal-

owner at the time, which were shipped for the purpose and

with the object that they should be sold. Mr. Justice Fry

thought that, though the coals were sold for the purpose and

with the object of their being shipped, and however clear it

might be that they were afterwards shipped, yet if the sale

passed the property in the coals from the coal proprietor

before they were put on board the ship, it could not be a

" shipment for sale " within the meaning of the contract.

I have come to a different conclusion. I have found some

difficulty in exactly seeing how the words should be used to

express the idea which I have ; but I think that those words

which the Lord Chancellor has read, come as accurately as

any words can be brought to do it, to express what we mean.

If the coal proprietor has sold the coals — that is to say, has

entered into a contract for the sale of the coals, which contract

for sale is such as to show, as a matter of fact, the intention

of that sale to be that the goods shall be put on board ship —

though it would not literally be the case that they were shipped

for sale, but literally it would rather be that they were sold

before shipment, yet I think that that is within the meaning

. of the contract, and that what the parties meant was that upon

WITHAM V. VANE. 461

such sales as those the sixpence per chaldron should be paid. Lord

. Blackburn :

That goes beyond what Mr. Justice Fry allowed. judgment.

My lords, there was a contention, which was not much

urged, but an attempt was made to say that, inasmuch as

the coals which are now sent up by railway were within the

mischief (if I may use the phrase) that the parties had in

view, it was reasonable and just and cy-pres to say, " If you

are to pay sixpence for every chaldron which comes to

London by sea you should pay sixpence for every chaldron

which comes to London by railway." That might be said,

but whether it would be just or would not be just as a cy-pres

doctrine, it is to my mind perfectly clear that you cannot

construe the words used in the covenant of 1824 as meaning

anything of the sort. In asking for that, those who do so

ask for a great deal too much.

Lord Bramwell : My lords, I concur in what has been Lord

111- -ITT • • 1 Bramwell :

proposed to your lordships. We are invited to say that there judgment,

was no counterpart of the conveyance of 1824 executed by

Lord Darlington. Now I feel as certain that a counterpart

was executed by him, as one can feel of anything not

depending upon one's own knowledge or the direct testimony

of persons who declare that they have seen and know the

thing of their own knowledge and whom one believes. I am

satisfied that it was executed ; and it strikes me as rather

alarming that a doubt should be entertained upon the matter,

because the same difficulty might be made in every case in

which a man had granted a lease and taken a counterpart

signed by the tenant. I am very much inclined to think

that, without further evidence, there would be enough to show

that there was this indenture in separate parts. I do not

rely very much upon its being stated to be an " indenture."

In point of law, no doubt, that means that it is in more than

one part, that is the technical signification ; but I should not

attach much value to that point. However, it is stated to be

an indenture ; but it is an instrument which purports to con-

tain a covenant by Lord Darlington. He takes the estate

which is conveyed to him by it ; it was his duty, under his

contract, to execute a counterpart. It was to the interest of

462 APPENDIX V.

I'oni the grantor of the estate that that counterpart should be

judgment. executed ; and I strongly incline to think that that alone

would suffice to make us believe in the existence of the

counterpart : it would be good prima facie evidence of it, and

the legitimate conclusion, if it stood there, would be, not that

the instrument had not been executed, but that it had been

executed, and had been lost. But when, in addition to that,

the other evidence is considered, it seems to me to be absolutely

clear that the counterpart was executed.

Now, if I thought that I was differing from that most able

and, in my opinion, most consummate judge, the late Lord

Justice James, I should have great doubt whether I was not

in the wrong ; but it is a singular thing that if his judgment

is examined, it will be found that he assumes that the counter-

part was not executed. He gives no reason ; but he seems to

assume it, and his judgment is directed to the consideration

whether, if that was so, any relief could be given to the

plaintiffs. With respect to the other two learned Lords

Justices, I say, with great submission to them, that I cannot

agree with their reasoning ; and, in particular, that matter

which was relied on, that the part of the instrument executed

by the grantors was not executed by Lord Darlington, seems

to me almost to furnish an argument that a counterpart was

executed by him, because, if it was his duty to execute some

instrument, and he did not execute that part, the legitimate

conclusion would be that he had executed a counterpart. I

am satisfied, therefore, that that counterpart was executed.

The only other matter on which I think it necessary to say

anything, the other ingenious difficulties having been dealt

with by the noble and learned lords who have preceded me, is

upon the words " coals shipped for sale." Now, upon that

subject I concur in the opinion which has been expressed. If

I entertained anything like a grave doubt upon the matter, I

should yield it to the opinion of the three noble and learned

lords who have also heard this case and who entertain none,

but really the only misgiving which I have about it is whether

" shipped for sale " would include the case of coals that were

sold to the consumer, and as it were put on board the con-

sumer's ship, or possibly taken away by the purchaser for the

WITHAM V. VANE. 468

purpose of consumption. But I must say that I think the good Lord

sense of the thing is the other way — the good sense of the judgment,

thing is to make the royalty payable upon everything that is

got from the colliery and taken and shipped. It may be said

that that gives no meaning to the words " for sale." Possibly

it does not give any meaning to them — but it continually

happens, I believe, that the argument, that you must find

some meaning for every word, is unduly pressed. It may

possibly have been in the minds of those who drew this instru-

ment, that if coals were put on board a ship somehow or

other, not in anticipation of a sale by the person to whom they

were delivered or for any other object, a royalty should not be

payable upon them — but I do not think we are driven to hold

contrary to what, as I said before, is the good sense of the

thing. I think it is contrary to the good sense of the

thing, that where goods have been sold and put on board the

ship, or the chartered ship of the purchaser for his own con-

sumption, that is not within the clause. It must always be

borne in mind that at the time when this instrument was

executed, except as regards the coal sold locally and in the

neighbourhood, there could be no contemplation that there

would be any extensive sale, or indeed any other sale than that

which resulted in a shipment.

I concur therefore in the opinions which have been expressed

to your lordships.

Lord Fitzgerald : My lords, I also concur in the judgment Lord

which has been pronounced by the noble and learned Lord judgmeut.

Chancellor, and in the reasons which he has given for that

judgment. I have only to say a word on two points of the

case. The first is upon the question of evidence. I confess

that when I read the judgments, having before me the Appen-

dix, and read also the documents in the Appendix, I was

amazed at the statements in the judgments. First, Mr.

Justice Fry expressed himself as having come to the con-

clusion that a counterpart had been executed by the then Earl

of Darlington, but solely upon the ground that it was his

duty to do so, and that enjoyment under the deed which was

produced had been consistent with the execution of such a

464 APPENDIX V.

Lord covenant as that now in question. It is not necessary for me

judgment. ^ oflfer any opinion on the point whether, if it rested on the

supposed duty alone, the learned judge was right in coming to

that conclusion. But when we come to the evidence in this

case, there is clear evidence of the existence and execution of

the counterpart. Not only is there evidence, but it is evidence

which is proper to be considered as conclusive by way of

estoppel. In reference to contracts, I have always understood

that, even as to a deed, a verbal admission by a party of its

existence, and of the contents of that deed, will be amply

sufficient when once you account for the non-production of

the original. You have an admission of it, and you have

evidence showing its contents. But this case does not rest

upon a verbal statement. There is an instrument of 1843,

proceeding upon the basis of a solemn statement that the earl

had executed a deed containing this covenant, and that deed

is not the one which is produced, for that is not executed by

him. That is further confirmed by the Act of Parliament;

and I feel that I can only account for the course which has

been pursued in this case, and for the judgments, by supposing

that this evidence was not brought to the attention of the

Court. For instance, we find one of the Lord Justices saying

this : — " As regards the question of fact, there does not appear

to me any evidence at all which would lead to the inference

that the duke executed a counterpart of that deed of 1824.

That a counterpart was in contemplation hardly appears to be

a probability. There is nothing upon the face of the deed to

suggest that a counterpart was intended." And, again,

another of the Lord Justices says this : — " With great

deference to the learned judge" (Mr. Justice Fry) "that is a

matter in which I cannot coincide with him. Whether the

duke did execute that deed or not is, to my mind, a question

of fact" (as it is) "to be tried like every other question of

fact, namely, upon the evidence, and if there is no evidence

which leads to the reasonable conclusion that he did so, we

ought to find that that fact is not proved." I can only

account for these judgments by supposing that this evidence

was never brought before the learned judges in some shape or

other. It is observable (I called attention to this yesterday)

WITHAM V. VANE.

465

that there is not a single expression on the face of any one of Lord

^ ^ ^ -^ Fitzgerald

these judgments dealing either with the instrument of 1843 or judgment,

with the Act of Parliament. Therefore it seems to me per-

fectly clear, that there is ample and persuasive proof of the

execution by the earl of the counterpart of the deed containing

the covenant.

My lords, there is only one other thing upon which I wish

to observe, and that is as to the construction of this covenant.

I confess that it appears to me to be a question of some

difficulty. No doubt upon the literal construction, if you were

to adhere to the very letter of the contract, the construction

given to it by Mr. Justice Fry is quite correct. But I appre-

hend that we are not to adhere to the literal construction of

the covenant if it will work injustice, and above all if that

literal construction will enable the covenantor to evade a

liability which he is under. Now, upon looking to the

covenant itself, it is open to a fair and liberal interpretation

which will work no injustice, but which will give to each party

fairly their rights. No doubt it will make it possible for the

covenant in one sense to be inoperative, because the present

colliery proprietors, if they find it for their interest, in place

of shipping the coal to send it all to London by rail, may

evade the payment of the sixpence per chaldron.

My lords, we must interpret this covenant by the state of

things at the time when it was entered into. That was at a

time when there were no railways ; and it is in evidence that

there were then three modes of disposing of the coal, namely,

by land sale, by river sale, and by sea sale. Land sale is out

of the question here, because it is admitted that the covenant

does not attach upon a mere land sale, that is to say, a sale in

the interior. That it might attach upon a river sale is plain,

because, according to the evidence, the river sale is sometimes

conducted in this way : the coal having been sold is put on

board a keel, or river boat, and is loaded into a certain ship,

so that it is obvious that the coal taken by the river boat may

come under the designation of a shipment by sea. Therefore

the covenant would appear to us to attach to certain river

sales, that is, where there is a contract for sale in connection

with a delivery by river on board keels which carry the coal

C.R.P. H s

466

APPENDIX V.

Lord

Fitzgeralil :

judgnient.

to a certain ship. And so it would equally apply to the case

of a sea sale, which I understand to be a sale of coal to be

shipped and sent by sea away from the place. Once shipped

for sale we have nothing more to do with it — it is not necessary

to inquire further; for the interpretation which the Lord

Chancellor has given, and in which I entirely join, is this,

that where there is a sale of coal to be shipped, to be sent by

sea, where it is brought into connection with a contract

for shipment and is actually shipped, it matters not whether

there is to be afterwards a sale or not. That would embrace

all the cases in which the owners of the colliery themselves

shipped for sale according to the literal interpretation of the

contract, and also the other cases where there was a sale or a

contract for shipment, the coal being either delivered by

river in the manner described, or sent down to the staith

to be pat on board ship, and when once that takes place

we have no further inquiry to make as to what becomes of

the coal.

My lords, upon these grounds I entirely concur in the judg-

ment which has been delivered by the Lord Chancellor.

Order.

The Order appealed from was reversed ; and it was

declared that the Order of Mr. Justice Fry should

be varied by omitting the words "put on ship-

board by or on behalf of the colliery proprietor

for the purpose of subsequent sale by him " and

substituting the words " sold by or on behalf of

the colliery proprietor for the purpose of shipment,

and actually shipped, and coal shipped by or on

behalf of the colliery proprietor for the purpose of

sale by him or on his account." And after certain

declarations as to costs, the cause was remitted to

the Court below.

( 467 )

APPENDIX VI.

(ADDITIONAL NOTES BY THE EDITOR.)

Escheat Upon the Dissolution of a Corporation.

[Lord Coke's statement (see pp. 35, 36, supra) that on the Lord Coke's

dissolution of a corporation, lands belonging to it revert to statement

the donor, is criticized by Mr. Gray (Perpetuities, ss. 44-51 a).

It is difficult to resist the conclusion at which he arrives, that

Lord Coke's statement is erroneous. The principal, if not the

only, foundation for the statement appears to be a dictum of

Choke, J., in the Prior of Spalding's Case (7 Edw. IV. 10-12),

that on the dissolution of a corporation every feoifment made

to it is determined and therefore the donor may enter. But

in the case before the Court, as Mr. Gray points out, the

question was as to the nature of frankalmoigne tenure, and

where land is held in frankalmoigne, the donor and the lord

must be the same person (see p. 11, supra) ; the remark of

Choke, J., was therefore obiter. The other authorities cited by

Lord Coke in supj)ort of his statement are really adverse to

it, and show that on the dissolution of a corporation, lands

held by it belong to the lord not by reverter, but by escheat.

If Lord Coke's statement were accurate, it is difficult to see

how a corporation could aliene its land free from the grantor's

right of reverter : Preston's way out of the difficulty (see

p. 226, supra) is not satisfactory. It may also be noticed that

in referring to the old rule that in the case of a gift of land to

an abbot and his successors, the donor might annex a covenant

or condition against alienation, Preston's explanation is that

this is " on account of the reversionary right of the grantor ;

since he will be entitled to the land, by way of reverter, on the

dissolution of the corporation " (Prest. Shepp. Touch. 130).

But in " Doctor and Student," to which Preston refers, the

old rule in question is expressly confined to the case of gifts

to the Church, and the reason given for the rule is that

'\* when lands be given to an abbot and to his successors, the

intent of the law is, and also of the giver (as it is to presume),

that it [sjc] should remain in the house for ever ; and there-

fore it is called mortmain, that is to say, a dead hand, as who

saith, that it shall abide there alway as a thing dead to the

house. And therefore, as I suppose, the law will suffer that

aH2

468

APPENDIX VI.

Hertford

College lands.

Suggested

conclusion.

Whether they

are real

property.

Originally

territorial.

Now merely

personal

privileges.

[condition to be good that is made to restrain that such mort-

main should not be aliened " (Chap. XXXV.). If Preston's

explanation were correct, a condition against alienation might

be annexed to a grant of land to a trading company at the

present day.

[The statute 56 Geo. 3, c. 136, contains a preamble to the

effect that on the dissolution of Hertford College, Oxford, two

commissions of escheat were issued, under which it was found

that the lands of the college, some of which were held in fee

and others for terms of years, had escheated and devolved

and did then belong to His Majesty by virtue of his preroga-

tive royal, and these proceedings were confirmed by the Act.\*

[On the whole, therefore, it may be said with some con-

fidence that the statements of Lord Coke and Mr. Preston are

contrary both to principle and to authority, and that the

decision in Hastings Corporation v. Letton (supra, p. 36, n.), is

erroneous.]

Dignities and Titles of Honour.

[Mr. Challis was clearly of opinion that territorial baronies,

or peerages titular of a place, are a species of property at the

present day (see pp. 42, 45, 48, supra). Other writers go even

farther, and treat all inheritable dignities and titles of honour

as real property. The editor ventures to dissent from this

view, and also from that of Mr. Challis.

[The theory that dignities of inheritance are real property

seems to have originated with Sir Matthew Hale (Analysis of

the Law, 59), and he was followed by Black stone (Comm. ii.

37). But Blackstone did not treat of dignities in detail under

the head of real property, because he had already explained

their nature and incidents in the proper place, namely, in the

first volume of his work, which deals with the law of persons,

including constitutional law, and from what he there says we

may trace the origin of the fallacy that dignities are real

property at the present day. He says that the dignity of

peerage was originally territorial, that is, annexed to land, so

that when the land was aliened the dignity passed with it, as

appendant. " But afterwards, when alienations grew to be

frequent, the dignity of peerage was confined to the lineage of

the party ennobled, and instead of territorial became personal "

(Bl. Comm. i. 400). Cruise is to the same effect : " All dignities

having been originally annexed to lands were considered

incorporeal hereditaments, wherein a person might have a

freehold estate. And although dignities are now become little

more than personal honours, yet they are still classed under

the head of real property" (Cruise, Dig, iii. 167). Why

dignities which have become personal honours should continue

• [The Editor is indebted to his learned friend, Mr. L. L. t^adwell, for

drawing his attention to the provisions of this Act.]

DIGNITIES AND TITLES OF HONOUR.

469

[to be classed as real property is not apparent. Lord St.

Leonards put the matter accurately when he said that if

baronies by tenure ever existed, the effect of the statute 2 Car.

2, c. 24, was to destroy the tenure and to leave the title of

honour "as a substantive personal right."\* A dignity Not rights of

cannot be aliened, even for the life of the holder for the time property,

being, nor can it be the subject of legal proceedings (per Lord

Macnaghten in Couiey v. Con-leij, [1901] A. C. at p. 456). A

privilege which is merely a personal right, which is absolutely

inalienable, and the enjoyment of which is not protected by

law, cannot, with any approach to accuracy, be described as

property.

[Inheritable dignities which never had any connection with Baronetcies,

land — such as baronetcies — are obviously not real property,

although a dignity of this kind can be limited to a man and

the heirs of his body, so as to make it descend in the same

way as an estate in tail male in land.t Until recently the

\*\* hereditary degree of baronet " was in a still more defenceless

condition than an hereditary peerage, for there was no check

on the assumption of the title of baronet by persons not

having any right to it. But by Eoyal warrant dated

11th February, 1910, provision is made for keeping an ofi&cial

roll of baronets, and only those persons whose names are

entered on it are entitled to be officially recognized as

baronets.

[The erroneous notion that inheritable dignities, such as Peerages

peerages, are real property, has probably arisen from Lord belong to con-

Coke's statement that dignities which concern lands or certain i^w?

places are not merely hereditaments, but also tenements, and

therefore entailable under the statute De Donis (Co. Litt. 2 a,

20 a). But the student must not allow himself to be misled

by Lord Coke's excursions outside the province of real property

law. Inheritable dignities belong to constitutional law, or

possibly to the law of status ; their nature is not a question

of real property law. Baronies, as we have seen, were

originally territorial ; but when they ceased to be appendant to

land and became personal, they continued to descend accord-

ing to the rules governing the inheritance of land held in fee

simple so far as was possible ; X and when a new peerage was

created, limited to the grantee and his heirs, or to the grantee

\* IBerkelei/ Peerage Case, 8 H. L, C. at p, 118. As to the history and nature

of dignities, see Pollock and Maitland, i. 260, 279, 408 ; May, Const. Hist, i.

243 ; Stubbs, Const. Hist. ii. 178 ; Anson, Law and Custom of the Constitution,

i, 197 ; Palmer, Law of Peerage.]

•]• [This is so, whether the inheritance created by such a limitation is analo-

gous to an estate in tail male, or to a fee simple conditional limited to a man and

his heire male (see Prest. Est. ii. 63). The difference was formerly of importance

with regard to forfeiture (Xorrf Ferrer's Case, 2 Ed. 373 ; Hargr. note (3)

to Co. Litt. 20 a), but since stat. 33 & 34 Vict. c. 23, conviction for treason or

felony does not cause any corruption of blood.]

I [It was not alway.T possible, as in the case of coparceners (see pp. 114-115,

supra.')']

470

APPENDIX VI.

[and the heirs male of his hody, it descended to his issue in the

same way as land so limited. Thus the earldom of Westmore-

land was granted to Ralph Nevil and the heirs male of his body ;

one of his descendants having been attainted of high treason, the

question arose whether this caused a forfeiture of the dignity;

James I. referred the question to the judges, and they resolved

that the dignity was forfeited by force of a condition tacite

annexed to the " estate of the dignity " ; they also resolved

that even if the dignity had not been forfeited by the common

law, it would have been forfeited by the statute 26 Hen. 8,

because the earldom was an estate tail within the statute De

Bonis (Nevil's Case, 7 Rep. 33 a).\* This resolution was not a

decision of a court of law on a question of real property : it

was an expression of opinion on a question relating to the

personal privileges possessed by an English peer, the most

important of which is the right to sit and vote in the House

of Lords (Stubbs, Const. Hist. ii. 184).t The case was one of

constitutional law, and has no more to do with the law of real

property than has the question whether the common law rules

of descent apply to the Isle of Man (Co. Litt. 9 a), or whether

a man can be entitled by the curtesy of England to exercise

certain honorary oflfices at the king's coronation (Co. Litt. 29 a) ;

or whether the king can create an unlimited number of peers

to avoid a deadlock between the two Houses of Parliament.

Analogy be- [Lord Cairns, C, said, in the Buckhnrst Peerage Case t : "It

tween titles of is the well- established and constitutional law of the country that

r^\*\*^tate^ a peerage, partaking of the qualities of real estate, must be

made in its limitation by the Crown, so far as it is descendible,

descendible in a course known to the law, and that in the

descent of peerages there cannot be introduced variations or

alterations in the ordinary law of the country with regard to

\* [The second reason given for this resolution is certainly not convincing.

To talk of a dignity as a subject of estates, as if it were real property, and

therefore within the statute Be Bonis, is obviously inaccurate according to

modern ideas, for as Mr. Challis remarks (p. 225, gnpra), " the nature of an estate

is practically ascertained by the privileges of ownership and alienation which

it confere." But the student must remember that in early times there was an

important point of resemblance between a grant of land to be held by

military tenure and a grant of an earldom. In each case one of the principal

objects of a grant was that the grantee should assist in the defence of the

coiiutry (^Kevil's Ctise, svj}ra ; Rt^x. y. Knollyx^lA. Uaym. 10). In James I.'s

time the relation between dignities and tenure was, in theory at least, much

closer than it has been since theabolition of grand serjeanty and the other military

tenures (see p. 42, gvprn), although even then, owing to peerages having lost

their military character, there was a great difference between the " tenure " of

a peerage or dignity, and the tenure of land, and at the present day no one is

likely to contend that peerages and other dignities are held in common socage

(see p. 24, ««//?•«).]

■J" [At the present day claims to peerages are referred by the Crown to the

House of Lords. (L. R. 4 H. L., at p. 148). As to the distinction between a

decision of the Committee of Privileges of the House of Lords ou a claim to a

peerage, and a decision of the House of Lords sitting as the tribunal of ultimate

appeal upon a question of law, see Wiltes Claim of Peerage, L. R. 4 H. L. 126.]

X [2 A. C. at p. 20. See Cope v. De la Warr, L. R. 8 Ch. 982.]

DIGNITIES AND TITLES OF HONOUR. 471

[descent ; and by a parity of reasoning, there cannot be intro-

duced provisoes and conditions controlling and moulding the

descent of a peerage in a manner different from that in which

real estate can be made to descend according to the law of the

country." That is to say, a peerage is not real estate, but it

resembles real estate in the mode of its descent. Again, in a

later part of his judgment, Lord Cairns said : " Uses never

could have had any application to a peerage, because they

were originally trusts, and there could be no trust of a peerage,

which was a personal possession, and could not be held by

one person in trust for anotber." In the same case. Lord

Hatherley, after referring to the provisions of the patent

creating the peerage, said : " If that were a limitation of real

estate there cannot be a doubt of what it must be held to be."

See also Cojw v. Earl de la Warr, L. R. 8 Ch. 982.

[So far as the law of real property is concerned, the question B^ Rhett-

would be of no practical interest to the student, were it not Carmc'sWdl.

for the decision of Chitty, J., in Re Rivett-Carnac's Will (30

Ch. D. 135). The case arose on sect. 37 of the Settled Land

Act, 1882, which provides that where personal chattels are

settled on trust so as to devolve with land until a tenant-in-

tail by purchase is born or attains tbe age of twenty-one

years, or so as otherwise to vest in some person becoming

entitled to an estate of freehold of inheritance in the land, a

tenant for life of the land may, with the leave of the Court,

sell the chattels. By the definition clause in the Act, "land"

includes incorporeal hereditaments. In Re Rlvett-Carnacs

Will, plate was settled to devolve with a baronetcy, and

Chitty, J., held that the baronetcy was " land " within the

meaning of the section, so as to give the Court jurisdiction to

sanction a sale of the plate.

[The learned judge said : " Unquestionably a dignity which Whether a

descends to the heirs general or the heirs of the body is in law pJ-opey-iJ^be

an incorporeal hereditament." This statement seems to called an

rest on the passage cited above from Cruise, whom Lord incorporeal

St. Leonards described (8 H. L. C. at p. 122) as " a useful but hereditaruent.

not a very accurate writer." It would certainly not have

commended itself to Lord Coke, for according to him the

question whether a hereditament is corporeal or incorporeal

depends on the manner in which it could at common law be

conveyed from one person to another (Co. Litt. 9 a), and this

test is obviously inapplicable to a baronetcy. In modern law,

too, "incorporeal hereditament" is a term belonging to the

law of property, and nothing can be gained by applying it to a

personal privilege which is not property at all, being inalien-

able and incapable of being protected by a court of law.

[This, however, is a point of minor importance, for even if it Dignities are

were accurate to say tbat an inheritable dignity is an incor- JJ^fj^.'^^ scope

poreal hereditament, the question would still remain whether ^f ti,e settled

"land," in the Settled Land Act, includes hereditaments Land Act.

472 APPENDIX VI.

[which are not real estate. Such a construction appears

impossible. The object of the Act was to do away with the

evil consequences resulting from strict settlements of land (in

the proper sense of the word), and to make settled land

marketable by giving to tenants for life and other limited

owners large powers of dealing with it by way of sale,

exchange, lease, &c. (Bruce v. Marquis of Aileshnry, [1892J

A. C. 356 ; lie Mundy and, Roper, [1899] 1 Ch. at p. 288). In

administering the Act, the Court has regard, when necessary,

to the well-being of the land and the interests of the tenants

and labourers on it (ib). It is obvious that a title of honour,

such as a baronetcy, is not within the policy of the Act,

because no injury is done to the community, or to any class

of persons, by the fact that it descends in the same way as an

unbarrable estate in tail male in land, or by the fact that it may

be held by a person who is too poor to support it in the proper

way. Nor is it within the general provisions of the Act, for it

cannot be sold, exchanged, leased, or otherwise dealt with.

The terms of sect. 37 (cited above) show that titles of honour

are not within its scope ; there cannot be " a tenant in tail by

purchase " of a baronetcy, or " a person becoming entitled to

an estate of freehold of inheritance " in a baronetcy : a

baronetcy is merely a personal honour or privilege, in which

there are no estates. The section is obviously confined to

cases where chattels are settled so as to devolve with real

estate.

[Mr. Challis disapproved of the decision in Re Rivett-

Camac's Will, and also of the decision in Re Aylesford (32

Ch. D. 162), in which the point was quite different (Hood and

Challis, 262, 264).]

KULE AGAINST PERPETUITIES.

Option of pur- [It has been held by Warrington, J., applying the principle

chase in lease, laid down in London d- South Western Railway v. Gomm

(supra, pp. 183, 184), that a proviso or covenant in a lease,

under which the lessee has an option of purchasing the fee

simple at a certain price at any time within a period exceed-

ing the limits allowed by the Eule against Perpetuities, is void

for remoteness so far as it attempts to create an interest in

land (Woodall v. Clifton, [1905] 2 Ch. 257 ; Worthing Corpora-

tion V. Heather, [1906] 2 Ch. 532). In the latter case the learned

judge also held that the lessee could recover damages from

the lessor's assigns for breach of the covenant to convey.

Reversionary [The learned editors of Key & Elphinstone's Precedents

termsofyears. (9th ed. vol. i. 971, n.) say, with reference to the validity

of a reversionary lease (supra, p. 186) : "It is conceived

that the rule as to perpetuity applies, on the ground that

RULE AGAINST PERPETUITIES.

473

[the interessc termini will not become a term unless a condition

precedent, viz., the entry by the lessee, happens, and as that

condition cannot be performed till the instant when the

reversionary lease is to commence, it will be too remote if

the original term has more than twenty-one years to run."

It is respectfully submitted that the right of entry which is

vested in the owner of an interesse termini cannot accurately

be described as a condition : it is part of his interest. As

Bowen, L.J., said in Gillanl v. Cheshire Lines Committee

(32 W. R. 943), the interesse termini " is an interest which

the law recognizes in a future term, coupled with a right to

complete that interest by possession . . . this right of entry

is a proprietary right."

[If a reversionary lease which has been actually granted is

subject to the Rule against Perpetuities, how can a covenant

for perpetual renewal, at the option of the lessee, be good ?

That certainly is subject to a condition precedent, namely,

a request by the lessee.

[It is of course impossible to predict what view the Courts Tendency of

will take when the question comes before them. Most modern ^^exiend'^^^

judges seem prepared to accept without question Mr. Lewis's Rule against

assumption that the modern Rule against Perpetuities embodies Perpetuities.

a general principle of the common law, regardless of the fact

that this assumption is contradicted by the history of the

Rule, and is contrary to the opinion of the Real Property

Commissioners (see the Editor's note, pp. 208 seq., supra).

It follows that no intending lessee can be advised to take

a reversionary lease commencing at a period exceeding twenty-

one years from its date. The suggestion' of the learned editors

of Key & Elphinstone's Precedents that, where there is an

existing lease, it should be surrendered and a new lease

granted to take effect at once, is satisfactory from the con-

veyancer's point of view, but there seems some doubt whether

its adoption would not result in liability to pay reversion

duty under the Finance Act, 1910, subject to an allowance

in respect of the unexpired term.

petuities at

common law.

[In considering the question whether there is a general No rule

principle or rule against perpetuities at common law, as main- against per

tained by many modern judges and text- writers (supra,

pp. 208 seq.), it should be borne in mind that if there had

been such a rule, it is certain that Littleton would have

mentioned it. So far is this from being the case, that when

Littleton refers to the attempt made in Richard II. 's reign

by Richel, J., to create an unbarrable entail, he gives three

reasons why the limitations were void, but that of perpetuity

is not mentioned (Litt. ss. 720-3). Nor does Lord Coke, in

his commentary, refer to the doctrine. He says elsewhere

that a condition designed to prevent a tenant in tail from

suffering a common recovery is void, not on the ground of

474

APPENDIX VI.

Customary

and pi"e8crip-

tive rights.

[perpetuity, but because it is repugnant to the estate lail

(Co. Litt. 224 a) ; yet it was with reference to limitations and

provisoes of this kind that the term " perpetuity," in its

obsolete meaning of an unbarrable entail, first came into

use (Law Q. R. xv., p. 72).

[The student will find in Mr. Joshua Williams's work on

Rights of Common an interesting account of many customary

and presci-iptive rights, especially those which existed, down

to 1854, in the vill of Aston in Oxfordshire. If the modern

Rule against Perpetuities is, as Mr. Lewis contends (Per-

petuities, p. 620) "to be treated as embodying a grand and

fundamental principle of our jurisprudential code" — by which

ne apparently means the whole body of English law, including

the common law — it is difficult to see how these customary

and prescriptive rights came to be recognized as lawful. But

there is no foundation for Mr. Lewis's statement (see pp. 'i05

seq., supra).]

Effect of Modern Legislation on the Law of Curtesy.

Hope V. Hope. [Mr. Challis's expression of opinion {siqwa, p. 344 — 5) that

the Married Women's Pi-operty Act has not made any sub-

stantial change in the law of curtesy, has been justified by

the decision of Stirling, J., in IIoj)e v. Hope, [1892] 2 Ch. 336.

In that case the wife was married before the Married Women's

Property Act, 1882, came into operation ; in 1891 she became

entitled to real estate, and died shortly afterwards, intestate,

and (it seems) seised of the property in question : Stirling, J.,

held that her husband was entitled to an estate by the curtesy.

The reasoning by which the learned judge arrived at this

result applies equally to the case of a woman married since

the Act came into operation.

Seisin of [The question whether the nature of curtesy has been

tenant by the altered by recent legislation is not an easy one to answer.

At common law, where a woman was seised of land, her

husband, immediately on the birth of issue capable of

inheriting, acquired an inchoate estate by the curtesy, or, as

it was said, he became tenant initiate, and did homage to the

lord alone, although his estate was not consummate until the

death of the wife ; there was no mesne seisin, and on her

death the husband held immediately of the lord. Tenancy

by the curtesy differed in some of these respects from tenancy

in dower, for in the case of dower the mesne seisin, on the

death of the husband, was in the heir, and when seisin was

delivered to the widow she held of the heir and not of the

lord. Yet her seisin was for some purposes treated as a

continuation of the seisin of her husband ; it related back

to his death, so as to defeat the descent to the heir and

exclude the doctrine of possessio fratris (see, on the points

above referred, to, Co. Litt. 30 a, 241 a ; W^atkins on Descents,

curtesy.

SEISIN. 475

[ch. I. s. iii.). Seisin is now of no importance in the law of

descent. In the case of a woman subject to the Married

Women's Property Act, 1882, it is clear that the husband

does not acquire any " estate by the curtesy initiate " in her

land on birth of issue. Nevertheless, there seems no reason

to doubt that on her death intestate, without having disposed

of the land, he becomes tenant to the lord. The point migl)t

conceivably be of importance if the land were subject to

heriot-right (see p. 416, supra).

[The question remains whether Part I. of the Land Transfer Effect of Land

Act, 1897, has made any difference. In the case of a married j'^'IJ"''^^^" ^^^'

woman dying intestate since 1897, her real estate vests in

her personal representatives for the purpose of paying her

debts, &c., and subject thereto they hold it as trustees "for

the persons by law beneficially entitled thereto." Conse-

quently after payment of debts, &c., they can be required

by the husband to convey the real estate to him for his life,

and then a question may conceivably arise, if the land is

subject to heriot-right, as -to the tenure by which he holds it.

Under the old law there was a distinction between persons

who took particular estates by act of law, and those who took by

act of the party ; a tenant by the curtesy took by act of law

and was tenant to the lord, while a grantee for life took by act

of the party and was tenant to his grantor, unless the grantor

disposed of the fee by the same conveyance ; consequently,

in the case of heriotable land, a heriot was due on the death

of a tenant by the curtesy, but not on the death of a tenant for

life by a grant not disposing of the fee (Watkins on Copyholds,

ii. 136, 137). Supposing, therefore, that a married woman

seised of heriotable land dies intestate since 1897, and that

her personal representatives convey it to her husband for

life, with remainder to the heir, the result will be the same

as if the woman had died before 1898 ; that is, a heriot will

become due on the death of the husband, supposing that he

dies seised of the land. But if they convey to the husband

for life, without disposing of the fee, the question arises

whether he takes by act of law or by act of the party. The

statute was probably not intended to alter the rights of the

lord, and the correct view seems to be that the husband takes

by act of law, and that a heriot is due on his death if he dies

seised of the land. A technical and literal reading of the

statute would of course lead to the opposite conclusion.]

Seisin.

[Mr. Challis's statement of the rule with regard to seisin incorporeal

in deed of incorporeal hereditaments, such as rent-charges hei-edita-

(supra, p. 233), must be understood as referring to the ™^°^\*-

common law. The Statute of Uses applies to rent-charges,

and it has been held that if a rent-charge is granted to A.

476 APPENDIX VI.

[and his heirs to the use of B. and his heirs, the seisin in

law which A. tlms acquires is converted by the statute into

a seisin in deed in B. : lleelis v. lilain, 18 C. B. N. S. 90;

llad/ieliVs Case, L. R. 8 C. P. 306. The decision in the

former case was criticized by Mr. George Sweet (11

Jar. pt. 2, p. 27) and defended by Mr. Joshua Williams

(Settlements, 15). Some of the judges in Hculjicld's Case

intimated that they were by no means satisfied that Jleelis

V. Blain was rightly decided.]

( 477 )

GENERAL INDEX.

ABATEMENT,

is the wrongful entry of a stranger, before the entry of the heir;

235.

reduces heir's estate to a right of entry, ib.

ABEYANCE,

ot imtaediate freehold, or seisin, cannot be produced by act of

the parties, 100.

prevented by seisin in law, 235.

may be caused by operation of law, 101.

or by statute, ib.

not generally caused by executory limitation, 102, 172,

of peerage, 114, 115.

ACCUMULATIONS OF INCOME,

formerly subject only to the rule against perpetuities, 200.

Thellusson Act restricts the period allowed for, 201.

only one of the periods allowed by the Act may bo adopted, 202.

the Act applies to real and personal property, ib.

excessive trusts for, only void for the excess, 203.

unless they violate the rule against perpetuities, when they

are wholly void, ib.

what becomes of the excess, ib.

exceptions from the Act's provisions, ib.

the Act does not extend to Ireland, 204.

has been extended to Scotland, ib.

English freeholds and leaseholds are within the Act, indepen-

dently of domicil of owner, ib.

Accumulations Act, 1892, as to accumulation for purchase of land,

205.

ACTION, RIGHT OP,

estate might be turned to, by tortious alienation, 89.

this operation styled discontinuance, ib.

would not support a contingent remainder, 121, 139.

two stages in —

(1) founded on right of possession, 408.

(2) founded on mere right, ib.

'' action " here means real action, t&.

478 GENERAL INDEX.

ADMINISTRATORS,

might take advantage of a condition, as to estates transmissible

to them, 81.

whether they may be special occupants, 359, 360,

estate pur autre vie taken by, under Statute of Frauds, 362.

under Wills Act, ib.

ADMITTANCE,

legal estate in copyholds acquired by, 27, 31.

right to, acquired by surrender, ib.

relates back to the surrender, ib.

ADVOWSON, APPENDANT OR, APPURTENANT,

not an incorporeal hereditament, 52

seisin in deed of a manor is seisin of, 236, Addenda, p. xlv.

ADVOWSON IN GROSS,

included by Mr. Challis in mixed hereditaments, 46.

Brsccton and Lord Coke in incorporeal hereditaments,

50, 63.

inight he held by knight service, 42 n.

reason for application of common law rules of limitation to, 112.

seisin in deed of, how obtained, 236.

ALIEN,

crown formerly might have acquired a base fee in lands of alien

tenant in tail, 329.

ALIENATION,

history of, prior to Quia Emptores, 18.

effect of Quia Emptores on, 19.

finas for, 21, 23.

condition against, in a conveyance in fee simple to a corpora-

tion, 226, 467.

ALLODIAL LANDS,

do not exist in England, 5.

ANCIENT DEMESNE,

manors in, what "are, 29.

peculiarities of copyholds of, ib.

of freeholds, 31, 32.

ANN, JOUR, ET WAST,

meaning of, 35.

existed by custom of Gloucester, though there was no escheat, ib.

none by custom of Kent, ib.

ANNUITY,

limited to heirs, not charged on land, is a personal hereditament,

46.

ASSURANCES. And see Feoffment ; Release ; Grant.

classification of, 380.

examples of, taking effect under modern statutes, 380 seq.

by way of use, 389, 419.

GENERAL INDEX. 479

ATTAINDER,

three kinds of : —

1. Quia suspenstcs est per collum, 34.

did not apply to gavelkind lands in Kent, ib.

abolished by 33 & 34 Vict. c. 23, ib.

2. Quia abjuravit regnum, ib.

long since abolished, ib.

3. Quia utlegatus est, ib.

not affected by 33 & 34 Vict. c. 23... 35.

crown's right to a year and a day, ib.

no escheat on, by custom of Gloucester or of Kent, ib.

ATTORNEY,

when may he appointed by infant, 401, and note.

ATTORNMENT,

formerly necessary to complete grant of a reversion or remain-

der, or of a rent-charge, 51, 415.

now unnecessary, ib.

BARE TRUSTEE,

as protector of the settlement under Fines and Recoveries Act,

317.

meaning of, 321.

BARGAIN AND SALE,

fee simple might pass by, without words of limitation, 223.

takes effect under Statute of Uses without transmutation of

possession, 392, 419.

valuable consideration necessary for, 420.

necessity for valuable consideration avoided by doctrine of

estoppel, ib.

might be effected by parol, prior to Statute of Inrolments, 419, 420.

for valuable consideration, duly inrolled, still valid, 421.

of freeholds under common law power, 383.

of copyholds under common law power. Addenda, p. xlv.

for chattel interest, inrolment not required, 421.

how made use of, in conveyance by lease and release. See

Lease and Release.

BARONETCY,

nature of, 469.

not intailablo, 45 n.

question now unimportant, 469 n.

held to be " land " within Settled Land Act, 471 .

BASE FEE,

definition of, 325.

origin of, out of fees tail, 61, 322, 325. ,

merger of, 93, 332,

by what methods base fees may arise, or might formerly have

arisen, 326.

an estate conterminous with, may arise as a determinable fee, 330.

this limitation discussed, ib.

480 GENERAL INDEX.

BASE FEB— continued.

enlargement, now substituted for merger, of, 94.

by what moans may be enlarged, 335 — 338.

specific performance oi covenant to enlarge, 338.

the descent of, is to the hears general, 332.

whether a base fee can be a fee simple absolute, 333.

BOROUGH-ENGLISH,

is a customary mode of devolution, 14, 230.

is connected with burgage tenure, 15.

custom of, not affected by the Descent Act, 240.

BUILDING,

considered as separate hereditament, 54,

BURGAGE TENURE. See Borough-English.

CASES PARTICULARLY DISCUSSED,

Agency Co. v. Short, or the Squatter's Case, 433.

Ash forth. Re, 213.

Atkins V. Montague, 114.

Beverley v. Beverley, 130.

Boddington v. Robinson, 97.

Brotherton, Re, 56, 350 n.

Copestake v. Hoper, 416.

Darhison v. Beaumont, 132.

Doe v. Horde, 405 n.

Goodright v. White, 133.

Hollis' Hospital and Hague, Re, 207.

Keppell v. Bailey, 184.

Rivett-Carnac's Will, Re, 45 n., 471.

Sharp's Case, 400.

Shelley's Case, 154.

South Eastern Railway v. Associated Portland Cement Manufac-

turers, 184 n.

Taltarum's Case, 309.

Tulk v. Moxhay, 185.

CASTLE-GUARD,

an incident of knight-service, 9.

CHARITABLE USES,

gifts to, must in their inception comply with the rule against

perpetuities, 195.

when once established, are not subject to the rule forbidding

the creation of " perpetuities," or inalienable interests, 195, and

note, 205.

CHATTEL INTEREST IN LAND,

includes terms of years, 64 seq.

also certain interests which endure for an uncertain

time, 66.

nature of such interests, ib.

GENERAL INDEX. 431

CHATTEL INTEREST IN LAl^D-continued.

under old law, devise for payment of debts might create, ib.

if limited to heir, passes nevertheless to executor, 252.

executory devise of, is good, 171.

on a descent cast, possession of tenant gives heir seisin in deed,

233, 237.

CHIVALRY. See Tenure in Chivalry.

CO-HEIRS, CO-HEIRESSES,

take as coparceners by descent, 373.

joint tenants by devise, 376.

COLLATERAL LIMITATION,

meaning of, 252.

COMMON LAW ESTATES,

kinds of, 59.

COMMON LAW TENURE,

as to, generally, 4 — 17.

is free, or frank, tenure, 7.

divided, as to lay tenure, into tenure in chivalry and tenure in

socage, 8.

as to spiritual tenure is frankalmoigne, 11.

COMMON, RIGHTS OF,

are extinguished at common law by enfranchisement, 350.

not in equity, ib.

effect of statutory enfranchisement upon, ib.

and of enfranchisement by tenant for life, under S. L. Act, ib.

common appendant or appurtenant, nature of, 52.

in gross is an incorporctal hereditament, 53.

no escheat of, at common law, 38.

now see Intestates Estates Act, 1884... 38 seq.

COMMON, TENANCY IN. See Tenancy in Common ; Tenant in

Common.

CONDITION,

who entitled, at common law, to take advantage of, 81.

statutory innovations upon the common law rule, ib.

remainder cannot be limited upon a forfeiture for breach of, ib,

in defeasance of a freehold, whether within the rule against;

perpetuities, 187, 207.

a{9signments and devises thereof may be subject to the rule,

188.

possibility of reverter upon, neither assignable nor deviseable at

common law, 76.

now assignable and deviseable, 77, 228.

estate subject to, is not destroyed until entry, 219, 261.

C.R.P. I I

482 GENERAL INDEX.

CONDITIONAL FEE,

discussion of, 263—268.

estate given in frankinarriage was, before Stat. De Bonis, 13.

cut down by Stat. Be Bonis to a fee tail, 60, 287.

possibility of reverter upon, 83.

whether there could bo a remainder upon, 84, Appendix II.

can now only subsist (1) in hereditaments other than tene-

ments, 62.

(2) in copyholds of manors where there

is no custom of entail, 27, 62, 272.

'• CONDITIONAL LIMITATION,"

various meanings of, 190, 254, 262.

CONTINGENT ESTATES,

as opposed to vested, 74.

CONTINGENT REMAINDERS,

criterion between vested and contingent estates, 74.

distinction between contingent remainders and executory in-

terests, 76.

how fai' within rule that freehold must not be placed in abey-

ance, 104, 105.

are subject to the rule forbidding limitations to unborn genera-

tions in succession, 115, 118 n., 196, 197 n., 205, 206, 214,

215.

no limitation which can take effect as a remainder is construed

as an executory interest, 123.

application of rule to limitation in favour of a class, 125.

cannot be subsequent to executory limitation, 124.

but executory limitation may be converted into a contingent

remainder if preceding limitation takes effect, ib.

at common law, must bo supported by precedent freehold, 119,

121.

precedent freehold must be created by the same instrument, 120.

various modes of destruction of, 121, 135 — 140.

their liability to destruction is independent of the mode by

which they arise, 121.

trustees to preserve. See Trustees to Preserve Contingent

Remainders.

equitable, not liable to destruction, 122,

but are subject to rule against perpetuities, 141.

in copyholds, not destroyed except by natural expiration of the

precedent estate, 122.

effect of enfranchisement, 123.

Pearne's four classes of, 126.

Class 1. Where the contingent event is the determination of

tJie prior estate in one, or some only, of several

possible ways, ib.

can be vested only on the determination of the

prior estate, not during its continuance, 127.

GENERAL INDEX. 483

CONTINGENT REMAINDERS— continued.

Fearne's four classes of — continued.

Class 1 — continued.

the definition would include estate of trustees to

preserve, 145.

the estate of trustees to preserve, not contingent,

144.

suggested modification of definition so as to

exclude the estate of trustees to preserve,

146.

Class 2. Where the contingent event is one which may never

happen, 127.

Class 3. Where the contingent event must happen at some

time, but not necessarily till after determina-

tion of precedent estate, 128.

exception from class 3... 129.

Beverley v. Beverley, 130.

Class 4. Where the contingent event is the coming into being

of a person not yet in esse, or the ascertainment

of a person not yet ascertained, 131,

exceptions from class 4... 132.

Burchett v. Durdant, ib.

Darhison v. Beaumont, ib.

Ooodright v. White, 133.

limitations within the Rule in Shelley's case are

not to be treated as exceptions, 134,

destruction of, at common law, by —

1. Forfeiture, 135.

2. Surrender to next vested remainderman, 136,

3. Merger, 137. \*

taking place simultaneously with creation of precedent

estate, would - not destroy contingent remainders,

ib.

4. Tortious alienation of precedent estate, 138.

5. Turning of precedent estate to a mere right, 139.

6. Natural expiration of precedent estate pending the con-

tingency, ib.

whether child en ventre sa mere could take, if precedent estate

expired before his birth, 140,

statutes modifying the common law liability to destruction —

10 & 11 Will. 4, c. 16. ..140.

7 & 8 Vict. c. 76. ..141.

8 & 9 Vict, c. 106... 138.

40 & 41 Vict, c. 33.. .141.

how far they are still liable to destruction, ib.

whether they are within the rule against perpetuities, 197 — 200,

213—217,

created by limitation "to A. and the heirs of the body of his

father," who is alive, 299.

II 2

484 OENERVL INDEX.

COPARCENERS,

definition of, 373.

distinguished from joint tenants and t^^nants in common, 374.

aro entitled, at common law, to compulsory partition, 375.

descent of share, 375, 376.

co-heiresses do not take as, under devise to ancestor's heirs, 376.

a peerage falls into abeyance among, 114.

may bo revived by the Crown in favour of any of, ib.

an office of honour held in grajid serjeanty does not fall into

abeyance among, 115.

how to be exercised on descent among, ib.

a release by one to another, might pass a fee simple without

words of limitation, 223.

a rent granted by one to another, for equality of partition,

might be in fee simple without words of limitation, ib.

COPYHOLD TENURE, AND COPYHOLDS,

origin of, and original connection with villein status, 25.

general characteristics of, 26.

true criterion of, 31.

fealty generally incident to, 14.

descent of, 27.

customs of descent, 16.

not affected by 12 Car. 2, c. 24. ..24.

the common law seisin is in the lord, 30.

customary freeholds are essentially copyholds, 29.

entails of copyholds, 27, 299.

contingent remainders of, not destroyed except by natural ex-

piration of the prior ^freehold, 122.

on enfranchisement, lose their protection, 123.

Rule in Shelley's case applies to limitations of, 165.

peculiar customs of descent, why more common in copyholds than

in freeholds, 230.

copyholds are by escheat united to the manor, 242.

conditional fees in copyholds of manors in which there is no

custom of entail, 300.

Dower Act does not extend to copyholds, 348.

copyholds may bo enfranchised, under S. L. Act, by tenant for

life of the manor, 349, 350.

no general occupancy of copyholds, 359.

may be special occupancy, ib.

estate pur autre vie in, is now deviseable, 362.

CORNAGE,

an incident of knight-service, 9.

CORODY,

is an incorporeal hereditament, 53.

lands appurtenant to, pass by grant of the corody, 398.

GENERAL INDEX. 485

CORPORATION,

successors of corporation sole might take advantage of a condi-

tion, 81.

seisin of a corporation sole is in abeyance during interval caused

by death or other vacancy, 101.

contract by, relating to land, may last for ever, 184.

" successors " necessary in limitation of fee simple to a corpora-

tion sole, 224.

/ except in gift in frankalmoigne, ib.

qucere, whether the Conv. Act, 1881, has altered this rule, ib.

words of limitation not generally necessary in a grant to a cor-

poration aggregate, 225.

two classes formerly of corporations aggregate, ib.

powers of alienation possessed by corporations at common law,

ib.

upon dissolution of, whether estate in fee simple escheats or

reverts, 35, 226, 467, 468.

leaseholds devolve to Crown or re-

vert to lessor, 36 n., 226 n., 468.

condition against alienation, in gift to, 226, 467.

a corporation solo may be tenant in common with himself as an

individual, 369.

any corporation may now hold in joint tenancy, 365 n.

cannot be seised to a use, 389.

may be seised upon trust, ib.

a person may be seised to the use of, ib.

a corporation sole may in his natural capacity be seised to tho

use of himself and his successors as a corporation, ib.

CORPOREAL HEREDITAMENTS, 47, 49 seq.

CORPOREAL THINGS, 49.

COVENANT,

giving a specific claim to specific property, is within the rule

against perpetuities, 183.

secus of a personal covenant, 184.

distinction, in equity, between affirmative and prohibitive, 185

and note,

for the renewal of leases, excepted from rule against perpetuities,

186.

COVENANT TO STAND SEISED,

common law rules of limitation do not apply to, 106.

takes effect under tho Statute of Uses without transmutation of

■ possession, 392.

must be in consideration of blood or marriage, 419, 420.

further remarks upon, 422.

CROSS-REMAINDERS,

connection of, with tenancy in common, 370.

material in practice only when limited in tail, ib.

may be in separate parcels, or in undivided shares, ib.

486 GENERAL INDEX.

CROSS-REMAINDERS— coTO^mued.

examples of, 371.

nature of the estate taken by donees under the original limita-

tion, 372 and note,

cannot arise by implication, except in a will, 372.

what words arc sufficient for the limitation of, 373.

insertion of, in executory settlement, ib.

CURTESY,

the four essentials to make a husband tenant by the, 342.

usually allowed by custom, in copyholds, 27.

in gavelkind lands, 342.

tenancy by the, was a bar to possessio fratris, 241.

tenant by the, may be protector of the settlement, 317.

difference as to tenure, between curtesy and dower, 343.

allowed out of equitable estates, ib.

effect of a separate use, 344.

Married W. P. Act and Land Transfer Act, 344, 345,

474, 475.

powers of a tenant by the, under S. L. Act, 345.

CUSTOMARY ESTATES,

in copyholds, are legal estates, 26.

CUSTOMARY FREEHOLDS,

usually found in manors of ancient demesne, 29.

Lord Coke's opinion, that they are true freeholds, ib.

general conclusion against, 30, 31.

- CUSTOMARY RIGHTS,

existence of, proving that there is no general rule against perpe-r

tuities at common law, 209, 474.

CUSTOMARY TENURE,

origin of, 25.

CUSTOMS,

peculiar customs of descent, 16.

gavelkind and borough-english, 14, 15.

not affected by the Descent Act, 240.

why more commonly apply to copyholds than freeholds, 230.

in what places they might exist, 17.

CUSTOMS OF MANORS AND LOCAL CUSTOMS,

Wareham, 16.

Taunton Dean, ib.

Bray, ib.

Sedgley, ib.

Exeter, ib.

Dymock, 273,

Kent. See Gavelkind.

Gloucester, 17 and note.

Cornwall, 17 n.

Durham, ib.

Aston, 474.

GENERAL INDEX. 487

CY PRES,

doctrine of, 115.

exception to old rule forbidding limitations to unborn de-

scendants in succession, 118 n.

DE BONIS, THE STATUTE,

operation of, 60 seq.

provisions of, 288 seq.

modifies a conditional fee —

(1) in restraining alienation, 287.

(2) in confining descent to persons included in the original

form of the gift, 288.

(3) in permitting the limitation of a remainder, 288.

DEED,

when signature essential to validity of, 404.

relation between premisses and habendum, 411.

tak&s effect from delivery, 107.

in relation to limitation of freehold in futuro, ib.

rule does not apply to a feoffment, ib.

DERIVATIVE ESTATE,

distinguished from an original estate, 67.

gives rise to remainders and reversions, ib.

ceases upon the cessation of the original, 69.

estate created by a power, is, 70.

three modes of derivation of, ib.

out of an estate tail, 72.

for life, 73.

pur autre vie, ib.

out of a term of years, 74.

DESCENDIBLE,

distinguished from " of inheritance," 358 and note.

DESCENT,

of lands in gavelkind, 14.

in borough-english, 15.

by other special customs, 16.

special customs of, more frequent in connection with copyholds

than with freeholds, 230.

of uses, follows that of the lands to which the uses relate, 385.

of lands, unaffected by questions of domicil, 231.

at common law, traced from person last seised in deed, 232, 238.

such person, called the " stock " or " root " of, ib.

doctrine of possessio fratris, 240 seq.

now traced from the purchaser, 238.

definition of purchaser, ib.

presumption against descent, 239.

under limitation to heir, ho takes as purchaser, »6.

special customs of, not interfered with by the Descent Act, 2 ±0.

488 GENERAL INDEX.

D'ESGE^T— continued.

summary of Descent Act's provisions, 240.

effect of escheat, 242.

on total failure of heirs of purchaser, now to be traced from

person last entitled, 242, 247.

this rule restricts escheat, ib., 249.

statement of the rules of descent in fee simple, 238 — 247.

(1. as to the root of duscent at common law, 238

( lA. ,, ,, at the present day, ib.

(2. as to heirship in the ascending line at common law, 242.

( 2a. ,, ,, at the present day, 243.

3. as to preference of male issue to female, ib.

4. as to primogeniture and coparcenary, ib.

5. as to representation of ancestor by his issue, ih.

(6. as to the half-blood at common law, 244.

( 6a. ,, ,, at the j^resent day, ib.

7. as to preference of male collateral stocks at common law,

245.

] 7a. as to preference of male collateral stocks at the present

( day, ih.

8. as t > precedence among female stocks, 216.

9. effect of total failure of heirs of purchaser, at the present

day, 247.

examples of, under the rules, 247.

of a conditional fee, 265.

at common law, might be wider than of fee tail, 266.

this rule not applicable to gifts in frankmarriage, 267.

effect of Statute De Bonis in confining descent, ib.

of a qualified fee, 271.

how entry was tolled by a descent cast, 407.

entry now cannot be tolled, ib.

DESULTORY LIMITATIONS,

meaning and examples of, 113.

good only on creation de novo of incorporeal hereditaments, ib.

or term of years, ib.

whether must be such as, if continuous, would create a fee, 114.

DETERMINABLE FEE,

origin of, 60.

nature of, 251.

distinction between, and base fee of like duration, 61, 330.

whether still valid, 251 n., and Appendix IV.

no remainder upon, 83.

divisible into two classes, according as the future event. is one,

(1) which admits of becoming impossible, 254.

(2) which must for ever remain liable to happen, ib.

examples of, 255 — 260.

DETERMINABLE LTAnTATIONS,

remarks upon, 252, 233.

GENERAL INDEX. 489

DEVESTING. And see Vested.

properly signifies the turning of an estate to a right of entry, 89,

how effected by tortious feoffment, 405.

DEVISE. And see Executohy Devises.

fee simple at common law conferred no power to devise, 226.

except by local custom, ib.

such customs did not extend to remainder or reversion upon a

fee tail, ib.

devises of the use of lands given effect to by Court of Chancery,

168.

the Statutes of Wills, 227.

the Wills Act, 228.

estates pur autre vie, 362. |

DIGNITIES. And see Titles of Honour.

nature of, 45, and note, 468 seq.

DISCONTINUANCE. And see Action, Eight of.

properly signifies the turning of an estate to a right of action, 89.

distinction between, and devesting, ib.

effect of, 407.

DISENTAILING DEEDS,

under the Fines and Recoveries Act, 315.

must be enrolled, 321.

by way of mortgage, operation of, 322.

DISSEISIN,

turns the estate of the disseisee to a right of entiy, 91.

actual disseisin may still take place, 91.

disseisin by tortious feoffment at common law, 405.

now prevented by statute, ib.

entry upon, how tolled at common law, 407.

tolling of entry now prevented by statute, ib.

DISTRESS,

by lord, for services in arrear, 19.

by Crown, on unlicensed alienation, 20.

DIVINE SERVICE,

tenure by, distinguished from fraukalmoigne, 12.

DoanciL,

descent of lands unaffected by questions of, 231.

English freeholds and leaseholds subject to Thellusson Act, in-

dependently of testator's, 204, 205.

DOWER,

several species of, now extinct, 345.

at common law, 346.

by special customs, ib.

no dower out of joint tenancy, ib.

490 GENERAL INDEX.

BOWEH—continiicd.

dower out of tenancy in common, 346.

formerly, none out of equitable estates, 16.

now allowed by Dower Act, ib.

means by which dower may now be defeated, 347.

Dower Act does not extend to copyholds, 348.

tenant in, cannot exercise powers of Settled Land Act, 348.

wife entitled to, out of fee tail, determined by death of husband

without issue, 346.

wife entitled to, out of base fee which is defeasible by the entry

of issue in tail, 322.

EASEMENTS,

not incorporeal hereditaments at common law, 51.

but now so considered, 55.

properly said to be extinguished, not merged, 88.

distinction between existing easements and those created de novo,

56, 349, 350.

sale and exchange of, under Settled Land Acts, ib.

ELEGIT,

tenant by, 237.

EN AUTRE DROIT,

merger of estates en autre droit, 92.

Lord Coke's distinction as to, ib.

is now not law, 95.

ENFRANCHISEMENT OF COPYHOLDS,

effect of, upon contingent remainders, 122.

rights of common, 350.

powers of tenant for life, under S. L. Act, ib.

ENLARGEMENT,

of base fee, 94.

ENTAIL,

tenements alone are within the stat. De Donis, 43.

custom to entail copyholds is good, 299.

in absence of custom, attempt to entail copyholds creates cus-

tomary conditional fee, 300.

equities of redemption can be entailed in equity, 45 n.

estates pur autre vie, are not capable of, 362.

ENTIRETIES, TENANCY BY,

definition of, 376.

characteristics of, 377.

tenants are seised yer tout only, and not per my, 367.

applies to all estates of freehold, 377.

as to chattels real, 377.

pergonal and equities of redemption, 377.

effect of the M. W. P. Act upon, 378.

GENERAL INDEX. 491

ENTRY,

is suflScient, if made on any part of the lands, 235.

and with any part of the person, ib.

in law, is sufficient, where actual entry is prevented by violence,

ib.

right of, formerly tolled by descent cast, 407.

distinction between right of entry and seisin in law, 234.

ENTRY: RIGHT OP,

would support a contingent remainder, 121.

if tolled, or turned to right of action, would not support con-

tingent remainder, ib.

on condition, to whom accrues, 81, 219.

estate subject to condition, not destroyed till entry made, ib.

may now be devised, 228.

or assigned, 77 n.

distinguished from a seisin in law, 234.

EQUITABLE ESTATES,

classed by Mr. Challis among mixed or incorporeal heredita-

ments, 45.

not properly so classed, 57.

contingent remainders limited out of, not liable to destruction,

122.

Rule in Shelley's case applies to, 165.

EQUITY OF REDEMPTION,

on failure of heirs of mortgagor, formerly did not escheat, 38.

but was extinguished for benefit of mortgagee, ib.

provisions of Intestates Estates Act, 1884, as to, 39, 40.

classed by Mr. Challis as a mixed hereditament, 45 n.

can be intaiied in equity, 45 n.

contingent remainders limited out of, not liable to destruction,

122.

as to husband's right in, when held by entireties, 377.

ESCHEAT,

peculiar to lands in fee simple, 33.

arises upon failure of heirs of the tenant, ib.

distinguished from forfeiture, 37.

division of, into —

1. By attainder, 33.

(i.) Quia siispensus est -per collum, 34.

(ii.) Quia ahjuravit regnum, ib.

(iii.) Quia utlegatus est, ib.

subject to Crown's right for a year and a day, 35.

unless restricted by local custom, ib.

2. Without attainder, ib.

by death without leaving an heii', ib.

birth of subsequent heir will defeat lord's right to, ib,

may be defeated by devise, ib.

492 GENERAL INDEX.

E8CRE AT— continued.

whether, on dissolution of a coi'poration, its lands escheat or

revert to donor, 35, 226, 467, 468.

of trust or mortgage estates on death without hoirs of sole trustee

or mortgagee, now abolished, 36.

none, at common law, of hereditaments not strictly the subjects

of tenure, 37.

nor of equitable estates, 38.

nor of equity of redemption on failure of heirs of mort-

gagor, ib.

provisions of Intestates Estates Act, 1884, with respect to, 38—40.

of lands parcel of a manor, 242.

ESCUAGE,

a service incident to tenure by knight-service, 9.

ESTATE,

may bo legal or equitable, 59.

derived from common law, custom, or statute, 59.

freehold of inheritance, 59.

mere freehold, 99.

original or derivative, 68.

vested, contingent or executory, 74.

particular, 77.

in reversion or remainder, 77.

in possession, 99.

estate in land cannot be created de novo except by statute, 69,

and Addenda,

examples of, 71, and Addenda,

in own right, or en autre droit, 92.

ESTATE FOR LIFE,

what estates can bo derived out of, 73.

estates created by conveyance under S. L. Act are not derived

out of, ib.

is a " mere freehold," 99.

properly includes an estate pur autre vie, 339.

list of possible estates for life or lives, ib.

right to estovers incident to, ib.

distinction between, under settlement, and under lease at rent,

340.

methods by which it may arise, 341.

how arises by implication of law, ib.

the implication may be rebutted by evidence of contrary in-

tention, ib.

of husband, as tenant by the curtesy of his wife's lands, 342 — 345.

of wife, as tenant in dower, 345 — 348.

statutory powers of tenant for life under S. L. Acts, 348.

esta.te for own life, cannot merge in estate pur autre vie, 356 n.

ESTATE PUR AUTRE VIE,

is a " mere freehold," 99.

methods by which it may arise, 356.

GENERAL INDEX. 493

ESTATE PUR AUTRE V IE-continued.

heirs as special occupants of, 358.

lieirs of the body as special occupants, 360.

under Statute of Frauds, the executor or administrator took as

assets, 362.

now under Wills Act, ih.

connection of general occupancy with, 359.

occupancy of copyholds, 359.

incorporeal hereditaments, 361.

assignable at common law, 362.

not deviseable under Statutes of Wills, ih.

provisions of Statute of Frauds, ih.

replaced by Wills Act, and extended to copyholds and in-

corporeal hereditaments, ih.

not intailable under Stat. De Donis, ih.

quasi-entail of, ih.

how quasi-remainders can be barred, 363.

ESTATE TAIL. See Fee Tail.

ESTOPPEL,

may prevent merger, 97.

ESTOVERS,

in gross, are within general definition of tenements, 43.

right of tenant for life to, at common law, 339.

fur autre vie, 356.

EXCHANGE,

whether may be made to take effect in futuro, 106.

'betyveen a tenant for life and a tenant in tail after possibility

good, 292.

of settled land, by a tenant for life, 350.

of easements, by a tenant for life, 56, 350 n.

of land in the same county, needs no livery, 398.

before Statute of Frauds might have been by parol, ih.

a deed is now necessary for, ih.

EXECUTORS,

might take advantage of a condition as to estates transmissible

to them, 81.

whether they might be special occupants, 359, 360.

took estate fur autre vie, under Statute of Frauds, 362.

now, by Wills Act, ih.

take a term of years, though it be limited to the heir, 252.

EXECUTORY,

meaning of, as opposed to vested, 74.

EXECUTORY DEVISES,

aro executory limitations in a will, 76.

distinguished from shifting uses, ih.

seisin, during unappropriated interval, is in heir-at-law, 170, 172.

494 GENERAL INDEX.

EXECUTORY DEY ISES-continued.

origin and history of, 168.

of the Ipgal estate in chattel interests, 171.

classification of, 174.

subject to rule against perpetuities, 168 seq.

EXECUTORY INTERESTS,

unknown to the common law, 75.

arise under executory devises or springing or shifting uses, 76.

distinguished from contingent remainders, 76, 81.

now assignable inter vivos, 77.

origin of. See EXECUTORY Limitations.

EXECUTORY LIMITATIONS,

history and origin of, 168.

do not cause abeyance of the freehold, 102.

no limitation, which might be good as remainder, is construed

as, 123.

legal remainder cannot be subsequent to, 124.

but executory limitation may be converted into a contingent

remainder if preceding limitation takes effect, 124.

Rule in Shelley's case does not apply to, 165.

are free from the common law rules as to —

(1) the impossibility of limiting a fee upon a fee, 169, 170,

173.

(2) the noii-abeyance of the freehold, 119, 169, 170, 173.

latter rule sometimes applied by analogy, 172.

of the legal estate in chattel interests, not possible by deed, 171.

only by devise, ib.

de^nition of, 172.

two classes of, 173.

distinction between shifting and springing limitations, 174.

examples of, 175.

could not be bai'red by a recovery unless limited in defeasance

of a fee tail, 177.

effect of Conv. Act, 1882, upon certain, 178.

introduction of executory limitations led to establishment of

rule against perpetuities, 179, 206, 216. See Perpetuities,

The Rule against.

how they differ from common law conditions, 219.

are descendible and deviseable, 176.

now made assignable by statute, 176.

effect of Settled Land Act, 224.

EXTINGUISHMENT,

applies to things collateral to land or legal estate, 88.

distinction between, and suspension, ib.

merger, 96.

of equitable estates, charges, &c., ib.

FEALTY,

incident alike to tenure in chivalry and in socage, 13.

by custom to copyhold and customary tenure, ib.

GENERAL INDEX. 495

FEALTY— continued.

incident to a reversion, ib.

• not incident to a common law tenancy at will, ib.

nor to tenure by frankalmoigne, 11.

FEE. And see Base Fee ; Conditional Fee ; Determinable Fee;

Modified Fee ; Qualified Fee Simple.

" fee," in English law, means an estate of inheritance, 218.

all fees must be such that they may by possibility endure for

ever, 251.

varieties of, 59 seq., 253 n.

two common law fees cannot exist in same land, 83.

rule does not apply to executory limitations, 169, 173.

FEE SIMPLE,

the greatest estate known to the law, 59, 218.

rights conferred by, 218. .

practical restrictions on, 219.

escheat is peculiar to, 33.

has given rise to determinable fees, conditional fees, and quali-

fied fees, 60.

no reversion or remainder upon, 83.

executory limitation in defeasance of, not barred by recovery,

177.

is presumed by the law to last for ever, 220.

word " heirs " formerly necessary in limitation of, to a natural

person, 221.

qucere, whether the copula " and " was necessary, ib.

limitation to a bastard and his heirs gives, 222. ,

an alien or a felon and his heirs gives, 222.

when may arise without express limitation, 222, 223.

may now be limited by words " in fee simple," 223.

when liable to be defeated by executory limitation, tenant not

' liable for waste, 223.

effect of Settled Land Act, 1882, and Conveyancing Act,

1882, on such limitations, 224.

limitation of, to corporation sole, 224.

to corporation aggregate, 225.

at common law conferred no power to devise, 226.

might be devised by custom, ib.

now confers absolute power to devise, 24, 228.

descent of, 230. See Descent.

customs affecting descent of, why more common in copyholds

than freeholds, ib.

where equitable fee simple requires same words of limitation

as legal fee simple, 222 and note.

FEE SIMPLE CONDITIONAL. See Conditional Fee.

FEE TAIL, •

originated from conditional fees, as modified by Statute De Bonis,

60, 72, 287.

what may be the subjects of, 47, 61, 62.

496 General Index.

FEE TATJj—coniinued.

does not exclude remainder or reversion, 60, 28fli

and therefore is a particular estate, 298.

gives rise to base fee, 61, 325.

no merger of, 93.

merger of, after possibility of issue extinct, ib.

executory limitation in defeasance o(f, might be barred, 177.

subsequent to, not subject to rule against

perpetuities, 180.

custom to devise did not extend to remainders or reversions upon,

226.

doctrine of possessio fratris did not apply to, 244.

limitation of, to heirs female, valid though unknown in practice,

287, and note,

classification of, into two divisions accordingly as the limitation :

(1) is restricted to one sex, 290.

(2) is to the issue of one or more than one body, ib.

meaning of terms " tail gonei'al " and " tail special," ib.

" general tail " and " special tail," ib.

word " heirs " formerly necessary to limitation of, 292.

words of procreation also necessary, ib.

might be implied, even in a deed, 293.

limitation " in frankmarriage " gives an estate in special tail, ib.

forms of limitation of, according to their classification, 294, 295.

general propositions relating to limitation of, 295 — 297.

words " in tail " now by statute sufficient for limitation of, 297.

limitation to the heirs of the body of an ancestor, 298.

in copyholds, good by special custom, 299.

in default of special custom the limitation creates a condi-

tional fee, 300.

alienation of —

history of, 302.

by fine, 276.

effect of a fine, 313.

by common recovery, 310.

effect of recovery, 314.

modern disentailing assurances, 315.

protector of settlement, 316 — 321.

statutory powers exerciseable by tenant in tail, 323. >

wife is dowable out of, 346.

FEE UPON A FEE,

cannot be limited at common law, 83.

rule does not apply to executory limitations, 169, 173,

FEIGNED EECOVERIES, ACT TO EMBAR,

remarks upon, 324 n.

FEOFFMENT,

livery of the seisin is the essence of, 48, 107, 397.

only conveyance in pais of corporeal hereditaments at common

law, 47.

GENERAL INDEX. 497

FEOFFMENT— con#m«e(f.

operation of, 105.

strict meaning of term, 397 n., 398, 399.

still valid, but little used, 397.

tortious, by tenant in tail operated as a discontinuance, 407.

by other tenant devested lawful estates, 405.

effect on contingent remainders, 138, 139.

tortious operation of feoffment now abolished, 139, 405.

operates under Statute of Uses with transmutation of posses-

sion, 392, 408.

by an infant, at common law, made propria manu, is only

voidable, 402.

by the custom of Kent, is good, ih.

deed was necessary at common law only for a feoffment to a

corporation aggregate, 403.

was often accompanied by a deed declaring the limitations, ih.

effect of the deed, or charter of feoffment, ih.

by Statute of Frauds must be " put in writing," 404.

must now (unless by infant under custom) be evidenced by deed,

ih.

FINES,

definition and meaning of, 304.

four kinds of, 305.

effect of, at common law, ih.

first Statute of, ih.

second Statute of, 307.

could be levied without concurrence of tenant of immediate free-

hold, 313.

by any tenant in tail in remainder, contingent, or by way

of executory limitation, ih.

but barred only the issue in tail, ih.

fee simple not generally obtained by, but only a base fee, ih.

abolished since 3 let December, 1833, ih.

base fee, when created by fine levied by tenant in tail, 326.

operate under Statute of Uses, with transmutation of possessioi^

391.

one of the parties must have had an estate of freehold in the

lands, 393.

would only bar estates which were sufficiently devested, 394.

effect of, in barring dormant titles, ih.

uses declared upon, by the persons levying, 395.

where no use was declared, the use resulted to the person entitled

to declare, ih.

as used by married women before the Fines and Recoveries Act,

ib.

separate examination of married women, origin of, 396.

FORFEITURE,

of prior freehold might formerly destroy contingent remainder,

135.

C.R.P. K K

498 GENERAL INDEX.

FORFEITURE- co»<iMu«f.

of prior freehold, &c. — continued.

but only after entry made for the forfeiture, 136.

now prevented by statute, 138.

for breach of condition, no remainder upon, 81.

whether now possible at all by operation of law, 150.

FORFEITURE FOR HIGH TREASON,

distinction between, and escheat, 37.

of common law fees, was by the common law, ih.

of conditional fees, 37, 265.

extended to gavelkind lands, 37.

none of fees tail, after De Bonis, ih.

restored by 26 Hen. 8, c. 13, ih.

gave a base fee to the Crown, 37, 328.

abolished by 33 & 34 Vict. c. 23... 37.

FORMEDON, WRITS OF,

classification of, 89 n.

en reverter, at common law, 84, and note.

en descender, whether at common law, 84 n.

en remainder, none at common law, in respect of a conditional

fee, 84, Appendix II.

whether in any other case, 84 n.

FRANK OR FREE TENURE. See Common Law Tenure.

FRANKALMOIGNE,

a division of common law tenure, 11.

incidents of :

1. Tenant must be an ecclesiastical corporation, ih.

2. Special terms of grant, ih.

tenure of, cannot be created by a subject since Quia Emptores, ih.

continuing estate taken by, without words of succession, ih.

fealty not due to the lord in respect of, ih.

could only subsist between donor and donee, ih.

converted into socage, how, ih.

differed from Divine Service, how, 12.

secular service repugnant to, and void, 11, 12.

not abolished by 12 Car. 2, c. 24. ..23.

FRANKMARRIAGE,

nature of, 12.

conditions necessary to its validity, 12, 293.

land might bo given in, after marriage, 12.

before Stat. De Bonis the estate was a conditional fee, 13.

lands given in, to a daughter, must be brought into hotchpot, 375.

FREEBENCH,

dower out of lands o(f customary tenure is, 346.

distinguishwl from dower by special custom, ih.

GENERAL INDEX. 499

FREEHOLD,

meaning of " iinmodiate freehold," 99.

\*,' mere freehold," ib.

during a term of years is not expectant upon, but subject to, the

term, ib.

is vested in possession, notwithstanding existence of a term of

years, ib.

immediate freehold cannot be placed in abeyance by act of

parties, 100.

may be placed in abeyance by operation of

law, 101.

or by statute, 101.

limitation of freehold in futuro void ab initio at common law,

104.

three kinds of freeholds in futuro, ib.

rule does not generally apply to executory limitations, 102, 170,

173.

FREEHOLD TENURE, ESTATE HELD BY,

quantum of, the same now as in Littletons time, 7, 8.

relation of, to free status, 7.

criterion between freeholds and copyholds, 30, 31.

GAVELKIND,

several meanings of the word, 14.

the tenure is socage, ib.

descent of lands in, not affected by enfranchisement, ib.

nor, according to tho better opinion, by a common law fine

levied of lands in ancient demesne, ib.

presumption that all lands in Kent are, 15.

effect of disgavelling Acts, ib.

character of descent of lands by, ib.

no escheat of lands in, on attainder of felony, 34, and note,

forfeiture, for high treason, 37.

custom of, not affected by the Descent Act, 240.

curtesy of lands in, is of a moiety only, and ceases on re-mar-

riage, 342.

attaches without birth of issue, ib.

dower out of, is of a moiety, and ceases on re-marriage, 346.

must be distinguished from freebench, ib.

coparcenary in lands in, in Kent, 373, 374.

not (>lsewhere, except by special custom,

374.

customary feoffment of, by infant, 402.

semble, must be for valuable consideration, ib.

livery must be made propria manu, ib.

GRAND SERJEANTY. See Serjeanty.

GRANT,

at common law, incorporeal hereditaments lie in, 48, 51.

now, by statute, all hereditamenf-s lie in, 48, 381.

K K 2

600 OENERAf. INDEX.

GRANT— co«</;n/ erf.

operation of a statutory de<»d of grant, 415 «eq.

grant, of immediate freehold gives seisin in deed, ib.

the word not necessary, at common law, to pass things lying

in grant, 382.

common law rules of limitation apply to, 105, 106.

takes effect from delivery of the deed, 107.

relation between the premisses and habendum in, 411.

meaning of " grant " in old books, 52 n.

different operation of a grant and a surrender, 88.

of copyholds, by lord, 25 — 28.

HABENDUM,

may enlarge an estate contained in the premisses, and capable

of taking effect, 411.

may not abridge or make void any estate expressly limited in

the premisses and capable of taking effect, ib.

may abridge the implication of an estate in the premisses, 412.

takes effect in preference to an estate in the premisses which is

void, 412, 413.

may modify the premisses when both estates are compatible,

413, 414.

HALF-BLOOD. See Descent.

HEIR,

in copyholds, customary heir generally identical with heir-at-

law, 27.

might take advantage of a condition, as to estates descendible

to him, 81.

the same person may have several different heirs, 230.

could not at common law take, by purchase from his ancestor,

the same estate which he would take by descent, 239.

can now, by statute, ib.

as special occupant, 358.

•• HEIRS,"

in limitations within Rule in Shelley's Case, 152.

distinction between heirs general and special, accordingly as they

take by purchase or by descent, 157, 158.

at common law, necessary to limitation of a fee simple to a

person, 221.

and of a fee tail, 292.

statutory substitute for, in limitation of fee simple, 223.

tail, 297.

limitation to heirs male creates fee simple in a deed, 264.

may create fee tail in a will, ib.

not a word of limitation in grant of estate piir autre vie, 358.

HEREDITAMENTS,

what term includ&s, 41.

definition of, 43.

GENERAL INDEX. 501

HEBEDITAMENTS— co«#m«^<Z.

divided into (1) real, mixed, and personal, 44.

(2) corporeal and incorporeal, ib.

which savour of the realty, are intailable, 61.

HEREDITAMENTS, CORPOREAL,

what are comprised in, 47, 58.

at common law, lie in livery, and not in grant, 47, 51.

seisin in deed of, ^w obtained, 233, 235.

now lie in grant as well as in livery, 381, 411, 415 seq.

when destructible, 54.

HEREDITAMENTS, INCORPOREAL,

definition of, 47, 48, 51.

at common law, lie in grant, ib.

destructible, 54.

creation of, de novo, 54, 56, 111, 327, 349 n., 350 n.

desultory limitations of, 113.

common law rules of limitation apply to, when in esse, 111.

do not apply upon creation, de novo, of, 112.

seisin in deed of, how obtained, 233, 236, 475.

special occupancy may exist of, 361.

but not general occupancy, ib.

estate pur autre vie in, deviseable, 362.

HEREDITAMENTS MIXED,

phrase includes all inheritances which savour of the realty, 45.

estates of inheritance in offices relating to land,

45, and note,

advowsons in gross held for a fee, 46.

rents-charge, ib.

commons in gross, ib.

profits a prendre, ib.

whether it includes equitable estates of inheritance, 45, 57.

territorial baronies and peerages titular of

a place, and seignories in gross, 45, and

Addenda.

HEREDITAMENTS PERSONAL,

meaning and examples of, 46, 47.

not intailable under Stat. De Bonis, 47, 62.

HEREDITAMENTS REAL,

meaning of, 44.

HERIOT,

incident of tenure, 3 n.

not affected by 12 Car. 2, c. 24... 23.

example of heriot custom, 416.

duo on death of tenant by the curtesy, 475.

502 OENKllAL INDEX.

HOMAGE,

an incident of tenure, not a tenure, 13.

generally, of t<?nure in chivalry, ib,

abolished by 12 Car. 2, c. 24... 13.

HOMAGE ANCESTRAL,

a species of tenure, generally in chivalry, 13.

sometimes in socage, 10.

causes of ita early disappearance, 13.

HONOUR. And see Titles of Honour.

meaning and nature of, 4 n.

the Honour of Arundel, 5 n.

IN CAPITE,

tenure, 4, 5.

alienation by tenant, 20.

INCORPOREAL HEREDITAMENTS. See Hebeditaments, Incor-

poreal.

INCORPOREAL THINGS,

true nature of, 49, 50.

INCUMBRANCES,

effect of merger of a base fee upon incumbrances of the rever-

sion, 332.

incumbrances of tenant in tail, not prejudiced by recovery, 314.

INFANT,

feoffment by, only voidable at common law, 402.

under the custom of Kent, ib.

must deliver seisin propria manu, ib.

INHERITANCE,

estates of, 59.

distinction between inheritance and special occupancy, 358, and

note.

INTESTATES ESTATE ACT, 1884,

provisions of sects. 4 and 7 of, 38 — 40.

INTESTATES' ESTATES ACT, 1890,

effect of, 238 n.

INTRUSION,

is the wrongful entry of a stranger, before the entry of a re-

mainderman, 235,

reduces remainderman's estate to a right of entry, ib.

ISSUE,

in a devise, may be equivalent to " heirs " for purpose of Rule

in Shelley's Case, 164.

in sect. 6 of the Descent Act, means " inheritable issue " accord-

ing to English law, 231.

GENERAL INDEX. 603

JOINT TENANCY,

definition and limitation of, 365.

may exist of chattel interests, ib.

cannot bo limited of estates in general tail, ib.

may of estates in special tail, 360.

distinguishing characteristic of, is right by survivorship, ib.

tho benefit of survivorship not necessarily the same to each joint

tenant, ib.

is defeated by severance, ib.

effect of partial alienation on, 367 n.

severance of, creates a tenancy in common, 367.

how severed by the merger of a prior estate, 88.

divorce of two donees in special tail creates joint tenancy for

life, 291.

no dower out of fee held in, 346.

partition of, 368.

JOINT TENANT,

effect of surrender of a prior life estate to, 88,

grant of prior life estate to, ib.

release by one in fee simple to another required no words of

limitation, 223.

must all take simultaneously, at common law, 366.

secus, under Statute of Uses, ib.

"unity of interest, title, time, and possession," 367.

seised per my et per tout, ib.

share of each, is distinct for purposes of alienation and forfei-

ture, ib.

by severance become tenants in common, ib.

effect of severance, where they are joint tenants for their lives,

368.

partition between, 368.

corporation may be, 365.

JUS ACCRESCENDI,

in joint tenancy, 366.

KENT, CUSTOM OP. See Gavelkind.

KING,

is lord paramount of the whole kingdom, 4, 5.

KNIGHT-SERVICE,

a species of tenure in chivalry, 9.

abolition of, 23.

LAND,

meaning of, 41.

ambiguous meaning of "hereditament" in relation to, 44, 49.

meaning of, in Settled Land Act, 56, 349 n. (f), 47L

LAND TRANSFER ACT, 1875,

effect of registered tran-sfer under, 385.

504 ORNER.VL INDEX.

LAND TRANSFER ACT, 1897,

effect of, on descent, 237 n.

LEASE. And see Term of Years ,

"lease" sometimes means a grant for life, 340, 397 n.

how lease for life is commonly granted, 102, and note,

from what day a lease for life commences, 107,

LEASE AND RELEASE,

is a release operating at common law to enlarge a chattel interest,

380, 409, 410.

common law rules of limitation apply to, 106.

the lease alone derived its operation from the Statute of Uses,

380. i: ;

same object could bo effected, by a common law lease, with actual

possession, 380, 381.

statutory substitute for, under 4 & 5 Vict. c. 21... 381.

superseded by grant 8 & 9 Vict. c. 106, ib.

by whom invented, 410 n.

LEASEHOLDS,

are they tenements ? 424.

LEASING, POWERS OF,

tenant in tail, 72, 323.

tenant for life, or other limited owner, under Settled Land Acts,

351.

LEGITIMACY,

how ascertained, 231.

" LESSEE,"

includes a tenant for life under an express grant, 340.

LIMITATION,

determinable, remarks on, 252.

sometimes styled collateral, ib.

styled by Littleton, conditions in law, 253.

sometimes styled, conditional limitation, 254.

Preston's definition of a direct, 252.

of a collateral, 253,

upon condition, distinguished from determinable limitation, 260,

and from conditional fee, 267,

" to A. and the heirs of the body of his father," 298,

LIMITATION AT COMMON LAW, RULES OF,

Rule 1. As to freehold in futuro, limited out of estate in posses-

sion in corporeal hereditaments, 104.

rule connected with the theory of a feoffment, 104.

applies to all assurances of freeholds at common law,

105,

does not apply to a covenant to stand seised to uses,

106.

GENERAL INDEX. 605

LIMITATION AT COMMON LAW, RULES OF~continued.

Eule 1 — continued.

whether it applies to common law exchanges, 106.

remarks on Boddington v. Bohinson, 108.

Rule 2. As to freehold in futuro limited out of remainder or

reversion, 111.

Rule 3. As to freehold in futuro limited out of incorporeal here-

ditaments in esse, 111.

does not apply upon the creation de novo of incor-

poreal hereditaments, 112.

Rule 4. As to discontinuous or desultory limitations, ib.

application of, to a determinable fee, ib.

does not apply upon the creation de novo of incor-

poreal hereditaments, 113.

remarks upon Atkins v. Mountague, 114.

Rule 5. As to remote limitations of inheritance, 115.

application of, to a will, gives rise to the cy pres

doctrine, ib.

Rule 6. As to limitations upon remote contingencies, 116.

LIJ^nTATIONS, EXECUTORY. See Executory Limitations.

LIMITATIONS, STATUTE OF,

base fee enlarged by, 337.

abolished doctrine of warranty tolling entry, 308.

descent tolling entry, 407.

when wrongful possession abandoned before statutory period has

elapsed, right of true owner revives without entry by him,

433 seq.

LIVERY,

at common law, corporeal hereditaments lie in, 47, 51.

essential part of a feoffment is livery of the seisin, 48, 107, 397.

in what cases not necessary, at common law, to convey freehold

in possession, 397.

in deed, must be in the absence of hostile claimants, 399.

how made, ib.

by or to attorney, 401.

in law, general requisites of, ib.

of one parcel gives seisin of all parcels in same county, 402.

by infant under custom, must be made propria manu, ib.

secundum formam cartce, 403.

LONG TERMS,

enlargement of, 71, 333.

MANOR,

creation of, since Quia Emptorcs, 21.

MANORS OP ANCIENT DEMESNE,

what are, 29.

customary freeholds, are usually copyholds of, 29 — 31.

freehold tenants of, 31, 32.

506 OENKRAL INDKX.

AfARKETS,

at common law, do not escheat, 38.

sometimes classified as mixed hereditaments, when in gross, 44.

more properly classified as incorporeal hereditaments, 53.

MARRIED WOMAN,

might levy fine or suffer recovery, with husband, 395.

separate examination of, 396.

other customary assurances by, ib.

gucpre, whether M. W. P. Act has altered status of, 378.

MAXIMS OF LAW,

AnglicB jura in omni casu libertaii dant favorem, 8.

CHJus est dare, ejus est disponere, 67, 70.

no one may take advantage of a condition except the maker of

it or his privies, 81.

the immediate freehold may not by act of parties be placed in

abeyance, 100, 101.

mergers are odious in equity, 94.

whether there is a maxim that the law will not contemplate a

double possibility, 116 — 118, and note.

nemo e^t heres viventis, 131, 132, 330, 331.

seisina facit stipitem, 238.

cessante statu primitivo, cessat derivativus, 69, 70, 314 n.

quod meum est, amplius esse meitm non potest, 405 n.

MERGER OP ESTATES,

generally, 68, 86—97.

definition of, 86.

not prevented by interposed contingent remainder, 86.

distinction between merger and surrender, 87.

of a life estate, may sever joint tenancy in the reversion, 88.

of estate era autre droit, 92, 95.

estates tail and base fees, 93.

modern law of, 94.

in equity, 94 seq.

question of intention, 97, and note.

of precedent estate, generally destroys contingent remainder, at

common law, 87, 137.

but not if it takes place simultaneously with creation of

precedent estate, 87, 137.

in such cases, merged estates open to let in contingent re-

mainders, 87, 138.

destruction of contingent remainders by, abolished, 138.

enlargement now sub.stituted for, in the case of a ba.se fee, 94,

332.

MINES AND MINERALS,

are corporeal hereditaments, although destructible, 54, 58.

^lODIFIED FEE,

meaning attached to the phrase, 62.

confers absolute right of user on the tenant, 262.

GENERAL INDEX. 507

MORTGAGOR,

failure of heirs of, did not cause escheat of equity of redemption

previously to Intestates Estates Act, 1884. ..38.

redemption by, defeats dower of mortgagee's wife, 347.

effect of power of sale in Lord Cranworth's Act upon the estate

of, 383.

NEW RIVER SHARES,

formerly realty, 38, 46.

true nature of, 38 n., 57.

OCCUPANCY, GENERAL,

nature of, 359.

none, of copyholds, ib.

nor of incorporeal hereditaments, 361.

OCCUPANCY, SPECIAT;,

nature of, 358.

is not a descent, ib., and note,

heir as special occupant, 358 seg.

heirs of the body as special occupants, 360.

whether executors or administrators could be special occupants,

ib.

may exist of incorporeal hereditaments, 361.

of copyholds, 359.

OFFICE,

may bo a hereditament mixed, 45.

office of honour, descent to coparceners, 115.

OPTION OF PURCHASE,

may bo void for -remoteness, 472.

ORIGINAL ESTATE,

generally, 68 — 74.

distinguished from derivative estate, 67, 68.

every estate, greater than a tenancy at will, may bo, 68.

PARAMOUNT LORD,

supreme, is the king, 4, 5.

PARCENERS. See Coparcenees.

PARTICULAR ESTATE,

the estate of freehold prior to a remainder or reversion is a, 77.

in relation to a reversion, is derivative, 78.

relation of, to a remainder, ib.

t^rm of years is not a particular estate, for purposes of seisin, 80.

but is often so styled, 119.

a fee tail takes effect as, 298.

PARTITION,

among coparceners, at common law, 375.

joint tenants, by statute, 368.

tenants in common, ib.

jurisdiction of court to order sale instead of partition, 368.

608 GENERAL INDEX.

PARTITION— co«#»«uerf.

rent granted for equality of, among coparceners, might be in fee

without words of limitation, 223.

voluntary, must now be effected by deed, 375.

among coparceners, did not alter the root of descent at common

law, ib.

tenant for life may concur under S. L. Act in making, 350.

and may raise money for equality of partition, 353.

PEERAGE,

sometimes is included in mixed hereditaments, 44.

■whether it can accurately be described as real estate, 468 seq.

falls into abeyance among coparceners, 114.

may be revived by the Crown in favour of any of them, ib.

det\*>rminable limitation of, 255. '

land with reference to, 112.

PERPETUITIES, THE RULE AGAINST,

made necessary by the introduction of executory limitations, 179,

206, 209, 216.

fixed by analogy to rules governing common law limitations, 195,

206, 216, 217 n.

history of, 177 seq., 206 seq.

statement of, 180—183.

its relation to gifts to charitable uses, 194, 195.

does not apply to limitations subsequent to an estate tail, 180.

the shares of the persons to take must be ascertained within

the period, 183.

to what subjects the rule applies, 183—186, 472 — 474.

form.s no part of the common law, 261, 473.

does not apply to personal covenants, 184, 472.

whether it ought to be applied to restraints on alienation, 192 n.

exceptions from, are (1) conditions in defeasance of a term of

years, 186.

(2) covenants for renewal of leases, ib.

(3) negative covenants, running with the

land, 187.

common law condition in defeasance of a freehold not within,

187, 261.

decision in Re Hollis' Hospital and Hague to the contrary,

questioned, 207 seq.

has properly no application to common law limitations, 197, 216.

but under Cont. Rem. Act, 1877, contingent remainders which

conform to the rule are protected, 141.

applies to equitable contingent remainders, 141, 213.

remoteness does not depend upon the event, 191.

application of, to gifts to a class, ih.

effect of, on subsequent or alternative limitations, restrictions,

&c., 192, 193.

GENERAL INDEX. 509

PERPETUITIES, THE RULE AGAIUST—continued.

application of, to appointments under a special power, 193.

general power, ib.

to powers of sale and exchange, 194.

PERPETUITY,

Rometimes means an inalienable interest, 205.

in old books, generally means a limitation intended to create

an unbarrable entail, 103 n., 206, 215.

original common law contained no rule against perpetuities, 208,

209, 215, 473.

creation of perpetuities prevented by common law rules of limi-

tation, 103, 197 n.

rules of the later common law which prevented land from being

made inalienaWe beyond a certain period, 103, 196, 197 n.,

205, 216.

confusion between " perpetuity " and " remoteness," 103 n., 195 n.

charitable trust never void on ground of " perpetuity," ib.

PETITE, OR PETTY, SERJEANTY. See Skrjeanty.

PORTIONS,

provisions for raising, not within Thellusson Act, 204.

POSSESSIO FRATRIS,

the doctrine of, 241.

now inapplicable, ib.

none generally, of land in dower, 241, 242, 474.

of lands held by the curtesy, 242.

none, of an estate tail, 244.

POSSESSION,

in early times, synonymous with seisin, 64.

meaning of, in modern times, 64, 98, 99 n.

a freehold estate is vested in, in spite of outstanding term of

years, 99.

of tenant for years, gives seisin in deed, without entry by re-

versioner, 236.

similarly of other persons having chattel interests, 237.

POSSIBILITIES,

distinction between bare, and coupled with an interest, 76, and

note,

not assignable at common law inter vivos, 76.

coupled with an interest might be devised, 77.

supposed common law rule against double possibilities, 116.

no such rule, 118 n.

POSSIBILITY OF REVERTER. See Reverter.

POSTHUMOUS CHILDREN,

by the better opinion, could not at common law take by way

of contingent remainder, 140.

now enabled by statute, ib.

610

GENKKAL INDEX.

rOSTllUMOl'.S CIJ 1 LDHEN- conthutod.

for purposes of divscont, wore tri-at^nl as in osur, 1:50.

could take und(>r devises by special custom, ib.

position of, in\* relation to the rule against perpetuities, 182,

183.

POWERS,

estates arising under, out of what estate they are derived, 70.

existence of prior power does not prevent vesting, 75.

subsequent exercise of power may limit prior estate within Rule

in Shelley's Case, 163.

application of rule against perpetuities to appointments under,

193, 194.

under the S. L. Act, 1882... 349.

exercise of prior power by husband, defeats dower of woman

married before 1834... 347.

PRECIPE, TENANT TO THE,

at common law, 310.

by 14 Geo. 2, c. 20, ib.

person who could have made, may be protector of the settle-

ment since the F. and R. Act, 320.

PREROGATIVE OF THE CROWN,

to revive dormant peerage, 114.

PRESCRIPTION,

general rule that only incorporeal hereditaments can be claimed

by, Addenda, p. xlv.

tenancy in common may be claimed by, 369.

PRESCRIPTIVE RIGHTS,

existence of, proving that there is no general rule against per-

petuities at common law, 209, 474.

PROFIT A PRENDRE,

sometimes included in mixed hereditaments, 46.

therefore intailable under Statute De Donis, 43, 61.

more usually classified as an incorporeal hereditament, 53.

PROTECTOR OF THE SETTLEMENT,

function of, by analogy to person entitled to make a tenant to

the prcecipe under old practice, 304, 315.

who is, 316—321.

does not cease to be the, by incumbrance, alienation, or bank-

ruptcy, 317.

settlor, or trustee of executory settlement, may appoint special

protectors, 318.

special protector may disclaim by deed inrolled, ib.

in what cases the person who could have made the tenant to the

prcecipe maj' be protector since the Act, 320.

PUR AUTRE VIE. See Estate pur Autre Vie ; Tenant pur Autre

Vie,

GENERAL INDEX. 511

PURCHASE,

" heirs " not a word of, in limitations within Rule in Shelley's

Case, 152.

distinction between heii's general and special, accordingly a8 they

take by descent or by purchase, 157, 158.

heir may now take by, under gift or devise from ancestor, 239.

whether heir took by, under a limitation to heirs of a specified

person at common law, ib.

the specified ancestor now takes by, for purpose of tracing

the descent, ib.

PURCHASER,

now the root of descent, 239.

how ascertained, ib.

QUALIFIED FEE SIMPLE,

arises out of the fee simple, 60.

not found in practice but may legally exist, 62.

whether Blackstone's views on the rules of descent throw doubt

on the existence of qualified fees, 272, 273 seq.

difficulty caused by Lord Coke's views, 276.

limitation of, at common law, 269.

whether the limitation is necessarily in the paternal line, 277.

limitation of, under Descent Act, 282.

effect of 22 & 23 Vict. c. 35, s. 19, upon, ib.

descent of, 271.

alienation of, 278.

Preston's opinion, ib.

analogous limitations to heirs as purchasers found in seHlo-

ments, 239, 281.

the bearing of Blake v. Hi/nes upon, 284 — 286.

QUANTUM OF ESTATE,

relation of, to tenure, established by custom, 7.

and to political status of tenant, ib.

relation inter se of fees, in point of quantum, 221 n.

QUASI-ENTAILS,

of estates pur autre vie, 362, 363.

QUASI-REMAINDERS,

of estates pur autre vie, 363.

QUEEN CONSORT,

has for some purposes the capacities of a feme sole, IH.

example of a limitation to successive queens consort, ib.

QUIA EMPTORES, STATUTE OF,

prevented sub-infoudation, 19.

but freed alienation in fee simple, ib.

apportionment of services under, ib.

applies only to lands held in fee simple, 20, 22, 438.

does not bind the Crown, 20.

512 GENERAL INDEX.

QUIA EMPTORES, STATUTE 0¥— continued.

effect, of, on tenants of the Crown in capite, 20.

on creation of manors, 21.

Crown and mesne lords together may dispense with, ib.

effect of, in extinguishing mesne tenure, 230.

REAL ACTION,

three kinds of writs of formedon, 89 n.

forraedon en reverter existed at common law, 84.

qucere, as to formedon en remainder, 84, and notes, 429.

remitter, in its effect, was equivalent to, 90.

could only be brought against tenant of immediate freehold, 100.

a fine was a, 304.

also a recovery, 310.

plaintiff and defendant in, styled demandant and tenant, 310 n.

two classes of, (1) possessory actions, 408.

(2) droitural actions, ih.

RECOVERIES, COMMON,

history of, 303.

founded on doctrine of warranty, 308.

Taltarum's Case, 309.

a collusive real action, 310.

recovery with double voucher, 312.

single voucher, ih.

treble voucher, ih.

now abolished, 313.

effect of, 314, and note,

did not affect estates derived out of, or incumbrances upon, the

estate tail, 314.

could not be suffered by tenant in tail after possibility, ih.

or by women tenants in tail ex provisione viri, ib.

or by tenant in tail, where reversion was in the Crown, 315.

could be suffered by tenant in tail, after he had levied a fine,

335 and note.

effect of, on fines for alienation due to the Crown, 21, 22.

base fee could arise by, where reversion was in the Crown, 324 n.

took effect under Statute of Uses with transmutation of posses-

sion, 391.

uses declared upon, by the persons suffering them, 395.

when use resulted to the person suffering them, ib.

by married women, ib.

RECOVERIES, FEIGNED,

evasion of Statutes of Mortmain by, 6 n. .

by reversioners on terms of years, 64.

RE-ENTRY.

same as entry, 77 n.

GENERAL INDEX. 513

RELEASE,

conveyance of immediate freehold by, without livery of seisin, 398.

may operate (1) by way of enlargement, 409.

(2) by way of passing an estate, ib.

what interest will qualify releasee to accept release, ib.

effect of, by way of enlargement of a term of years, ib.

conveyance by lease and release founded on this doctrine, 410.

one tenant in common cannot release to another, 369 n.

joint tenant may release, but not assign, ib.

coparceners may either release or assign, ib.

release under 4 & 5 Vict. c. 21. ..381.

REMAINDEE,

not properly included among incorporeal hereditaments, 52.

definition of, 78.

origin of the phrase, 79 n.

distinction between, and a reversion, 77, 78.

relation, of, to the particular estate, 78.

at common law might be created by feoffment without deed

or writing, 53, 79, 403.

two essential characteristics, (1) to await the regular determina-

tion of precedent estate, 81.

(2) to take effect forthwith upon

such determination, 82.

a distinction noted, as to limitations upon condition, 81.

upon a term of years, peculiar nature of, 80, 99.

base fee, 80.

same estate may be both reversion and remainder, 80.

alternative remainders in fee simple, 80.

cannot be subsequent to executory limitation, 124.

cannot be limited in expectancy upon a common law fee, 83.

whether a remainder could be limited upon a conditional fee,

83, Appendix II.

in futuro is bad, 104.

how remainder in futuro differs from a contingent remainder

preceded by an immediate estate of freehold, 105.

of inheritance, prior to Stat. De Bonis, could only be in fee

simple, 195.

and could only subsist upon an estate for life, or pur autre

vie, 195, 196.

after Stat. De Bonis, might be in fee tail, ib.

and might be limited upon a fee tail, 298.

legal, are outside the rule against perpetuities, 197, 207, 213 seg.

seisin in deed of, how acquired, for purposes of descent, 233.

how conveyed, under the old practice, 382.

REMITTER,

meaning of, 90.

distinction between, and merger, 91, 92.

whether decision in Agency Co. v. Slvort turned on doctrine of,

91 n., 434 seq.

C.B.P. L L

514 GENERAL INDEX.

RENT-CHAEGE,

is an incorporeal hereditament, 51, 53.

is a tenement for purpose of entail, 43.

not, at common law, for purpose of escheat, 38.

application of common law rules of limitation to, 111, 112.

seisin in deed of, how acquired, 233, 236, 475, 476.

base fee in, when rent-charge was limited in its inception to

heirs of the body, 327.

estate pur metre vie in, 361 n.

granted for equality of partition, is descendible in same way as

the land, 375.

is within the Statute of Uses, 475.

creation of, de novo, by use upon a use, 387.

RENT-SECK,

at common law, does not escheat, 38.

REPUGNANCY,

between the premisses of a deed and the habendum, rules as to,

411—415.

RESULTING USE,

estate taken by way of, is within Jlule in Shelley's Case, 163.

doctrine of, its bearing upon the application of the doctrine of

freehold in futuro to executory interests, 172.

REVERSION,

not properly included among incorporeal hereditaments, S2

definition of, 79.

distinguished from remainder, in its relation to the prior estate,

77.

upon a term of years, 80.

upon a base fee, ib.

same estate may be both remainder and reversion, ib.

whether any could subsist upon a conditional fee, 84, Appen-

dix II.

may subsist upon a fee tail under Stat. De Bonis, 298.

seisin in deed of, how acquired, 233.

what becomes of the, upon statutory enlargement of term into

fee simple, 333, 334.

how conveyed, under the old practice, 382.

tortious, 405.

REVERSIONARY LEASE,

whether rule against perpetuities applies to, 186, 472.

REVERSIONER,

at common law could destroy a term of years by collusive re-

covery, 7, 64.

REVERTER,

strictly equivalent to reversion, 82, 83.

sometimes used to denote a possibility of reverter, ib.

whether there is a reverter on the dissolution of a corporation,

35,36,226,467.

GENERAL INDEX. 515

REVERTER, POSSIBILITY OF,

none, on a fee simple, 33, 220.

upon other common law fees, 83, 220.

upon a conditional fee, 84.

effect of Stat. De Bonis upon, 298.

upon a condition at common law, descendible, but neither assign-

able nor deviseable, 76 n.

now assignable by statute, 176, 177.

and deviseable, 228.

qucere, as to possibility of reverter upon determinable fee, ib.

RIGHT OF ENTRY. See Entry, Right of.

RIVER AVON NAVIGATION,

shares in, real estate, 46, 58.

SEIGNORY,

is a hereditament real, 45.

distinction between seignory in gross and seignory of manor, 6 n.

SEISIN. And see Livery.

denotes the possession of the freeholder, 64, 98.

formerly also applied to chattels, 64 n.

meaning of being " in the seisin of the fee," 99.

independent of, and unaffected by, existence of terms of years, 99.

cannot be placed in abeyance by act of parties, 100.

may by operation of law, 101.

or by statute, ib.

in case of executory limitations, how abeyance is avoided, 102,

172.

seisin in deed, defined, 233.

seisina facit stipitem, 238.

connection of, with doctrine of possessio fratris, 240 seq.

of corporeal hereditaments, how obtained at common law,

233.

since Statute of Uses, seisin in deed of corporeal heredita-

ments may be acquired without actual entry, 391, 410,

420 seq.

since 8 & 9 Vict. c. 106, seisin in deed may bo transferred

by deed of grant, 411, 415.

of incorporeal hereditaments, 233, 236, 475.

of remainders and reversions, 233, 242.

existence of a chattel interest removes necessity for actual

entry, 233, 236.

seisin in law, defined, 234.

distinguished from a right of entry, ib.

suffices to prevent abeyance of the freehold, 235.

how converted into seisin in deed, 235.

made the estate assets in the hands of the heir, 237.

entitles a wife to dower, ib.

does not entitle a husband to curtesy, ib.

of a widow by dower, continued her husband's seisin, 241, 474.

LL 2

516 GENERAL INDEX.

SEISIN — continued.

seisin in law — continued.

of a tenant by tho curtesy, 242, 474.

distinction between common law seisin and customary seisin, 30.

SERJEANTY, GRAND, TENURE BY,

a species of tenure in chivalry, 8, 9.

retains its honorary incidents, though converted into socage, 9, 24.

an office of honour held by, does not fall into abeyance among

coparceners, 115.

how to bo exercised on descent among coparceners, ib.

SERJEANTY, PETITE, TENURE BY,

a species of tenure in socage, 10.

effect of stat. 12 Car. 2, c. 24, on, ib.

SERVICES,

incident to tenure in chivalry, 9.

socage, 10.

could not be reserved upon a gift in frankalmoigne, 11, 12.

right of distress for, 19.

effect of sub-infeudation on, ib.

of Quia Emptores, ib.

apportionment of, on alienation, ib.

peculiar to chivalry, abolished by 12 Car. 2, c. 24. ..23.

honorary services of grand serjeanty, not abolished, 24,

SETTLED LAND ACT, 1882,

policy of, 349 n., 472.

powers of, not confined to tenants for life, 224, 323, 348, 353 n.

does not extend to tenants in dower, 348.

powers conferred by, 349 seq.

mode in which powers operate, 353.

requirements for exercise of powers, 354.

what interests are overreached by exercise of powers, 224, 354.

powers authorise creation of easements de novo, 56, 349 n.,

350 n.

easement in esse is an incorporeal hereditament within meaning

of Act, 56.

whether a baronetcy is an incorporeal hereditament within

meaning of Act, 471, 472.

SETTLEMENT,

what is, within meaning of Settled Land Acts, 353, 354.

compound, 354.

trustees of. See Trustees for the Purposes of the Settled

Land Acts.

SHELLEY'S CASE, RULE IN,

when applicable, 152.

essential characteristics of limitations within —

(1) a prior estate of freehold, 153.

(2) a subsequent limitation in the same instrument to the

heirs of the same person, ib.

GENERAL INDEX. 517

SHELLEY'S CASE— continued.

statement of Shelley's Case in detail, 154 — 161.

the rule was expressly laid down in Shelley^ a Case, 161, 162 n.

statement of the rule : —

(1) prior estate must be of freehold, 162.

(2) subsequent limitation, to heirs general or special, 163.

(3) both must arise under same instrument, ih.

(4) prior freehold may be by resulting use, ih.

(5) or subsequently limited under power, ih.

(6) as to interposed estates, ih.

(7) as to contingent limitations, ih.

(8) as to meaning of "issue" in a devise, 164.

(9) as to further addition of words of limitation, ih.

(10) rule applies to equitable limitations, 165.

(11) rule applies to copyholds, ih.

(12) does not apply, where subsequent limitation is execu-

tory, ih.

(13) nor, generally, to executory settlements, 166.

probable origin of, ih. 167, and note.

SHIFTING AND SPRINGING LIMITATIONS,

defined, 174.

may be created by way of use or by executory devise, 76.

examples of, 175.

seisin, during unappropriated interval, results to settlor, or

descends to heir-a,t-law, 102.

limitation by way of use may be void under rule against abey-

ance of the seisin, 172.

subject to rule against perpetuities, 183.

SOCAGE,

tenure in, 10.

SPORTING, RIGHT OP,

may be an incorporeal hereditament, 46 n.

STATUTE MERCHANT AND STATUTE STAPLE,

tenancy by, 66.

STATUTORY POWERS,

under Settled Estates Act, 323, 348.

of tenant for life and other limited owners under S. L. Acts,

348.

exercise of, by tenant in tail, 323, 324, and note.

SUB-INFEUDATION,

meaning of, 18.

effect of, on lord's rights, 18, 19.

checked by Quia Emptores, 19.

SUFFERANCE. See Tenant by Sufferance.

518 GENERAL INDEX.

SURRENDER,

customary, precedes admittance to copyholds, 27.

admittance relates back to, ib.

distinction between, and merger, 87, 88.

of prior freehold, might destroy contingent remainder, 136.

no longer has this effect, 138.

of immediate freehold, without livery of seisin, 397.

cannot b6 made by tenant for his own life to one pur autre vie^,

151.

of freehold, is now void at law, unless made by deed, 398.

of lease, tenant for life, under S. L. Act, may accept, 352.

SUSPENSION,

of rent, easement, &c., 88.

TAIL. See Fee Tail ; Tenant in Tail.

T ALT ARUM' 8 CASE,

stated, 309.

TENANCY IN COMMON. And see Tenant in Common.

is a sole and several ownership, 368.

may be claimed by prescription, 369.

by what methods it may arise, ib.

the shares in, may be unequal, 370.

connection of, with cross remainders, ib.

TENANCY BY ELEGIT,

is a chattel interest, 66.

enables seisin in deed to be obtained without entry, 233, 237.

TENANCY BY ENTIRETIES. See Entireties, Tenancy by.

TENANCY OF GUARDIAN IN CHIVALRY,

was a chattel interest, 66.

abolished by 12 Car. 2, c. 24, ib.

TENANCY BY STATUTE MERCHANT,

is a chattel interest, 66.

now obsolete, ib.

enables seisin in deed to be obtained without entry, 233.

TENANCY BY STATUTE STAPLE,

is a chattel interest, 66.

now obsolete, ib.

enables seisin in deed to be obtained without entry, 233.

TENANCY AT SUFFERANCE. See Tenant by Sufferance.

TENANCY AT WILL,

qualifies tenant to take a release, 409.

may arise, though heirs be named in the grant, 252.

copyhold lenure was, in theory, 25, 26.

original relation of, to villein status, t&.

TENANT IN CAPITE. See Tenure in Capitb.

TENANT IN COMMON. And see Tenancy in Common.

is sole owner as to his own undivided share, 368.

GENERAL INDEX. 619

TENANT IN COUUON— continued.

wife is dowable out of husband's undivided share, 346.

cannot convey his share to another by release, 368.

can compel partition, ib.

a man may in an official capacity be, with himself as an indivi-

dual, 369.

TENANT FOR LIFE,

on the subject in general, 339 — 355.

common law right of, to take estovers, 339.

unless restrained by covenant, 340.

different position now of a, under a settlement, and under a lease

for life at a rent, ib.

by what methods tenancy for life may arise, 341.

powers of, under the Settled Estates Act, 348.

under the S. L. Acts, 348—355.

TENANT BY SUFFERANCE,

nature of tenancy, 409.

could make tortious feoffment at common law, 405.

cannot take a release, 409.

TENANT IN TAIL. And see Fee Tail ; Pkotector of Settle-

ment.

in possession, effect of tortious feoffment by, 89, 407.

could not suffer common recovery, if reversion in the Crown,

315, 324 n.

alienation by, now regulated by Fines and Recoveries Act, 315.

disentailing deed by, must be inroUed, 321.

effect of disentailing deed not inrolled, 322.

power of, to make leases under Settled Estates Act, 323.

powers of, under S. li. Acts, ib.

TENANT IN TAIL AFTER POSSIBILITY,

definition of, 291.

could not suffer common recovery, 314.

can make no disposition under Fines and Recoveries Aot, ib.

if in possession, can exercise powers of S. L. Acts, ib,

TENANT PUR AUTRE VIE, And see Occupancy.

on the subject in general, 356 — 363.

cestui que vie must be living when estate is created, 356 n.

rights of, at common law, to estovers, 356.

by what methods tenancy pur autre vie may arise, 357,

of incorporeal hereditaments, 361, and note, 362.

had no power to devise under Statutes of Wills, 362.

had under Statute of Frauds, ib.

now under Wills Act, ib.

when may exercise powers of S. L. Acts, 356.

death of, might at common law leave seisin in abeyance till entry

of occupant, 101.

in remainder, cannot take surrender from a tenant for his own

life, 151.

520 GENERAL INDEX.

TENANT AT WILL,

could make tortious feoffment at common law, 89, 405.

can take release of reversion, 409.

effect of possession on seisin af the freehold, 233, 236.

TENANT FOR YEAES. See Term of Years.

TENEMENT,

strict definition of, 42. ,

wider meaning of, in common use, 43.

only tenements, in the wider sense, are intailable, 43, 61.

things may be, for one purpose and not for another, 43.

whether a dignity or title of honour can properly bo called a

tenement, 469, 470, and note.

TENURE,

by the common law, 4 — 17.

divisions of, 8.

on the phrase, " leasehold tenure," 65, 424.

TENURE IN CAPITE,

generally refers to tenure immediately of the Crown, 5.

may be holden of a subject, ib.

ut de corona and ut de honor e, 4 n.

TENURE IN CHIVALRY,

a division of common law tenure, 8.

now abolished, 23.

TENURE IN GROSS,

distinguished from tenure " as of a manor," 6 n.

TENURE IN SOCAGE,

a division of common law tenure, 10.

different species of, 10, 11.

all lay tenure now converted into, 23.

how such conversion enlarged the right to devise lands, 24,

227.

TERM OF YEARS,

could formerly bo destroyed by reversioner, 7, 64.

a mere contract at common law, 426.

unknown to the common law as an estate, 63, 98.

how far there can be tenure of, 65, Appendix I.

confers no seisin, only possession, 64, 98.

does not affect the seisin of the immediate freehold, 80, 99.

its relation to subsequently limited estates, 99, 100, 119.

on a descent cast, the possession of the termor gives the heir

seisin in deed, 233, 236.

will not support a contingent remainder, 100, 119.

may he limited to commence in futuro. 113, 186, 472.

or may revive after avoidance, 113.

4

GENERAL INDEX. 621

TERM OF YEABS— continued.

executory limitation of the legal estate in, not possible by deed,

171.

is possible by devise, ib.

conditions in defeasance of, not subject to rule against perpetui-

ties, 186.

nor covenants for renewal of, ib.

whether reversionary terms of years are subject to rule against

perpetuities, 186, 472, 473.

enlargement of, under Conv. Act, 1881... 333, 383.

whether tenancy by entireties is applicable to, 377.

if limited to heir, passes nevertheless to executor, 252.

THELLUSSON ACT, THE. See Accumulations of Income.

TIMBER. And see Trees.

provision as to produce of, not within the Thellusson Act, 204.

power of tenant for life under S. L. Act to cut, 352.

TITHES,

at common law, could not be held by a layman, 43.

impropriate, are tenements, ib.

incorporeal hereditaments, 53.

TITLES OF HONOUR,

not affected by 12 Car. 2, c. 24... 24.

nature of, 468 seq.

TORTIOUS ALIENATION,

could be effected by feoffment, fine, or recovery, 138, 394, 405.

estate conveyed by, was a new estate, 138.

absolutely destroyed the estate of the alienor, ib.

secus, as to the estates in remainder, 138 n.

how it might destroy contingent remainders, 138, 139.

this effect abolished by statute, 139, 405.

effect of feoffment by tenant in tail actually seised, 89, 407.

by other persons in possession, 405, 407.

TRANSFER,

under Land Transfer Acts, 384.

TREES,

right to, apart from land, 58.

TRUSTEES TO BAR DOWER,

estate of, analogous to that of trustees to preserve contingent

remainders, 148, 149.

whether now valid, 149.

TRUSTEES TO PRESERVE CONTINGENT REMAINDERS,

origin of, 142.

common form of limitation to, 143.

how they prevented destruction of contingent remainders, 144.

522 GENERAL INDEX.

TRUSTEES TO PRESERVE CONTINGENT REMAINDERS-co«-

tinued.

concurrence of, in such destruction, waa a breach of trust, 144.

unless done with permission of the court, »6.

estate of, was vested, not contingent, 144 aeq.

proposed modification of Fearne's definition to exclude estate

of, 146.

estate of, limited after a prior term of years in lieu of an estate

for life, ib.

in this case gave the actual seisin, ib.

and was the estate supporting the remainders, 147.

generally, were " bare trustees," 148.

causes for their appointment removed by 8 & 9 Vict. c. 106...

138, 139, 144.

trustees sometimes appointed to guard against natural oxpii;^tion

" of prior estate, 148.

difference between such trustees and ordinary trustees to pre-

serve, 149.

TRUSTEES FOR THE PURPOSES OP THE SETTLED LAND

ACTS,

necessity for, to enable tenant for life (or other limited owner)

to exercise statutory powers, 354.

on sale by tenant for life, purchase-mopey must be paid to

S. L. A. trustees, or into court, 353.

of compound settlement, 354, 355.

TRUSTS,

executed and executory are subject to rule against perpetuities,

183.

substantially identical with uses before the statute, 386, 387.

origin of modern trusts, 387.

USE,

before Statute of Uses meant beneficial interest in land, 385 n.

doctrine of a use upon a use, 387 n.

rent-charge may be created de lurvo by way of, 317.

USES,

I. Prior to the Statute of Uses, nature of, 385, 386.

followed the descent of the things of which they were

the uses, 385.

course of descent ef , could not be changed, ib.

might be alienated inter vivos, 386.

devised, although the lands were not deviseable, ib.

the legal estate might be conveyed, under 1 Ric. 3, c. 1, ib.

II. Under the Statute of Uses, 386 aeq.

general effect of the statute, 386.

the origin of modern trusts, 387.

whether the statute applies to uses in wills, ib.

what uses are executed by the statute, 389, 390.

statute applies to rent-charges, 475.

GBNBRAL INDEX. 623

USES — continued.

II. Under the Sta,tute of Uses — continued.

a limitation " unto and to the use of " takes effect by the

common law, 389.

in what cases seisee to uses may be also cestui que use, 390.

manner in which assurances operate under the statute, 391.

assurances operating under the statute may be either (1)

with transmutation of the possession, or (2) without, 391.

(1) with transmutation of possession,

(o) fine (obsolete), 391.

(&) recovery (obsolete), ib.

(c) feoffment, 392.

(JT) release of the reversion on an estate, less than a free-

hold, to the person having the estate, ih.

(e) grant of the seisin by statutory deed, ih.

(2) without transmutation of possession, ••

(a) bargain and sale, 392.

(ft) covenant to stand seised, ih.

ope'ration in the case of rent-charges, 475, 476.

distinction between shifting a^d springing usesj 76, 174.

UT BE CORONA, TENUEE,

meaning of, 4 n.

effect of, in respect of wardship, ih.

UT BE HONORS, TENURE,

meaning of, 4 n.

UT BE PERSONA, TENURE,

inaccurate phrase for tenure ut de corona, 4n.

VESTED,

criterion between vested and contingent estates, 74.

estates vested, liable to be devested by the exercise of a prior

power, 75.

as opposed to executory, 75.

VESTING DECLARATION,

under Trustee Act, 384.

VILLEIN,

enfranchised by grant of what estates, 7, 8.

connection of status, with copyhold tenure, 25, 26.

how base fee in lands of a villein tenant in tail could arise, 329.

villeins in gross were personal hereditaments, 47 n.

WARDSHIP,

effect of tenure ut de corona on, 4 n.

ut de Jionore on, ib.

sub-infoudation on, 18, and note.

524 GENERAL INDEX.

WARRANTY,

was a covenant real, annexed to an estate of freehold, 307.

created only by word warrantizo or warrant, ib.

operation of, ib.

application of words lineal and collateral to, ib.

lineal, if accompanied by assets, was a bar to the issue in tail,

notwithstanding Statute De Bonis, 308,

eflBcacy of a common recovery based on this rule, ib.

now made ineffectual by statute, ib.

WASTE. And see Ann, Jouk, et Wast.

tenant in tail after possibility, not punishable for, 292.

assignee of, is punishable for,

357.

tenant for life, punishable for, unless contrary declared, 340.

power to cut timber under S. L. Act, 352.

WAYS,

may be in gross, or appurtenant to land, 54, 55.

WHITBY V. MITCHELL, RULE IN,

name now given to rule formerly known as the maxim against

double possibilities, 118 n.

applies to equitable limitations in a deed, 116 n.

is independent of rule against perpetuities, 116.

WILL. See Tenancy at Will,

WILLS, STATUTES OF,

principal provisions of, 227.

WORDS AND PHRASES,

in liberam eleemosinam, 11.

in puram eleemosinam, ib.

ann, jour, et wast. See sub voc.

quia suspensus est per collum. See Attainder.

quia abjuravit regnum. See Attainder.

quia utlegatus est. See Attainder.

" tail general," and " tail special," 290.

" general tail," and " special tail," ib.

in liherum maritagium, 12, and note,

conusor and conusee, 305,

deforceant, ib.

warrantizo, 307.

tenant to the prcecipe, 310,

tenant and demandant, 310 n,

jus accrescendi, 366.

per my et per tout, 367.

per tout et non per my, ib.

YEARS, TERM OF. See Term of Years,

BBADBURY, AONKW, & CO, LD,, PRINTERS, LONDON AND TONBBIDOB.

,i>C SOUTHERN REGKDNAL LIBRARY FAOLITY

A 000 703 763 3

UNIYERSITY OF CALIFORNIA LIBRARY

Loa Alleles

This book is DUE on tlic last date stamped bdow.

JUL 16 ^3"

JAN 1 0 1979

jgiJiwxf'

4T585

