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Interests in Chattels Real and Personal*

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While the trust and the will have played no small part in the modern law as to future interests in land,¹ in the corresponding law as to chattels they have, as it were, stolen the show. The immutability and indestructibility of land made the law of estates workable without the interposition of any third party to safeguard the property for those interested. The personal chattel had, and has, no such immutability or indestructibility, and the interposition of some third party such as the trustee, in the case of the trust, or the executor or administrator with the will annexed, in the case of the will, is almost, if not quite, essential to the security of the person entitled to the future interest. This difference between land and the personal chattel is not something temporary or artificial. The trustee or the executor or the administrator with the will annexed is, therefore, likely to continue to play just as important a part in future interests in chattels personal as he has in the past. Well-advised settlors of such property will put it in trust and not hazard the application to it of the common law of estates. Not all settlors, however, are well-advised, and so the applicability of the common law of estates even to chattels personal is not entirely academic.

The typical chattel real was, and is, the term for years. Such an interest is an interest in land, a leasehold rather than a freehold, and were it not for the accidents of legal history, would be classified primarily with other interests in land rather than with chattels. The subject matter of leasehold and freehold alike is the land and the land is no less immutable or indestructible in the one case than in the other. There is no such compelling reason, therefore, for the interposition of a third person for the protection of future interests in chattels real as there is in the case of chattels personal. This has been reflected in pronounced differences in the law of future interests applicable

*This is the fourth of a series of articles by the author. The first, *The Common Law Scheme of Estates*, appeared in (1933) 18 IOWA L. REV. 425; the second, *Equity and the Law of Property*, appeared in (1934) 20 IOWA L. REV. 1; the third, *The Conversion of the Use into a Legal Interest*, in (1935) 21 IOWA L. REV. 1. Subsequent articles will take up Alienability and the Rule against Perpetuities, and Statutory Reform in the Nineteenth Century.

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1. See articles cited *supra* note *.

to the two types of chattels.² But as a whole these differences have been less conspicuous than the factual differences between the two types of chattels would lead one to expect. The chattel character of the term for years has, at times, proved weightier than its incidence in the land. It was this chattel character that was held in England to keep it outside the scope of the Statute of Uses³ and that made its limitation by will independent of the Statute of Wills.⁴ This freedom of the term for years from the Statutes of Uses and Wills freed the term for years from the prejudices aroused by those Statutes and allowed a development of the trust and of executory interests in connection therewith that profoundly affected the whole law.

The leading case⁵ on future interests in chattels involved a chattel personal and for more than three quarters of a century⁶ remained the only authority to be reckoned with as to chattels generally. In the time of Henry VIII, however, there came to be a great increase in long terms for years,⁷ and until the rise of the modern moneyed securities it was the limitation of those long terms for years rather than the settlement of personal chattels that occupied the attention of the courts. This increase in long terms for years was due partly to the increased protection given the term for years by the St. 21 Hen. VIII, c. 15 (1529) against collusive proceedings by the one having the fee, partly to the suppression by the Statute of Uses of the devise of land by way of the use,⁸ partly to the desire to avoid the incidents of tenure *in capite*,⁹ and perhaps most of all, to the fact that uses limited on legal terms for years were held not to be within the Statute of Uses¹⁰ and the consequent development of long trust terms to satisfy the various exigencies of family settlements.¹¹ With the change in the form of moneyed securities from rents¹² to stocks and bonds¹³

2. Particularly in the continued application of the theory of use and occupation to chattels personal after the substitution of the theory of the executory devise in the case of chattels real. The theory of use and occupation assumed the continuing function of the executor. In the case of the executory devise, the assent of the executor was given once and for all to the first devisee. As to these matters see *infra Use and Occupation* and *The Executory Devise*.

3. 27 HENRY VIII, c. 10 (1535-1536).

4. 32 HENRY VIII, c. 1 (1540).

5. Y. B. 37 Hen. VI, 30 (1459); see *infra Use and Occupation*.

6. Until Dyer 7a, pl. 8 (1536).

7. 2 BL. COMM. * 142; 4 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1924) 465, 7 *id.* (1926) at 130. Joshua Williams was struck with their vogue in Elizabeth's time; see his THE SETTLEMENT OF REAL ESTATE (1879) 258.

8. 4 HOLDSWORTH, *op. cit. supra* note 7, at 465 n. 2.

9. 5 *id.* (1927) at 306, 307; 7 *id.* (1926) at 130.

10. Anon., Dyer 369a, Jenk. 245 (1580).

11. For a consideration of these long trust terms, see WILLIAMS, REAL PROPERTY (23rd ed. 1920) 584-594.

12. See Frank A. Fetter, *Rent Charge*, 13 ENCYCLOPEDIA OF THE SOCIAL SCIENCES (1934) 292.

13. In the last decade of the seventeenth century, dealings in company shares became numerous enough to cause the publication of a paper listing the prices of stock and shares (8 HOLDSWORTH, (1926) *op. cit. supra* note 7, at 214, and in 1704 two famous merchants in London had told Holt, C. J., that "bonds for money were transferred frequently, and indorsed as bills of exchange." Buller v. Crips, 6 Mod. 29, 30. See 8 HOLDSWORTH (1926) *op. cit. supra* note 7 at 172 n. 2, 175.

and the great industrial development of the nineteenth century, outstanding securities classed as personal chattels came to form a predominant element in the national wealth.¹⁴ This new form of wealth was fairly permanent in its nature, primarily intended for investment, and suitable, therefore, for family settlements. It was made to order for the trust device. As the trust had again come into its own, there was, therefore, little occasion for any great development as to what might be done with these securities by way of future limitation at common law.¹⁵

Long terms for years have not been as common in the United States, with the exception of Maryland, as in England, and so the law as to their future limitation has received scant attention, but long building leases have an increasing vogue¹⁶ and spendthrift trusts tend to the increase of long trust terms. In the United States, too, the tendency to allow to be done by deed, what can be done by will,¹⁷ must be reckoned with in the future. Nevertheless it is by will, rather than by deed, that most settlements in the United States are made. It would, therefore, seem that the part played in the past by the will and the trust in the limitation of future interests in chattels is not likely to be materially lessened. This predominant part played by the will and the trust cannot be emphasized too much and should not be lost sight of when considering future interests in chattels in their less routine aspects.

BAILMENT AND THE LANDLORD-TENANT RELATIONSHIP

The nearest thing to the landlord and tenant relationship in the law of personal chattels was, and is, the bailment. The landlord finds his counterpart in the bailor, the tenant his in the bailee. Both the bailment and the lease for years concern specific property. Both commonly involve the turning over of this specific property for the time being to another. In both there is a separation of possession from proprietary right. The interest of the bailor is often spoken of as a reversionary interest. And yet the two relationships are not identical. The bailor is not a *land* lord. Coke stated that there was no privity of estate between the bailor and bailee, so that the same covenant made as to land and cattle would run with the land but not with the cattle.¹⁸ On the other hand, because, it would seem, trespass *vi et armis* was denied to the landlord subject to a term for years,¹⁹ it was denied also to the bailor of the furnishings

14. Lionel D. Edie, *Investment*, 8 ENCYCLOPEDIA OF THE SOCIAL SCIENCES (1932) 263, 265, estimated the value of outstanding securities in the United States in recent years as from one third to one half of the national wealth. In England it was estimated at 60 per cent of the national wealth for 1918.

15. 7 HOLDSWORTH (1926), *op. cit. supra* note 7, at 477-8.

16. See White, *Practical Considerations in the Drawing of 99 Year Leases* (1920) 18 OHIO L. REP. 311.

17. See *infra* In the United States.

18. Spencer's Case, 5 Co. 16 a (1583).

19. Bedingfield v. Onslow, 3 Lev. 209 (1685).

in a rented house,²⁰ though previously there seems to have been no such restriction on the right of the bailor to bring either trespass or trover.²¹ Both relationships had their origin in contract.²² But while the bailment remains predominantly contractual,²³ in the case of the lease, the emphasis has shifted, too far perhaps,²⁴ from contract to property. There has been no such shift in the case of the bailment.

The tenant for years seems to have been a misfit in the predominantly feudal society in which he emerged. He had not the settled aspect of the tenant in fee or even of the tenant for life. He was likely to be a husbandman,²⁵ or a money lender²⁶ or an investor.²⁷ Whether for these or more strictly juristic reasons,²⁸ he was denied the character of a freeholder and the term for years denied the character of a freehold.²⁹ Not only was the term for years not a *franc-tenement* or freehold, in the beginning, it was treated as a mere contract and not as an interest in the land at all.³⁰ This was reflected in the doctrine of the later law that the term for years was not a 'tenement' of any kind.³¹ That it was not a 'tenement' was considered to follow inevitably from the

20. Ward v. Macauley, 4 T. R. 489 (1791).

21. See the opinion of Baron Parke as to trover in *Manders v. Williams*, 4 Exch. 339 (1840) and the admission by Holmes (COMMON LAW (1881) 172-3) although contrary to the general trend of his argument. See, further, Bordwell, *Property in Chattels* (1916) 29 HARV. L. REV. 517-9.

22. As to the term for years, see 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2nd ed. 1899) 36, 106-7, 217. Bailment was a "real" not a consensual contract, —AMES, LECTURES ON LEGAL HISTORY (1913) 76-7. To bail was to deliver the possession of a chattel and not necessarily with the obligation of redelivery to the bailor or his nominee. *Bailler* might be used to indicate the consummation of a sale or a loan of money. See 2 POLLOCK AND MAITLAND, *id.* at 169, 185. In this wide sense the bailment of a chattel corresponded very closely with the feoffment of land and had more of conveyance and property in it than in the beginning had the lease for years. In both the bailment and the feoffment it was the possession that was transferred and there was no inherent reason why some interest could not be retained in the case of the bailment as well as in the case of the feoffment. Pollock and Maitland are convincing that this was the case and that the accepted conception behind those kinds of bailment which would still be called such, was one of retention of ownership or property by the bailor. *Id.* at 176-7. If the bailor lacked protection against third parties, the fault lay with the remedial law. *Id.* at 177-8.

23. See Cullen, *The Definition of a Bailment* (1926) 11 ST. LOUIS L. REV. 257; cf. Laidlaw, *Principles of Bailment* (1931) 16 CORN. L. Q. 236.

24. As in the reluctance to apply the doctrine of dependant covenants to leases and the insistence on the lease as the purchase of an interest in the premises rather than an agreement for their use.

25. The evidence tends to show that the husbandry lease—the common type of lease in the United States—was not as early as the beneficial lease purchased by a premium. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 111, 113.

26. *Id.* at 112.

27. *Id.* at 116-7.

28. *Id.* at 114-5.

29. *Id.* at 36-7.

30. *Id.* at 36, 106-7, 217.

31. See Challis, *Are Leaseholds Tenements?* (1890) 6 L. Q. REV. 69, REAL PROPERTY (3rd ed. 1911) app. I; WILLIAMS, REAL PROPERTY (23rd ed. 1920) 22.

fact that it could not be entailed.³² Already in Bracton's time, however, this denial of any interest in the land to the termor had been outmoded,³³ a special writ had been devised for his protection,³⁴ and he had been accepted into the category of tenants, for he was doing fealty.³⁵ His protection³⁶ and his responsibilities³⁷ as a tenant were still further increased by legislation of Edward I. As a tenant he had a status or estate,³⁸ and in the new category of estates, which developed with the Statute of Quia Emptores,³⁹ the term for years found a more ready place⁴⁰ than in the category of tenements, which came to be identified with the freehold.⁴¹ Even here, however, the contract origin of the term for years remained somewhat of a stumbling block and so able a lawyer as Challis could say that "terms of years originally pushed themselves into the rank of 'legal estates' only by virtue of the statute 21 Hen. 8, c. 15."⁴² He was here, however, parting company with Littleton and Coke⁴³ whose treatment of the term for years was essentially that of Bracton.

The term for years, therefore, seems to have changed from a mere contract to a property right by the time of Bracton and the relationship of lessor and lessee for years to have developed into that of landlord and tenant.⁴⁴ This landlord and tenant relationship was the privity of estate which Coke attributed to the lessor and lessee for years, to sustain the running of the covenants with the term, but which he denied to the bailor and bailee.⁴⁵

The improved status of the termor was marked by an increasing effectiveness of his remedies against third parties. The writ given him in Bracton's time was narrowly construed,⁴⁶ but trespass *vi et armis* was probably early accorded him and he soon had a special form of this action for cases of ejectment.⁴⁷ Only damages were at first given in ejectment but by the time of Henry VII specific recovery was definitely allowed.⁴⁸ The termor thus gained

32. Challis, *ibid.*

33. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 107-9, 113.

34. *Id.* at 107-8; BRACTON, *DE LEGIBUS ANGLIAE*, fol. 220.

35. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 113; BRACTON, *op. cit. supra* note 34, fol. 80; LITTLETON, *TENURES*, § 132; *CO. LITT.* *67b.

36. Against collusive proceedings, *STATUTE OF GLOUCESTER*, 6 EDW. I, c. 11 (1278).

37. He was made liable for waste, *id.* c. 5.

38. See 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 10-11.

39. 18 EDW. I, cc. 1-3 (1290).

40. See Bordwell, *The Common Law Scheme of Estates* (1933) 18 *IOWA L. REV.*, 426 n. 13, 427, 429.

41. WILLIAMS, *op. cit. supra* note 31.

42. *REAL PROPERTY* (3 ed. 1911) 64.

43. He frankly admits as much; Challis, *Are Leaseholds Tenements?* (1890) 6 *L. Q. REV.* 69.

44. Examples of sub-leases are given of as early dates as 1271 and 1286. 2 POLLOCK AND MAITLAND, *op. cit. supra* at note 22, at 112 n. 8.

45. *Spencer's Case*, 5 *CO.* 16 a (1583), cited note 18, *supra*.

46. *Id.* at 108.

47. *Id.* at 108-9.

48. MAITLAND, *EQUITY AND THE FORMS OF ACTION* (1916) 350.

a remedy more suited to the times than the old freeholders' remedies which he had been denied, and it soon supplanted them as the current method of trying title to land whether leasehold or freehold.⁴⁹ With the great development of long terms in the time of Henry VIII which has already been mentioned, the term for years came to have a prominence in the conveyancing world that was very different from its humble beginning. The genesis of the recent property reform in England was the proposal to make the only interest in land the term for years. This was termed evolution and not revolution. It was, however, too revolutionary for the more conservative lawyers.⁵⁰ The fee simple was allowed to retain its place as a legal estate but the general character of the reform was not changed.⁵¹

Less spectacular has been the history of the bailment. In the earlier history of the law the bailee was apparently in a more favored position than the termor for years. Even before the advent of trespass, he, apparently, had remedies, such as the *actio furti* and the appeal of robbery, against third parties.⁵² Dean Ames would logically have ascribed to him, as to the disseisor,⁵³ the absolute 'property' in the goods, with a mere contract right in the bailor.⁵⁴ To have ascribed the absolute property in chattels to the bailee, however, would have found no support in the authorities and would have been as *contra* to the ideas of the times of which Pollock and Maitland wrote as of later times. To the lawyers and laymen of that time the bailor had the property, the bailee, the custody.⁵⁵

A more substantial theory than that of property in the bailee is that the English law started out with the denial of all remedy to the bailor against third parties.⁵⁶ A corollary to this theory was that of absolute liability of the bailee

49. *Id.* at 351-3.

50. See Bordwell, *Property Reform in England* (1925) 11 IOWA L. REV. 1, 8-9.

51. For the early actions when goods had been stolen or taken by robbery and as to the availability of these actions to the bailee, see 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 157-170.

52. "The disseisor gained by his tort both the possession and the right of possession; in a word, the absolute property in the chattel." AMES, LECTURES ON LEGAL HISTORY (1913) 179.

53. Dean Ames expressly applied the doctrine of the preceding note to any conversion by the bailee (*id.* at 180). Nor did he confine it to cases of conversion. It was his explanation (*id.* at 194-5) of why in the later law the absolute property was attributed to the bailee for life. He did not, in so many words, apply it to the ordinary bailment where there had been no conversion but such was the logic of his position for he would have allowed the bailor only a personal action in detinue against the bailee (*id.* at 73-5) and in such action the bailor was not entitled to the return of the chattel as the defendant had the alternative of returning the chattel or paying its value. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 174-5. Ames' theory of the bailment in the later law was that of a divided ownership between the bailor and bailee. LECTURES ON LEGAL HISTORY (1913) 193-4.

54. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 176-7. See *supra* note 22.

55. The best rounded account of this theory is that by Pollock and Maitland. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 155-180. It was Mr. Justice Holmes, however, that first gave it general currency. COMMON LAW (1881) 165-180. The hesitation

to the bailor. It was Mr. Justice Holmes who gave this theory vogue and, as is so often the case, the limitations he put on the theory were overlooked by his successors. He admitted the grant of trespass to the bailor "at a pretty early date"⁵⁶ and "that this was spoken of bailments generally, and was not limited to those which are terminable at the pleasure of the bailor."⁵⁷ Further "it was to be expected that some action should be given the bailor as soon as the law had got machinery which could be worked without help from the fresh pursuit and armed bands of the possessor and his friends. To allow the bailor to sue, and to give him trespass, were pretty nearly the same thing before the action on the case was heard of."⁵⁸ Mr. Justice Holmes was evidently of the opinion that the gift of trespass to the bailor was practically as old as the action itself and that this was not confined to the bailment at will. Such is believed to have been the case. The judges of the Year Books seem to have had no difficulty in giving trespass to the bailor.⁵⁹ For a time trespass threatened to occupy a field comparable to the modern trover. The difficulty lay not in giving the bailor the action but in finding a taking *vi et armis* in a delivery by the bailee to a stranger or in some other act of the bailee after a delivery to him. Conversion was a much more elastic term than trespass *vi et armis* and became the fashion instead.

The practice of giving two actions for one wrong, e. g., trespass to the bailor and to the bailee, was not, if we can believe the statement of counsel in 1344-5, confined to trespass but was true also of the Appeals, because, he says,—"both servant and master will have an appeal in respect of the same felony."⁶⁰ The practice of the double appeal, of master and servant, is as old,

with which Pollock and Maitland accede to this theory in their direct account of it is somewhat lost in the sweeping generalization at the end of the chapter as to the inability of the law of the time to sanction more than one interest in a chattel. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 170, 172-3, 182-3. However sound this generalization may be as to early feudal or pre-common law days, it does not seem true of the historic common law.

56. COMMON LAW (1881) 171.

57. *Id.* at 172; *Ward v. Macauley*, 4 T. R. 489 (1791), cited note 20, *supra*, *contra*, fitted into the law of actions of its time and gained such general currency that even such scholars as Ames and Maitland, with this statement of Holmes to warn them, failed to recognize its novelty. This unawareness was a contributing factor to what is believed to be the false impression that the historic common law started out without protection to the bailor against third parties. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 173 n. 1. Trespass for the bailor seems not to have been the exceptional but the regular thing until trespass on the case finally made it exceptional.

58. COMMON LAW (1881) 172. Fresh pursuit had been a marked feature of the early Germanic action for cattle stealing and of the like actions for robbery and theft in the English local courts and was carried over to a certain extent into the Appeals of Robbery and Larceny in the royal courts. These were more highly punitive proceedings than the earlier actions but retained their recuperatory character. Fresh pursuit seems to have remained a requirement for the restitution of the stolen property after it had given way to fresh prosecution as a condition of bringing the Appeals. AMES, *op. cit. supra* note 52, at 52; 1 BRITTON (ed. Nichol 1865) 118.

59. See Bordwell, *Property in Chattels* (1916) 29 HARV. L. REV. 501, 519.

60. Y. B. 18-19 Edw. III 508; *Fitzh. Abr.* 32.

at least, as 1194.⁶¹ Servant and bailee were by no means clearly differentiated at that time,⁶² in fact, are not today except for purposes of criminal liability.⁶³ The servant away from the house or the presence of his master was treated like a bailee.⁶⁴ Bracton's statements which are cited to show that the bailee had the Appeals, refer primarily to cases of servants or villeins.⁶⁵ Nothing is said by him of two Appeals for one felony but that the possibility of the Appeal in the servant or villein should have meant the denial of it to the master or lord seems just as unlikely as it did to the lawyers of the following century. The emphasis of Bracton⁶⁶ and the other writers of his time⁶⁷ is on two interests to support an Appeal and the logic of that, in the case of the bailment, was two Appeals for one felony.

Back of trespass and the Appeals, in the law of the old local courts, the negative side of the old Germanic scheme, which would have denied all relief against third parties to the bailor, may have found some place, but any direct evidence to that effect is surprisingly lacking. Arguing from the later law, one might suppose that the law in England as to the bailor had taken a different turn from that on the Continent from the first. Whether this be so or not, the historic common law, the law of the King's court, did take a very different turn at a very early date. It would seem error, therefore, to make the denial to the bailor of any remedy against the third hand "the starting point of our common law."⁶⁸ Rather, it would seem, the historic common law gave him protection from the first and took very easily to the notion of two protected interests in one chattel. If this be so, the gap between land and chattels was even less than has been urged.⁶⁹

If the foregoing be sound, the failure to apply the law of tenure and estates and remainders to chattels personal was not the consequence of any difficulty

61. 1 Rot. Cur. Reg. 51; AMES, LECTURES ON LEGAL HISTORY (1913) 59 n. 2. Ames' statement, "nor could a servant maintain an appeal without his master" (*id.* at 59) is hardly borne out by his citations. There was an early tendency to require something more than mere *custodia* to support an Appeal lest the master hide behind the servant, but the thing emphasized as necessary was the servant's responsibility to his master and not the latter's presence. See 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 172 n. 2.

62. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 172 n. 2.

63. HOLMES, COMMON LAW (1881) 227.

64. *Id.* at 226.

65. FOLIOS 103 b, 146 a.

66. *Ibid.* and fol. 151.

67. 1 BRITTON (ed. Nichol 1865) 56; FLETA, LIB. I, c. 39; 2 MIRROR OF JUSTICES, (Sel. Soc.), c. 16, p. 57.

68. As urged by Pollock and Maitland. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 172.

69. Maitland, *The Seisin of Chattels* (1885) 1 L. Q. REV. 324, and Ames, *Disseisin of Chattels* (1889) 3 HARV. L. REV. 23, showed that the gap between the early land law and the law of chattels was not as great as had been supposed. Pollock and Maitland would seem to have left this gap wider than was warranted in doubting that the law of Bracton's time could sanction two rights in one chattel. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 181-3.

in allowing two interests in a chattel. The surprising thing would have been if it had been so applied. Despite the analogy between the feoffment and the bailment⁷⁰ their fields were far apart. The background of the common law scheme of estates and the subsequent steps in its development were lacking in the case of the bailment. That background was the feudal land law. Status was feudal and by a peculiar twist status became estate.⁷¹ The seignory with its landlord and tenant relationship was feudal. Under the Statute of Quia Emptores it was only one step from the seignory to the modern reversion with its landlord and tenant relationship.⁷² A second step, and a momentous one, was from the reversion to the remainder.⁷³ Had the feudal system applied to chattels personal the first step and then possibly the second might have been expected but certainly not the second without the first. As it was, neither step was taken. In the case of the chattel real the first step was taken⁷⁴ but not the second.⁷⁵

Unlike the feoffment and the bailment, the lease for years was dependent not on delivery but on entry. This entry might, and commonly would be, *in futuro*. The leasehold *in futuro* came naturally, therefore, though the freehold *in futuro* was proscribed. A rival to the remainder, the *interesse termini*, developed⁷⁶ and it was able to hold its own against the remainder in England until abolished by the Law of Property Act, 1925.⁷⁷ Neither delivery nor entry were necessary in the case of the will and so the limitation of chattels by will developed quite independently of the bailment and the lease, in different courts and under the influence of a foreign system of law.⁷⁸

USE AND OCCUPATION

The idea of a use and occupation in one person with the property in another appears in the leading case involving future interests in chattels⁷⁹ and apparently was at first applied to both chattels personal and chattels real.⁸⁰ With the great development of future interests in chattels real, it was

70. *Supra* note 22.

71. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 10-1, 78-9.

72. Bordwell, *The Common Law Scheme of Estates* (1933) 18 IOWA L. REV. 425, 430-1.

73. *Id.* at 432-3.

74. See *supra* note 44.

75. See *infra* *The Interesse Termini*.

76. *Ibid.*

77. 15 GEO. V, c. 20, § 149 (1) (2).

78. See *infra* *Use and Occupation* and *The Executory Devise*.

79. Y. B. 37 Hen. VI 30 (1459).

80. Where a chattel real was not devised outright, the common practice seems to have been to devise the use and occupation to the one intended to have the limited interest rather than to devise the term or the land for the limited period, or to devise an estate. When the theory as to terms for years shifted from use and occupation to executory devise, there was no longer occasion for this practice, but the continued emphasis in the later cases that the use and occupation of the land or term was the same thing as the land or term itself, shows the prevalence of the early practice. The term occupation in the phrase "use and occupation"

discarded as to them⁸¹ but retained as to chattels personal⁸² and then gradually faded out of the picture in England as to the latter,⁸³ to be revived by John Chipman Gray in consequence of a colloquy between himself and a student.⁸⁴

Use and occupation has always been confined to testamentary gifts and therein lies the clue to its origin. Testamentary gifts were within the jurisdiction of the Ecclesiastical courts⁸⁵ and later of Chancery⁸⁶ and the greater part of the law relating to them was developed under the influence of the canon or civil law.⁸⁷ That use and occupation had its genesis in the closely related *usus* and *habitatio* of the civil law is convincing.⁸⁸ Chancery judges of the late Stuarts turned to the civilians to find the true doctrine.⁸⁹ The civilian rule that there could not be a usufruct in perishables⁹⁰ is reflected in the like English rule as to life estates in consumables.⁹¹ In the later civil law, *usus* and *habitatio* were classed as personal servitudes.⁹² These were "much more like limited ownerships than like servitudes, but since a terminable ownership was not recognized, the fact that they were of limited duration caused them to be considered as rights different from, and less than, ownership—*jura, in re aliena*."⁹³ Exactly the same distinction was made between the use and occupation of the English law and the property in the goods. The law of life estates was a law of limited ownership. Not so with use and occupation. It was something different and apart from the property or ownership.⁹⁴ Again, in the classical Roman law "ownership could not be conferred on the terms that it was to end at a certain time or on the occurrence of a certain event: there was no such thing as a terminable ownership, expressly created."⁹⁵ Compare this with Brooke's famous comment that "a gift or devise of a chattel for an hour is for ever", but "where a man devises that W. O. shall have

would seem to have special reference to the chattel real and to correspond to the *habitatio* of the Roman law.

81. *Infra* p. 141.

82. *Id.*

83. *Id.*

84. GRAY, THE RULE AGAINST PERPETUITIES (3rd ed. 1915) app. F.

85. 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW (ed. 1922) 625-629.

86. *Id.* at 629-30.

87. 3 HOLDSWORTH, *id.* (ed. 1923), at 536.

88. For an account of these and other personal servitudes in the Roman law see BUCKLAND, A TEXT-BOOK OF ROMAN LAW (1921) 267-274. These applied to moveables as well as land. "*Habitatio* was a modification of *usus* of a house or lodging." (*Id.* at 274). *Usus* was commonly created by will (*id.* at 273 n. 4) though not necessarily so (*ibid.*; D. 7. 8. 1.), while *habitatio* was apparently necessarily so created (*id.* at 274).

89. *Vachel v. Vachel*, 1 Cas. Ch. 129 (1669); *Hyde v. Parrat*, 1 P. Wms. 1 (1695).

90. BUCKLAND, *op. cit. supra* note 88, at 270.

91. *Randall v. Russell*, 3 Mer. 190 (1817).

92. BUCKLAND, *op. cit. supra* note 88, at 267-8.

93. BUCKLAND, A MANUAL OF PRIVATE ROMAN LAW (1925) 162.

94. Y. B. 37 Hen. VI 30 (1459).

95. BUCKLAND, *op. cit. supra* note 93, at 113.

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the occupation of his plate for term of his life, and if he dies, that it shall remain to I. S. this is a good remainder: for the first hath but the occupation, and the other after him shall have the property."⁹⁶

Brooke's epigram, making ownership for a day ownership forever, was not, like use and occupation, confined to the case of the devise but was expressly extended to the case of the gift and in another version⁹⁷ confined to the case of the gift. This has obscured its very evident derivation from the Roman law through the jurisdiction of the Ecclesiastical courts over legacies and has given an impression of the inability of the early common law to sanction two rights in a chattel that is unwarranted. The statement did little to hinder the development of future interests in chattels by will for there the notion of use and occupation that went with it was a positive help. There was no such "*diversitie*" in the case of gifts *inter vivos*, however, and so Brooke's striking phrase pretty well killed any chance there might otherwise have been for the gradual application to gifts of chattels *inter vivos* of the common law scheme of estates.

The leading case on use and occupation,—the leading case on future interests in chattels as well—was a case in 1459,⁹⁸ in which the use and occupation of a grail or service book had been given to one executor for life, then to a second executor for life and after his death to the parish. The first executor had evidently turned it over to the parish, whether to be redelivered on request or by way of gift was in question, and after his death it was taken from the parish by the second executor. He was sued in trespass by the wardens of the parish. The report of the case is inconclusive because of adjournment but the discussion closed with the opinion of Moile, J. that the replication, alleging a gift to the parish by the executor who was the first life tenant, was good. There would, therefore, seem to be much in the suggestion of Dyer, C. J.⁹⁹ that the case really turned on the overriding effect of a transfer by an executor¹⁰⁰ rather than on the overriding effect of a transfer by one having the use and occupation. The inconclusive character of the report, however, left this in doubt and up to the time of *Welcden v. Elkington* in 1577¹⁰¹ the common law courts, while ready to accept the theory of a use and occupation for life in the first taker with a subsequent interest in some one else, were apparently agreed that the second devisee was at the mercy of a transfer or even a forfeiture by the one having the use and occupation for life.¹⁰² In reply,

96. BROOKE, ABR. Devise 13, March Transl. 61.

97. BROOKE, ABR., Done 57.

98. Y. B. 37 Hen. VI 30.

99. *Welcden v. Elkington*, Dyer 358 b, 359 a (1577).

100. See GODOLPHIN, THE ORPHANS LEGACY (1685) Pt. 2, c. 16, § 2; 1 WILLIAMS ON EXECUTORS (12 ed. 1930) 547.

101. 2 Pl. Com. 516 (1579); Dyer 358 b, 359 a.

102. The law at the beginning of Elizabeth's reign is well summed up by Brooke: "If lessee for years devise his term, or other his chattel or goods, by testament, to one for

evidently, to inquiries from Chancery, they said that the second devisee in such a case had no remedy.¹⁰³ As there was no remedy at law, Chancery evidently responded by requiring security of the first taker.¹⁰⁴

The inadequacy of the common law remedy of the subsequent devisee of a chattel prior to *Welcden v. Elkington* may have been due, as already indicated, to a confusion between the powers of an occupant and of an executor, for in other cases than that of the grail, the occupant was an, or the, executor, but the difficulty went deeper than this. As far as the common law courts were concerned the property was in the executor until he relinquished it and the various devisees had a claim on him but no interest that the law could recognize until he had assented to the particular devise. The assent to one devise was not an assent to another.¹⁰⁵ The executor was not *functus officio* until he had finally transferred the property. As applied to chattels personal this was rather a desirable doctrine. It left a fiduciary to look after the property.¹⁰⁶ In the case of the chattels real, however, there was no such continued need of responsibility in the executor, for the land could not be destroyed or lost, and the analogy to interests in the freehold would have made the first taker the representative of the subsequent interests. As such representative, the assent to his devise would be an assent to all the subsequent devises, with the executor out of it. Under the theory of use and occupation the devise of the chattel had been a direction to the executor, just as the limitation of the use before the Statute of Uses had been a direction to the feoffee to uses. But if the assent to the first devise of the chattel real was an assent to the subsequent devises as well, then the subsequent devises ceased to be directions to the executor and were a limitation of the chattel itself. The first assent gave subsequent devisees legal rights which were executed automatically and which might survive the death of the devisee during the continuance of the previous devise.

term of his life, the remainder over to another, and dies, and the devisee enters, and aliens not the term, nor gives, or sels the chattel, and dies, there he in remainder shall have it; but if the first devisee had aliened, given, or sold it, there he in the remainder had been without remedie for it (B. *Chattels* 23 *Done* 57). And so B seems if they be forfeit in his life, he in remainder hath no remedy. 33 H. 8 B. *Done* 57 the end." (March Transl. 33).

103. In *Dyer* 74 b (1552) Montague, C. J., said that all the justices in the time of Lord Rich, Chancellor, were of the opinion that in such a case there was no remedy. The case referred to by Montague, C. J., is possibly 2 Edw. VI, referred to in BROOKE'S *ABR.* Devise 13, for Brooke in his various abstracts speaks the same language.

104. Lord Nottingham, in the *Duke of Norfolk's Case*, 2 Swans 458, 464 (1681), says that when the common law judges, in the time of Elizabeth, came to have more regard to the remainder, Chancery, to fix them in this opinion required security, but the more likely process would seem the reverse. The difficulty being a matter of remedy, it was a typical case for the jurisdiction of Chancery. Not to be outdone by Chancery, it would seem, the common law courts gave the remedy they had previously denied.

105. This is clearly brought out in the leading case, *Y. B.* 37 Hen. VI 30 (1459).

106. See Fearn's argument, *CONTINGENT REMAINDERS AND EXECUTORY DEVISES* (6 ed. 1809) 412-414.

This step was taken with regard to chattels real in *Welcden v. Elkington*.¹⁰⁷ Henceforward the theory of use and occupation was out of it as far as the devise of the chattel real was concerned. Some other theory however, was needed to take its place. A possible substitute was the duplication in the chattel real of the interests already familiar in the case of the freehold. *Welcden v. Elkington* tended in that direction and in his less technical moments the language of Brooke had been the language of freehold estates.¹⁰⁸ The stumbling block in the way of this, apparently, was in the allowance of a remainder in a term for years after a devise for life. Remainder in the old sense of something that remained out was compatible with such a limitation but remainder in its more modern sense, and in the sense in which it appears in Coke,¹⁰⁹ of a residue or something left over after the subtraction of a minor interest, was more difficult. It seemed hard to say that there was anything left over after the devise of a life estate in a term for years. A new theory, or at any rate a new name, was necessary to reconcile the common lawyers to the subsequent limitation and this was found in *Manning's Case* in 1609.¹¹⁰ The subsequent interest was called an executory devise. Before taking up the story of the executory devise, however, something further must be said of *Welcden v. Elkington*, of the continued application of the theory of use and occupation to the chattel personal, and of the *interesse termini*.

One of the difficulties in *Welcden v. Elkington* had been to reconcile the subsequent gift to the son with the previous gift to the wife, which, according to the old theory, was in effect a gift of the term itself. It was argued that the subsequent gift to the son was void for repugnancy.¹¹¹ To avoid this repugnancy the judges said that they would treat the gifts as if they had been made in the reverse order, when the repugnancy would disappear.¹¹² The will as a whole was regarded rather than the precise order of the gifts. A like construction was resorted to in *Manning's Case*¹¹³ though from a somewhat different angle.

The further point was made in *Welcden v. Elkington* that though the use and occupation of the land was devised, this would be accounted a devise of the land itself.¹¹⁴ This was even more explicitly brought out in the argument in *Paramour v. Yardley*¹¹⁵ in the Queen's Bench a year later. There counsel said: "In some things the occupation, profit, or use is a distinct thing from the property. As one may have the occupation or use of a glass to look at

107. 2 Pl. Com. 516 (1579); Dyer 358 b, 359 a.

108. *Supra* note 102.

109. Co. LIT. 49 a.

110. 8 Co. 94 b.

111. This seems to have been Baldwin's point in Dyer 7 a (1536).

112. 2 Pl. Com. 522-3 (1579).

113. 8 Co. 94 b.

114. 2 Pl. Com. 524 (1579).

115. *Id.* at 539.

himself in, and another may have the property of it. So one may have the use of a map or of a globe, and another the property. And so one may have the use of a fire, and another the property. And so also of a book, one may have the occupation or use of it to read in it, and the property may be in another. So that in things of this kind the use, occupation, or function is distinct from the property. But otherwise in the case of land, for there he who has the occupation and use of it has the property of it for the time."¹¹⁶

The abandonment of the theory of use and occupation as to chattels real, therefore, did not necessarily mean its abandonment as to chattels personal. Commonly the use and occupation was for life or for a less period.¹¹⁷ In 1565, however, there is a note of a case¹¹⁸ where a former Chief-Justice had devised divers jewels and pieces of plate to one Nicholas and the heirs male of his body and the court were of the opinion that "the said Nicholas had no property in the said plate, but onely the use and occupation." No adverse comment is made on this attempt to create an entail in a chattel personal by way of use and occupation. For some time to come, however, the law courts were strict in insisting that the words use and occupation or similar words should be used and not the language of estates in devising the chattel personal. If the chattel itself was devised for life the gift was absolute.¹¹⁹ However, with the rejuvenescence of Chancery after the Restoration of Charles II and its assumption of the jurisdiction of the administration of decedents estates, Chancery insisted that the exact words used were immaterial and that the devise of the chattel for life should be construed as the devise of the use and occupation.¹²⁰ After these cases in the times of the late Stuarts, there is a great dearth of judicial authority as to the devise of future interests in chattels personal until recent times. In 1788 it was held that the one having the beneficial interest and possession for life could not confer a greater interest than she had on a purchaser¹²¹ and in 1817 that the old rule that a gift for life of a personal chattel was an absolute gift of the chattel would still be followed where there was a specific gift of chattels which are consumed by their very use.¹²² The recent tendency in England to abandon the theory of use and occupation even as to chattels personal and to carry over to them the theory of the executory devise or bequest, applicable to chattels real, will be considered later.¹²³

116. *Id.* at 542-3.

117. The *usufructus* of the Roman law "was usually for life, never more, and, sometimes for a fixed term." BUCKLAND, A TEXT-BOOK OF ROMAN LAW (1921) 268. See also as to *habitatio*, *id.* at 274.

118. Owen 33.

119. Anon., March 106 (1641).

120. *Vachel v. Vachel*, 1 Cas. Ch. 129 (1669); *Hyde v. Parratt*, 1 P. Wmo. 1 (1695).

121. *Hoare v. Parker*, 2 T. R. 376.

122. *Randall v. Russell*, 3 Mer. 190.

123. See *infra*, *The Executory Devise*.

THE INTERESSE TERMINI

What the theory of use and occupation and the theory of executory devise were to the limitation of the term for years by will, the theory of the *interesse termini* was to its limitation at law by act *inter vivos*. These theories are the key to the case law but have proved of variant vitality.

Executory devise, *interesse termini*, remainder, were logical consequences of the three variant transactions under which they originated, the will, the lease for years, and the feoffment. They are another example of the powerful influence in any, and especially in a primitive, system of law, of the method of transfer on the general property law. The will at common law was an informal act and stressed the intent. The lease for years was not so formal as the feoffment, for no delivery was required, but it was more formal than the will in that entry was required and that more stress was laid on the exact words used and less on the intent.

The operative fact of the feoffment was the delivery of the land. The agreement, or the charter of feoffment, that accompanied it, was of secondary importance. Agreement could look to the future but transmutation of possession, which was the phrase used to characterize the common law conveyances, was a present physical fact which occurred once and for all. An agreement could "expect" but not the feoffment, as long as the judges insisted on the importance of the delivery and refused to give delivery a fictitious meaning. This the medieval judges did.¹²⁴ How to reconcile this formal method of transfer with family settlements must have been a problem. It was solved by the invention of the remainder, analogous to the reversion, which was treated as a present interest of future enjoyment arising simultaneously with the particular estate or estates that preceded it.¹²⁵ The contingent remainder did not fit into this scheme very well but in time it too was allowed.¹²⁶ But the general principle of the feoffment, that it could not "expect," remained the same and except with the aid of the Statutes of Uses and Wills, the freehold *in futuro* and the conditional limitation were ruled out.

The contract origin of the lease for years had its disadvantages but it had this advantage, that the agreement of the parties had greater weight in the transaction than the agreement did in the case of the feoffment. And once the agreement was recognized as the vital thing, the way was open for future transfers and future interests, for one could agree as readily to a future transfer or interest as to a present. The consequence of this was that the lease for years, unlike the feoffment, could "expect."¹²⁷ Resort was not necessary,

124. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 22, at 88-92.

125. Bordwell, *The Common Law Scheme of Estates* (1933) 18 IOWA L. REV. 425, 432-4.

126. Bordwell, *supra* note 125, at 434-5.

127. *Palmer v. Thorpe*, Cro. Eliz. 152 (1589).

therefore, to the rather artificial conception of the common law remainder. The leasehold *in futuro* even after the lessor's death, was recognized at an early date¹²⁸ and apparently never questioned. Successive leases could be granted and the first lease made terminable on a contingency and a new lease limited to take effect on the happening of this contingency. Such contingency might have been the death of the previous tenant.¹²⁹ Where the lessor was the holder of the fee, the above cases presented little difficulty. In such case, at any rate, the uncertainty as to the date of beginning or that the contingency was as to event and not merely as to time and might not happen at all, were early swept aside as immaterial. The certainty which characterized the term for years as distinguished from the tenancy for life or the tenancy at will, did not here prove much, if any, of a restriction.¹³⁰

Where there was only a term for years to dispose of, the matter was more difficult.¹³¹ The difficulty, however, was rather as to form than to substance. In an early case, already referred to,¹³² it was said that a grant by a termor of so many of the years as should remain at his death would be void for the uncertainty. Brooke queried as to this, and in the time of Elizabeth it was settled that if the grant at the termor's death took the form of a demise for a definite term of years, the limitation was good.¹³³ In *Locroft's Case* the subsequent grant is reported in Croke and Coke as for a longer term than the original lease¹³⁴ so as to amount, in the modern law at least, to an assignment of the original lease. Apparently if the future sub-lease or assignment took the form of a term for a definite number of years, though its beginning should be an uncertain event such as the death of the termor or of a preceding tenant, the requirement of certainty was satisfied. *Locroft's Case* was that of a term commencing with the death of the termor but if the proper form of a term for a definite number of years were observed, there is no reason to believe that the result would have been different had it followed another term for years de-feasible on the previous tenant's death.¹³⁵ The objection of uncertainty

128. BRO. ABR. *Graunts*, 154, 7 E. 6 (1552), *id.*, *Lease*, at 66; March Transl. 111.

129. The Rector of Chedington's Case, 1 Co. 153 a (1598); a clearer account of the case under the name of *Lloyd v. Wilkinson*, is given in Moore 478.

130. See *The Bishop of Bath's Case*, 6 Co. 34 b (1605).

131. The difference between the two situations is brought out in the citations from Brooke, *supra* note 128.

132. *Supra* note 128.

133. *Grute v. Locroft*, Cro. Eliz. 287 (1591), Moore 395, pl. 514, referred to in *The Rector of Chedington's Case*, 1 Co. 153 a, 155 a (1598), in *Blamford v. Blamford*, 3 Bulst. 98, 108 (1615), by Coke C. J., in *Foot v. Berkley*, Carter 147, 155 (1666), by Tirrel, J. See also *Anon.*, Poph. 4 (1592); *Herbin v. Chard*, Poph. 97 (1595); *Gree v. Studley*, 2 Salk. 413 pl. 3 (1699), 1 Ld. Raym. 737 by Holt C. J.; 10 *Vin. Abr.*, Estate, B. b. 5.

134. Cro. Eliz. 287, 1 Co. 155 a; but in Moore 395, the original lease is given as the longer.

135. Gray does not notice the distinction between the grant of the residue of the years after the termor's death and the grant of a definite term commencing with such death. However, Popham. C. J. (1 Co. 155 a) and Walmesly, J. (Poph. 97), whom Gray quotes

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could not henceforth be made merely because the future interest was to begin at the termor's or other tenant's death, and the *Bishop of Bath's Case*¹³⁶ would have seemed to remove the objection based on the uncertainty of the continuance of such future interests even though it were for the "residue of the years" after the death, for that case held that certainty as to continuance might be had either "by express numbering of years" or "by matter *ex post facto*."¹³⁷ In later years it seems to have been taken for granted that there was no fatal uncertainty in such a phrase.¹³⁸ In fact the real objection as to uncertainty had been as to the beginning of the future term and not as to its continuance¹³⁹ and once the former was removed, the objection as to uncertainty lost all vitality.

At the time, therefore, that *Manning's Case*¹⁴⁰ was decided and executory devises were allowed in terms for years, the time was ripe for allowing the same thing to be done with the term by sub-lease and assignment under the theory of the *interesse termini* that could be done by will under the theory of executory devise. The difficulty in allowing life estates and remainders in terms for years seemed equally great whether by will or by act *inter vivos*. There was the same theory of the indivisibility of the chattel interest, the increasingly technical meaning of "remainder," the same unwillingness to duplicate within the term, the freehold estates. On the other hand, the possible escape from these difficulties was as available in the one case as in the other. The lease, like the will, could "expect" and on the basis of transfers *in futuro* there was the possibility of making the term for years more adaptable and modern than if it were made to conform to the common law scheme. In the one case, that of the will, this means of escape was taken advantage of,¹⁴¹ in the other, that of the sub-lease and assignment, the opportunity was missed, though they remained a potential means of settling a term for years without the use of a trust term,¹⁴² and remain so today.

The vitality of the executory devise, the sterility of the *interesse termini*, has doubtless had many a parallel in the biological world. Perhaps explanation enough would be that it just happened so. Some explanation, however, may be found in the differences between the demise and the devise. The de-

in his *THE RULE AGAINST PERPETUITIES* (3rd ed. 1915) §§ 808, 809, to show that the termor could grant nothing to commence after a previous tenant's death, agreed to this 'diversitie'.

136. 6 Co. 34 b (1605).

137. Co. 35 a.

138. The whole argument in *Wright v. Cartwright*, Burr. 282 (1757), was that such words would render the lease good.

139. See especially the position taken by Walmsley and Wyndham, J. J., in *Green v. Edwards*, Cro. Eliz. 216 (1590), 1 Leon. 218, 1 And. 258, Moore 297.

140. 8 Co. 94 b. (1609).

141. See *infra*, *The Executory Devise*.

142. See PRESTON, *ABSTRACTS OF TITLE* (ed. 1819) 153; LEWIS, *THE LAW OF PERPETUITY* (ed. 1843) 90-1; contra, *semble*, GRAY, *op. cit. supra* note 84, § 811.

mise was the more formal in that entry was necessary to complete the transaction. The demise was commonly by deed and the construction of deeds was more technical than of wills in which greater stress was laid on the intent. Finally the executory devise was developed under severe competition with Chancery while at only one stage of the law does the competition between the *interesse termini* and the trust deed appear, and this was at a time when Chancery was in the ascendancy.

The theory of the *interesse termini* is older than that of the executory devise and goes back in fact, if not in name, at least as far as Littleton.¹⁴³ Before entry, a lessee for years was not capable of receiving a release, for he had "only a right to have the same land by force of the lease."¹⁴⁴ Such right was substantial enough to survive the death of the lessor¹⁴⁵ or lessee¹⁴⁶ prior to any entry and according to Coke was grantable to another even in case of a future or reversionary term.¹⁴⁷ Under the Statute of Uses,¹⁴⁸ the importance of the entry to support a release was largely destroyed¹⁴⁹ and the *interesse termini*, in consequence, was much less conspicuous. In the field of future interests, however, its potentialities remained as great as ever.

The lease, unlike the will, was peculiarly the creature of the common law courts. In the case of the will, where the testator was frequently without aid of counsel, the misuse of some technical word was not so fatal, but no such leniency was felt as to transactions *inter vivos*. If in the attempt to settle a term by deed, the language of the freehold was used, it was just too bad for the settlor. And if the "residue of the term" was used instead of the "residue of the years" the mistake was fatal until Lord Mansfield introduced a more liberal practice.¹⁵⁰

The executory devise had developed under the competition of Chancery.¹⁵¹ For some reason no such competition developed between the *interesse termini* and the trust deed. But on one notable occasion they clashed. Sir Orlando Bridgeman, known as the father of modern conveyancing, had drawn up the trust deed which was in question before Lord Nottingham in the *Duke of Norfolk's Case*.¹⁵² The heads of the common law courts were called in for advice and Pemberton, C. J., seems to have felt that Sir Orlando had rather bungled the thing by not resorting to successive leases.¹⁵³ Lord Nottingham

143. TENURES, §§ 66, 459.

144. *Id.* § 459.

145. *Id.* § 66.

146. CO. LIT. 46 b.

147. *Id.* at 46 b, 54 b.

148. 27 HEN. VIII, c. 10 (1535-6).

149. WILLIAMS, REAL PROPERTY (23 ed. 1920) 214-6.

150. *Wright v. Cartwright*, 1 Burr. 282 (1757).

151. See *supra*, *Use and Occupation*.

152. 3 Cas. Ch. 1, 27, 36 (1682).

153. *Id.* at 24.

was very pointed in his rebuke¹⁵⁴ and termed the suggestion "such a subtilty as would pose the reason of all mankind."¹⁵⁵ This could not have aided the popularity of the *interesse termini* as a means of settling terms for years.

By the Law of Property Act, 1925,¹⁵⁶ the doctrine of the *interesse termini* was abrogated. With the repeal of the Statute of Uses this was necessary lest the old requirement of entry be revived in all its former importance. Irrespective of this, the abrogation was just as well, for the *interesse termini* was a pronounced case of arrested development.

THE EXECUTORY DEVISE

The cases of *Welcden v. Elkington* and *Paramour v. Yardley*¹⁵⁷ had denied the consequences of the theory of use and occupation to the chattel real and thus differentiated it from the chattel personal, but they had not squarely met the old objections to the application of the law of freehold estates to the term for years. Hard-headed common law judges like Walmsley felt this to be a great difficulty.¹⁵⁸ A new category, or at least a new name, was needed to reconcile the result in these cases with the older theory, and it was found in *Manning's Case* in 1609.¹⁵⁹ A term for years had been devised for life with a limitation over. The subsequent devise was assumed not to be a proper remainder but was held to be good as an executory devise. In some respects this looks like a mere juggling with words and so it was deemed by Lord Nottingham¹⁶⁰ and by Lord Mansfield.¹⁶¹ What made it look more like a juggling with words was that the judges construed the words in reverse order as in *Welcden v. Elkington*.¹⁶² This was not, however, as in *Welcden v. Elkington*, to avoid a repugnancy by construing the will as a whole, but apparently to show that the subsequent limitation needed no particular estate to support it and therefore was not properly in the category of a remainder.¹⁶³ Read in reverse order, the character of the second limitation as a gift *in futuro* rather than a remainder was much clearer. Once the point was made clear, however, the reverse construction could be dropped for it was expositional rather than anything fundamental. Certainly in the light of subsequent history, *Manning's Case* was something more than the clever evasion of embarrassing precedents. A new name was invented for interests that had formerly been nameless.

154. *Id.* at 36.

155. *Id.* at 50.

156. 15 GEO. V, c. 20, § 149 (1) (2).

157. See *supra*, *Use and Occupation*.

158. *Woodcock v. Woodcock*, Cro. Eliz. 795 (1600) 6; *Matthew Manning's Case*, 8 Co. 94 b. 95 a (1609).

159. 8 Co. 94 b.

160. *The Duke of Norfolk's Case*, 2 Swans. 454, 464 (1682).

161. *Wright v. Cartwright*, 1 Burr. 282 (1757).

162. See *supra*, *Use and Occupation*.

163. GRAY, *op. cit. supra* note 84, §§ 58-60, uses like reasoning in arguing that a contingent use is good though preceded by an estate for years.

Had the name been restricted to future devises of terms for years its importance might still have been greater than that of the *interesse termini* in transactions *inter vivos*, but not immeasurably so. However, it was not so restricted, and in *Pells v. Brown*¹⁶⁴ was used to sanction the devise of a fee on a fee, which had been proscribed in *Corbet's Case*.¹⁶⁵ The hard-fought battle which the common law judges thought they had won in *Corbet's Case* and in *Chudleigh's Case*¹⁶⁶ against limitations contrary to the common law¹⁶⁷ was thus in a fair way to be lost. The new name gave a tangibility to these new limitations by way of devise which formerly they had lacked. They were still not regarded with favor. The common law remainder was still preferred.¹⁶⁸ But the executory devise had a definite, if inferior, place beside it in the future limitation of the freehold. The old monopoly of the remainder was gone. Remainder was still likely to be used loosely of any limitation that remained out after a preceding limitation, but more and more this primary meaning of remainder faded out, and the remainder came to be only a favored class of future limitations of the freehold, to be carefully distinguished from executory interests.

Coke and his associates would doubtless have regretted their ingenuity if they had thought that by the turn of a phrase they were undermining the victories previously gained against limitations of the freehold, by means of the use or devise, contrary to the course of the common law. The term for years involved neither the Statute of Uses¹⁶⁹ nor Wills¹⁷⁰ and it was with the term for years that *Manning's Case* was directly concerned. Apparently they did feel that there was little harm in allowing what was in effect a life interest in a term as long as this could be reconciled with the old authorities. The difficulty was technical rather than substantial. Once this technical difficulty was overcome, they and their successors showed some, but not much, hesitation in allowing to be created by will in terms for years, interests analogous to the traditional common law interests. In time, one life interest after another was recognized,¹⁷¹ and interests analogous to the contingent remainder.¹⁷² Towards the end of the century the analogy of the possibility of reverter was resorted to, to support what, in the case of the freehold, would have been a reversion.¹⁷³ In the year following *Manning's Case*, even a devise

164. Cro. Jac. 590 (1620).

165. 1 Co. 83 b (1599-1600).

166. 1 Co. 134 b (1589-95).

167. Bordwell, *The Conversion of the Use into a Legal Interest* (1935) 21 IOWA L. REV. 1, 19-20.

168. *Id.* at 24-5, 33.

169. 27 HEN. VIII, c. 10 (1535-6).

170. 32 HEN. VIII, c. 1 (1540).

171. *Alford's Case*, Bridg. J. 584 (1662).

172. *Cotton v. Heath*, 1 Roll. Abr. 612 pl. 3, Poll. 26 (1638).

173. *Eyres v. Faulkland*, 1 Salk. 231 (1697).

over after the limitation of a term to one and the heirs of his body was said to be within the protection of the common law courts.¹⁷⁴

Not long after *Manning's Case*, however, a reaction set in against allowing the devise over for a term of years after a gift to one and the heirs of his body.¹⁷⁵ Many had been the devices attempted by conveyancers to get around the dockability of the entail. For a time, in *Scholastica's Case*,¹⁷⁶ they seemed to have found such a device in the will. The ultimate reversal of *Scholastica's Case* was the aim of Bacon¹⁷⁷ in his argument in *Chudleigh's Case*, and this was finally accomplished in *Mary Portington's Case* in 1613.¹⁷⁸ If now the fee tail should be allowed by devise in the term for years, the fight for the power to disentail would be lost, for the disentailing machinery, the common recovery and the fine, was not adaptable to the term for years. The judges soon saw, therefore, that they had gone too far toward allowing entails in terms for years and disallowed the subsequent limitations. In accordance with the old law the devise of a fee tail in a term for years was the devise of the whole term. And any of the gifts after failure of issue which would have turned the preceding estate into a fee tail in the case of the freehold, shared the same fate as gifts limited after express fee tails.¹⁷⁹

The case that put an end to the threat of allowing by devise what would practically have amounted to an entail of a term for years, was *Child v. Baylie*.¹⁸⁰ In subsequent years, however, this aspect of the case was rather lost sight of, and the case was criticized for having failed to distinguish between the case of the entail, where the gift over would be after an indefinite failure of issue, and the case where something more than a mere life interest was given to the first taker, but where the gift over, if it took effect at all, would take effect after a life in being, or, in other words, after a definite failure of issue.¹⁸¹ *Child v. Baylie* was a case of the latter kind. The first decision in *Child v. Baylie* was in the King's Bench in 1618. Two years later the same

174. *Tatton v. Mollineux*, Moore 809 (1610), Pollexf. 24. Two years later, in *Retherick v. Chappel*, 2 Bulst. 28, the devise of a term after successive devises in tail was held good. Chancery had evidently long given protection to the devisee in such a case. See *Wallis v. Arden* (1571) and *Price v. Jones* (1583-4) Tot. 122, both cited in *Cole v. Moore*, Moore 806 (1607).

175. *Bennet v. Lewknor*, 1 Roll. Rep. 356 (1616).

176. *Newis v. Lark*, 2 Plow. 408 (1572).

177. 7 BAC. WORKS (Spedding's ed.) 636. See Bordwell, *supra* note 167, at 1, 30-31.

178. 10 Co. 35 b.

179. *Child v. Baylie*, Cro. Jac. 459 (1618-1623), Palm. 48, 333, W. Jo. 15, 2 Roll. 129, definitely overruled *Retherick v. Chappel*, 2 Bulst. 28, and approved *Bennet v. Lewknor*, 1 Roll. 356 (1616). In *Sanders v. Cornish*, Cro. Car. 230 (1631), there was an attempt to limit a term in strict settlement. The court was inclined to hold the devise bad. After 1660 the cases holding the devise over after an indefinite failure of issue became numerous. For the cases see GRAY, *op. cit. supra* note 84, at 161.

180. Cro. Jac. 459 (1618-1623).

181. *The Duke of Norfolk's Case*, 3 Cas. Ch. 1, 2 Swans. 454 (1682).

court, with a change of but one member in four,¹⁸² decided *Pells v. Brown*.¹⁸³ The same sort of limitation was involved, but it concerned the freehold and not a term for years. The first resolution in the later case was that such a gift over did not convert the preceding limitation into a fee tail. Henceforth, *Child v. Baylie* did not involve a fee tail but a conditional limitation, and one might have expected a reversal of the King's Bench. Three years after *Pells v. Brown*, *Child v. Baylie* was carried to the Exchequer Chamber but there was no reversal. The judges said they did not want to extend *Manning's Case* nor did they show any inclination to extend *Pells v. Brown*. As subsequent events showed, the common lawyers, under *Manning's Case*, were willing to duplicate in the term for years by will, the things that could be done with freehold life estates, but there they stopped. The heads of all three common law courts were still of this mind in the *Duke of Norfolk's Case*,¹⁸⁴ more than three score years later.

The *Duke of Norfolk's Case* has been made so much of as the fountain head of the modern rule against perpetuities, that it is likely to be overlooked that the perpetuity was only one of the negative aspects of the case and that the rule as to remoteness of vesting was merely one way of meeting objections to the multiplication of interests which Chancery favored. Perhaps there is nothing more anomalous in the law than duplicating with the term for years the very elaborate things that can be done with the fee simple. As though two kinds of ownership of land, legal and equitable, were not enough, the possibility of long terms limitable for most purposes in the same way as the fee simple, meant what was virtually a third kind in the already complicated land law. The common lawyers were against such duplication in the first place but finally under the pressure of Chancery allowed life interests and their concomitants. There, under *Child v. Baylie*, they for a time drew the line. But long terms were very much a fact in the life of the times and Lord Nottingham felt, that but for the entail, a man should be able to do with these long terms by executory devise or trust deed practically what he could with the fee simple. The undue multiplication of these executory interests he felt could be met by a rule against remoteness of vesting. The positive side of the *Duke of Norfolk's Case* was that it established these executory interests both as to the term for years and as to the freehold on a new basis.¹⁸⁵ Henceforth executory interests had a definitely accepted place in the law, although in the case of the freehold, the remainder still had the preference.

Whether executory devises, or bequests, as they are more modernly called, of terms for years, are still possible at law in England is a question since the

182. Sir John Croke had died and his place taken by Sir Thomas Chamberlain.

183. Cro. Jac., 590 (1620).

184. 3 Cas. Ch. 1, 2 Swans. 454 (1682).

185. See Bordwell, *The Conversion of the Use into a Legal Interest* (1935) 21 IOWA L. REV. 1, 20-1, 32-3.

INTERESTS IN CHATTELS, REAL AND PERSONAL 141

Law of Property Act, 1925.¹⁸⁶ That Act turned executory devises of the freehold into equitable interests and made them subject to the Settled Land Act, 1925. If executory bequests of terms for years are not brought within the Settled Land Act, 1925, then the Settled Land Act, 1925, can be evaded by means of long terms just as the Statute of Uses was.¹⁸⁷ History may repeat itself in this respect but this does not seem at all likely. Fore-warned is fore-armed and there seems to be no disposition to flout the Statute.

Though it would thus seem that the day for the legal executory bequest of a term for years in England is over, there is some authority for holding that the theory of the executory bequest has there supplanted the theory of use and occupation as to chattels personal.¹⁸⁸ The authority is not that of an appellate court, but it is backed up by the opinions of most text-writers.¹⁸⁹ Gray, at first, accepted this authority as sound but in his later editions reverted to the older theory of use and occupation,¹⁹⁰ which he considered more satisfactory from the point of view of the rule against perpetuities. Sir William Holdsworth seems inclined to Gray's view.¹⁹¹

Legal future interests in chattels personal by act *inter vivos* in England have yet to await development. By trust deed, however, everything can be done with the personal chattel that can be done with it by will. This preference for equity is not likely to be lessened by the fact that future interests in land were thrown into equity by the Property Acts of 1925. Blackstone¹⁹² said that a life estate could be created in a personal chattel by deed and did not specify a deed of trust, but it seems as if it must have been the latter he had in mind. His statement has had no effect on the English practice. As far as gifts *inter vivos* are concerned the law would seem to be about where it was in the time of Brooke. Sales, and especially conditional sales, it would seem, may open the doors for future legal interests in personal chattels, for by means of the sale, title may pass *in futuro*, and the conditional sale goes at least as far as the old common law condition and reverter. But sale and conditional sale have remained commercial instead of passing into the field of settlement, as the bargain and sale did to some extent in the case of land.

IN THE UNITED STATES

In the United States there has been a tendency to get away from the tortuous paths by which future interests in chattels gained such position

186. See Potter, *The Modern Classification of Future Estates in Land in English Law* (1933) 18 IOWA L. REV. 289, 291-294.

187. *Id.* at 294.

188. *In re Tritton*, 61 L. T. R. 301 (1889) 6 Morr. 250; *In re Thynne* (1911) 1 Ch. 282; *In re Blackhouse*, (1921) 2 Ch. 51.

189. See 7 HOLDSWORTH, *HISTORY OF THE ENGLISH LAW* (1926) 476-7.

190. GRAY, *op. cit. supra* note 84, § 831.

191. *Id.* at 477.

192. 2 BL. COMM. (1st. Am. Ed. 1771) 398.

as they did in England. The positions having been gained, the tendency has been to make the paths straight and to consolidate and extend the positions. There was an opportunity for this in a new country such as did not exist in the old. Just as in England the common law of torts and contracts had developed around certain forms of action, so the common law of property had developed around certain forms of transfer, and there was hardly a law of property at all, but a law of feoffments, and a law of wills, and a law of bargains and sale. In the first half of the 1800's the tendency both in England and the United States was to get away from the law of actions to a substantive law of torts and contracts that should be more scientific than the old. In the United States, the feoffment, the fine and the recovery, and all the intricacies of the old English conveyancing, never had any real existence, and so in the field of property the tendency was away from a law of transfers, to a more scientific view of the general law of property. What could be done by will, it seemed reasonable, should also be possible by act *inter vivos*, and if interests in chattels and land were practically the same, there was no sense in calling them by different names. If the old English statutes were operative, they were in force not as such, but in principle, or as part of the common law. A narrow construction of the Statute of Uses limiting its application to uses limited on the freehold did not preclude the recognition in the United States of interests in chattels which but for that narrow construction would long have had recognition in England.

Long before the American Revolution, in fact from the *Duke of Norfolk's Case*,¹⁹³ it had been accepted law in England that practically everything could be done with the term for years by will, that could be done with the freehold, except create an entail. Furthermore, prior to the *Duke of Norfolk's Case*, future interests in terms following gifts for life, had been treated by analogy to the law of the freehold, although they had been called executory devises.¹⁹⁴ On analogy to the older common law of the freehold, a conditional limitation after an interest greater than a life interest had been denied.¹⁹⁵ The *Duke of Norfolk's Case* allowed such a conditional limitation and thus made the analogy to the more modernized law of the freehold complete.¹⁹⁶ As Lord Mansfield said,¹⁹⁷ practically the only difference left, except in the case of the entail, was in the name. What was called a remainder in the case of the freehold, in the case of the term, was called an executory devise. This law has not been questioned in the United States,¹⁹⁸ though there has

193. 3 Cas. Ch. 1, 2 Swans. 454 (1682).

194. *Supra The Executory Devise*.

195. *Child v. Baylie*, Cro. Fac. 459 (1618-1623), Palm. 48, 333, cited notes 179, 180, *supra*.

196. *Supra The Executory Devise*.

197. *Wright v. Cartwright*, 1 Burr. 282 (1757).

198. GRAY, *op. cit. supra* note 84, §§ 71b, 816, 856.

not been great room for its application. If the language of estate and remainder is used where such language would be proper of the freehold, no harm is done, and probably a more accurate idea is gained of the law applicable to such situation than if such language had been avoided.

According to two such great conveyancers as Preston and Lewis, the term for years could have been settled at law by deed through the theory of the *interesse termini* as effectively as by will.¹⁹⁹ For some reason the potentialities of this theory were never realized. The recognition of such potentialities in the United States, however, works in with the prevalent theory of allowing to be done by deed what can be done by will and is supported by such cases as *Culbuth v. Smith*.²⁰⁰ Here, too, as in the case of the executory devise, it would seem better to follow the analogies of the freehold as far as possible, treating the future interests as executory interests only where the analogy to the law of the freehold demands. If the language of the freehold is used instead of the language of the *interesse termini*, this should be no more fatal than in the case of the will. In the United States the grantor is about as likely to be without adequate counsel as the testator. The same leniency should be allowed him as in the case of the executory devise, for the technique of the *interesse termini* is even less familiar. In fact the old technique of the *interesse termini* would seem quite obsolete.

In the case of the chattel personal, the old theory of use and occupation in gifts by will does not seem to have survived, in England, the period of the American Revolution but seems to have given way to the theory of the executory devise or bequest.²⁰¹ The latter followed more closely the law of the freehold, for it made the first taker the representative of the succeeding interests in the matter of the executor's assent.²⁰² On the other hand use and occupation partook more of the simplicity of the early common law of estates. If one be used to supplement the other the parallel to the modern law of the freehold is striking. To the extent that use and occupation is stressed, the tendency will be to exalt the position of the executor as urged by Fearn²⁰³ and to secure the subsequent holder. That the law parallels the law of the freehold does not mean that it should be identical. The materials are handy in the case law of the United States²⁰⁴ to work out a satisfactory law of future interests in chattels personal by will that shall harmonize with the law of the freehold and yet take into consideration the physical differences between land and moveables.

199. 3 PRESTON, ABSTRACTS OF TITLE (ed. 1819) 153; LEWIS, THE LAW OF PERPETUITY (ed. 1843) 90-1.

200. 69 Md. 450 (1888).

201. *Supra Use and Occupation and Executory Devise*.

202. See *supra Use and Occupation*.

203. CONTINGENT REMAINDERS AND EXECUTORY DEVISES (6th ed. 1809) 412-414.

204. See GRAY, *op. cit. supra* note 84, §§ 844-852. For a more modernistic approach, see Simes, *Future Interests in Chattels Personal* (1930) 39 YALE L. J. 771.

The settlement of chattels personal by deed, other than deed of trust, or other act *inter vivos* was, and still is, dormant in England.²⁰⁵ In the United States, however, two elements have entered in that have made a difference, the statement by Blackstone that life estates and remainders could be created in personal chattels by deed,²⁰⁶ and the existence of a peculiar kind of chattels, slaves. The generations of American lawyers who were brought up on Blackstone, if their attention was called to the statement by Brooke that a gift of a chattel for a day was a gift of it forever, most probably regarded it as a bit of antiquarian lore with which they had little concern. At any rate they followed Blackstone as ample authority. And there was more occasion for this than in England because of the tendency to make family gifts of slaves for life. These might be by deed and then the authority of Blackstone was directly in point, or they might be by less formal means,²⁰⁷ but as long as the method of transfer was a proper method for chattels, it was held sufficient. Even executory limitations of chattels personal by acts *inter vivos* have been allowed.²⁰⁸ In the case of sales this would seem to follow from the possibility of future transfers. In the case of gifts the analogy from executory bequests is strong.

The clarification of the law by the selective application of the law of estates and executory interests to chattels would seem a great desideratum.²⁰⁹ One of the great services of John Chipman Gray was that he found authority for such clarification in the existing American authorities. This would not mean that more or less discredited doctrines like the destructibility of contingent remainders would have to be taken over and applied to chattels. The law of chattels would by no means have to be identical with the law of land. Tenure by no means would have to be carried over to chattels personal. But the law of chattels would be assimilated to the law of land and the crooked places would be made straight.

205. See *supra* *The Executory Devise*.

206. 2 BLACKSTONE, *op. cit. supra* note 192.

207. *Brummet v. Barber*, 2 Hill S. C. 543 (1834).

208. GRAY, *op. cit. supra* note 84, at 846-848.

209. *Contra*, Simes, *Future Interests in Chattels Personal* (1930) 39 YALE L. J. 771. In the opinion of the present writer, the abandonment of the old categories and the adoption of a new terminology, would tend to make the law of future interests even more a matter of words than it was recently accused of being.