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Real Property: Dalhousie Law School, First Year

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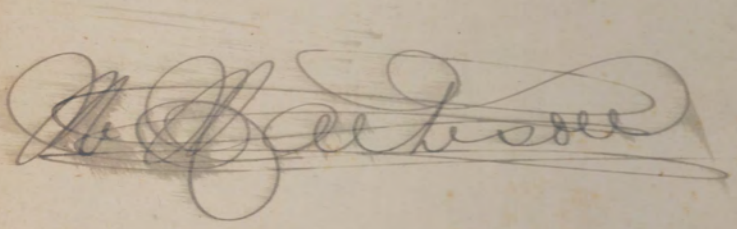
Dalhousie Law School
Frank Heathcote
First Year



Real Property — 1888-99

L. Frank Watkins

Freehold

Real Property - 1st Lecture

The law of Real Property dates from the Feudal System. The King was regarded as is the ultimate owner of the soil. At present in the eyes of the law a man cannot at really own property but merely estates in that land

Two classes of Estates in land

I Estates of freehold

II Estates of less than freehold

Three classes of of freehold

1. Estates in fee-simple
2. Estates in fee-tail
3. For life

Escheat was the right of the lord to take the land in case the tenant died without heirs

Estate in fee-simple is the largest estate known to our law, It will descend to the heir, no matter how remote in direct line or collaterally and the holder may transfer it to whomsoever he please or will it at his death

Estate-in-fee-tail is one limited to a man and

his heirs in a particular line viz to A and the heirs of his body. A fee-tail might be restricted as to the female heirs of female heirs or the heirs of a particular wife - ~~Def~~ An estate-fee-tail was originally in the nature of an estate in fee-simple conditionally upon the holder having a special kind of heirs and if these heirs failed, then terminated, but this did not affect the tenants right to alienate, if he had these heirs, then he could prevent his son from succeeding him; to abrogate this 1 DD 13 Ed 1 c1 was passed which took away the right of the tenant from selling his land to cut off the special line of heirs from succeeding or to destroy the lords right in case that special line of heirs became extinct.

As this statute took away the power of alienation the estate lost its chief characteristics of a fee-simple and became known as a fee-tail

Estates in fee-tail have been done away with in Nova Scotia by R.S. 5th Series Cap 88 p 636

Estates for life are either:—

I. Estates for life of the grantee

II Estates for the life or lives of any other person or persons In the latter case they were termed "pour autre vie"

Estates of less than freehold were

1 Estates for ~~the term~~ years

2 Estates at will

3 Estates at sufferance

The law of "Estate for ~~term~~ years" is not at present Law of real property but we take it up because such an estate is with us personal property and on the death of the holder will descend not to his heirs but to his executors to be distributed as personal property

An estate for ~~term~~ years may be for either (1) a fixed term ~~for the term~~ of years or (2) for 1 year certain and continuing on from year to year until notice of termination be given (or from mo to mo)

An estate at will is one where the holder holds lawfully at the pleasure of the owner who generally can turn him out when he chooses to do so or the holder may leave at his pleasure

An estate at sufferance is one where the holder came by it lawfully but continues it to hold it unlawfully against the will of the real owner

All these estates are of present interest in the land i.e. when the parties interested are in actual possession But these estates except the last two might be held as future estates in land At common law there are two ways in which future estates in land could be held

(1) By reversion (2) By Remainder

An estate in reversion is created by the owner of a fee-simple, fee-tail or for-life granting a less estate (as regards time) viz. if "A" owning a fee-simple granted it to "B" for life B would own a present life estate in the land and "A" would own a future estate in fee-simple which is called a reversion and he would take possession on the death of B

An estate in Remainder is created as follows. The owner of the estate would grant a smaller estate to one grantee and on the determination of that estate an estate to another grantee Eg. A owning a fee-simple might grant to B an estate for life and on the determination of B estate to C, in that case Cs estate would be one

in Remainder. If in the above example he granted the whole fee-simple A would have parted with all his estate in the land or in the following manner. "A to "B" for life & remainder to C for life. Here "B" would have estate for life in possession. C would have an estate for life in remainder, on death of B, and a ultimate reversion in fee-simple on death of C

Remainders are divided into two classes

1 Vested Remainder 2. Contingent ReRemainder

Vested Remainder is one arising on the determination of the particular estate Eg. An estate to A to B for life and on death of B to C

Contingent Remainder is one which arises after the determination of the particular estate if a certain event has occured Eg. an estate to B for life & and if at Bs death C is residing in N.S. then to C. C's estate is a contingent remainder for he will not be entitled to estate unless in province at time of Bs death Leake 17-45-

Seisin

Seisin is the possession of land by one claiming

a freehold estate therein It is essentially different from title to land for the title would mean right of ownership to land A man may be seized of land although he has no title to it as it is sufficient to be possessed of it and to claim a freehold estate therein Again a man may have the most perfect title to land but if he is not in possession he is not seized of it when he is seized he must be in possession of it and claiming a freehold estate therein, and if he is only claiming as a tenant for years he is possessed but not seized of it (Important)

For the purpose of seisin the possession of a tenant is the possession of his landlord

Estate to "A" for life on death of A to B in fee-simple

A is seized of the land for he is in possession and claiming a freehold in that possession

Whenever a person is seized of land and claiming a freehold estate therein, he will hold the seisin of all the estate therein in remainder and reversion

A transfers to A for life and on death of A to B for life keeping the reversion in fee-simple in himself. Here A is seized but keeps seisin

for benefit of X and himself

One in actual possession is presumed to be seized of it in fee-simple unless it is shown he holds it for a lesser estate

A rule of law. He regards every bit of land somebody is seized of it If no or one is in actual possession it is seized by by the one last in possession

On death of holder the seisin passes to his heir or next in reversion as it is. is another principal of common Law that the the seisin cannot remain in abeyance

Lecture 21

The principal that someone must be seized of land gives rise to numerous rules re regarding future estates of freehold

It is a rule that no estate of freehold in in land could be created to commence in futurity e.g. "A" vested a bit of land but could it not at common law transfer any freehold interest to "B" to arise or commence at at some other time than at the moment of that transfer

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2nd Rule: That an estate in remainder must be limited to vest immediately on the termination of the particular estate otherwise the remainder would be void Eg. If land limited to A for life and on determination of As estate and one day to B in fee simple Here Bs estate would be void and no interest at common law would pass to him because if it did then during that one day the seisin would be in abeyance

3rd Rule No contingent remainder could be created without a freehold estate to support it: for if such could be created then during the term of the principal estate the seisin would be in abeyance Eg. An estate limited to A for 10 years and at the end of 10 yrs * "B" should be in the province then the estate to be held by "B" in fee simple. Here the contingent remainder to "B" would be void for if it were good then during the 10 years nobody would be seised of the land. It would not for his is in possession claiming only as a tenant for years and "B" could not as he is to have no estate in the land unless he is in the province at the determination of As estate

4th Rule That the seisin could never shift i.e. that no future estate in land could be be created by way of remainder that would ~~could~~ cut short the previous particular estate before its natural determination and any attempt to do so was abortive and the remainder so that was attempted to be created would be void e.g.g. the transfer of an estate to A for life & and on the marriage of "A" to "B" in fee-simple Here the remainder to B would be a absolutely void for the conveyance would be an attempt to shift the seisin from A to B before the estate limited to A had run on to its natural determination viz. to the death of A. Of course an estate for years could be created to arise at a future time because an estate for years never affected the seisin in the land

Dissesin is a wrongful entry on the land and the dispossession of the freeholder therein when the holder of the particular estate was dissesed not only was his seisin gone but the seisin of all the estate in remainder and

remission, which was dependant on his estate was gone also, and if at that time any of those remainders were contingent they ceased and were cut out and the estates of the others were changed to mere right of entry which the owner could take advantage of whenever his right to possession of the land accrued. These rights of entry were not at common Law transferable and could not be assigned and neither could they be assigned in Nova Scotia now, but in England they are assignable. This right of entry ceased either if the disseisor died and his heirs succeeded to the land or if the disseisor transferred the land to a third party. In such cases the rightful owner would merely have his right of action to the recovery of the land but would have no right to a summary ~~right~~ mode of entry of the land.

As regards conveyance or transfer of lands, for this purpose all estates and interest in land may be divided into two

1 Corporeal Hereditiments
2 Incorporeal Hereditiments

Corporeal Hereditiments were estates of freehold in land

in possession

Incorporeal Hereditaments was either as a future estate in land or else some single incorporeal right in land Eg. A right to pass over a certain plot of land which is called a "right of way"

The rules at Common Law as regards the transfer of these rights was that Corporeal Hereditaments could be transferred by livery of seisin only and that Incorporeal Hereditaments could be transferred by grant only. Anyone could transfer his present interest in land if unless he was ~~transferred~~ seised of it The the mode of transfer was for Corporeal Hereditaments livery of seisin, livery in deed, livery in law

Livery in deed was where a seller and a purchaser or feoffer and feoffee entered together on the land to be conveyed and the feoffer to took some part of the land as a twig or sod and handing it to the feoffee stated that he hereby transferred the land to him

Livery of seisin in Law was where the feoffer and feoffee went in point of view of the land & and the feoffer said "I transfer yonder land to yo you. Enter

If feoffee died then was no passing of title

upon and enjoy it" or words to that effect
Then if the feoffee entred on the land it
would pass to him, but if he did not enter on
the land it would pass to him, but if he did
not enter on the land or if the feoffee before he
entred, the title would not pass to him
Ordinarily the words limiting the estate were spoken
but these were soon to be embodied in writing
which was called "Charter of Feoffment"
As Incorporeal Hereditaments from the earliest times
lay in grant i.e. it was transferred by a deed
under seal. A transfer of an estate in land
by Livery of Seisin was very early found to be
too cumbersome and was gotten over by
the conveyancers chiefly in the following manner
By transfer of Lease and by release. The party
desiring to transfer the land would first grant an
estate for years to the party desiring to purchase
it. The purchaser would thus enter upon the
land under his lease and as soon as the
entry had been made the landlord would release
to him his reversion and thus the whole estate
in the land would pass to the grantee

If person entitled before deed of feoffor to enter pierced

Transfer by livery of seisin gradually fell into disuse in England and was finally done away with by Stat 8 & 9 Vict c106 a 3 th though it had long before that date become practically obsolete

Livery of Seisin was never employed to transfer land in this province (NS) even in earliest timtimes but it must be remembered that though transfer by livery of seisen is abolished still all rules as of seisin are as binding as they were in the earliest times and it is equally true now as then 1, that no transfer of a freehold could be made unless the transferor was in possession in of it Wright vs Hulet 2 Thompson 430

Neither can any estate now be transferred if it infringes all the rules of seisin

Conveyance by way of a fine and the Conveyance by way of a common Recovery See Bl Stonton II 347 - 363 are both used in transfer of estates of freehold

As regards actions for recovery of land Under early times when the rightful owner of landed was put out of possession he had distinct his right of entry so called & right & to execute

on land and repossess it and dispossess the wrongful holder himself, and if the wrongful holder died while in possession of the land and the land was possessed by his heir and seisin went to him. In that case the rightful owner lost his right of entry & he also lost it if the disseisor transferred the land to another person. If he thus lost his right of entry or if he preferred to waive his right of entry he had the right of bringing action at law for the recovery of the land. At common law this is known as a real actions and these were divided into two classes

1 Possessory Actions
2 Writs of right

These were sub-divided into a great number of writs to suit the exigencies of each case (1 Gray 457) These gradually fell into disuse and were superseded by actions of Ejectment

Blackstone Vol III Ch III

Lecture 3rd

Uses after the Feudal System became established in England, the hardships from way of tenure became burdensome. The restraints put upon alienation by the heavy fine of the lord and the inability to devise lands became very burdensome on the holders of of real property. The way out of this difficulty was provided by the invention of uses which grew up contemporaneously with the common law but entirely independant of it. A Use was a conveyance or declaration by which the land was held by the legal owner for the benefit of another person. It was originally a mere personal promise on the part of the legal owner to hold the land for the purpose of the use. The common law took no notice of the use and refused to enforce it and regarded the legal owner as the real owner of the land.

Uses were first enforced in the ecclesiastical courts but were not satisfactory as these courts could only enforce their decrees by moral coercion. As the jurisdiction of the Lord Chancellor grew uses came to be enforced by him and always soon this came to be the regular way of enforcing them. The process by which they were enforced

was as follows; A writ called subpoena was issued to bring the parties before the Lord Chancellor and then on the use being proven the legal owner was ordered to execute it. Obedience to this order ~~being~~ was enforced by attachment and arrest for contempt of court in refusing to obey the order.

The party by whom the legal estate was held was called the "Feoffee-de-use" and the person for whose benefit it was held was called the Cestui-que-use. Originally the obligation to regard the use being a mere personal one it bound only the "feoffee-de-use" Then the court held that it bound his heirs — 1 Grey 462

"If a 'feoffee-de-use' grant certain rents to a third party "who has notice of the use that party will take the "rent subject to the use"

Next it was held that it bound the land in the hands of the purchaser when he had notice of the use when he bought it — 1 Grey 463 —

Then the principal was extended to cover a case where a transfer was made by the feoffee-de-use when no money was paid even though the grantee had no notice of the use — 1 Grey 465 —

In conveyance by these uses, the rules of seisin had no application as the seisin was always in the feoffee-to-use and in the eye of the Common Law the Cestui-qui-use was a mere tenant at will, whose possession was at Common Law the possession of the Feoffee-to-use as far as seisin was concerned, and therefore a use could be created of a freehold in future.

By means of these declarations of uses not only were the wrongs not remedied, that were intended to be, but creditors were unable to realize their executions against their debtors and the "Statute of Mortmain" which was passed to prevent the Ecclesiastical Corporations from acquiring land were evaded. To remedy this the Statute of Uses was passed (27 Hen VIII C.10) 1 Grey 866 ——

The intention of the passing of this act was to do away with uses entirely by enacting that the legal estate should immediately follow the use and vest in the cestui--qui-use who should hold both the equitable title and the legal one. But the real effect of this Statute was almost entirely done away with by

the legal construction put upon it by the courts which held

1 that the statute did not apply where any discretion or confidence was placed in the feoffee-to-use

2 that the statute ~~did not apply~~ could only execute one use and if a use was created out of a use the latter one would not be executed by the Stat e.g. Land granted to A, to the use of B, to use of C the statute would pass the legal title of Estate to B but the use would enure to the benefit of C, In this manner arose the modern equitable estates of trust in land

A use might be raised in two ways

1 By transmutation of possession

2 Without transmutation of Possession

Transmutation was when one conveyed the legal estate to another subject to the use of the person or persons to whose benefit the feoffee-to-use was to hold the land was expressed it was immaterial whether there was a consideration or not Sorrin's Case 1 Greg 8-10

when a feoffment with livery of seisin is made to one to his own use he will take by force of the feoffment, but if the use is to the feoffee and another jointly they will take as joint ~~[illegible]~~ tenants under the use by force of the statute and not at common law. If no consideration passed and no use expressed, land resulted to original grantor.

If a consideration was paid and no use expressed the use ~~resulted to the original grantor~~ inured to benefit of person who paid ex consideration

Armstrong vs Wolsely 1 Grayay 480

If upon the ~~[illegible]~~ of conveyance of a fee:- simple the use be declared only for a particular estate and no consideration affect the use as to the future estate, the future use will result to the grantor In like manner if in such a conveyance of the fee-simple, the use is expressed for the future estate only and no consideration appears to affect that particular estate, the use as regards that particular estate will result to the grantor Again if the use is expressed to the grantor for a particular estate, and no use is expressed as to the remainder, the use of the Remainder will not result to the grantor but will inure to the benefit of the grantee; for if not it would be

absend to limit the use of the particular estate to the grantor. if in such cases the law would give him both the particular estate and the estate in fee-simple

Uses may also be raised in two ways without transmutation of possession ~~and in two ways~~

1 By bargain and sale

2 By a covenant to stand seised

When land was bargained and sold and the consideration paid although no feoffment passed equity held that the seller should hold the land for the benefit of the buyer.

Statute of Enrolment 27 Hy VIII c16. Bargain and sale of freehold estates in land had to be enrolled in a certain office in England. The effect of the Statute was overcome by the grantor covenanting the use by way of lease and release and as the rules applicable to seisin did not apply to uses. neither attornment nor actual entry on land was necessary

Attornment the agreement of the landlord to accept a new tenant or to give up the service, generally the former. The consideration expressed in the lease might be nominal - Baker v Kent - 1 Gray 491

The second way with transmutation of possession by covenant to stand seised. This was where the grantor promised to hold the land for the benefit of another person. To make such a covenant a valid conveyance the following were necessary

1. The covenant must be by deed 1 Gray 484 87
2. The cestui-qui-use must be related to the covenantor by blood or marriage Shanton v 1 Grey 488
Mere friendship is not sufficient 1 Grey 488
Such relationship is sometimes called a "good consideration" in contradistinction to a "valuable one" where a "quid-pro-quo" is given, And a use created without a "good" or "valuable" consideration will be considered unenforced.

When there is a feoffment to the feoffee to hold to his own use, the feoffee is in by the Law of common Conveyance and not by the use which takes effect by virtue of the use. And the use is regarded merely as words of limitation &c. showing the duration of the estate the party takes. But if the use is to the feoffee and another jointly they will take as joint tenants under the use by force of the statut and not at Common Law Litt. 99--124

Lecture 4th Limitation of Estates

Limitation of Present Estate
" " Future Estate

Estates in fee-simple may be created or transferred by will or by deed

1st Deed These estates can only be created when the word heirs is used. Thus a deed to A and his heirs passed the fee-simple to heirs
"Heirs" must positively be used, no other words of similar import even though they show the intent equally well e.g. A deed to A in fee simple or to A forever would not give A an estate in fee-simple, but only a life estate
This is the general rule.
There are four so-called exceptions
1st In cases absolute by the fictitious actions of fines and common recovery
2. Where one of several joint owners release his share in the land to another joint owner
3. Where land deeded to a corporation, then if a corporation aggregate no words of limitation need be used. If a Corporation sole then the word successor to be used

4 when in the deed creating the estate, the grantor refers back to, and incorporates in it, a former deed in which the word heirs is used

5 when land is deeded to trustees and from the nature of the trust it would be impossible that it could be carried out without a fee-simple transferred to the trustees.

A limitation to "A and his heir" (singular in form) will be construed as if it read to "A and his heirs" and will pass the fee

The words heirs may be used as words of purchase and in that case a fee-simple will be limited though the word heirs is not repeated. By words of purchase I we mean words designating the grantee e.g. A deed "to the heirs of A" would pass a fee-simple to them just as well as if the deed read to "the heirs of A and their heirs", the latter three words being considered superfluous

Where a grant made to A for life, remainder to his heirs A will have an estate in fee-simple this is the simplest form of the rule in Shelley's Case

Limitation of fee-simple created in wills

Rule as regards the necessity of using the word heirs, as regards words of limitation, as regards an estate in fee-simple, is relaxed when the estate is created by a will. Any other word of like meaning and import will do. Eg. A devise to A in fee-simple or to A forever will pass the estate in fee simple. but of course the word heir may be used in a will and in such a case will be construed as if in a deed. The rule in Shelley's Case applies to the creation of an estate by will in the same manner as if created by deed.

Now suppose a devise of an estate made to A without any words of limitation. what estate would A have before "Statute of Wills" (1 Vict c. 26 s. 28), A would only take a life estate but since that statute he would take the fee-simple, unless from the context of the will it was clear he was only entitled to a life-interest R.S.N.S. c 84. s 75

<u>Estates for life</u> may be created in two ways

1. By the act of the Parties

If the estate is for the life of any person other than the Grantee on the death of the Grantee the land will descend to his heir for the remainder of the term as special occupant, or the Grantee may devise the remainder of the term

...uborn's life
... unkeing, or
... where of persons
... determined

...
... necessary in
... If. I create
... of limitation
... words of
... insufficient
..., the deed

... in fee simple,
... of <u>rich Wills</u>
... to a person
... will, must be
... of the will is
... life estate
... is nothing.

Estate for life may be created in two ways
1 By the act of the Parties
2 " " operation of the Law
1st Case may be limited either for grantor's life or grantee's or any number of lives in be being or limited for the joint lives of a number of persons In the latter case the estate is determined if any of the lives die,
2nd Case Created by the operation of the law
Just by deed no words of limitation necessary in creating life estate, for example. If I I create an estate to "A" using no words of limitation he will have a life estate. If any words of limitation are used which are insufficient to pass an estate in fee simple, the deed will pass a life estate.
A deed limited to "A" forever, or to A in fee simple,
Second By Will Since the passing of "the Wills act" if land is willed simply to a person the construction of the whole will, must be looked to, To see if the intention of the will is to curtail that estate to a life estate The presumption being, if there is nothing

no words, a fee simple will pass: but if from the construction of the will, it is clear that a life estate is only intended to pass, such will pass e.g. If subsequently in the will a different devise is made of the remainder after the estate has expired.

By operation of the law there are two cases of Estate for life which may arise

1 Dower and 2. Courtesy

Dower is the life estate which the widow holds in the third part of the land, owned by her husband during his married life. The husband cannot defeat that right by conveying the land away during marriage unless the wife joins with him, Dower does not vest in an equitable estate

Courtesy is the life estate a husband acquires after the death of his wife in the land owned by his wife during her married life. This estate appertains to an equitable estate as well as to a legal one no entry is necessary to complete estate

Watts vs Ball

1 Pierre Williams 108

It is a condition precedent to the creation of this

estate, that should be issue of the above marriage born alive during mothers existence
Estate for years are the same whether created by deed or will. It is one where the time of duration is certain, it may be created for any time no matter how long or how short, but if for more than three years under the "statute of frauds" it must be in writing. By subsequent statute it was enacted that such an estate must be created by deed

8+9 Vict c 6, s 103

This act passed in Nova Scotia

R.S. N.S. 5th series Ch 91, sec 91

The instrument creating such an estate may be called a ~~lease~~ demise
If the paper writing creating the estate is void as a lease, if the term is for more than three years, and not under seal the instrument may be good as agreement for a lease

Stafford - 1 Compton & Jarvis ~~33~~ 91

An estate for years being a chattel interest, passes to the executor or administrator on the death of the holder and there is no need to use those

words as words of limitation in the lease and if inappropriate words are used they will be disregarded e.g. A lease to A and his heirs for 25 years will be construed as if made to "A" and in case of his death will pass to his executor, not his heir

A lease may be created to extend for successive years at the option of either party: Before a term of 3, 6 or 9 years. If it leaves it at whose option the renewal is to be made. The court will be construe it to be at the option of the lessee

Lecture 5th

Determination of an estate for years is done in six ways

1 Expiration of the term
2 Disclaimer of landlords title
3 Breach of an express condition
4 Breach of an implied condition
5 Merger
6 Surrender and acceptance

Expiration of the term all the landlord has to do is to

deliver up possession

Disclaimer of Landlords title It is a principle of

Disclaimer of Landlords title
The Act must amount to a renunciation by the party of his character as a Tenant either by claiming title in himself or by setting up title in another or writing
Doe dem Williams v. Cooper 1 M&G 135

deliver up possession

<u>Disclaimer of Landlords title</u> It is a principle of Common law that a tenant cannot deny his landlords title to the land in his possession. Mere words will never amount to a disclaimer

Doe at demise of Graves vs Wills

10 Ad & Ellis 427

Mere payment of rent to a third party will not amount to a disclaimer. Doe at demise of Dibblom vs Parker Gow, 80

Doe Dem Williams vs Cooper 1 Manning & Granger 1338–

<u>Breach of an express condition</u> If the lease creating the estate contain any condition that the estate shall determine on the tenants failure to perform any acts or set of acts then on such failure the estate will determine

<u>Breach of implied condition</u> from the nature of the relationship of landlord and tenant the law implies such conditions that if the parties fail to perform the thing ceases

10 Ed Woodfall Landlord & tenant, C.p. 16 – 121

<u>Merger</u> If the landlord leases to the tenant either his whole estate or any estate in freehold.. the estate for years will be swallowed up in the smaller one

<u>Surrender and acceptance</u> two kinds
(1) Act of parties, (2) operation of Law

<u>Surrender by act of parties</u> is where the tenant delivers up the estate to the ... same such a surrender ... ed by the parties

29 Ch II; C. 3 ...
Leake - ...

<u>Operation of Law</u> ... is where landlord a... acts which both co... ave imply a material i... t

E.g. <u>where the tenant</u> ... m <u>the landlord</u>

Lyons v ...
13 ...

Also where a tenant ... to ~~the landlord~~ a third party and ... third ~~person~~ accept as ...

Also by the tenant d... l. accepting the keys of ...
Dodd. Dav...
6 M ...

36

Also where the tenant gives up the premises and the landlord lets it to a third party & that party takes possession
Nickells v Atherstone 10 Q.B. 944

Where the Tenant delivers up the keys it must be really clear that the Landlord <u>accepts</u> the keys. Mere leaving of the key at Landlords house or office is not an acceptance by him Cannan v Hartley 9 C.B. 634

How far does

Destruction of the premises ~~terminate~~ terminate the lease, of the land itself is leased the destruction of any or all of the buildings thereon will not terminate the estate

Suppose the upper flat of a building is leased and the whole building is destroyed by fire. In England even that will not terminate the lease

England Eizon vs Gorton
5 Barg N.C. 501

U.S. Graves vs Berdan Contra Debarin
26 NY 501

Of course this is law only when nothing is contained in the lease in respect of the burning of the premises

A stipulation or condition is often contained in the lease either of the land or part of the buildings that the estate should cease on destruction of the premises

In fact the solicitor should always see that such a condition is contained in the lease

Creation of tenancy from year to year
or month

300

Surrender and acceptance two kinds

(1) Act of parties, (2) Operation of Law

Surrender by act of parties is where the tenant delivers up the estate to the landlord who accepts the same such a surrender must be in writing and signed by the parties

29 Ch II; C. 3; s 10 ✓

Leake - 184 - 205

Operation of Law a surrender by operation of law is where landlord and tenant perform certain acts which tho' coming in from what the law imply a mutual intention of ending the estate E.g. where the tenant accepts a new lease from the landlord

Lyons vs Read

13 M & W 285

Also where a tenant assigns his interest to the landlord and the landlord gives it up to a third person accepts assignee as his tenant

Also by the tenant delivering and the landlord accepting the keys of the house

Dodd. Dans vs Nekl

6 M & G 72

An estate from year to year may be terminated

1 By determination of the interest of lessor

2 By the mode of determination of freehold estates from year to year as ... ...er, and acceptance

3. By Notice of ei... ...alf years notice is required ... ...nt.

Wright vs Da... ...1

such notice is to ... ...l not to terminate the es...

Estates at Will ... ...e tenant holds at the wi... ...d whenever the lessor allow... . Such a tenancy is ~~called~~ ... as the holding of a ce... ...ty enters upon land u... ...ase it this estate wi... note

where the facts ... ...gh to raise the presum... ...ar to year an estate at wi... ...n 12

A tenancy at w...

1 By notice given ...

2 By any act of ... his

In Equity the holding of a Trustee is deemed a Tenancy at Will, as the cestui is deemed the real owner.

If a person enters on land under an agreement to purchase it, unless such agreement is consummated he is Tenant at Will.

Ball v Cummins C M & R 120

position as ~~landlord~~ tenant

3. By any act of the landlord inconsistent with with his position as landlord (9 M&W 6: 643)

4 By attornment of landlord

5 By death of tenant

Tenancy at Sufferance exists when the tenant has entered rightly, but after his tenancy has has expired he overholds wrongfully and continues in possession The distinction of this tenancy from the last is that the tenant at will is in possession with the consent of his landlord. The tenant at sufferance by reason of the laches of his landlord in not turning him out, No notice is necessary before the landlord may enter and bring ejectment, if a tenant if he overholds against the will of the the landlord is liable for double rent

Summary Ejectment RS 1923 53 54 115 42

2 Geo II c 19 a 18 ; RS N.S. 136 c. 3

Lecture 6th

Estates on (1) Special limitations (2) or Conditions

Besides those limitations of estates we have been considering certain estates may be created to determine on the happening of a certain event On the other hand estates to continue to the time

An estate from year to year may be terminated
1 By an determination of the interest of lessee
2 By to the mode of determination of proved estates from year to year as disclaimer, Merger, surrender, and acceptance
3. By by Notice of either party In England a half years notice is required. In Nova Scotia three months. Wainright vs Darby 1 ZR 360; 5th R.S. c 178, 01 which notice is to expire when the year ends and not to terminate the estate during the year

Estates at Will an estate at will is where the tenant holdds at the will of the landlord, and is created (and hurell) where the lessor allows the lessee to occupy the land. Such a Tenancy is called the common law regards as the holding of a cestui-qui ~~de~~ trust. If a party enters upon land under an agreement to purchase it this estate will be created (2 C.M.&R. 120) note where the facts of the ~~tenancy~~ occupancy is not strong enough to raise the presumption of an ~~occupancy~~ Tenancy from year to year an estate at will, will be created (4 Taunton 12)

A tenancy at will will expire
1 By by notice given by either party
2 By by any act of the tenant inconsistent with his

provided certain events do not happen

First called an estate determining on a special limitation

Second an estate terminating by breach of a condition, for example, An estate granted to A until he marries is one on a special limitation, but an estate to a widow for life on condition she does not marry again is an estate which will cease on breach of condition

Special Limitations At common law a special limitations could be annexed to a fee-simple. In fact an estate to "A" and the heirs of his body was previous to the Statute de Donis an estate in fee-simple, which was limited till A or his direct descendants died without issue. But Since Stat Quia Emptores 18 Ed I C 1 A special limitation annexed to a fee-simple is absolutely void

Colliers vs Walters

L R 7 Equity Cas 2. P 361 important,

An estate for life or years may be created terminating on the happening of a certain event E.g. An estate to A until he becomes a bankrupt

Here it will take it until declared bankrupt, and if so declared the estate will cease ipso facto

An estate upon condition may be

1. Either a condition precedent to the vesting of the estate — or
2. A condition subsequent which divests an estate already created, (we have nothing to do with first)

Subsequent Condition An estate limited to cease upon conditions subsequent differs from one which ceases by special limitation in this respect

In the latter case the estate immediately ceases of itself as soon as the event happens

In the former the estate will not cease until the grantor or his heirs show a determination to act on the breach of the conditions and to declare the estate forfeited

If such a condition is affixed to a freehold estate the only way a grantor or his heirs can show their determination that the estate shall cease is by an entry on the land

In an estate for years it is sufficient if he notifies his lessee

Roberts vs Davis
4 B + Adolphus 664

unless the lease expressly provides that upon breach of condition the landlord must enter to constitute forfeiture of the estate

A condition can only be reserved at Common Law in favour of the grantor or his heirs. his right could not be assigned or transferred because he had merely a right of entry and no estate

Rice vs Boston & W Railway Company

12 Allen 141 Mass Reports

Such a condition could be reserved on an estate in fee simple or assignment of lease leaving no reversion in the lessor or assignor

Doe vs Bateman

2 B & Ald p168

In such a case right of entry is called a <u>right of possibility of reverter</u>

A Breach of a condition will not only defeat the estate of the party who breaks it. but all estates depending on it by way of remainder

As regards the effect of a license given by the landlord or grantor to break a condition or a waiver by them of the conditions broken.

Four propositions were decided in

Dumpors Case

1 Smiths leading Cases 41

1 If the condition was a non-continuing one, and license was given to break it, it is destroyed and the estate is absolute.

2. If the condition was a continuing one, the breach of that condition for which license was given will not destroy the effect of a future breach

The law of this proposition was considered doubtful until confirmed by

22+23 Vict c35. sec 1

Wainer which includes 3rd + 4th propositions ie

If the grantor or lessor wainer the breach of a non-continuing condition, the condition does not take effect, and the estate is absolute, and if a breach of a continuing condition; then it will only apply to the past breach (and not to any future breach

256 - 734 Leake

The estate may be limited at the same time to several persons

There are four ways in which it may be held in Common

1. Tenants in parcenage
2. Joint tenants
3. Tenants in common
4. Tenants in Entirety.

Tenants in parcenage This tenancy always arises by act of the law, as in descent. when land of deceased party passed to a class of heirs
Eg. In England if the ancestor dies intestate without male heirs his daughter will inherit as parceners. Likewise in this country when a man dies intestate all the children will inherit.

How this tenancy may be destroyed
1 By a member, alienating, selling, or devising his share
2 By a partition of the estate by deed
3 By a suit for the tenancy.

Estate in Joint Tenancy In order for two or more to hold at joint tenancy. There are four requisites
1, Interest of each must be the same
2, Title of each must arise under the same instrument or conveyance
3. The titles must arise at the same time
4. The tenants must hold by one and the same

individual possessions or as put sometimes unity of Interest; unity of time; unity of title unity of possession

Unity of Interest That is each member must hold the same estate in the land &c If demised to two persons, one for life, and the other for a term of years. they would not hold as joint tenants

Unity of Title The estate must be created by the same instrument, this tenancy can not arise by descent or by act of the law

Unity of Time This had to be observed strictly as to joint tenancy arising at Common Law but not so essential when conveyance was made under Statute of Uses or by Will

Blandford as Blandford
3 Bulstrode Reports 101

Unity of Possession That means that each have possession of each & every part as well as of the whole. At Common Law if an estate made to two or more without any words of severality. they will take as joint tenants, but under our Statutes unless expressly stated that ~~unless~~ they are to hold as joint tenants; they

will take as Tenants in common

Revised Statutes 5th series C87 - 626

No tenancy will be destroyed or will merge

1 By act of Law

2 " " Parties

By act of Law, By one of the class obtaining the remainder then as the smaller estate merges into the larger one unity of interest will cease, consequently the tenancy destroyed. Or by death of all the tenants save one, when the survivor would hold the estate

By act of the Parties

1. By act of assignment of the estate by one joint tenant to a stranger; then the assignee will hold as a tenant in common as to that share though the surviving tenants will be joint tenants as to the balance
2. By release of one joint tenant to another. Then the one to whom the ~~estate~~ release is given, supposing there are three (3); will hold $\frac{1}{3}$ as tenant in common and $\frac{2}{3}$ in joint tenancy
3. By a voluntary partition by deed
4. By a partition suit

Tenancy in Common This arises where several people hold an estate and not necessarily as between them, ~~equity~~ interest of time, unity; title, a possession. All that is essential is that there is an undivided occupancy.

This tenancy only arises by act of the parties or by a deed or will. A partition of this tenancy may be effected either by deed or partition suit

Tenancy by entirety This arises where land is conveyed to a man and wife to hold jointly being a kind of joint tenancy it will have the same unities and will have the right of survivorship It may be severed by one party assigning his right in it.

Leake 223–231

Manby vs

Tudor leading cases on Conveyance 876

Lecture 4th

How future estates in land may be created at Common Law

1 By way of reversion and remainder
2 Under statute of uses as shifting or springing uses
3 By way of wills or executory devises
4 By way of equitable trust

These estates may be created entirely by an instrument granting them, or the grantor or testator may give to another the power to create them by another instrument. We will consider each in order and then the rule in Shelley's Case

1 Reversion

A person holds an estate in reversion when having held a larger estate he grants a smaller one in same lands to another person. The estate which he continues to hold is a reversion for ex. A holds lands in fee-simple and conveys to B a life estate. Then A will still have an estate in fee-simple in it by way of reversion which will come into possession when the estate to B expires.

An estate in reversion will occur whenever the grantor grants an estate which ~~is~~ in the eye of the law
2 is less than the estate he holds though it may practically be limited and last longer than the original one eg. A holds an estate for life and makes a lease to B for 100 years. In that case A will have a reversion in
3 the land though practically he would never come into possession. Such a lease would of course
4 expire on the death of A because A could

not
conveys more than his own right estate
On the other hand if the owner of a particular estate grants a larger estate in the eye of the law than he possesses no reversion will remain in him although he holds larger than the estate he granted Eg. If A held a lease for 100 years in certain lands and grants a life-estate therein to B. then A will have no reversion in the land but the whole term of 100 years will pass to B

2 Remainders

An estate in remainder is created when the owner of the land at the same time and by the same conveyance grants a particular estate to one person and another estate to another person to commence on the determination of the former estate Eg if L owned an estate in fee-simple and conveyed to A for life and after his death to B for life. then B holds an estate in remainder to come in possession on the expiration of A's estate

And I would still hold the reversion in fee simple or to A for life, after his death to B for life, after his death to C in fee simple - Here I have certainly divested myself of all interest in the land and C comes into possession on death of A or B

In creating an estate by way of remainder care must be taken that all the rules relative to seisin be observed — They are

1. A remainder must be created so as to come into possession immediately after the preceding estate
2. No remainder must be limited to take effect at the expiration of the particular estate and not in defeasance of it - ie not to cut it short - for in such a case it should shift the seisin An estate in remainder must be created at the same time and by the same instrument as create the particular estate
3. No remainder can be limited after an estate in fee simple for that is all the grantor can originally hold. Nor is it strictly proper to term it an estate in remainder where the grantor conveys an estate for years and after its expiration a freehold estate to another person, because then the person who holds the freehold estate has a present estate and seisin in the land though subject to the right of possession of the tenant for years But such an estate is very often for convenience termed

Inter-vivos - Terminal

a remainder, A lease for a term of years to two or more persons in succession does not create a remainder e.g. If I hold an estate for 100 years and lease it to A for 10 years, and one day after the expiration of said lease to B for 10 years. Here B would not have an estate in remainder but merely a right to possession under his lease at a future time, viz on the expiration of A's lease

Remainders are of two kinds Vested; Contingent;

A vested remainder is one which is ready to come into possession upon the determination in any way or at any time of the preceding vested estate during the continuance of the remainder as in terms limited e.g. If an estate be limited to A for life, Remainder to B for life then remainder to C ~~for life~~ in fee-simple Here B & C have both vested remainders because no matter how A's estate will determine then B will come into possession, and the same can be said as regards C's estate i.e. when A & B will determine then C will be ready to come into possession. It does not make B's estate contingent remainder though he may die during life time of A and may never come into possession

Contingent Remainders are of four classes

1. Remainders limited on an uncertain event which also determines the particular estate by a special limitation e.g. An estate to A until he becomes bankrupt then to 'B' in fee simple
2. Remainder limited on an uncertain event which does not affect the particular estate e.g. An estate limited to A for life and if he dies without issue then to B in fee-simple
3. A remainder limited on a certain event which may not happen until after the determination of the particular estate e.g. An estate limited to A for life and if A dies in life time of B then to C in fee-simple
4. A remainder limited to a person not then ascertained or born. e.g. A remainder limited to the heir of B, or a remainder limited to the unborn son of C.

All these rules may be reduced to one head That they depend for their vesting on the happening of an event which may not happen during the continuance of the preceding vested estate or at the instant of its determination

A contingent remainder becomes a vested remainder as soon as the contingency happens

1st Rule A contingent remainder must have a freehold vested estate to support it otherwise during contingency the seisin would be in abeyance. e.g. An estate to A for 10 years and on its determination to the heirs of B for life and on the death of the heirs of B, the remainder to C in fee-simple. Here the estate given to the heirs of B would be void not having a freehold vested estate to support it and C would have a present freehold estate subject to A's term of years

2nd Rule That a contingent remainder must become vested during the contingencies of the particular estate or at the instant of its determination and if not then vested it will fail altogether. and the next limitation will take effect. The only exception is in the case of a posthumous child which will take an estate in remainder as if born during further lifetime

— Reniger v Long 1 Lack 274 —

At common Law a contingent remainder was liable to fail by the forfeiture surrender or merger of the preceding vested estate before contingency

L happened. This was got over by conveyance limiting
a new estate to a person to hold until the contin-
gency happened in case the preceding estate
should determine in any of these ways such
estate is called an estate in Trust to preserve
contingent remainder such an estate
was rendered unnecessary by (8 & 9 Vict
Chap 106 sec 8) Such an estate is not
necessary to the grantor

Another rule of law affecting contingent remainder
which bears a strong analogy to the rule against
perpetuities — An estate cannot be
limited to an unborn child if an unborn child

Routledge vs Dorrill

2 Vessey Jr 357

The reason of that rule is that, otherwise the estate
would be tied up ~~the estate~~ and rendered unsaleable for an indefinite
period Though an estate by way of remainder cannot
be limited after an estate in fee-simple still
two or more contingent remainders in fee-simple
may be limited to take effect in the alternative
Until such a contingency happens the fee-simple
will remain in grantor

In construing documents creating a remainder the court will favour that construction which will render remainder vested rather than that which would construe it contingent

P vs Spratt

4 B + Ad 731

If An estate limited to to widow for life determined if she marries again with a limitation to B if she does marry Here the court would construe B's estate a vested remainder to take effect on the determination of the widows estate no matter how determined whether by marriage or death

Lockesford vs Ch

2 Lev 176

These rules govern remainders when created by an instrument under Statute of Uses or by a will if the estate is created by way of remainder and not by use

20

Lecture 8th

Future Estates limited by Statute of Uses

A use can be created in two ways, by transmutation of possession and without transmutation of possession as stated in a former lecture

In the second way it can be created by Bargain and Sale and a covenant to stand seized

A future use may be created by any of these uses

Massachusetts judges thought that English judges in cases decided that a future use could not be created by way of Bargain and Sale, but all these English cases are examined in

Rogers vs The Eagle Fire Insurance Co

9 Wendell 611 ; 5 Gray 131

and these clearly show that the English cases do not support any such doctrine as propounded by the Massachusetts Jdg

Another question raised by Mr Sugden - Lord St Leonards - as to whether a future estate could be raised by way of Bargain and Sale in favour of an unborn person He thought it could not as the consideration money could not be paid by the unborn person but as it has become frequently held that a use

and even a ~~fee~~ use may arise by Bargain and Sale by consideration paid by a third person, but there is very little to support this doctrine and the cases he cites to prove it are neither strong or conclusive

Gray on Perpetuities

61 to 65- inclusive

Another point, as to whether a future contingent use can be created after an estate for years. A contingent remainder could not be limited after an estate for years. The reason is that the seisin would be in abeyance until the contingency happens

This reason fails in the ~~as~~ case of a future use as the doctrine of seisin does not apply to estates limited by way of the Statute of Uses. Accordingly it was held in

Adam vs Savage

2 Ld Raymond 854

and Raleigh vs Otelland

2 Equity cases Abridged 753

that a contingent use limited after an estate for years to a person not in (esse) unborn to be void

These cases have been much criticised by future cases and text writers — Leake 35H. note C.
but it is very doubtful if they would be followed at the present day :- From what has been stated it may be laid down, that after it has been decided that a future estate created to take effect by way of Statut of Uses and under it and not as a remainder, there are no restrictions as to the manner in which it is raised as long as it does not infringe on the rule against perpetuities

As to the vesting of future estates under the Statute of Uses, A future use may be created to take effect in two ways
11. As a springing use
22 As a shifting use

Springing uses are those where the estate granted to e commence in future and no earlier estate is granted at all, or where the earlier estate terminates before the commencement of the future use e.g. A use limited to A after B's death, or a use limited to B for life and after his death and a certain time to the use of A and his heirs

Shifting uses are those limited to take effect in

defeasance of the preceding one, as an estate to the use of A's widow for life, but if she marries then to the use of C: Here C's estate would be limited by way of a shifting use as the estate to A's widow shifts to C before its natural termination.

In construing an instrument creating a future estate, the court will rather construe the limitation to take effect, as a remainder than a shifting or springing use; if the court consider it was to take effect as a remainder they will so construe it, although they consider it bad as remainder; and where bad as a remainder they will refuse to find it effect as as a shifting or springing use

Hale vs Ester

2 Keene 444; 4 Myline & Craig 187

Executory Devises. A future estate may be created by will either as a remainder or an executory devise. An Executory Devise is a limitation of a future estate of an interest in land which consistently with the rules of common law cannot take effect as a remainder.

Where the executory devise is springing in its nature i.e. where it arises in future and no particular estate is given in the mean time there is no danger in confusing it ~~with the~~ with a remainder. Where it is shifting in its nature, at first sight there may be a doubt but by the following test we can always tell whether an estate is a remainder or executory devise

1) An estate by Remainder always arises in derogation of the grantors estate or that of his heirs

2) Executory devises always arise in derogation of the ~~grantors~~ a former estate i.g. A devise to A for life and after his death to the eldest son of B in fee-simple. Here the estate given to the eldest son is a remainder for it arises in derogation of the estate of the testators heirs for if there be no such gift. Then after A's life estate is ended testators heirs are entitled to the fee But if I devise to B for life to A, or his heirs. Here A's estate would be an executory devise because it arises ~~not~~ in derogation of B's estate i.e. it

would cut B's estate short if the contingent happen

If an estate is limited in a will as a remainder and fails to affect because the contingency did not happen during or at the determination of the particular estate, the contingent remainder is void and the future estate cannot be supported as an executory devise e.g. a devise to A for life and after his death to the eldest son of B. Dies dead if B has no son but a son born two years after; here is a perfect estate limited by way of remainder but as at A's death no one represents the parties named for the future estate, the remainder is void or rather inoperative and no interest will accrue to B's son when he is born

Perceival vs Perceival
L.R. 9 Equity 386

Though we have seen that a future estate limited as a remainder under the Statute of Uses is void if it does not comply with the requisite necessary to make it a good remainder at Common Law such an estate would be good if created in a will as an executory devise e.g. a devise to A for life and with remainder to his children living at the death

If A+B, Lese the estate given to the children of A living at death of A+B would be a good executory devise, and supposing A died before B then the testators heirs would be entitled to the estate until B died and at his death the estate would vest in the children of A.

Harm vs Barnes
4 Boroughs 2154
Stephen vs Stephen
Talbots cases 228

Similarly there was never a doubt that a future contingent estate could be devised after an estate for years

Gore vs Gore
2 Pierre Williams 24.

We have seen that if a person held a term for years no matter how long it were and if he deeded it to a party for life the whole term passed to the heirs but such was not the law regarding a devise A man may hold a term and if he devises it to A for life he may either devise the remainder of the term or if he does not then on his death the term will descend to testators heirs

Mannings Case
8 Coke 94 B. 5 Gray 135

Where the executory devise is simply to arise in futurity

The present estate passes to the testators heirs or the residuary devisee

If the executory devise is given in derogation of a prior estate and the future estate only for a limited estate and not for an estate in fee simple, it will divest the particular estate to the extent only of the estate created by the executory devise. Eg an estate given to the testators daughter A, in fee simple, but if she marries under 21 to his daughter B for life. Here if she A marries under 21 B will take for her life but at her death it will return to A and her heirs if she is dead; but if the executory estate for life, limited to the same person to whom the fee simple originally devised, the fee-simple would then be divested altogether and the residuary devisee take it altogether

Wright vs Wright
1 Vesey Sr 409

If an executory devise fail & become void from any cause, as the object for such cause never came into existence or the event upon which it is to be limited is to remote, the preceding estate will continue to its natural determination but if the devise elapses by the death of the devisee in the testators life time, then the testators heir will stand in the place of the devisee and on the happening of the contingent the estate will go to him, Even if it cut it off short

Leake 349 — 372

Lecture 9th

Where the estate is created in a will, whether it is a remainder or an executory devise must be determined by the facts as they are, of the time of the testators death, not when the will is taken, because a will always speaks from the time of the testators death e.g. A devise to A and after his death to the children of B. Now the children of B would have an estate by way of remainder Suppose A dies in testators lifetime and B has got no child at the testators death and the child is born afterwards born that child is entitled to the estate as an executory devise and conversely an estate which

by its limitation was an executory devise, may by an event happening in lifetime of the testator be changed into a remainder e.g. An estate given to B in fee-simple but if B marry X devise to B for life and at his decease to C in fee simple. Here if B marries X in testators lifetime C's estate is changed from an executory devise into a vested remainder

In accordance with the general principle of construction which favours a vested estate, the words in future will if possible refer to the time of taking possession and not to the time of vesting of the estate e.g. A devise to A until B attains 21 then to B in fee simple. Here on the death of testator B will have a vested estate subject to a term of years in A. but if the devise to B stood alone the estate could only vest on his attaining that age In this connection four (4) examples of construction were laid down by Lord Romilly in {Edwards vs Edwards. 15 Bevan 357; 16 Jurs 759

① If there is a simple devise to A in fee simple if he dies, to B in fee simple, here if he should die, construed to be if he die in testators life-time, otherwise the testator speaking of an event which is certain as contingent

(2) A gift to A in fee-simple and if he dies without leaving children to B in fee-simple. Here the reason given does not apply and B would take no matter when A died childless

(3) A gift to A for life remainder to B in fee-simple, but if he dies, to C in fee-simple

(4) A gift to A for life, remainder to B in fee-simple but if he dies childless to C in fee-simple

Lord Romilly considered both (3) & (4) to mean dying, & childless during the continuance of the particular estate; but if the estate once vested in B, he and his heirs would hold absolutely as against C

The construction of (4) has been expressly overruled in O'Mahoney vs Brewdell

LR 4 P&I appeals 388

where it is held that C's estate would vest whenever B died childless. As regards the third the judges in that case refused to consider it But it seems that that one was rightly decided by Lord Romilly to be analogous to the first one A devise to children "prima-facie" vests in those alive at the testators death, but if none alive future children will take it Also under the devise

to the children of the future estate all will take who are alive at the termination of former estate
A child by means of exception always takes as if already born
Leake 319 – 342

Powers An instrument creating a future estate by way of use or executory devise may either designate the estate created, the party to whom it is given, the event or time at or on which it shall vest, or it may give to another person the power to decide these points. Such a power is called a power of appointment and revocation and it will act by shifting the use either from the grantee or his heirs or from another grantee. This power may be either general as regards all these points, or special as regards one of them, or still more restricted giving the authority only to act in one of the two ways only or to appoint to one or more of a certain class (2 persons)
The estate appointed under a power will take effect from the time the power is executed in the same manner as if that appointment contained in the deed, creating the power and will only carry the legal estate as far as it would if the limitation had been contained in that instrument

e.g. If the land given to the use of A to such uses as he should appoint to B, here B would only have an equitable estate because the "statute of uses" could only execute the first use, and the execution of the power being a use out of a use could not pass an equitable estate, if the use appointed is to take effect as a remainder after a particular estate it is liable to fail if the contingency does not happen during the continuance or at the determination of the particular estate but unless the original instrument gives authority to appoint an estate in the future after a particular estate and the appointment is not made until after the particular estate terminates the appointment is not void but will take effect as a good springing use e.g. An estate given to A for life remainder to such children of A, as A & B, or the survivor of them should appoint, A dies and B appoints it to C, A eldest son here A would have good estate by way of a springing use. These powers may be created either in a will or a deed. If created in a will it may operate either as authority to appoint a legal estate or to appoint it to the use of the legal estate

which of these it is dependant on is the construction of the will

In the instrument creating the power either a bare authority may be given to appoint the estate or the estate may be given the appointor to be conveyed to the appointee In the first the power will operate in favour of the appointee as if it were an executory devise or use to him, and his title will be under the instrument creating the power and until such appointment is made the estate will remain in the grantor or his heirs but if the estate is given to the ~~grantee~~ appointor the appointee takes through and by virtue of the conveyance made to him by the appointor of the power These powers may be divided into classes according to the purpose to be effected by them

(1) Those which operate on the beneficial interest and are designed to modify the uses already granted or to create new ones eg a power of jointure for a wife or to provide ~~jointure~~ portion for the children

(2) Those which operate on the subject matter of the estate only. This last class may be subdivided into

(A) Those which affect the whole subject matter as a power of sale, power of mortgage or power to make partitions

(B) Those which affect the arrangement of the estate only as a power to lease. As the instrument creating power does not convey the estate but merely gives authority to the appointor to convey it; technical words of limitation are not required even where the power is contained in a deed. The extent of power depends upon the construction of the instrument creating it, taking into consideration the purpose for which it was created. A general power to sell or appoint imparts a power to convey or appoint to as large an estate as the creator of the power possesses and of course includes the power to convey for any less estate; so likewise a general power to appoint gives power to appoint either a legal or equitable estate. Where a power unrestricted as to time gives the appointor ~~time~~ may make the appointment at any time during his life and even where an estate has been given to him and it has expired before the appointment was made

such appointment is fixed, eg. If A gives an estate to B for life or until he becomes bankrupt, and on expiration to such of his children as he should appoint, In such a case he could make a valid appointment after his bankruptcy, but the creator may restrict the power as to time in which the appointee must make the appointment either that he shall not make the appointment before a given time or not after or during a given time only eg a power to appoint during coverture cum Read Leake 372-3922

LECTURE 10[4]

A power to appoint may be general either by will or deed or may give authority to appoint by one of these methods only, In all cases at Common Law the terms directed in the instrument creating that power must in the instrument appointing under that power be strictly complied with, In the case of wills appointing an ~~appointee~~ estate under a power, our Statutes have relieved the appointee in those cases where the creator has only authorized the appointment to be made by will drawn

in a more formal way than is necessary to pass the estate at law e.g. where the creator appointed the estate should be made by a will to be executed in the presence of four (4) witnesses in that case the will under our statutes is good if witnessed by the ordinary number of witnesses (2)

P.E.I. R.S. 5th Series C 86 Sec 4

Unless the power is fiduciary in its nature e.g. where the ~~power~~ creator has reposed trust in the judgment of the appointor he (the appointor) cannot delegate his authority unless the creator has expressly given him power to do so. The instrument executing or creating the power must show an intention to execute it; but it may either do so expressly, or by implication e.g. If merely a power is given and the appointor conveys an estate in the land there the grantee will take under the power As the law implies that the grantor had no right to convey unless under the power, he must have intended the power to operate as an appointment under that power But if the appointor has an estate as well as a power

to appoint to. the conveyance will operate as a transfer of his estate and not as an appointment under the power, A partial execution of a power does not exhaust it but the appointee may continue to appoint by other instruments until his power is exhausted provided he appoints during the time he is authorized to do so
A power either general or special may be executed with a power of revocation and new appointment unless the instrument creating it shows that the creator intended to give only a power to be executed once for all, But the deed or will executing the power must expressly reserve to the appointor the power to revoke, and appoint anew, As we have seen a power may be either those that are called collateral to the estate & those that are more than collateral, This last class may be divided into those which are appended or annexed to an estate and powers in gross

I A collateral power is one where the appointor has no estate in the subject matter to be appointed

2. A power appended or annexed to an estate is one where the appointor has an estate in the subject matter which will be affected if an appointment is made under the power
3. A power in gross is where the appointor has an estate in the land, but an appointment made under the power can have no effect upon the estate eg. where the appointor has an estate for life and power of appointing in fee at his death

In considering how a power may be extinguished or suspended by any act done by the appointor there are three classes which must be considered separately

(1) A power collateral cannot be suspended or extinguished by any act done by the appointor as he has nothing but a mere authority to appoint

(2) A power ~~appended or collateral~~, appended or annexed to an estate where the appointor has an estate in the land and has transferred to another an interest in his estate he will not be allowed by executing the power

either to destroy or depreciate the estate or interest he has granted. If the estate he has granted is less than the estate he might have appointed the power will be suspended during the continuance of such interest, but if he has granted the whole interest, the power in that case will be extinguished, An involuntary conveyance such as a bankruptcy will work an extinguishment or suppression of the power as well as a voluntary act

(3) A power in gross cannot be extinguished or suspended by the appointor conveying his estate, In former times it might be extinguished by a fine but there is no such conveyance now, A collateral power cannot be released but either a power appended or in gross can be

Edwards vs Slater

Tudors Leading Cases on Conveyancing p 777

Lewis 2 Ed Chap on Powers

Rule in Shelleys Case

Tudors L C on Conveyancing p 448

The rule in Shelleys Case may be stated thus

that where an ancestor by any devise or conveyance takes an estate of freehold and in the same devise or conveyance an estate is limited by way of remainder either immediately or mediately to his heirs in fee simple or fee tail the words "his heirs" are words of limitation and not of purchase, and the heirs will only take by descent and not by purchase. To make this better understood he defines the words limitation and purchase. Words of limitation show merely what estate whether fee simple or not is given but words of purchase designate to whom an estate is given. Therefore in the rule in Shelleys Case the word "heirs" merely shows what estate the ancestor has, and not that any estate is given to the heirs. This being so, we will see that the true effect of the rule is that the ancestors name should be read in place of the word heirs Eg. A devise to A for life with remainder to his heirs in fee now apply the rule in Shelleys Case and the limitation would read "to A for life

and remainder to A in fee simple which by the doctrine of merger would at once vest a present estate in A

(2) A devise to A for life and if A dies before B to A heirs in fee simple Here we must read the limitation as if it was to A for life and if A died before B then to A in fee Then then A takes a life estate and a contingent remainder in fee which being contingent does not merge the life estate so as to defeat any estate that may be limited on the other contingency happening viz. B dying before A

(3) To A for life remainder to B for life and remainder to heirs of A in fee simple. Now applying the same rule it will read: to A for life remainder to B for life and remainder to A in fee. Here A holds a present estate B next remainder for life and A an ultimate remainder in fee. Of course A holds no remainder But in this case if B should die in As life time, then immediately As life estate would merge in his fee and he would have the simple fee in possession

Lecture 11th

Supposing the intervening estate to B was a contingent one e.g. an estate to A for life, remainder to B for life if unmarried at the death of A and remainder to heirs of A. Here A will take a life estate in land, and a contingent remainder in fee simple, to come into possession at death of Both A+B. Here one would at first think that by the doctrine of merger A having a life estate and ultimate remainder in fee simple and there being only a contingent remainder intervening that the life estate would merge in the fee simple and so cut out the contingent remainder But in this case the Courts held that there was no merger. Some writers put the doctrine that in such cases the fee merges in A liable to be divested if the contingency on which the mediate remainder is to vest, takes effect

Pitchie thinks this very awkward and is like shifting the seisin which is impossible

The Rule in Shelley's Case only applys where the estate to the heirs is limited by way

of remainder and not where it is limited by way of an executory devise or a shifting or springing use

Lewis 373-392 ; 342-348

5 Gray - 91-92

Limitations to Rule in Shelleys Case

(1) Both limitations must be created under the same instrument e.g. If A gives an estate to his son B for life and afterwards devise a fee-simple in the same land to the heirs of "B". Here the Rule in Shelleys Case would not apply because not limited by same instrument, nor in following where land is granted to B for life and remainder to heirs of B in fee simple and B sells and transfers his estate in the land to X. Here X will only have a life estate in the land during B's life, and the heirs will have a remainder as purchaser under the original grant. But for this purpose a will and codicil is considered as one instrument, but whether the instrument creating the power, and the instrument exercising under the power are to be considered as one

and the same instrument, is a mooted question
{Fearne on Contingent Remainders p 75-
Jarvin on Wills Volume I p 775}
Both estates are considered as created by the same instrument where the particular estate arises from the execution of the remainder by ~~implication~~ operation of the law e.g. Suppose a wife left property to the heirs of her husband and dies. Here the husband would have a life estate by way of courtesy with the remainder to his heirs. Here the Rule in Shelley's Case would apply and the husband would hold the fee simple

(2) The estate created must both be of the same nature, that is both legal or both equitable If the estates are both legal it is immaterial that a trust is imposed on one of them Any estate of freehold being given to the ancestor will be sufficient to make the rule applicable It is immaterial whether it is for ancestors life or per autre vie The estate given to the ancestor must however be an estate of ~~freehold~~ freehold. The rule

will not apply where merely an estate of years is given to heirs no matter how long that estate of years may be. But by an analogy of the Rule in Shelley's Case if a testator would a long term, he may devise to A for life and remainder to A's executor here the whole term will immediately pass to A.

The instrument must give the ~~right~~ estate in remainder to the heirs of the ancestor. It is not sufficient that it is given to the heirs of a third person, who may be an heir in common with ancestor, E.g. one estate to A for life remainder to heirs of B's life of A In that case it would not be given under the Rule in Shelley's Case. But the rule will apply where the estate is given to both the husband and wife or intended husband and wife and remainder to their heirs or issue Then the husband and wife would hold in fee

The Rule in Shelley's Case is a positive rule of law and not of instruction. It will

apply even though in the instrument words are used after the limitation which tend to show that the grantor or testator intended that the rule should not apply e.g. Devise to A for life remainder to A's heirs as tenants in common: Devise to A during B's lifetime remainder to trustee to preserve contingent remainders: Remainder to heirs of A as tenants in common: Devise to A for life without impeachment of waste remainder to heirs of A in fee simple. Now in all these cases it is perfectly clear from words following limitations that it was clearly intended that A should have a life estate, and not a fee-simple, and if Rule in Shelley's Case was simply a rule of construction it would not have applied in any of these cases, but as it is a positive rule of law it applies to all. However the words by which its application is intended to be suppressed or limited may be struck out, and the law goes even further and if the will or deed expressly stated, that certain

should have a life estate only and all for no longer space of time, still the rule in Shelly's Case will apply and the words will be struck out. But the estate given in remainder must follow the ordinary rules of descent E.g. the rule would not apply where an estate is given to A for life, remainder to his heirs and the heirs of such heirs in fee tail male Nor would rule apply where an estate is given to A for life, remainder to the heirs of A and B his present wife in fee-simple

In applying the Rule in Shelly's Case, it is of course a preliminary question necessary to see if the remainder is given to the heirs of the ancestor. This is entirely a question of construction, and as in all cases of construction the whole instrument must be considered, for it may be apparent from it, if it, that the word heirs is not used in its legal sense but in another sense as equivalent to "children", or "sons" or "issue", or else ~~in fact~~ that the words are used in the sense of heirs

The following rules of construction may be given in this difficulty

① If the word "heirs" is used and from the context of the instrument it is perfectly clear that the testator used the word not in its technical sense but meaning something else, as for example his "children" then the rule will not apply. But in this case it must be absolutely certain, that that was the construction, for law will, if at all possible construe the document the other way

② If the remainder is given to the issue the presumption is that it will apply and it will be much easier to construe ~~the~~ the instrument that Rule will not apply than where the word "heirs" used

③ If the remainder is given to grantors "sons children the presumption is that Rule does not apply, and it will take a very strong context to make such words read as the technical words heirs

5 Gray - 91 92

Lees v Mosley 1 Y & C Eq 589

Lecture 12½

Rule against Perpetuities

In case of Cordell vs Palmer Ludas L.C.R. Conv. 321 the rule is stated as follows: A limitation of a future estate to be valid must vest within life or lives in being and twenty-one years. The term for twenty-one years may be a term in gross, that is a term without reference to the infancy of any persons. In the purpose of this rule a child in ventre sa mere is considered as a child in case. So the rule may be extended so as to take in the necessary months for its birth, but this exception is limited to such cases as they arise, and in no case to be treated as a term in gross. If no life or lives in being are mentioned then the estate must vest within or at expiration of the twenty-one years. If no lives a life in case it must vest on expiration. This rule is violated and consequently the future estate is void if that estate could in any possibility remain unvested beyond term limited by the rule, even though in the case under consideration the estate did vest within that

time e.g. An estate to A so soon, when he shall enter the ministry. This limitation would infringe the rule for it is possible he may enter the ministry after twenty-one years, and the fact that he entered before that age does not make it valid. This rule applies to both real and personal property and to legal as well as equitable estates therein. This rule against perpetuities is not of Feudal origin but of comparatively modern growth. By the Common Law when future estates could only be created by way of remainder, vested or contingent, and when these, when the contingency could be destroyed by way of fines and common recovery the inconveniences of properties being unalienable or tied up by these limitations were not felt But as soon as the Statute of Uses & Wills new classes of transfer arose viz:- those which took effect by way of Shifting and Springing Uses or executory devises, when the inconvenience and danger was felt especially after a good deal of dispute and it was decided that such limitation could not be destroyed by

fine or common recovery

Mannwyg Case. 5 Gray 120; 10 Coke 46 (b)

The courts at first seemed to have seen the danger of these limitations without knowing how to remedy them. The rule that such estates were void because of remoteness was laid down in the famous Duke of Norfolk case 5 Gray 498. 3 Ch 1

In that case the Duke conveyed land to trustees for a long time in trust to B his second son, and the heirs male of his body. But if A the eldest son ~~to the eldest son~~ should die without issue, and the title should fall to "B" then the term would be held in trust for C the Dukes third son. A died without issue in the life time of B and title descended to B. The question was whether the executory devise to C was good. All the judges were of opinion that the estate to "C" was void on account of ~~this~~ its remoteness but the Lord Chancellor, was of an opposite opinion, as the estate must vest, if at all within a life in being! viz on death of A., and his decision was upheld in House of Lords The rule that Lord Chancellor laid down [illegible]

that the future estate over was good providing the contingency on which the limitation was to take effect must happen within a life in being In this case the chancellor when asked by counsel at what point he would decide ~~point, he would decide~~ such limitations to be void, replied ~~he would~~ he would do so whenever any inconvenience appeared. These words were used in a subsequent case to extend the rule beyond a life in being In the case of Lloyd vs Carew 5 Gray 515, an extra time of twelve months was allowed [It is worthy to note that the decision was reversed by the House of Lords although the opinions of Lord Chancellor. Lord chief justice, and another judge was contra, and there were no other law lords in House at time]

In a subsequent case the time was extended to cover a space of eleven years. Then it was held in Low vs Burton 5 Gray 320 that it was immaterial what the number of lives were, if they were all lives in being when the conveyance took effect. Probably the rule as stated at beginning of lecture was laid down in

Cardell v Palmer. Now consider as to what estate or more correctly what limitations of estate does this rule apply:-

1st It clearly applies to all estates created by way of shifting or springing uses or executory devises. How about estates created by way of remainder?

As far as vested remainders are concerned no case infringing the rule can ~~apply~~ arise as the remainder or future interest are vested during the continuance of the present life estate. But as regards contingent remainders the case is very different and if no such rule applies the danger and inconveniences would be the same as in the case of uses and executory devises

In a former lecture on remainders it was stated that this was the rule governing remainders "that a limitation to an unborn child of an unborn child is void" In the late case of Whitby v Mitchell 42 ch D 494, Appeal 44 ch D 85 the court decided that the rule was separate and apart from the rule against perpetuities; and if a limitation was infringing this rule even if it did not infringe the rule against perpetuities

it was said. Gray on Perpetuities 234-240
We courts point this rule on a principle which was long ago exploded, that it was illegal to found an estate on a founded on a

This rule surprised the profession as there had been a growing conviction among most text writers and jurists, that this rule was a part of the rule against perpetuities. Let us suppose for the sake of argument that the rule "that the limitation to an unborn child of an unborn child is void," is a distinct rule - that in no wise decides the question as whether the rule against perpetuities does or does not apply to a contingent remainder. Challis on Real Property 146-147 states that it does not, we will first consider some examples to see where it will lead us if we take his view; But before doing so we will state the rule as given by Williams which is slightly different, viz: "An estate cannot be given to an unborn person for ~~[illegible]~~ life followed by an estate to any child of such unborn person

Now consider this case. A has four sons W. X. Y. Z at his death, bachelors. By his will he devises Blackacre to the eldest son W for life etc. Here the limitation does not infringe the rule. Yet it would not for an instant be valid. In this case An attempt to A ~~for life~~ a bachelor remainder to his eldest son for life, remainder to such of the children of A as would survive his eldest son. Here again the rule as regards remainders is not broken, but should

Challis Argument

I No such limitation was held void prior to establishment of executory devises. Reason for this was that such limitation could be destroyed by a fine or common recovery, and the remaindermen did not suffer

II that the objection is not as much against the time of vesting of remainder as against vesting of preceding estate. —— But there does not seem to be much strength in this argument especially since conveyances by fines and common recovery are obsolete

The only true and complete rule as to remainder

of, it is different from Rule against perpetuities
would seem to be that a contingent remainder
is not good unless it must vest within the
limits at being at the time of its creation
Under this rule Whitby vs Mitchell would be
rightly decided, and the rule is in effect a rule
against perpetuities without additional term
added by Lloyd vs Carew. By a later case it
was decided that rule against perpetuities did
apply in case of an equitable estate limited
by way of contingent remainder

Abbis vs Burrow 7 Ch D 211

It was also decided that where estate is
given to trustees to preserve remainder, it would
apply in fact by late case of In re Frost
43 Ch D 246, and from remarks of Cairns L
therein it appears that he considers that the
rule against perpetuities does in all cases
apply against contingent remainders

Lecture 13th

Rule against perpetuities as applied to Estate
on condition and right of entry

The question we will consider now is when land is transferred to grantee or devisee for a definite estate, but subject to forfeiture back to grantor or his heirs on breach of a certain condition .. when the rule ~~condition~~ applies, so that if condition is one, of which there might be a breach after time limited by said rule, such condition would be void, and right of entry in breach of it is gone. This until lately was quite a disputed point but the law is now settled in England, that rule against Perpetuities does apply and the condition will be void in such cases in which it infringes that rule and right of entry will be gone

London & SWRR Co vs Gunn - 20 Ch D 562 X
Dunn vs Flood - 25 Ch D 629 X

An apparent exception to this rule is the right of entry in a lease for years on breach of a covenant to pay rent where that covenant is coupled with a condition

In such a case the rule against perpetuities does not apply. This though is not a real exception for the landlord has a vested estate in the land and the rule against perpetuities

never affects vested interests. The rule against perpetuities ~~never affects vested interests~~ applies to estates created by powers but subject to those necessary modifications on account of the nature of a power. Where a power expressly directs an appointment beyond the time limited by the rule against perpetuities it will be void But if it does not direct such appointment the power is valid, but the appointment under the power must be restricted to estates and interests which will vest within the time specified by the rule. As we have seen, an appointment is read as if inserted in the instrument creating the power.

Therefore the time is computed from the creation of the power and not from the date of the appointment, except where the power is in every way general, because that equals an estate in fee simple, it is considered as original disposition of the property

The rule against perpetuities does apply to all cases of future contingent interest. Except in case of contingent remainders a stricter

rule applies is that a contingent remainder must vest within a life or lives in being without the additional term in gross of 21 years. Whitbread v Mitchell A limitation to a class must be so restricted that the objects of the case must become ascertained within the time allowed by the rule of. An executory devise to all the children of A who should attain twenty-one years would be good. But if it was limited to all the children of A who should attain twenty-eight years it would be void altogether, even as regards those children that would reach that age within the time limited by that rule - Smith v Smith LR 5 Ch D 342 —

But upon a gift to a class the number of shares must become ascertained within the period limited by the rule, and if the destination of some of those shares only is too remote the limitation as to the rest are good. e.g. a gift to the children of A who should attain twenty-one years and issue of such of those who should die under twenty-one years. such issue to take only their shares of their parents. but conditional

over their attaining twenty-one years. This limitation was held good as to the shares of the children who obtained twenty-one years because the number of shares would be ascertained and determine within the period specified by the rule

Also estate limited after a limitation too remote which is limited to take effect in the alternative of some event is also too remote and void e.g. A devise to the children of A who should ~~who should~~ be living at the end of twenty-eight years from death of testator and if no children of A be then living, the estate to go to B and his heirs in fee. Here both the devise to the children of A, and that to B and his heirs is void. but if this limitation had read "and if A died without issue then to B and his heirs" Here the time of the happening of the contingency would be within the time specified by the rule, and if that contingency had taken place, the gift to B would have been valid. though if the other contingency happened the gift to the

children of A would be void

The principal and only exception to the universality of the application of the rule against perpetuities is a gift to a charitable institution. Here the rule does not apply where there is a gift to one charity, and on the happening of a contingency the estate to go to the other charity.

Christs Hospital vs Granger 1 McN & G 460

But if the gift over is to a person the rule will apply. A charity in this case is construed very liberally so as to include any Benevolent, Philanthropic and Educational institutions. The effect on the preceding estate where the future estate has become void because its creator violated the rule against perpetuities, is that the instrument creating the estate should be read as if the void limitation was not contained in the instrument at all. If the preceding estate is a particular estate then the subject matter of the limitation will go to the testators or grantors heirs but if preceding estate was intended to be cut off by the void limitation then the effect of declaring limitation void will be that particular estate will continue to its natural determination

93 b

Lecture 14th

Nature and incidents of ownership of real property

As to regards his rights and title to the wild animals
any animal living on his land it is clear that
while animals are at liberty and untamed
none one has any property in them. The most
a man can have is a right to hunt and kill
them and when that is done his property begins
If he kills them where he has a right to, his
property in them is absolute. If he captures
them under like circumstances, and tames them his property
in them is permanent and they become domi-
cistic animals. If he captures them and keeps
them in a wild state, he has property in them
only so long as he has actual possession
of them. If they escape and regain their
natural liberty, his property in them ceases
In this being so we will consider what right the
owner has on wild animals living on his
land. He has what is called a possessory
title while they are living on his land. If
any one else kills them they become the
property of the owner of the land and he

may maintain trespass or trover for them
Sutton vs Mordy. 1 Lord Raymond. 750
Blades vs Higgs - 11 House of Lords 621

Property in a Border Tree

If a tree is near the boundary of one owners land so that some part of the branches, or roots or both, extend over into the land of the neighbouring properties. the question is, To whom does the tree belong? The mere fact that the branches extend over the land of the neighbouring proprietor does not give him proprietary right in the tree his only right is to cut a lopp off the overhanging branches, but he is not entitled to the fruit
Waterman vs Soper - 1 Lord Raymond 147

Now if the roots extend into the neighbouring proprietors land the question is somewhat different from that of the branches, as the tree derives some of its nourishment from the land. but in this case it would be reasonable to hold that the proprietors held the tree in common now But then the practical difficulty arose as to what share each held in the tree. Perhaps that but was abandoned. The true test is now what

land the tree took its origin. This is decided by seeing on whose land the trunk stands

rs 1 Gray 244

rs 37 am dec 738

If it is doubtful where the tree took its origin by the trunk extending on both properties the tree is owned in common. but if it is exclusively in one party's land that party will hold the tree

The owner in fee simple has absolute enjoyment and use of the land he owns. He may cut and haul away all trees growing on it and all crops. He may use up the soil itself and take away the gravel stone etc. In fact as long as he does not infringe on the ~~lands~~ rights of neighboring proprietors he may use the land as he pleases. When the fee is subject to an executory devise the tenants in fee simple have all the rights as if it were not subject thereto that is at common law. but equity will protect the future interest so far as to prevent the committing of equitable waste

Jones vs Wright 2 D & S. 3. J. J. 234. 1 Gray 593

Equitable waste is the cutting down and

taking away of property, which after being severed bears small value in proportion to the while joined to the reality, such as ornamental trees.

A tenant for life or for years has all the mines and profits of the land that accrue during his term, continuously and periodically, but he must not commit waste.

Waste may be defined as any act which is injurious to the inheritance, either in diminishing its value, or increasing the burdens on it, or by impairing the title of it. At present common law only protected the future owner where the particular estate arose by operation of the law [as in dower or courtesy] leaving the parties in the other cases to protect themselves in their grants or leases. The Statute of Marlbridge 52 Hy III c 23 2 was passed and it extended a remedy to all cases of tenants for life or years.

There are two kinds of waste actual and permissive.

Actual waste is where direct injury is done to the inheritance.

Permissive Waste is injury done to the buildings or premises by the tenants allowing them to be destroyed

for or want of repair

Tenant is liable for what actual damage is is done by strangers - 1 Gray 557

but he is not liable for what is done by the act of of God or the Queens Enemies.

A tenement at will is not liable for permissive waste; but when he commits what would if committed by a tenant for life or years would hold actual waste, he is liable in trespass, as by that act his tenancy is ended

1 Countess of Shrewsbury case. 1 Grey 163.

As regards a tenant for life he is bound to keep the house in repair so with a tenant for years unless there be a different covenant in the lease or grant.

The ancient remedy for such injury to the inheritance was by writ of waste. It could only be brought by an owner of an estate of inheritance in the land and only when he held the next estate in reversion or remainder. Eg. an estate to A for life remainder to B for life, and remainder to C in fee-simple. If A commit waste no writ

of waste would lie at Common Law against Lessee by Bond, B could not issue it for he had no estate of inheritance. C could not sue for though his estate was one of inheritance it was not the next in order of time. To remedy this difficulty equity stepped in and granted an injunction to restrict the tenant from committing actual waste Permit v Permit. 3 Atkins 44, 1 Gray 579. or if any actual waste had been committed to order an account to be made and a payment made to the party entitled thereto

Castlemain v Craven. 1 Gray 575.

But equity never interfered in cases of permissive waste. At present an action may be brought by any owner of future estate in land and he could claim damages for any actual waste.

An estate for years or life especially the latter was frequently granted with an express stipulation that the holder or tenant should not be liable for impeachment for waste In that case the tenant would not be liable under a writ at common law. for ordinary

waste. but Equity would restrain him from committing malicious waste and if he did commit it would grant relief and the same as regards equitable waste.

Vane vs Lord Barnard 2 Bern 738. 1 Gray 572
Robert vs Summerell 2 Eq Ca ab. 759. 1 Gray 574

Lecture 15th.

We will now consider what right a tenant for life or years has to cut down trees without committing waste

1st He has his right to estovers viz to cut wood for the repair of fences and buildings and agricultural instruments. But the wood so cut must be actually so used for that purpose. It must not be sold and the proceeds so used

Duke of Marlborough vs St John 5 DeG & S 174

If there is not sufficient dead wood to be cut he may cut firewood. He cannot cut timber. wood or wood that may in time become timber. In England oak and elm only are considered timber when of twenty one years growth. In this county all wood

fit for building purposes would be timber. The tenant may cut down young trees for the purpose of thinning them, but he must not cut down ornamental trees, hedges or boundary trees. Coke J. says a tenant cannot convert woodland into pasture or arable land even if he increases the value, without being liable for waste. Coke Littleton. 53 a.
Atkins vs Temple. 1 Ch Rep - , Dune v. Mose ditto.
Cole v. Green 1 Bevs 169.
In this country it is perfectly clear he would not be held liable.
Drake v Wiggle, 24 UCCP. 405. Titus vs Haines. 2 R.C. 242
As to the property in trees when cut or blown down (1) where the tenant is liable for waste: If the tree is blown, or cut down wrongfully during a term e.g. impeachable for waste, then the trees belong to the owner of the first vested estate of inheritance. Honeywood v. Honeywood, LR 18 Eq 306
1 Gray 598. Harrow School v. Alderton, 2 B & P 86
In the case of a tenant for life unimpeachable for waste the tenant for life would have property in all trees ornamental or not that were blown down. Pope v. L. Scammerville 2 Eq Cas Abt. 756 1 Gray 577

But he would not have property in trees which he wrongfully cuts down
On a an estate where timber trees have reached
full growth, and in future would be more
likkely to deteriorate than increase in value
equity will order them to be cut down and
the proceeds invested, and will pay the income
to the successive life tenants during their
terms and the principal to the first estate
in inheritance

Emblements. The term emblements is used
to designate the crops that are ripening at
the end of the estate which in certain cases
will be considered as personal property.
Emblements only include the annual crops
which are sown and cultivated by the indus-
try of the tenant e.g. Corn. oats potatoes etc
but will not pass over the product of any
perennial crop, nor grass, nor the fruit on
trees as apples pears etc

Evans vs Roberts 5 B & C 829
Rodwell vs Phillips 9 M & W 505

The right to emblements includes the right to

have term in the land till harvest and to enter and to gather them even though tenancy has expired Pococks vs Pierce 1 Gray 622

To whom does this right of emblements belong.

I. As between heir and executors the land belongs to executors. Newton vs Newton 8 Atkins 16

II As between executor and dower or widow they belong to latter Cooper vs Wordruff. 2 H & N 127

III As between grantor and grantee they belong to grantee

IV As between an executor of a tenant for life and the reversion and remainder-men they belong to executor of tenant for life- Lathem vs Attwood Cro Eliz

V as between the tenant for years and the landlord or remainder-man, but the term is for a fixed time that is it expires on a certain day the tenant will have no right of emblements

But as between a tenant from year to year, and a tenant at will, and both their landlords. The tenant has a right to the emblements except where the tenancy has determined by the act of the tenant Evans vs Roberts 5 B & C 835.

Ringstead vs Hollands 4 Bing 732

VI As between a tenant at sufferance and the landlord they belong to the landlord Keech v Hall Douglas Rep. 22.

In none of these cases will there be any right to the emblements if the tenant is dispossessed by one who holds to title adverse to the one from whom he holds.

Manure If scattered on the land it will in all cases pass with the land and be considered a part of it; but if it is in a heap it is personal property. Grunworth vs Price 1 Gray 641

In certain of the United States courts the judges have drawn a distinction in the cases where the manure accrue by cattle feeding on the land demised, and when it did not so accrue. Eg. a difference between manure on a farm and manure near a livery stable and decided although the manure was in a heap, if it accrued from the cattle feeding on the farm that it passed with it as real estate.

Gay v Muzzay. 1 Gray 634

But this doctrine has never been followed

heir, and the opposite was decided in case of

Dosley v Baines 1 Hanray NB 452

Buildings. A building annexed to the land becomes a part of it and will pass with it in either a conveyance or by descent. But if the building is merely resting upon the land by its own weight and is in no way joined to it permanently it is personal property and will not in any conveyance pass with the land, and on the death of the owner will pass to his executor and not to his heirs. If the building is once annexed to the land it matters not who put it there or whose timber was used in the building the ownership of the buildings belongs to the owner of the soil. E.g. If a stranger thinking he owns a lot of land builds a home on it, so that it is annexed to the land, and it is afterwards proved that the title of the land is in another person, the property of that building will be in the real owner of the land

Parish of Sudbury vs Jones. 8 Cushing 184 Mass.

So if the owner of the land takes timber belonging to B. and builds a house with it

Because one for house in trespass a tower, but he cannot go and take it out of the house into which it is built

Wake vs Hall. 8 R & appeal Cas. 209

But the owner of real estate may enter into an agreement with the person annexing the building or other personal property to his land that such building shall remain personal property and be owned by the person putting it there and will be so regarded by law as between the parties The better opinion is that such agreement cannot be entered into before the building is erected, and not by the owner merely by consenting to so regard it. Such an agreement need not be in writing and may be oral or may be implied from the act of the parties A court of Equity will not allow the landlord to gain advantage by fraudulent inaction in allowing a party who bona fide believed the land to be his by building on it. The test of the powers used is the following If a stranger begins to build on any land

supposing it to be his own, and I perceiving his mistake abstain from selling him right and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title in the land on which he has expended money, on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen, it was my duty to be active and state my adverse title, and it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake. It must here be noted that two things are required

I That the person must suppose he is building on his own land

II That the real owner at time of expenditure knows that land belongs to him and not to the person expending the money.

The relief given in such cases is either by compensation for money expended, or if there was any question of an agreement of a future term by ordering such a term to be executed

Ramsden vs Dyson. L.R. 1 H of L. 129-174

Lecture 16th " Fixtures

A fixture is a chattel annexed to and made part of the freehold. In that case the property will lose its character of personal and follow the nature of the real-estate to which it is attached & if Trover or conversion which would be the proper way of bringing an action for the conversion of personal property will not lie for the conversion of a fixture McIntosh vs Trotter 1 Gray 682. 3 N Hamp 187

Nor can a fixture be seized under an execution to levy on personal property Winn vs Degelby 5 Barb 634 1 Gray 692. Nor is the sale of a fixture a sale of goods wares and merchandise under the Statute of Frauds see 17th which requires such sale to be evidenced in writ. Lee vs Gaskill 1 Gray 705 In this case it was decided that the sale came under the 4th section of the Statut of Frauds viz "the sale of an interest in land" &c This was a case where an outgoing tenant sold to his landlord the right to remove certain fixtures. Here clearly it was not the sale of goods wares etc, nor of an interest in lands but

merely a contract by which a tenant gave up his right to remove certain fixtures and the case is clearly right as far as it goes. But if the question should arise between a tenant and a stranger and landlord as to the sale of fixtures which were sold, the stranger while still attached to the realty, the question would be different and in Ritchie's opinion it would come under the 4th section. There are no English cases on the point but an American case holds that even in that case it does not come under the 4th sec

Bostwick vs Leach 1 Gray 716, A transfer of property would take place. Numerous cases have decided that it is a transfer of personal property The argument is fallacious it must be property of some description, and that is abundant authority to say what it is not personal estate So what is it

Whether does the assignment of fixtures require to be registered as a bill of sale

Holland vs Hodson 1 Gray 709, 4 A 7 CP 335

Dee considering whether a chattel is so

affixed to the realty as to become a fixture the question is decided upon the facts of each particular case, and principally on these two considerations.

1st. The mode of annexation of the chattel to the soil or fabric of the building and the restent to which it is united with them, whether it can be easily removed or not, and whether if removed injury will be done to the chattel itself or to the building to which it is annexed

2d. The object and the purpose of the annexation: whether the chattel was annexed to the building or land for the purpose of the substantial improvement of the whole property or merely for the temporal purpose of more complete enjoyment of the chattel. In considering this latter case it is clear that the object of the annexation would be different if the party who annexed it had a small or large estate in the land So in considering the question, what are fixtures? Consider

1st. When it arises between an heir and executor of a deceased owner of land to whom when alive the

land belonged and to which it is thought the chattel is annexed

2nd " Between Grantor and Grantee and Mortgagor and Mortgagee to see if the chattel has been so annexed to the realty so that it passes with the realty under the conveyance

3rd " Between executor of a tenant for life and remainderman or reversioner

4th " Between a tenant for years and his landlord

" The general rule governing all these cases is that taking into consideration the object of the annexation: that as between heir and executor the law will require a less degree of annexation to convert the chattel into a fixture, so that it will descend to the heir, that it would be between a grantor and grantee: and if the question arose between the executor of a tenant for life and his reversioner or remainder man, a still greater degree than in either of the former cases would be necessary to convert it into a fixture, and a still greater degree of annexation if the case arose between a landlord and his tenant. Layton vs Layton 1 Gray 661. 3 Kent 12

As between heirs and executors a fixture annexed to the ground by mortar. Gas chandeliers etc are fixtures between heirs and executors, grantor and grantee. but not between anyother

A mirror screwed to the wall or pictures are not fixtures as between heirs and executors Between grantor and grantee mortgagor and mortgagee it is held that strengthening plates in a factory fixed in the earth were fixtures! but that weighing machine placed in holes in the earth faced with brick, were not fixtures

Re parts Albany 1 Gray 201

As between an executor of a tenant for life and a remainderman or reversioner a boiler annexed to the land in such a manner as to be raised round without injury to the land was held to be personal property

As between landlord and tenant machinery fixed to the floor with screws, or annexed to stone floors by mortar, bond, etc was held not to be fixtures. Besides these things many other things which are useless except when used in

connection with the realty, though slightly if at all annexed to it as shutters or double windows, Keys of a door, and an essential part of fixed machinery though detached from it, as a driving belt, were held to be fixtures
There are besides certain fixtures which the law has decided an outgoing tenant can remove when placed on the property by the tenant These are principally trade fixtures. This doctrine does not rest on the theory that these are not fixtures, but that though they are fixtures still the law will allow the tenant to remove them
Gibson v Hammersmith 39 LJ Ms Ch 337
This principal only applies when the question arises between the executor of a tenant for life and his remainderman or reversioner or between a tenant for years and his landlord, but it does not apply between heir and executor, grantor and grantee, mortgagor and mortgagee, Holland v Hodgson 7 C P 328 (Gray 709
This principle does not apply to a building put up for the purpose of trade. It was
Whitehead v 27 L J Ch 474

decided contrary in the United States
Vanmeeter v Record 9 Peters 137. The theory of
a trade fixture is very old. In England
trade fixtures do not extend to fixtures put
up for the purpose of carrying on agricultural
pursuits. Poes v Mowes 1 Smith LC 162
This case has been largely altered in England
by different statutes. (Leake uses v Profitt and 11 S)
and denied in the United States so that principles
of fixtures apply to agricultural fixtures
There are many strong cases in support of the
Am Dec, still the case of Poes v Mowes is
such a leading case that it would certainly
be followed in this country, and the landlord
must be left to the legislature
These fixtures are removable by the tenant before
his term expires, for if the tenant allows
his term to expire, and the landlord to take
on the land; his right to remove fixtures is
gone. In like manner if a tenant after having
annexed these fixtures surrender his lease to his
landlord and accepts a new one his right to
remove fixtures is gone. If landlord enter

ing for breach of conditions by the tenant, ends the tenancy, the right is gone, of the tenancy was held upon an uncertain event, as where one held land during the life of another person, and the life expired the term, most likely the tenant would be allowed a reasonable time to remove the fixtures — At any rate while he is left in possession he has a right to remove them even after his tenancy has expired
Ex parte Bowe. LR 10 QB. 109

Lecture 17th

Natural Rights

Every owner of land has certain rights which neighbouring proprietors are bound to regard These right are termed natural rights and they relate to and affect
1st to the air over the land
2nd the land or earth itself
3rd the water flowing through, on, or over his land
These right are founded on the natural use of the land and are independent and distinct from any particular use of these elements which may

as we shall see hereafter be acquired as an easement by prescription, custom or contract.

1st We will consider the right the owner has to air over his land. Every owner of land owns the space over his land and may maintain an action for trespass if that space is invaded by anyone, just as much as if the land itself was invaded.

Ellis vs Loftus Iron Co LR 10 CP 10

The owner of land has the right to have the air over his land pure and the neighbouring proprietor who pollutes that air with smoke, noxious gas etc will be liable. It is no defence by him to prove that he formerly owned the land and carried on the business which produced the noxious gas previous to the purchase of the land by the plaintiff, and the plaintiff knew the business was being carried on at the time of the purchase. Rhins vs Nael 4 Barg NC. 183

The right to the air being pure belongs to the occupier of the land, not to the owner of the reversion and remainder unless it can be shown that a permanent injury has been done to his inheritance thereby

Simpson vs Savage 1 CB NS 347

Now as regards the content of this right it is clear that actual damage must be shown to have occurred to the owner of the land by the act of the defendant. A mere technical and slight invasion of the plaintiffs air by the noxious gas will not support an action

Hole vs Barlow 4 CB NS 334

St Helen Smelting Co vs Tipping 11 HofL C. 642

Bamford vs 3 B.&S. 62

Besides this right to the pureness of air, each owner has the right to have his air free from noise. But here again the noise is not an absolute one nor right to freedom from all noise, but the noise must be such as would be a real diminution to the value of the property

Salater vs Jefferies LR 4 CPD. 172

The owner of the land has the following remedies if his air has been interfered with

1st He can bring an action at common law for damages sustained

2nd He can apply in equity for an injunction restraining the neighbouring proprietor from carrying on the business which produces the noise or noxious gas

But the latter remedy will not lie when the damages are caused only accidently and at great intervals - Cake vs Forbes LR 6 Equity 166
Under the judicature Act he could couple the remedies and apply both for damages for past injuries and for an injunction restraining the neighbouring proprietor from committing future injuries
Rights as regards land. The owner of the land has the right to have his land supported, as a natural right independent of all questions of custom prescription or contract. Where one person owns the surface, and another party owns that which is underneath eg. an mineral as coal, the owner of the under surface has no right to work and carry away any mineral in such quantity, as will make the land of the owner of the surface subside, but he must have sufficient of the mineral ~~outside~~ to support the upper surface. The whole question is did he make the land of the surface owner to subside or cave in so as to cause real damage to him, and here again the damage is the real gist of the action. He subsided

must be appreciable to support the action
Smith vs Thackery LR 1 CP 564
If the owner of the surface has built a house on his land, he has no natural right to the support of his house, but if from the action of the owner of the Mine, the land would have subsided to an actionable extent, if no house had been there, then the owner of the surface can recover for the injury to his house by increased damages
Brown vs Robbins 4 H & N 186
The action must be brought for the damage to the land ~~without~~ which must be sufficient to support the cause otherwise he cannot bring an action
Besides this right to sub-adjacent support every owner of land has the right to support from the adjacent land of the neighbouring proprietor, and if his land subsides from an excavation made on his neighbours land. the neighbour will be liable. As regards building the owners right to adjacent support is the same as sub-adjacent support
Smith v Thackery. LR 1 CP 564

He might to collateral support of soil to land bordering on the owners land and if subsidence, caused by an excavation more remote, the owner will not be able to recover damages- Birmingham vs Allen 2 R 6 Ch D. 284
Also the owner of neighbouring property may drain his property of subterranean water and not be liable for any subsidence
Pepperell vs Hobbinson 2 R 5 Exch 796

Water. Divisions regarding water
1) Rights and duties which the owners have as regards water flowing by his land
2nd As regards subterranean water percolating or filtering through his land
3rd " As regards surface water on his land
4th " As regards water brought or stored on his land by artificial means as in the case of a reservoir
In regard to running water the owner of the land has no actual property in the water itself which flows through or by his land in a fixed channel. He has merely the right to use it
Tyler vs Wilkinson. 4 Mason 397

In construing the statement of law as given by Judge Story two points are clear

1st The rights and duties of different owners of land through or by which the stream flows are co-relative and mutual

2nd That here again real damage is of the essence of the action

In case one riparian proprietor thinks he has a grievance against the other; As regards the true limit of a reasonable use spoken of above, then here the owner has the right to what may be called the ordinary use of the water flowing ~~through~~ past his land. e.g. for usual domestic purposes. as watering cattle etc. and this without regard to the diminution of properties further down the stream. He is also entitled to such ordinary use of it e.g. to turn a mill or irrigate his land. If thereby he does not inflict injury on owners of land on the stream Lord Kingston, in Mixer vs Gilmore 12 Moores P.C. 131, 166

If the owner of land on a river by obstruction forces the water back on the land of the upper

proprietor, he will be liable for all damages done by the effect of the ordinary rain and spring freshets on the stream but not for the case of extraordinary floods
McCoy vs Stanley 37 US SC. 680
Foster vs Foster 7 Thompson 484 N.S.
Besides the right to have the water flow in its natural channel each proprietor has the right to have the water pure, and any of the riparian owners is liable if he defouls or contaminates the water to a substantial extent, to the injury of any other owner. These rights of the riparian owner are pertinent to the land they own on the stream and they cannot seperate by grant or otherwise the ownership of the land and the right to use the water
Stopford Water Co vs Potter, 3 NC 300
Subterraneous Water) Now consider water percolating through the owners land:- the owner may use the water or make his grounds in such a manner, either to prevent the water percolating into his land from his neighbours land, or to assist it in so doing or to prevent the water

percolating on his land from escaping into his neighbours land e.g. If I open a mine on my land and thereby the water running from my neighbours well, percolates through the ground and flows into my mine, so that my neighbbours well is emptied. he will have no action against me nor would it make any difference if I out of spite made a cut in my land for the express purpose of draining my neighbours well.

— o — 10 Otr & C 3977

Acton vs Brunnell 12 M & W 324

Phelp vs Nolan 72 N.Y. 39

Pollution of Subterranean water

The owner of land is bound to keep all pollution of subterranean water on his own land and if it escapes by percolation onto his neighbours land. to his injury, he is liable

Tenant vs Goodwin 3 Salk 360

Ballard vs T. L R 29 Ch D 1115

Surface water not flowing in a definate channel

The owner of the land can use such water as he pleases even if thereby he deprives his neighbouring proprietors. He has the right

to collect the rain water on his land and prevent it from going on his neighbours land. And he can raise his land ~~and prevent~~ so that it will percolate into his neighbours land.

v Rambottom 11 Ex 630

but the owner of land has no right to collect that surface water, and then let it flow into his neighbours land

Water artificially collected on the land

Where the owner may be said to have the property in the water for he can use it all but he keeps it there at his peril and if it escapes to the injury of his neighbours he will be liable

Rylands v Fletcher LR 3 Hof L. 330

Simi January 23 1949