

# YALE LAW JOURNAL

Vol. XXXVI

MARCH, 1927

No. 5

## RIGHTS OF REVERTER AND THE STATUTE QUIA EMPTORES

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"It was little the disposition of English lawyers," wrote Professor Gray in commenting upon the meagerness of the consideration given in English Law to determinable fees, "to trouble themselves about questions which did not come up practically."<sup>1</sup> The same thing could even more truly be said of American lawyers. If determinable fees and rights of reverter dependent upon them were of no more frequent occurrence in the United States than in England, there would certainly be no sufficient reason for giving further time to their discussion.<sup>2</sup> But such is not the case. American courts have been frequently called upon to determine the nature and validity of such estates,<sup>3</sup> and the

<sup>1</sup> GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) § 779.

<sup>2</sup> This paper is supplementary to an article by the author entitled *The Quest for Tenure in the United States* (1924) 33 YALE LAW JOURNAL, 248. Since the publication of the first edition of GRAY, RULE AGAINST PERPETUITIES (1886) there has been much discussion of determinable fees. The most notable contribution is that of Professor R. R. B. Powell, whose able and scholarly article, *Determinable Fees* (1923) 23 COL. L. REV. 207, presents the most complete and accurate survey of the authorities yet published. Mr. J. M. Zane's *Determinable Fees in American Jurisdictions* (1904) 17 HARV. L. REV. 297, is also interesting and valuable.

<sup>3</sup> The cases are collected with comments by Powell, *op. cit. supra* note 2. Later cases are *Brill v. Lynn*, 207 Ky. 757, 270 S. W. 20 (1925) and *Kimbrell v. Parmer*, 202 Ky. 686, 261 S. W. 11 (1924) holding that a provision in a deed in fee that the land should revert to the grantor in case the grantee died without children, created a possibility of reverter in the grantor which could be released by him to the tenant in possession. Similar interests retained by grantors or testators were treated as valid reverters in *Mosely v. Pattillo*, 134 S. E. 49 (Ga. 1926); *Hopkins v. Vance*, 159 Ga. 309, 125 S. E. 592 (1924); *Alexander v. Fleming*, 190 N. C. 815, 130 S. E. 867 (1925). In *Stubbs v. Abel*, 114 Or. 610, 233 Pac. 852 (1925) a devise in fee to A and B with a proviso that land should revert to the testator's estate if both died before attaining the age of thirty, was held to create a valid determinable fee.

cases involving them in new and unexpected relationships appear to be increasing in number and importance. This peculiar fact is probably due to the sense of rapid change felt in a new country, even in land uses to be expected, causing grantors and testators to anticipate that the purposes and uses for which gifts of land are made may not persist in perpetuity. But whatever the reason, it is clearly desirable that American lawyers should come to a more satisfactory understanding of the true nature of rights of reverter than is now possessed.

Francis Williams Sanders, of Lincoln's Inn, barrister, published the first edition of his work on *Uses and Trusts* in 1791, the third in 1813. Thereafter he had to prepare an opinion involving a determinable fee. In the preparation of this opinion he made a discovery which he subsequently described thus, in the fourth edition of his book, published in 1824: <sup>4</sup>

"Before the statute of *quia emptores* (18 Edw. 1,) an estate might have been granted to A. B. and his heirs, so long as C. D. and his issue should live, or so long as C. D. and his heirs should be tenants of the manor of Dale; and upon C. D.'s ceasing to have issue, or to be tenant of the manor of Dale, the estate re-

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Yarbrough v. Yarbrough, 151 Tenn. 221, 269 S. W. 36 (1924) is an unusually well considered case. There was a grant to trustees to hold only so long as used for a church site with a gift over in case of disuser. The gift over was held void for remoteness, and the resulting possibility of reverter, remaining in the grantor's heirs, despite an inoperative attempt to assign it, was held valid and enforceable. Under somewhat similar facts, it was held in Halpin v. Rural Agr'l School Dist. No. 9, 224 Mich. 308, 194 N. W. 1005 (1923) that an attempt to assign the possibility of reverter extinguished it. In South Kingstown v. Wakefield Trust Co., 134 Atl. 815 (R. I. 1926) and Bristol Baptist Church v. Conn. Baptist Convention, 98 Conn. 677, 120 Atl. 497 (1923) where the gifts were restricted to similar charitable uses, but without express provision for reverter in case of disuser, the charitable trust was preserved and enforced *cy pres* against the heir of the grantor claiming a reverter. In First Reformed Dutch Church v. Crosswell, 210 App. Div. 294, 206 N. Y. Supp. 132 (3d Dept. 1924), appeal dismissed, 239 N. Y. 625, 147 N. E. 222 (1925) it was held that upon condemnation by eminent domain of land conveyed to be held only so long as used as a site for a meeting house, the heirs of the grantor are entitled to no part of the compensation awarded. See notes in (1925) 38 HARV. L. REV. 981; (1925) 34 YALE LAW JOURNAL, 444; (1925) 10 CORN. L. Q. 399; (1925) 25 COL. L. REV. 101. In McGahan v. McGahan, 151 N. E. 627 (Ind. App. 1926) the court went quite out of its way to hold that a conveyance to B (wife) for a consideration of "\$10,000 and for a further consideration that at the death of B, the above described land shall revert back" to the grantor, created a determinable fee in B which became absolute in B when she survived the grantor. See criticism in (1926) 21 ILL. L. REV. 387.

<sup>4</sup> SANDERS, USES AND TRUSTS (4th ed. 1824) 200. In a foot-note we are told, "The following observations are extracted from an opinion prepared by the author, and which was subsequently well considered by two gentlemen of eminence at the bar, and signed by them."

verted to the donor, not as a condition broken, of which the donor, or his heir, might take advantage by entry; but as a principle of tenure, in the nature of an escheat upon the death of a tenant in fee-simple without heirs general. But the statute of *quia emptores* destroys the immediate tenure between the donor and donee, in cases where the fee is granted; and consequently there can now be no reverter, or any estate or possibility of a reversion remaining in the donor after an estate in fee granted by him. This conclusion directly follows from the doctrine of tenures, and the effect of the statute of *quia emptores* upon that doctrine. The proposition does not require the aid of decided cases; but the passage in 2 And. 138,<sup>5</sup> contains an accurate exposition of the law upon this subject."

The secret thus discovered by Sanders had slept peacefully for five and a quarter centuries, not even suspected by the successive generations of real estate experts who lived during that period, including Littleton, Coke, Blackstone and Preston. It is true that certain comments made by Vavasour, J., in 1498,<sup>6</sup> and by Sir Edmund Anderson, Chief Justice of the Court of Common Pleas, in 1579<sup>7</sup> might, if standing alone, be interpreted as indicating opinions that determinable fees could not be created, yet there can be little question that up to Sanders' time the validity of determinable fees, if properly created, was generally taken for granted by members of the legal profession.<sup>8</sup> Certainly no one of the long line of judges and writers prior to Sanders' time even intimated that their validity was affected by the Statute Quia Emptores. Even though it be admitted that up to Sanders' time there was no case putting the validity of a determinable fee in issue, that fact may well be regarded as evi-

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<sup>5</sup> Christopher Corbet's Case, 2 And. 134, at 138 (1579). Sanders quotes from Chief Justice Anderson's opinion the following dictum: "If land be given to A. and his heirs, so long as J. S. has heirs of his body, the donee has fee, and may alien it. 13 Hen. 7; 11 Hen. 7; 21 Hen. 6, fol. 37; and says the law seems to be plain in it; and cites 11 Ass. 8, where the S. C. is put and held as before; and that there if the land be given to one and his heirs, so long as J. S. and his heirs shall enjoy the manor of D., those words (so long) are entirely void and idle, and do not abridge the estate."

Sanders corrects the citations here given to read 13 Hen. VII, Easter Term, f. 24; 11 Hen. VII, f. 6, pl. 25; 21 Hen. VI, Hil. Term, f. 33, pl. 21. But only the first reference is material and in that the supporting dictum by Vavasour, J., is immediately contradicted by Townshend, J.

<sup>6</sup> 13 Hen. VII, Easter Term, f. 24; see *supra* note 5.

<sup>7</sup> In Christopher Corbet's Case, *supra* note 5. The dictum in this case is quoted *supra* note 5. Professor Powell has shown clearly that it is not entitled to the weight given it by Sanders and Gray. See Powell, *op. cit. supra* note 2, at 215.

<sup>8</sup> See 1 PRESTON, ESTATES (Am. ed. 1828, taken from 2d Eng. ed. 1820) \*430 *et seq.* Throughout this extensive discussion by the greatest conveyancer of his generation, there is no reference to the statute Quia Emptores, nor any doubt expressed as to the validity of the estate.

dence of the general acquiescence in its validity, as well as of the relative unimportance of the estate among English land titles.

The publication of Sanders' discovery does not seem to have attracted much attention from the profession. The third report of the Commissioners on Real Property, published in 1832, casually but expressly adopted Sanders' theory, saying that "the statute of Quia Emptores, by destroying the tenure between the donor and donee, in cases where the fee was granted subsequently to the statute, put an end to any right of reverter in such grants."<sup>9</sup> It was accepted incidentally by Marsden<sup>10</sup> and fully approved by Leake,<sup>11</sup> but ignored by Hayes.<sup>12</sup> In 1865, Sir John Romilly, M. R., without reference to the Statute Quia Emptores, held that a devise to trustees to hold during the life of A and until the debts and legacies of the testator were paid, was a valid determinable fee.<sup>13</sup> There is nothing to indicate that Sanders' new discovery was even brought to the attention of the court. It is certainly not referred to in the arguments of counsel as reported. In 1873 the same will came up for construction before Sir George Jessel, M. R., who said that he regarded the interpretation of the will given by Sir John Romilly as untenable, and that "there is not any authority to be found for any such determinable fee."<sup>14</sup> The Master of the Rolls did not cite Sanders or make any reference to the Statute Quia Emptores, nor did counsel in arguments. There is nothing in the opinion to indicate that the learned judge's condemnation went beyond "any such" determinable fee as was alleged in the peculiar case before him.<sup>15</sup> Neither do the early American cases give any indication that the profession on this side the water had any knowledge of Sanders' discovery, or suspected that the Statute Quia Emptores had anything to do with determinable fees. Neither Kent nor Washburn makes any reference to the matter.

But in 1886 an American champion of Sanders came into the arena, and came with enthusiasm. In that year Professor John Chipman Gray published the first edition of his now classic work, *The Rule Against Perpetuities*, in which he fully accepted Sanders' view and supported it with that intellectual vigor, sound learning and thorough review of the cases that characterize all of his work and writings. While Sanders had naïvely stated that citation of authority for his new proposition was unneces-

<sup>9</sup> At 36. The report cites the dictum of Chief Justice Anderson referred to *supra* note 5, but does not refer to Sanders.

<sup>10</sup> MARSDEN, *PERPETUITIES AND ACCUMULATIONS* (1883) 71.

<sup>11</sup> LEAKE, *PROPERTY IN LAND* (1874) 36.

<sup>12</sup> HAYES, *CONVEYANCING* (5th ed. 1840).

<sup>13</sup> *Collier v. M'Bean*, 34 Beav. 426 (1865).

<sup>14</sup> *Collier v. Walters*, L. R. 17 Eq. 252, at 261 (1873).

<sup>15</sup> Powell, *op. cit. supra* note 2. But PRESTON, *op. cit. supra* note 8, at \*432 includes such an interest in his list of determinable fees.

sary, and then given in corrected form the abortive citations upon which Chief Justice Anderson had rested his dictum in *Christopher Corbet's Case*,<sup>16</sup> Professor Gray proceeded to examine all the authorities customarily cited in favor of the validity of determinable fees, and with that rare art in distinguishing and explaining cases of which he was past master, he made it appear that there was no English case really upholding the validity of such estates, and only one or two American cases; and he so emphasized the disapproving dicta in the few English cases which discredited the estate that he quite neutralized the chorus of approving declarations by judges and text-writers.

Immediately after the publication of Professor Gray's book, the profession began to take notice. Sanders' all but forgotten theory began to show distinct signs of life. Sir Howard Elphinstone, in his review of the book for the *LAW QUARTERLY REVIEW*,<sup>17</sup> criticised Gray's acceptance of Sanders' theory sharply, but so incautiously<sup>18</sup> that he fell an easy victim to Gray's rejoinder in the same periodical.<sup>19</sup> Challis came to the support of the older theory, mildly complaining that it seemed " 'extremely improbable, and even cousin-german to impossible,' . . . that a cardinal result of the Statute of Quia Emptores should be left to be discovered by Sanders," of whose writing he had not a very high opinion.<sup>20</sup> But Challis likewise admitted that Sanders was correct in saying that the Statute Quia Emptores, by destroying tenure between grantor and grantee, would render determinable fees invalid if applicable to them; but, he contended, since the statute by its terms "extendeth but only to lands holden in fee simple," it had no application to fees determinable, which were not fees simple. But this theory was also too weak to stand against Gray's reply that there was no authority to support Challis' contention, and that the common opinion of the profession, as indicated by the authorities, was to the contrary.<sup>21</sup> Even Sweet, who edited the third edition of Challis, *Law of Real Property*, conceded that "the weight of authority and argument is against Mr. Challis."<sup>22</sup> One American writer<sup>23</sup> thinks Challis' contention so weak as to be "wholly inept," but Professor Powell

<sup>16</sup> See *supra* note 5.

<sup>17</sup> (1886) 2 L. Q. REV. 394.

<sup>18</sup> He attempted to escape Gray's logic, which he admitted was conclusive "against the possibility of reserving a right of reverter to the grantor," by asserting that the right of reverter was in the chief lord of the fee, a position which Gray easily showed was untenable.

<sup>19</sup> Gray, *Determinable Fees* (1887) 3 L. Q. REV. 399. See also GRAY, *op. cit. supra* note 1, §§ 775, 776.

<sup>20</sup> Challis, *Determinable Fees* (1887) 3 L. Q. REV. 403, reprinted in CHALLIS, *REAL PROPERTY* (3d ed. 1911) 437.

<sup>21</sup> See GRAY, *op. cit. supra* note 1, §§ 777, 778.

<sup>22</sup> CHALLIS, *op. cit. supra* note 20, 439, n.

<sup>23</sup> Zane, *op. cit. supra* note 2, at 299, n. 9.

in a recent scholarly article<sup>24</sup> is disposed to accept it as the best explanation of the undeniable fact that in the United States, at least, determinable fees do exist.

After the rather feeble opposition of Elphinstone and Challis had thus broken down, one legal scholar after another joined Gray in accepting Sanders' theory,<sup>25</sup> so that in the third edition of the *Rule Against Perpetuities*, published in 1915, it might well be said that "most of the careful recent writers have adopted this view."<sup>26</sup>

But the courts have not. The question has not been squarely presented in any English court, but judicial utterances clearly show a tendency to abide by the older view that determinable fees may be validly created.<sup>27</sup> In the United States the issue has been repeatedly determined and almost without exception<sup>28</sup> in favor of the validity of such fees.<sup>29</sup> In only three of the numerous American cases is reference made to Gray's contention that the statute *Quia Emptores* made impossible the creation of determinable fees, and in all it is denied.<sup>30</sup>

Thus we have the unusual and interesting situation in which a numerous company of scholars of high repute assert that there cannot be such estates as determinable fees after the

<sup>24</sup> *Op. cit. supra* note 2, at 212. Powell considerably strengthens Challis' contention by noting that by its terms the Statute extends only to lands "*tenendis in feodo simpliciter*," that is, holden in fee *simply*, rather than "holden in fee simple" as Challis rendered the phrase.

<sup>25</sup> See POLLOCK, *LAND LAWS* (3d ed. 1896) 226; EDWARDS, *LAW OF PROPERTY IN LAND* (4th ed. 1904) 36; KALES, *FUTURE INTERESTS* (2d ed. 1920) 316; Zane, *op. cit. supra* note 2.

<sup>26</sup> GRAY, *op. cit. supra* note 1, § 36.

<sup>27</sup> See Lightwood's article on Real Property in 24 HALSBURY, *LAWS OF ENGLAND* (1912) 170, n. (n), where Sanders' theory and Gray's argument are considered and rejected. The author probably reflects the general opinion of the bar when he states that Challis' list of authorities affirming the validity of the estate is "rather curious than useful." This article was printed under the editorial supervision of Sir Arthur Underhill. In *Leach v. Leach* [1912] 2 Ch. 422, at 427, Joyce, J., said: "This limitation to Robert of a determinable fee simple appears to me to be free from objection in every respect, notwithstanding what may have been said in any book as to the effect of the Statute of *Quia Emptores* upon the creation of estates in fee simple determinable or qualified." The strength of this statement is, however, weakened by the fact that the case involved an estate on conditional limitation rather than on special limitation.

<sup>28</sup> The solitary case of *School Committee v. Kesler*, 67 N. C. 443 (1872) which declared that determinable fees could not be created in North Carolina, has been repeatedly disapproved in that state. See *Hall v. Turner*, 110 N. C. 292, 14 S. E. 791 (1892); *Keith v. Scales*, 124 N. C. 497, 514, 32 S. E. 809, 813 (1899).

<sup>29</sup> See *supra* note 3.

<sup>30</sup> *First Universalist Society v. Boland*, 155 Mass. 171, 29 N. E. 524 (1892); *North v. Graham*, 235 Ill. 178, 85 N. E. 267 (1908); *Lyford v. Laconia*, 75 N. H. 220, 72 Atl. 1085 (1909).

Statute Quia Emptores, and the courts with substantial unanimity declaring them valid. In short the courts, in the United States at least, are almost daily doing that which these real estate experts say cannot be done. The answer is, of course, that the recusant experts are wrong.<sup>31</sup> But how shall we explain the seeming impossibility of the existence of these estates under the Statute Quia Emptores that so strongly appealed to Professor Gray? It is submitted that here we have another and unusually striking instance of our practice of tricking ourselves with words and phrases and of reifying our concepts so that, imbued with a sort of objective reality, they take on a trailing cloud of attendant misconceptions to delude us still further. The term "tenure" has been the chief offender in this behalf, ably aided, however, by such expressions as "reversion," "reversionary rights," and the fluid term "determinable fee."<sup>32</sup> "Tenure" is treated as a unitary concept, a thing apart, as real and definite in its separate existence as a fence post or a chemical reagent. Indeed it is treated very much as a chemical reagent. If you add it to a fact situation, you get one result; if you take it away, you get quite another. This is strikingly illustrated in the following statement by Gray,<sup>33</sup> who states Sanders' discovery with much greater precision than does Sanders himself:

"Possibilities of Reverter.—These rights, as their name implies, were reversionary rights; but a reversionary right implies tenure, and the Statute Quia Emptores put an end to tenure between the grantor of an estate in fee simple and the grantee. Therefore, since the Statute, there can be no possibility of reverter remaining in the grantor upon the conveyance of a fee; or, in other words, since the Statute, there can be no fee with a special or collateral limitation; and the attempted imposition of such a limitation is invalid."

This may be reduced to syllogistic form thus:

There can be no reversionary right without tenure (that is, there must be a waiting "lord" ready to occupy the vacant fee).

A possibility of reverter after a determinable fee is a reversionary right.

Therefore, no possibility of reverter without tenure.

Again:

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<sup>31</sup> Mr. Zane is still rebellious. Thus he asserts that "no court in this country seems to have been willing to accept a line of reasoning, which is unanswerable. This result is mainly due to the fact that for authority upon this point the courts in this country are content with the confused statements of Blackstone and Kent, who have followed an imposing array of old English lawyers." *Op. cit. supra* note 2, at 299-300.

<sup>32</sup> Professor Powell, *op. cit. supra* note 2, collects no fewer than ten differing legal interests to which the term has been applied.

<sup>33</sup> GRAY, RULE AGAINST PERPETUITIES (1st ed. 1886) § 31.

There can be no possibility of reverter without tenure.

The Statute Quia Emptores abolished tenure between grantor and grantee in fee.

Therefore there can be no possibility of reverter after the Statute Quia Emptores.

Superficially this conclusion seems quite convincing; but fundamentally it is quite erroneous. The term "tenure" is at fault. It is used in two different senses, and the conclusion is vitiated by this duplicity. To understand this we must analyze more carefully the concepts which we describe by the terms "tenure" and "reversionary interest." Having determined the proper connotation of these terms, we may, by consistent use of them, proceed with greater hope of success in the endeavor to solve our problem.

By "tenure" we usually mean feudal tenure; that is the form of landholding permitted by rules developed under the feudal system. But what of tenure in its broader sense?

The basic idea connoted by the term is the right-duty relationship that continues between grantor and grantee after the grant of a possessory estate in land. When the interest granted is less in time than that possessed by the grantor, that is, a particular estate such as a term of years, we have no difficulty in finding the tenurial relationship, even under modern conditions, between grantor and grantee. For example, the law implies a duty on the part of the grantor to protect the grantee of such an estate in his quiet enjoyment of the land, while the grantee has a right to such protection. So the tenant is under a duty to do no act prejudicial to his landlord's reversion, while the landlord has a correlative right that the tenant refrain from such act. This relation we ordinarily express by saying that the tenant is estopped to deny his landlord's title. The landlord has a right to receive the rent to be paid and the tenant the duty to pay it; and, most important of all, the landlord has the right to possession at the end of the term, and the tenant is under a duty to surrender it. The sum total of all of the legal relations with respect to the land which the grantor retains is obvious and valuable and easily recognized under the term "reversion." But when the tenant in fee conveys in fee, the continuing relationship between grantor and grantee, if any, is less obvious and more difficult of analysis, and also more interesting.

Before the Statute Quia Emptores, the feoffor might by the terms of his feoffment (1) either substitute his feoffee in his place in the feudal chain, and retire himself from the feudal relationship; or (2) make the feoffee his own feudal dependant, retaining for himself his previous relationship to his lord. In the former case the feoffee holds of the feoffor's chief lord, and



there is no tenure between feoffor and feoffee. In the latter case the feoffee does hold of his feoffor, who remains a significant link in the feudal chain, and we have a situation known as subinfeudation.<sup>34</sup>

Let us now attempt an analysis of the tenure that arose in case of feoffment by way of subinfeudation. First we note that the feoffor did not part with all his interest in the land, although he was customarily said to convey the whole fee and to have no reversion. In fact he retained quite a number of significant legal relations. Some of these were implied in law according to the manner of holding agreed upon, as, for example, in knight service, or in socage, while others were created and fixed by contract. Of the former, many were so certain in extent and so significant in the feudal scheme that they received definite names such as homage, fealty, warranty, distress for service unperformed, escheat, wardship, marriage, reliefs, fines. The legal relations created by contract at the time of feoffment varied greatly according to political and economic need. One nearly always provided for was the services to be rendered (*reditus*-rent) by the feoffee to his lord. These services might vary from receiving a pepper-corn or "two Indian arrows of those parts," to standing guard in a castle on the Scottish border.<sup>35</sup> Other right-duty relationships might be created. For example, even before the Statute Quia Emptores, the implied feudal warranty, which in early times did not bind the heir of the feoffor without his consent, was frequently supplemented by a covenant of warranty expressly binding the feoffor's heirs and assigns.<sup>36</sup>

It is to be noted also that some of the implied legal relations retained by the feoffor were reversionary. By the term "reversionary right" is meant a right, the enforcement of which will at a more or less remote future time return the possession to the feoffor. If the reverting of the possession is certain to take place, that is, "vested," we call the interest a "reversion." If the reverting is dependent upon one or more conditions precedent,

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<sup>34</sup> 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW (1st ed. 1895) 310, 311; GRAY, *op. cit. supra* note 1, § 20; DIGBY, HISTORY OF THE LAW OF REAL PROPERTY (4th ed. 1892) 232; 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 79.

<sup>35</sup> BRACTON, f. 35a, 35b; WILLIAMS, REAL PROPERTY (22d ed. 1914) 39.

<sup>36</sup> 2 BL. COMM. \*301; 3 HOLDSWORTH, *op. cit. supra* note 34, 106, 160, 161. "The clause of warranty becomes a normal part of the charter of feoffment about the year 1200." 2 POLLOCK & MAITLAND, *op. cit. supra* note 34, at 311, n. 1, 660, 661. See also BRACTON, f. 37b. It is interesting to note that not only was the implied warranty of feudal law enlarged by covenant in the manner indicated, but it was also frequently narrowed in its operation by such express covenants. Indeed, it was quite possible for the feoffor, though accepting homage, by express provision, to free himself from the warranty that would otherwise be implied. BRACTON, f. 37b, 38.

that is, "contingent," we call the interest a "right of entry," or, changing slightly the operative facts, a "reverter," or "possibility of reverter,"<sup>37</sup> or perhaps, merely a "reversionary right." Among the legal relations mentioned above and implied in case of feoffments, it is clear that "escheat" is a contingent reversionary right,<sup>38</sup> and so is the right of distress under the older rule permitting the lord to seize the land for non-performance of services.<sup>39</sup> After a feoffment in fee these could not, of course, be a vested reversionary right, or reversion.

Among the conventional legal relations that made up the aggregate of feudal tenure, there might also be reversionary rights. The most frequent of these was created upon feoffment to a person and the heirs of his body, so construed as to set up that strange opportunist estate, known as the fee conditional, which was laid to rest in England by the Statute De Donis in 1285,<sup>40</sup> curiously revived in South Carolina by a statute of 1712,<sup>41</sup> and recently, after its sleep of six and a half centuries, miraculously revived in Iowa<sup>42</sup> and Nebraska.<sup>43</sup> The earlier authorities, assuming that issue of the feoffee must certainly fail, regarded the

<sup>37</sup> There seems nothing to support Gray's assertion that a possibility of reverter, if allowed to exist, must be a vested interest. GRAY, *op. cit. supra* note 1, § 113, n. 3. It is no more vested than any executory limitation to a designated person after a gift in fee.

<sup>38</sup> Gray thinks, reluctantly, that the right of escheat in real property is a future right, but that it must be vested since it escapes the rule of perpetuities. See GRAY, *op. cit. supra* note 1, §§ 115, 204, 205. The havoc wrought in legal reasoning by the use of such a highly artificial concept as "tenure" is well indicated by the much debated decision in *Burgess v. Wheate*, 1 Eden, 177 (Ch. 1759) holding that upon the death of an owner of an equitable fee without heirs, there is no escheat to the Crown for the reason that no tenure exists in the case of equitable holdings. See GRAY, *op. cit. supra* note 1, § 205, n. 1. This was corrected by 47 & 48 Vict. c. 71, s. 42 (1884) by which equitable estates were made to escheat in the same way as legal estates. It is interesting to note that escheat is abolished by the Administration of Estates Act, 15 Geo. V. c. 23, §§ 45, 46 (1925) which provides that if a person dies intestate leaving no persons qualified under the provisions of that Act to take by succession, his property, including equitable interests, passes to the Crown as *bona vacantia*.

<sup>39</sup> See 2 BL. COMM. \*45; *De Lancey v. Piepgras*, 138 N. Y. 26, 39, 33 N. E. 822, 824 (1893). But in England the lord's power of distress was early restricted to chattels found on the land. 1 POLLOCK & MAITLAND, *op. cit. supra* note 34, at 334.

<sup>40</sup> (1285) 13 Edw. I, st. 1; 1 PICKERING, STATUTES AT LARGE (1762) 163.

<sup>41</sup> *Vaughn v. Langford*, 81 S. C. 282, 62 S. E. 316 (1908). See GRAY, *op. cit. supra* note 1, § 14, with extensive note attached.

<sup>42</sup> See *Kepler v. Larson*, 131 Iowa, 438, 108 N. W. 1033 (1906).

<sup>43</sup> *Yates v. Yates*, 104 Neb. 678, 178 N. W. 262 (1920). In *Ewing v. Nesbitt*, 88 Kan. 708, 129 Pac. 1131 (1913) the court interpreting a devise to A and the heirs of his body, called it a fee-tail, but, by mere judicial construction, attached to the estate a power in the tenant to convey in fee simple, strikingly like that of the tenant in fee conditional, but stripped of the condition requiring birth of issue.

feoffor's retained interest as a reversion, and even allowed a remainder to be created after a fee conditional.<sup>44</sup> But later it was assumed that the feoffee's issue might never fail, thus rendering the feoffor's retained interest a mere possibility of reverter and precluding the creation of any remainder thereafter.<sup>45</sup> But failure of issue was not the only special limitation that the feoffor might impose upon his conveyance. The feoffment could be to A and his heirs, while tenants of the manor of Dale. When the manor of Dale ceased to be tenanted by A or his heirs, the possession reverted automatically to the feoffor or his heirs.<sup>46</sup> The legal relation that may result in such reverting is unquestionably one of those that make up the aggregate which we call the "tenure" by which A held the land. It is this particular kind of legal relation with which we are immediately concerned.

If, as so generally stated, the Statute *Quia Emptores* destroyed "tenure" in the sense of precluding the creation of any tenurial relations between grantor and grantee in fee, then beyond doubt it prohibited the subsequent creation of such determinable fees, and invalidated all attempts on the part of grantors to retain a possibility of reverter, which certainly involved a tenurial relationship.

But did the Statute *Quia Emptores* destroy all tenure between feoffor and feoffee in fee? Gray is clear that it did. He so states unequivocally: "The Statute *Quia Emptores* put an end to tenure between the feoffor of an estate in fee simple and the feoffee."<sup>47</sup>

If the analysis of the concept "tenure" made above is accepted, it is equally clear that it did not put an end to all tenure, but only that kind which we call "feudal tenure." Stating it more precisely, the statute negatived the existence, between the par-

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<sup>44</sup> "Not only could he create remainders after conditional fees, but he could play some tricks with tenures which seem very odd to us who have the happiness of living under *Quia Emptores*." Maitland, *Remainders after Conditional Fees* (1890) 6 L. Q. REV. 22, 24, citing (at 24) the interesting case of Sir Thomas Weyland, Rolls of Parliament, I, 66; 3 HOLDSWORTH, *op. cit. supra* note 34, at 104. And see CHALLIS, *op. cit. supra* note 20, 428 *et seq.*

<sup>45</sup> CO. LITT. \*327a, \*327b; CHALLIS, *op. cit. supra* note 20, 83-85; 2 BL. COMM. \*110, Chitty's note, citing *Willion v. Berkley*, Plowd. 224, 233 (1559). "According to the orthodoxy of a later age what the donor has when he has created a conditional fee is not a reversion but a 'possibility of reverter.' Whether the lawyers of 1285 had come in sight of this subtle distinction we may doubt, without hinting for a moment that it is not now-a-days well established." 2 POLLOCK & MAITLAND, *op. cit. supra* note 34, at 23.

<sup>46</sup> See SANDERS, *USES AND TRUSTS* (5th ed. 1844) 208; GRAY, *op. cit. supra* note 1, § 32.

<sup>47</sup> GRAY, *op. cit. supra* note 1, § 31.

ties to a subsequent feoffment in fee, of those legal relations theretofore implied from feudal custom.<sup>48</sup> This was accomplished by declaring that in case of such subsequent feoffment the existing duties owed by the feoffor to his chief lord with respect to the land should be thereafter owed by the feoffee to the same chief lord and not to the feoffor; that is to say, the statute substituted the feoffee for the feoffor, just as the parties might have done if they had so desired, without the statute. Such duties included both those implied from feudal custom, and those especially contracted for. Since, by the very terms of the statute, the customary duties were reserved to the feoffor's chief lord, they could not be implied in favor of the feoffor. But there is nothing in the statute to prevent the parties to a feoffment made thereafter from creating by express agreement such tenurial relationships as they may desire. This is made clear by the terms of the statute, the most significant portions of which are as follows: <sup>49</sup>

1. *"Forasmuch as Purchasers of Lands and Tenements of the Fees of Great Men and other Lords, have many Times heretofore entered into their Fees, to the Prejudice of the Lords, to whom the Freeholders of such great Men have sold their Lands and Tenements to be holden in Fee of their Feoffors, and not of the Chief Lords of the Fees, whereby the same Chief Lords have many Times lost their Escheats, Marriages, and Wardships of Lands and Tenements belonging to their Fees; which Thing seemed very hard and extream unto those Lords and other great Men, and moreover in this case manifest Disinheritance: Our Lord the King, in his Parliament at Westminster after Easter, the eighteenth Year of his Reign, that is to wit, in the Quinzime of Saint John Baptist, at the Instance of the great Men of the Realm, granted, provided and ordained, That from henceforth it shall be lawful for every Freeman to sell at his own Pleasure his Lands and Tenements, or Part of them, so that the Feoffee shall hold the same Lands or Tenements of the chief Lord of the same Fee, by such Service and Customs, as his Feoffor held before.*

2. *"And if he sell any Part of Such Lands or Tenements to any, the Feoffee shall immediately hold it of the chief Lord; and shall be forthwith charged with the Services, for so much as pertaineth, or ought to pertain to the said chief Lord for the same Parcel, according to the quantity of the Land or Tenement so sold. And so in this Case the same Part of the Service shall remain to the Lord, to be taken by the Hands of the Feoffee*

<sup>48</sup> It is interesting to note that when in 1641 the General Court of the Plymouth and Massachusetts Bay Colonies wished to abolish feudal tenure, they shrewdly refrained from using that shifty word, and declared that thereafter lands should be free from the specific feudal burdens therein enumerated. See the terms of this unusual ordinance set out in Vance, *op. cit. supra* note 2, at 258, n. 54.

<sup>49</sup> (1290) 18 Edw. I, st. 1, cc. 1, 2; c. 3 is omitted. The translation is that given in 1 PICKERING, STATUTES AT LARGE (1762) 255.

for the which he ought to be attendant and answerable to the same chief Lord, according to the Quantity of the Land or Tenement sold for the Parcel of the Service so due."

The wailing preamble of this Act sufficiently indicates its purpose. Even at this time, the services reserved in feudal grants, which were enforceable against the land in whomsoever's hands it might be, were of relatively small importance; but escheats, wardships and marriages of feudal wards brought large profits to the overlords, of whom, even in the time of Edward I, the king was by far the most important.<sup>50</sup> In recognizing the unrestrained power of sale in tenants in fee the statute was merely registering the status quo. The real purpose of the enactment was to save to the feudal lords their escheats, wardship and marriages, the value of which had been substantially destroyed by the practice of subinfeudation. In chapter one, the statute provides that a subsequent feoffee "shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before." Again, in chapter two, which provided for the apportionment of services in case of the conveyance of a part of the land held by the feoffor under a single previous feoffment, the language carefully provides that the new feoffee shall hold of his feoffor's lord, and be answerable to that lord for the part so taken. Nothing in the statute justifies Professor Gray's statement that it "enacts that in all conveyances in fee the tenant shall not hold of the grantor but of the grantor's lord."<sup>51</sup> It merely provides that the new feoffee shall hold by the old tenure of the feoffor's lord after the analogy of the familiar feoffment by substitution. There is nothing in it to prohibit the new feoffee from also holding of his feoffor by such tenure—that is, such aggregate of legal relations—as may be agreed between them. And that is exactly what was done. In an undated charter of feoffment probably made shortly after the enactment of the Statute,<sup>52</sup> the tenendum

<sup>50</sup> See 2 HOLDSWORTH, *op. cit. supra* note 34, at 348, 349; 3 *ibid.* 80.

<sup>51</sup> GRAY, *op. cit. supra* note 1, § 21. A similar statement is made by HOLDSWORTH, *op. cit. supra* note 34, at 36. "The Statute of Quia Emptores prevented any person from granting lands in fee simple so that the lands were held of him."

<sup>52</sup> This deed is printed in Latin from the original, "with the inspection of which we have been favored," together with the English translation given below, in (1853) 45 LEGAL OBSERVER, 191:

"Let those present and future know, That I, Thomas Charles of Horn-den, have given, granted, (*dedi, concessi*) and by this my present deed have confirmed (*confirmavi*) to Ralph Hardel, citizen of London, forty acres of land with their appurtenances, with the houses and buildings being on the said land, of which 36 acres are in the parish of Hornden, of the fee of the Lord Ralph of Arden, which I gained by single combat, and four acres with their appurtenances are in the parish of Stanford at Hallinbro of the fee of William Richer and Maude his wife.

clause<sup>53</sup> still ran to the feoffor and his heirs and the feoffee bound himself and his heirs and assigns to render service of one penny annually to the feoffor, his heirs and assigns as consideration for the feoffor's warranty of the land, although the provisions of the statute were fully met by a recital that the feoffee was to render to the feoffor's lord the services due to him. Certainly the parties to this particular feoffment would have been much surprised if told that no tenurial relationship existed between them. After the statute, feoffees began to insist that feoffors should give express warranties to take the place of the old feudal warranty no longer implied. It is probable that the remote chief lord of the fee, especially when he was the king, proved a very unsatisfactory vouchee. Feoffors still reserved service of many kinds, tending more and more to take the form of quitrents, quite familiar in our own time. The feudal right

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"To have and to hold of me and my heirs to the said Ralph and his heirs, or to whomsoever they shall choose to give, sell, or assign the said lands with their appurtenances, and their heirs well and in peace, freely, quietly, hereditarily, and for ever.

"Performing therefor the service due to the Lords of the fee, viz., to Ralph of Arden and his heirs 6s. per annum, at the four terms in the year, viz., at Easter 1s. 6d., and at the Feast of St. John the Baptist 1s. 6d., and at the Feast of St. Michael 1s. 6d., and at the Feast of St. Andrew the Apostle 1s. 6d., and to our Lord the King annually 2d. for ward and for two men to keep the said ward for one night in the proper and accustomed place,—and to Maude, the widow of William Richer, and her heirs, 10d. per annum twice in the year, the half at Easter and the half at the Feast of St. Michael. And to me, Thomas, and my heirs, 1d. at Easter for all services, rents, and secular demands appertaining to me or my heirs.

"And I the said Thomas Charles and my heirs will warrant, defend and acquit all the aforesaid lands with their appurtenances to the said Ralph Hardel and his heirs or their assigns, against all people, as well Christian as Jews, for the aforesaid service.

"And of this gift, grant, warranty, defence, and acquittal, the said Ralph has given me 36 silver marks in one sum.

"Whereof are witnesses, Simon of Dunthene, Jacob of Stanford, Thomas of Mucking, and John his brother, William of Langton, Walter of Wareham, Robert of Spring, John Malegrese, John of Coningham, Thomas Bendeville, Walter of Hornden, clerk, and others."

In a note in the *LEGAL OBSERVER*, *ubi supra*, the absence of a date is explained by this quotation from *CO. LITT. c. 1, §1, f. 6a*:

"The date of a deed many times antiquity omitted; and the reason thereof was, for that the limitation of prescription, or time of memory, did often in processe of time change; and the law was then holden, that a deed bearing date before the limited time of prescription, was not pleadable; and therefore they made their deedes without date, to the end they might alludge them within the time of prescription. And the date of the deedes was commonly added in the raigne of E. 2 and E. 3, and so ever since."

<sup>53</sup> "The tenendum was of use before the passing of the Statute of *Quia Emptores* to state whether the purchaser was to hold of the vendor or his lord." *ELPHINSTONE, CONVEYANCING* (7th ed. 1918) 127.

to distress was of course no longer implied, but it was usually given by contract, when the rent reserved became rent charge. Among the rights that could by contract thus be retained by the feoffor there might be and frequently were reversionary interests. Quite frequently the feoffor or grantor reserved a power of entry for condition broken, thus sometimes reacquiring possession of the land. To such reservation the Statute Quia Emptores had no application whatever.<sup>54</sup> Less frequently, land was conveyed in fee subject to a special limitation, which might by possibility cause the land to revert to the grantor or his heirs. Such determinable fees, and the consequent possibilities of reverter, may have been undesirable interests, and highly objectionable as clogs upon alienation, but they were not in the least affected by the Statute Quia Emptores. Sanders' now famous discovery was a mistake, historically as well as pragmatically.

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<sup>54</sup> Gray, confronted with the undeniable fact that rights (powers) of entry on breach of condition subsequent had uniformly been enforced by the English courts even when the feoffment was in fee, thus explains the seeming inconsistency of his contention that these shadowy interests remained in the feoffor unscathed of the statute that he thought so fatal to possibilities of reverter:

"The distinction between a right of entry for condition broken and a possibility of reverter is this: after the Statute, a feoffor, by the feoffment, substituted the feoffee for himself as his lord's tenant. By entry for breach of condition, he avoided the substitution, and placed himself in the same position to the lord which he had formerly occupied. The right to enter was not a reversionary right coming into effect on the termination of an estate, but was the right to substitute the estate of the grantor for the estate of the grantee. A possibility of reverter, on the other hand, did not work the substitution of one estate for another, but was essentially a reversionary interest,—a returning of the land to the lord of whom it was held, because the tenant's estate had determined." GRAY, *op. cit. supra* note 1, § 31.

But as already shown, rights of entry are not less reversionary in nature than possibilities of reverter. Both are contingent reversionary interests. More specifically, the former are powers reserved by the feoffor, by the exercise of which, upon the happening of the contingency stated (breach of condition) the feoffor extinguishes the legal relations of the defaulting tenant, and creates in himself the right of possession as well as the other legal relations that go to make up the aggregate we call a fee. See *Elliott v. Boynton* [1924] 1 Ch. 236. In the case of the possibility of reverter, the feoffor reserves a contingent right of possession which will "vest," if ever, only on the happening of the contingency specified in the special limitation upon which the estate is conveyed. In the one case the feoffor's reserved right may be said to be contingent upon two events, *viz.*, breach of condition and entry, while in the other that right is contingent upon one event only, the falling in of the special limitation. The holding of the English courts that rights of entry are subject to the rule of perpetuities (*In re Hollis's Hospital* [1899] 2 Ch. 540) is a sufficient acknowledgment that the grantor retains an expectant interest in land.