1894

The Development of the Law of Real Property in Pennsylvania

Robert Louis Grambs
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THE DEVELOPMENT OF THE LAW OF REAL PROPERTY
IN PENNSYLVANIA.

A Thesis Presented to the School of Law,
Cornell University for the

DEGREE OF BACHELOR OF LAWS.

by

Robert Louis Grambs.

Ithaca, N.Y.

1894.
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Preface.

In writing this thesis it is not the intention of the writer to state any new theories with regard to the law of Real Property nor has an attempt been made to lay down any new propositions of law. On the contrary an endeavor has been made to give but a brief outline of some of the prominent changes in the law of Real Property.

As a general rule, most of the text books upon the law of Real Property give the bewildered student but a faint idea of the law as it exists to-day. He is required to plunge blindly into the labyrinth of absurd fictions, exploded theories and blind superstitions which form the basis of so much of our law of Real Property. He is expected to examine these carefully and to evolve therefrom a system of law which he may reconcile with the almost countless conflicting decisions of the courts.
of numerous jurisdictions; and finally, when he has satisfied himself that he has acquired a conception of what the law in general principles really ought to be, he is told by the legislature that his labor has availed him nught – the law has been changed. In the following pages no attempt has been made to state all the changes in the law of Real Property in Pennsylvania. To do this would require a volume of no small proportions. That part of the law of Real Property of the state which treats of titles and conveyancing has been entirely omitted, with the single exception of a brief reference to the Recording Acts. While both of these subjects form an important branch of the law of Real Property, the writer has deemed it wise to limit his research to the law of estates, leaving the subject of "titles" to be investigated at some future day.

That part of the law of Pennsylvania which is similar to the old common law of England can find no place in this thesis – it is not within the scope intended.

In several instances the similarity of the law of the State to the common law has been briefly commented upon, but in most cases it has not been mentioned. Penn-
sylvania being one of the firmest adherents to common law principles has adopted as her own the great body of the common law of England subject only to such changes as her institutions may demand. In addition to these changes the legislature has seen fit, from time to time to introduce additional changes either on account of public policy or for the purpose of effecting justice. Some of the more prominent of these changes I have endeavored to enumerate and comment upon in connection with some of the changes which have been effected by various adjudications of the courts of the state. While the changes enumerated here do not comprise the whole number, still it is hoped that such as have been mentioned may lead some other student of Pennsylvania Law to discover additional changes and study the law of Real Property of his state with greater facility and satisfaction.
Previous to the reign of Charles II, England had been a slave to the feudal system. Long suffering and oppression had accustomed the sturdy, liberty-loving Anglo-Saxon to the tyranny of his lord. Though the feudal system had long previously outgrown its age of usefulness it was not until the statute 12 Car. II was passed that any substantial relief was obtained and the antiquated and complex system of land tenures which had so long prevailed reduced to any degree of simplicity. By the statute above referred to most of the feudal burdens were cast off and all tenures in general, except frankalmoin, grand sergeantry and copyhold, were reduced to one general species of tenure called "free and common socage." But the leading characteristics of the feudal tenures still remained and hampered to a greater or less ex-
tent the free alienation of landed property.

Such, in brief, was the situation in England, in 1681 when Charles II granted, by letters patent, the province of Pennsylvania to William Penn. In the previous charters it had been stipulated "that the grantees and their descendants should be considered as subjects born within the realm." There was no provision of this nature in the charter to Penn which provided however "that acts of Parliament concerning trade, navigation, and the customs, should be duly observed." And further, "that no custom or other contribution should be laid on the inhabitants, or their estates, unless by the consent of the proprietary, or governor and assembly, or by act of Parliament in England." The sovereignty of the country was reserved to the king and his successors, but "the lands, isles, inlets, etc. were to be holden to the said William Penn, his heirs and assigns, and in free and common socage, by fealty only, for all services, and not in capite or by knight-service." Soon afterwards a settlement was commenced, and a form of government prepared by Penn. One of the first tasks undertaken by Penn upon his arrival in the province in 1681 was to treat with the Indians.
for the extinguishment of their claims to the possession of the territory. It was agreed that no lands should be sold to any person but Penn or his agents and that the latter should not occupy, nor grant any lands, but such as should be fairly purchased of the Indians. Penn faithfully observed this engagement, and the Indian claim to all lands within the present limits of the state, has been extinguished by operation of successive purchases. Various prohibitory laws with severe penalties annexed for the violation thereof were passed, to prevent any intrusion or settlement of the unpurchased lands of the Indians. So sacred was this principle esteemed, that it was held to be a rule of property, that a grant of lands before such title had been extinguished, was void. (Thompson V. Johnson, 6 Binn. 68(1813).) Thus, title to all the lands in Pennsylvania, is derived from the Indians, not by acquisition and conquest, the result of a cruel and relentless war of extermination and disposition, but by a fair, equitable and just treaty of purchase entered into by the Indians voluntarily, without any coercion, duress or compulsion of any sort, and every sale was to be upon a valuable consideration.
What a vast contrast between the policy instituted and carried out by Penn and which was adhered to so scrupulously by his successors and subsequently by the state, and that pursued by the Governors of the other colonies whose administrations are stained and marred by deeds of dishonor, broken pledges and injustice to the Indians.

The title to the soil being thus vested in the proprietary, he had the undisputed right to dispose of it in whatever manner he thought proper. Availing himself of this right Penn established a land department, the officers and commissioners of which were his agents. No regular system was adhered to in making and confirming grants to individuals. The leading object being to survey off each particular grant, and have the survey returned into the land office, and thereupon to grant a patent. But as may be supposed, great irregularities were introduced and as a result, titles to lands became complicated and for a long time insecure. But the legislature, aided by the adjudications of the courts, at length perfected a system which has almost quieted controversies arising out of original titles. Penn's charter provided "that the laws for regulating and governing
property, within the said province, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and chattels, etc., should be and continue the same, as they shall be for the time being, by the general courts of the laws of England, until the said laws shall be altered by the said William Penn, his heirs or assigns, and by the freemen of the said province, their delegates or deputies, or the greater part of them." (Penn's charter sec. VI, Colonial Records vol. I, p. 17.). By the 17th section he had the right "to parcel out the lands among purchasers, tobeholden of himself and his heirs, by such services, customs and rents, as to him or them should seem fit, and not immediately of the crown."

The revolution having dissolved all political connection with the crown of Great Britain, soon after its close, viz in 1779, by an act of the legislature (1S. Laws, 479) the estates of the late proprietaries, were Vested absolutely in the commonwealth. Thus by a single stroke the sovereign will of the people of the newly erected state made the soil and lands within its jurisdiction (with certain exceptions) "subject to such dis-
posal, alienation, conveyance, division and appropriation
as to this or any future legislature of this commonwealth
shall from time to time seem meet and expedient in pur-
suance of such law or laws as shall for that purpose here
after be made provided." The act also confirmed all
previous titles of whatever kind from the proprietaries
etc., while the arrears of purchase money for lands, (ex-
cept the proprietary tenths) were made payable to the com-
monwealth; all proprietary quit rents were extinguished,
and the tenure from free-socage became allodial, the gran-
tees being vested in their own right with the absolute
title, unconnected with any superior, and not subject to
any service. Various statutes were subsequently passed
for the purpose of regulating the granting of letters
patent to warranties by the state. The result of these
changes is well and clearly stated by Judge Reed in com-
menting upon Blackstone's Commentaries. He says, "In
reviewing the preceding chapters in the Commentaries, on
the subject of titles and tenures, and contrasting them
with our free, unencumbered, and absolute estates, one
cannot suppress his astonishment, at the immeasurable dif-
ference between them. Every species of oppressive bur-
den, that an unlimited prerogative, and insatiable cupid-
ity could suggest, and but illy concealed by a long train
of absurd fictions, is attached to the one, while the
other is absolutely free from all restrictions and incum-
brances, and the holder is contemplated as the lord par-
amount of his own estate." (Pennsylvania Blackstone, Vol.
I, p.359).

It has been maintained by some high authorities that
tenures do not now exist in Pennsylvania. The leading
champion of this view was Judge Woodward, who expressly
decided in Wallace V. Harmstad, 8 Wr. 499, that since the
revolution, Pennsylvania titles are alodial, not feudal.
But the weight of authority seems to be the other way.
Professor Mitchell of the University of Pennsylvania in
referring to this question, says, "It is a question on
which high authorities are ranged on either side, whether
tenures now exist in Pennsylvania. Tenures certainly
did exist here prior to the revolution, and, it is believed
no lawyer ever questioned it, and the better opinion is that they still exist." This view is also supported by Chief Justice Sharswood, in a note to his edition of Blackstone, Bk. II ch. VI at p. 77. He says: "In Pennsylvania, it has been decided that the statute Quia Emptores was never in force, and subin-feudation always lawful; and though there are some opinions that tenures fell with the revolution, yet all agree that they existed before, and the better opinion appears to be that they still exist. The principles of the feudal system, in truth underlie all the doctrines of the common law in regard to real estate, and wherever that law is recognized recourse must be had to feudal principles to understand and carry out the common law."

"The principles of the feudal system," said chief-justice Tilghman, "are so interwoven with our jurisprudence that there is no removing them without destroying the whole texture." Lyle v. Richards, 9 S and R., 333.

"Though our property is allodial," said chief-justice Gibson, "yet feudal tenures may be said to exist among us in their consequences and the qualities which
they originally imparted to estates; as for instance, in precluding every limitation founded on an abeyance of the fee." (McCull v. Nuly, 3 Watts, 71.) In support of the view taken by these authorities is the fact that the Divesting Act of 27 February, 1779, was simply a transfer of the proprietaries’ rights to the commonwealth. There is not a single section in this act abolishing any lordship, etc., they were transferred only. And though the commonwealth, is not regarded, in the feudal light, superior lord of the soil, and though the lands of individuals are not held mediately of the state, upon fealty or any other service, yet, the government of the state, being one founded by universal consent, is unlimited in its powers and authority, except so far, as exceptions are enumerated in the constitution; with this limitation, the legislative power embraces all cases affecting the public good, both as it regards the community as a whole, and the individual members composing it. It was one of the fundamental principles of property that where no one individual has an exclusive right to any specific piece of property it belongs to the community. Agreeably to this principle the legislature of Pennsylvania has enacted
from time to time various acts the first of which was passed in 1787, the preamble of which declared it to be an act "to declare and regulate escheats."

One species only was provided for. That is, where any person at the time of his or her death, "is seized or possessed of any real or personal estate, within this commonwealth, and dies intestate, without heirs, or any known kindred, such estates shall escheat to the commonwealth."

2 S Laws, 425. Escheats "propter delictum tenentis", are entirely abolished by the constitution of the United States, (Art I. Sec. IV. Subs. 3; sec. X, sub. 1; Art.III sec. III sub. 2) and of the commonwealth (Art. I, sec.18-19). It is evident therefore, that in Pennsylvania "the owner of land still stands in a relation to the state which corresponds, in some degree, to feudal tenure; for whenever the title to land fails, through defect of heirs the land reverts by escheat to the State, which therefore occupies, so far as the doctrine of reverter is concerned the position of paramount lord."
For the purpose of convenience I shall follow to a great extent the arrangement of Blackstone in the Second Book of the Commentaries. It is easier and more natural to follow the well-beaten path. And in accordance with this arrangement I propose to consider briefly, first, Free Hold Estates of Inheritance.

Blackstone has defined an estate of freehold to be "such an estate in lands as is conveyed by livery of seizin, or in tenements of any incorporeal nature, by what is equivalent thereto." This definition may be accepted as a correct statement of the common law meaning of the term.

While this definition may prove very satisfactory to the Pennsylvania lawyer as to the origin of this estates, it gives but an imperfect idea of the subject as understood in that state, where the right of property always draws after it the right of possession. And when by consent the one is transferred, the law furnishes the means of obtaining the other. In Pennsylvania livery of seizin
is unknown, and the term "possession of the soil by a freeman" has little if any place in the jurisprudence of the state except as a relic of antiquity.

Any estate in lands or tenements, however created, whether of inheritance or for life, is considered a freehold, the ownership and not the possession giving character to the estate.

As we have already observed, the feudal doctrine with regard to land tenures in Pennsylvania is entirely exploded, and every owner of land holds it in his own right, without owing any rent or service to any superior. He holds not in his demesne as of fee, but absolutely "in dominico suo." Respect for precedent and ancient forms, alone has continued the expression "as of fee" though the reasons for its former use have no relation to the present condition of Pennsylvania titles. But the general characteristics of this estate are very similar to the estate of fee simple at common law. It is only necessary, therefore to point out a few of the distinguishing character-
istics in order to give an idea of the estate as it now exists.

Blackstone says, "The word 'heirs', is necessary in the grant or donation in order to make a fee or inheritance. For if land be given to a man forever, or to him and his assigns for ever, this vests in him but an estate for life." He then proceeds to point out the exceptions whereby the rule "is now softened." It has been frequently held that the rule still exists in Pennsylvania though changed by various adjudications for the purpose of doing justice and to give effect to the apparent intent of the parties. In some of the later cases there seems to be a disposition to relax the rule even in executed conveyances inter vivos. Thus, in Freyvogle v. Hughes (6 P. F. Sm., 228) a conveyance was made to a trustee and his heirs, for the separate use of a married woman, no words of limitation being used as to her estate, and the Supreme Court held that the limitation of the legal estate was enough to give her a fee, that being the evident intent of the grantor. Again, in Ringwalt v. Ringwalt (Leg. Int. 1885, p. 80), a conveyance was made of real and personal property to the grantor's mother, during his life, re-
remainder to his lawful issue if he had any, and in default of such issue then to "his surviving brothers or their legal representatives." It was held that the surviving brothers took estates in fee. In Mergenthaler's Appeal, fifteen W. N. C. 442, Judge Gorden said, "it may now be regarded as settled that even technical words of limitation found in an executed conveyance, may be so qualified by the context as to make them conform to the intention of the grantor."

A further exception to the old common law rule is found in the case of wills. Whenever in a will, on a fair construction of the whole instrument, it appears to be the intention of the testator to give an estate in fee use of such an estate will pass without the words of inheritance (Fulton v. Moore, 1 Cas. 474). But, in cases prior to the act of 8 April 1833 (Wills Act) some intention must be shown which will be equivalent to the technical words. Section 9 of the Wills Act provides that all devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appears by a devise over, or by a limitation, or otherwise in the will,
that the testator intended to devise a less estate.
This section does not apply to wills executed before the
passage of the act, although the testator died afterwards
(Smith v. Coyle, 1 W. N. C. 370). As at common law, the
chief incident and attribute of an estate in fee simple
in Pennsylvania, is the power of the owner to alien or
transfer it, and all general provisions and restrictions
upon alienation are void, because they are held to be re-
pugnant to the nature of the estate. (Walker v. Vincent,
7 Har. 371). When speaking of common law in this connec-
tion, I mean the later common law since the right to
alien is comparatively recent and is contrary to the feu-
dal doctrine which at first forbade and afterwards dis-
couraged alienation of lands, while it recognized and per-
mittedit subinfeudation.

The distinction between estates tail and fees-simple
in Pennsylvania is unimportant since, by statute, es-
tates tail are to be construed into fees-simple. The
question has usually arisen on the distinction between an
estate tail and a life estate with remainder, or a base
fee with executory devises after it. The Supreme Court
of the state has refused to consider the question as being of any importance, where the only question was whether the limitation was a fee-simple or a fee-tail. (Kennedy v. Humes 15 W. N. C. 508).

Since but few estates tail exist in Pennsylvania at the present time, and those can readily be converted into estates in fee-simple, the only points of practical importance are how the estate is created and how it may be barred or changed into an estate in fee-simple.

In regard to the method of creation it is sufficient to state that estates tail are generally created by conveyance or devise to one and the heirs of his body. But words of procreation are necessary. (McIntyre vs. Ramsey, 11 Har., 320). The word issue has been held to be an apt word of limitation and to import a fee-tail. (Gast v. Baer, 62 Pa. St., 35.) Estates tail had become common in Pennsylvania as early as 1705. In that year the general assembly of the province passed an act for barring them by simple deed, proved or acknowledged and recorded. This law was rejected by the Queen in council. In 1710 an act containing a similar provision met a like fate.

By the act of 27 January 1749 - Purd. Dig., p. 720, pl. 1) fines and common recoveries were made of the same ef-
fect in barring estates tail as in England. The act of 16 January 1799 (Purd. Dig. 721, pl. 3) provided that entails might be barred by deed in the usual form in fee simple provided such deed stated an intention to bar the entail. It was further required that after being acknowledged according to law such deed should, on motion in open court, be entered upon the records of the supreme court or common pleas as sheriff's deeds were required to be, and also to be recorded within six months after its date in the recorder's office.

A radical change in the law was made by the Act of 29 April 1855, which provided: "Whenever hereafter, by any gift conveyance or devise, an estate in fee-tail would be created according to the existing laws of this State, it shall be taken and construed to be an estate in fee-simple, and as such shall be inheritable and freely alienable." In Nichols v. Bettle 7 P. F. Sm. 387, Judge Strong says,"The act of 1855 practically makes the statute De Donis inoperative. It remits us to the common law as it was before 13th Edward I. ### This declaration of capability of transmission by descent and of alienability is mere surplusage."
The result of this act has been to prohibit the creation of an estate tail, and the words which would have amounted to an entail now create an estate in fee-simple. While estates tail are still to be found in Pennsylvania they were all created previous to April 27, 1855. It is further provided by the act of 14 April, 1859 that a final judgment or decree in partition, or any judicial sale, shall bar an estate tail with the same effect as a common recovery or deed entered and recorded under the act of 1799, and the purchaser or person to whom the land is decreed shall take an estate in fee-simple. (Purd. Dig. 722 pl. 6).

Freehold estates not of Inheritance in Pennsylvania are divided as at the common law into two classes: 1, Conventional. 2, Those created by operation of law.

(1) The first class does not differ materially from the estate as it existed at common law. Words of inheritance being still necessary to convey an estate in fee-simple, in the absence of such words the deed of conveyance will pass merely a life estate. As at common
law the estate may be for the life of the grantee or pur autre vie. Also as at common law, the tenant for life must not commit waste, which may be of two kinds. 1. Voluntary; and 2. Permissive. 1. The tenant for life must not use the land in such a manner as to cause its value to diminish so that it can not be well appropriated to the purposes for which it was intended when the life tenant came into possession. Thus, in Jones v. Whitehead the court restrained the tenant for years from plowing up a meadow for the purpose of sowing the land with corn (Parson's Eq. Cas. 304.). In some portion of Pennsylvania the old common law rule that the tenant for life may not fell timber does not prevail. It has been held that it is not waste for tenant to clear wildland of trees when such land is thereby enhanced in value.

A tenant for life may mine from an open mine and even make a new opening in order to get at the minerals; but he can not go through an old opening to reach a new vein, which is in effect making a new opening (Westmoreland Coal Co.'s. Appeal, 85 Pa. St. 344).

The act of 10 April, 1848 provided that no tenant or tenants for life should be restrained from the reasonable
and necessary use and enjoyment of the lands and premises in his, her or their possession. In Irwin v. Covode, 12 Har. 166, the court, in construing this act says: "While the right of possession continues unquestioned in the tenant, there is no limitation or restraint whatever imposed by our acts of assembly on his working of open mines. It may indeed be doubted whether the saving clauses adverted to, do not empower him to open mines and quarries that he may have reasonable use and enjoyment of the premises, but this we do not decide, for it is not in the case."

2. As a general rule, the tenant for life in Pennsylvania is liable for all damages except such as result from natural ware and the act of God. The statute of Gloucester, 6 Edward I., c. 5 (Rob. Dig. 9) has been held to be in force in Pennsylvania. It provides: "And he which shall be attainted of waste shall lose the thing which he hath wasted, and, moreover shall recompense, thrice as much as the waste shall be taxed at." But in Willard v. Willard 56 Pa. St., 119, where there was an attempt to enforce a forfeiture for waste, the Supreme Court refused to allow it. The remedies for waste now
in use, are - Injunction in Equity, writ of estrepelement under the act of 10 April, 1848, commanding the sheriff to stop waste, action on the case for damages in the nature of waste and perhaps the old writ of waste.

The estate of tenant after possibility of issue extinct cannot come practically under consideration under existing laws of Pennsylvania and therefore will not be further considered.

The fundamental principles of the law of curtesy in Pennsylvania are very similar to the common law principle of this estate. But the common law rule requiring seizin has been modified to a great extent. Thus, where the wife has the right of entry, or constructive seizin, it has been held that the husband has his curtesy, in cases where there is no actual adverse possession (Stoolfoos v. Jenkins 8 S. and R. 175). The intestate Act of 8 April 1833 sec. 1, Art. III provided that the real estate of a married woman intestate shall descend as thereinafter provided, "saving to the husband his right as tenant by the
curtesy, which shall take place although there be no issue of the marriage in all cases where the issue if any, would have inherited."

Previous to the passage of the Married Woman’s Act of April 11, 1848, the lands of married women were liable to be taken in execution for the debts of the husband, and his estate by the curtesy initiate sold by the Sheriff in her life time. But the act of 1848 put a stop to this injustice and secured to married women the enjoyment of their estates both as to title and possession. Various acts have been subsequently passed declaring the meaning of the act of 1848.

The act of 1848 gave married women the right to make wills, but the husband may have his right to take her real estate as tenant by the curtesy if he does not choose to take under such will. A man who has deserted his wife or refused to provide for her for one year or upwards is not permitted to claim curtesy (act May 4, 1855, sec. 5).

Common law dower can only exist in Pennsylvania at the present time in cases where a married man conveys his
lands or tenements in his life time and his wife does not join the deed of conveyance. This is due to the various statutes which have been passed from time to time. Both dower and curtesy may be had in an equitable estate (Shoemaker v. Walker 2 S.&R. 555). And the seizin of the husband need be but seizin in law.

The act of April 8, 1833 provided that where an intestate shall leave a widow and issue, the former shall be entitled to one third of his real estate for the term of her natural life, and to one third of his personal estate absolutely. If the intestate shall leave a widow, and collateral and other kindred, but no issue, the widow shall be entitled to one half of the real estate, (including the mansion house and appurtenances) for her life and to one half of the personal estate absolutely. In default of known heirs or kindred who might take under the act, the real estate vests in the widow for such estate as her husband had therein, and she is entitled also to all the personal property, absolutely. This provision was expressly declared to be "in lieu and full satisfaction of her dower at common law."

The Wills Act, 8 April, 1833, sec. 11 (Purd. Dig. p.
1711) provides: "A devise or bequest by a husband to his wife of any portion of his estate or property, shall be deemed and taken to be in lieu and bar of her dower in the estate of such testator, in like manner as if it were so expressed in the will, unless such testator shall in his will declare otherwise. Provided, That nothing here in contained shall deprive the widow of her choice, either of dower or of the estate or property so devised or bequeathed."

The Married Woman's Act of April 11, 1848, sec. 11, declared that the section of the Wills Act above mentioned should not be construed to deprive the widow of a testator in case she elects not to take under the will of her share of personal estate, but she was given her choice either of the provision made for her by the will or of her share of the personal estate under the Intestate Laws.

The act of April 20, 1869 sec. 1, provided, "In case any person has died, or shall hereafter die leaving a widow and a last will and testament, and such widow shall elect not to take under the will, in lieu of dower at the common law as heretofore, she shall be entitled to such interest in the real estate of her husband as the widows
of decedents dying intestate are entitled to under the existing laws of this Commonwealth."

Since the passage of the last mentioned act common law dower exists in Pennsylvania only in the one case previously mentioned.

Dower may be barred in Pennsylvania by,

1. Wife joining in deed of conveyance with separate acknowledgment.
2. Divorce, "a vinculo matrimonii." 
3. Elopement and adultery of wife.
4. Devise in lieu of dower.
5. Jointure.
7. Sheriff's sale.
8. Orphans' Court sale for payment of debts.

In its general characteristics the Pennsylvania estate for years does not differ in any material point from the common law estate of the same name.

The statute of 4 Ann, c. 16, sec. 9 which abolished the old rule requiring the tenant to attorn to the vendee of his landlord is also in force in Pennsylvania. Rob-
In computing the length of the term, the old common law rule with regard to the length of a month as laid down by Blackstone, does not prevail in Pennsylvania where a month means a calendar and not a lunar month. (Shapley v. Garey, 6 S. and R. 539). A term for a period less than three years may be created orally; but if it exceeds the period of three years a writing is necessary. Act 21 March, 1772, sec.1, (Purd. Dig. p. 830 pl. 1).

The Pennsylvania courts have laid down an exception to the old common law rule that tenant for years is not entitled to emblements where his estate expires by its own limitation. By a custom peculiar to Pennsylvania, where the term ends in the spring the tenant is permitted to return during the summer, after his estate has expired and take his grain which was sown in the previous autumn. Bittinger v. Baker, 5 Cas. 66.

The estate from year to year still exists in Pennsylvania and is similar to the common law tenancy from year to year except that three months notice instead of six is required in order to terminate the tenancy.
The estates of tenants at will, and at sufferance still exist in Pennsylvania as at common law and do not differ from the common law estates, except that in the case of estates at will the landlord must give three month's notice to quit to entitle him to the summary process given by statute (Purd. Dig. p. 1018 pl. 20, act of 1863.)

While the theory of mortgages in Pennsylvania is very similar to that of the common law, the methods by which payment of the debt secured by the mortgage is enforced are very unlike those used in England. By a fiction of law the mortgagee has the legal title vested in him subject to be divested upon the payment of the debt secured by the mortgage but he has no estate in the lands. The mortgage in the hands of the mortgagee is merely a chattel real. He has only a debt due him, a choose-in-action, which, on his death, descends to his executor and not to his heir. But, notwithstanding this change brought about by equitable principles, so much of the common law character of the mortgagee's title still remains as to enable him to take possession of the proper-
ty and to bring ejectment for it, certainly after default is made in payment of the money, or any part of it, according to the stipulations of the mortgage and, perhaps, even before default. Youngman v. R. R. Co., 65 Pa. St. 278; Guthrie v. Kahle, 10 Wr. 333. Mortgages by deposit of title deeds do not exist in Pennsylvania. Bowers v. Oyster, 3 Pa. St. 233. All mortgages, other than purchase money mortgages (which have sixty days), must be recorded at once, to secure their lien against other mortgages, conveyances and judgments. (Act 28 March, 1820).

All mortgages must be in writing, under seal and acknowledged, and since the act of June 8, 1881, the defeasance clause, when separate, must also be by deed, executed at the same time as the conveyance, and recorded within sixty days. But, notwithstanding the plain words of the statute, that "no mortgage shall be a lien until left for record," it has been held, in accordance with equitable principles that an unrecorded mortgage is good against the mortgagor, and all claiming under him with notice of the mortgage; and all volunteers are bound by the mortgage, whether they have notice or not. No one is pro-
ected by the statute but a bona fide purchaser, without notice. *Mellon's Appeal,* 8 Cas. 121. The mortgage has three remedies: (1) To take possession of the mortgaged premises during the continuance of the debt, or obtain possession by ejectment; (2) After the debt has become due proceed on the bond which usually contains a power of attorney to confess judgment; (3) Issue a scire facias on the mortgage. The latter course is usually taken, and the land is sold under a writ of levari facias, by sheriff's sale. Ejectment is seldom resorted to on account of the length of the proceedings, and also because the mortgagee who has recovered possession must account for all the rents and profits actually received, and also those which would or might have been received but for his negligence.

In regard to uses in Pennsylvania, little need be said. I need but state that the most important provisions of the Statute of Uses or the Statute 27 Henry VIII c 10 are still in force in Pennsylvania (Robert's Dig. p 412: *Rush v. Lewis, 9 Har. 73*) and then leave the subject. The only important statutory provision enacted in regard
to trusts is the Act of 22 April, 1856, which provided that, except implied trusts, all declarations must be in writing and signed by the person creating same or else manifested in his last will and testament.

What has been said with regard to the law of Uses and trusts in Pennsylvania applies equally well to the law of Remainders and Reversions. An examination of the numerous decisions of the Pennsylvania courts upon this important branch of the law of real property must lead one to conclude that the entire law of England with regard to remainders and reversions has been adopted in Pennsylvania with slight if any variations; and such changes as have been made have not effected the principles of the common law. The decisions of the courts as a general rule have a tendency to modify the harsh rules of the common law where this has been practicable, and to give effect to the apparent intention of the parties when such modifications do not contravene public policy. This tendency is especially noticeable in those cases where it has been attempted to apply the Rule in Shelly's case.
The courts have not always adhered to the old settled rule with regard to what are words of purchase and what words of limitation. Though numerous and respectable way, authorities may be found the other, the doctrine in Pennsylvania is, that the rule shall only take effect, when it is not controlled by the intention of the testator. (Lessee of Findlay v. Riddle 3 Bin, 139). But ordinarily, the word "heirs" seems to imply that the ancestor shall take an estate in fee.

Trusts for accumulations, when contrary to a sound public policy have always been discouraged and discon- tenanced by the Pennsylvania courts; and by the act of 14 April, 1853, sec. 9, it was expressly provided that no person shall settle and dispose of any property so that the income of the same shall be accumulated for any longer time than the life or lives of such grantor or testator, and the term of twenty-one years thereafter.

Knowledge of the old common law with regard to joint tenancy is chiefly valuable in Pennsylvania in examining titles which go back of 1812. In that year a statute was passed which, under the decisions of the courts of
the state, has turned all such estates into tenancies in common. It provides: "If partition be not made between joint tenants, whether they be such as might have been compelled to make partition or not or whatever kind the estate or thing holden or possessed be, the parts of those who die first shall not accrue to the survivors but shall descend or pass by devise, and shall be subject to debts, charges, curtesy or dower, or transmissible to executors or administrators and be considered to every other intent and purpose in the same manner as if such deceased joint tenants had been tenants in common: Provided always that nothing in this act shall be taken to affect any trust estate." (Purd. Dig. 939, pl. 1).

While, in effect, this statute deprives joint estates of all the peculiar features which distinguish them from tenancies in common, it does not prohibit testators or grantors from expressly creating a right of survivorship. (Arnold v. Jack, 12 Har. 57). But express words are required to create such an estate. (Kerr v. Verner. 16 P. F. Sm. 326)
Notwithstanding the Married Women's Act of 1848 it has been decided that estates by the entireties still exist in Pennsylvania, the court having determined that the effect of that act was a protection to her in her seizin of the whole land, so that she could not be deprived of it by a sale of her husband's interest therein in his lifetime. (McCurdy v. Canning 64 Pa. St. 39). Nor does the act of 1812 which abolished survivorship among joint tenants apply to this estate. This was decided in Diver v. Diver 56 Pa. St. 106 where it was determined that the estate held by husband and wife is not a joint tenancy and therefore not within the terms of that act.

By the third section of the Intestate Act of 1833, previously referred to, it is provided that the real estate of an intestate shall, in certain contingencies, therein enumerated, "vest in the father and mother of such intestate during their joint lives and the life of the survivor of them." It would seem that in such cases the father and mother, if both living, take as tenants by the entireties.
Estates in Coparcenary can exist in Pennsylvania only in those cases to which the statute regulating the descent and distribution of Intestate Estates, does not apply, since that expressly provides that, where lands descend to several persons under its provisions, they shall take and hold as tenants in common. Therefore coparcenary can exist only in cases of estate tail and trust estates.

Tenancies in common, in Pennsylvania, are so very similar to the same estate at common law as not to require any further consideration here. The acts which have been passed applying to this estate are few and have to do with the law of procedure rather than substantive law.
In the preceding pages I have attempted to outline briefly the leading changes in the law of Real Property in Pennsylvania with reference to the various estates now in existence and to define to some extent the nature of such changes and the characteristics which distinguish the modern law of Real Property in that state from the law as it existed at common law.

I propose now to discuss briefly a few minor subjects having reference to no estate in particular.

And first, with regard to fixtures. The old doctrine that whatever is fastened to the soil belongs there to has been exploded as a test or criterion by which a case is to be decided. Perhaps the leading Pennsylvania case upon the subject of fixtures is Meigs' Appeal, 12 P. F. Sm. 28, where a question was raised as to the character of certain frame buildings which the United States government had erected upon York Common as barracks for troops during the Civil War. If they were reality, and formed part of the land, they belonged to the borough of York which owned the land. If personalty, they belonged to the United States Government or its vendees, and they had the right to remove them. It was argued on
behalf of the borough of York, that the buildings were erected upon posts which were sunk deeply into the ground and therefore, being fastened directly to the soil and not merely placed and rested upon it, they were part of the land. But Judge Agnew, delivering the opinion of the Court, said, "The old notion of a physical attachment has long since been exploded in this State. The question of fixtures or not depends upon the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act."

The law with respect to party walls has been effected to some extent by two statutes. The first passed in 1721, gave to the owner of land the right to enter upon his neighbor's ground and to build his wall equally upon his own land and that of his neighbor, and provided that before the neighbor should use the party wall so built, he should pay the first builder for so much of the wall as he intended to make use of. The other act passed April 10, 1849 (Purd. Dig. 1307) provided that the right to the party wall, or to compensation for it, should pass
to the purchaser on a conveyance of the house, unless otherwise expressed in the deed, thus making the party wall a part of the realty and an appurtenance to the land on which the house first built is erected. (Knight v. Beznken, 6 Cas. 372.)

The rule laid down by the courts of most of the states that the title to land bounded by large navigable streams of water extends only to high-water mark differs somewhat from the Pennsylvania rule which extends the title of the riparian owner to low-water mark, subject to the right of the public to pass over so much of it as lies between low and high water mark, when covered with water. (Pursell v. Stover, 14 Out. 43).

The English doctrine that the navigability of a stream depends upon the ebb and flow of the tide has never been introduced into Pennsylvania where many rivers are navigable far above tide-water. (Carson v. Blazer 2 Binn. 476).

But few decisions have been rendered in Pennsylvania bearing upon the subject of "common", and the few cases which have found their way to the Supreme Court have been
decided in accordance with common law principles.

The law of easements in Pennsylvania is similar, wherever recognized, to the common law. The common law of England with reference to Public Ways or Highways, Private Ways, Ways of Necessity, Water-courses and other water rights, Lateral support, Drain and drip, Burial lots and Pews is equally applicable to Pennsylvania. But the common law rule with regard to the easement of "light and air" has never been acknowledged in Pennsylvania. The right to air and light may exist, but only by virtue of an express grant. (Haverstick v. Sipe, 9 Cas. 371.)

While the Recording Acts of Pennsylvania can not properly be considered a part of the substantive law of Real Property within the scope of this thesis, yet a thorough knowledge of them is absolutely necessary in order to arrive at a full and accurate understanding of the general law. The first recording act passed in Pennsylvania which received the assent of the crown was the Act of 28 May, 1715 which is still in force. Another act amending the act of 1715 was passed March 18, 1775. The substance of both these acts is incorporated in the Act of 19 May, 1893 (Laws of 1893 p. 109) which provides that
all deeds not acknowledged and recorded within ninety
days"shall be adjudged fraudulent and void as to any sub-
sequent purchaser for a valid consideration, or mortgagee
or creditor of the grantor or bargainor therein."

Robert Louis Grantle.