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OLD QUESTIONS—WALKER'S THEORY OF THE COMMON LAW.

There is something about an old question that is very attractive to the quiet and speculative mind of a student. There is no hurry, no bustle about it. The crowd cares nothing for it—you feel that you can take it—that you can carefully and leisurely enjoy it. There is no glaring sunshine about it; but around it is that gray-half light that contemplation loves. It is of the olden time, and there is something of mystery and of veneration about it—something of the ruin and the ivy; and your pursuit of it is amidst the shadows of "things that were." It has been a subject of investigation to the great masters, and you feel your inquiry as an association with them. And then to find out a new and satisfactory solution of it!—a solution so simple and plain, you wonder that it was not always known—it makes you feel that there is yet more room. Old law questions particularly commend themselves; for the study of them begets a love of the profession—not a love for its mere honors and profits, but a love for it as the science of humanity, as a science which calls into vigorous action the highest and best faculties of the mind. They commend themselves too, as

the very entrances into the science, which stretches itself out into a vast—a boundless extent, with divisions and sub-divisions interminable. He who finds other entrance often knows not which way to turn; and turning, finds himself involved in depressing and inextricable difficulties. No where else can a clue be found that will lead to the certain and satisfactory determination of many a new and untried question.

How can any one hope to learn the tendency of a system; the philosophy of it; its influence upon the character and destiny of those who live under it, if he study not the system as it was, as well as the system as it is?

In order to get at the philosophy of a system, it is necessary to study it in detail, to go from point to point, and after one has thus gone over the whole ground, then to lift up his eyes and take a survey of it as a whole. Now, this survey is what Mr. Walker has attempted in his "Theory of the Common Law"—a book that deserves to be carefully read by every member of the profession, for the object is worthy of all praise; and even if the conclusion be incorrect, yet it may suggest and lead to a more successful effort. And even if the law, or the reason of it, be sometimes mistaken, yet the errors will encourage, whilst the learning will stimulate us to renewed exertion. It is a book that seems to be to the Common Law, what De Quincey's "Cæsars" is to the History of Imperial Rome. But we do not propose to offer a criticism upon it, as a work—we propose only to notice two or three "Old questions," about which we differ with the learned author.

Take this one—"Why does the law inexorably demand that the remainders shall vest at the very instant of the determination of the preceding estate," p. 21.

Mr. Walker answers—"By the Common Law, livery of seizin was necessary to give the title to a freehold interest in land. When, therefore, the tenant for life took livery of seizin, the remainder-man acquired an inchoate right to the remainder. This right vested in the remainder-man as soon as the particular estate commenced, but did not authorize him to enter into the possession of the land, even at the death of the tenant for life, without the consent of the

lord. *Sciendum est feudum sine investitura nullo modo constitui posse.* Now, if the tenant for life forfeited his estate—and only by forfeiture could he lose it—it necessarily reverted to the lord; because the remainder-man, not having livery of seizin, could not enter to exclude the lord, and livery could not be granted him, as remainder-man, under the original agreement, for the tenant for life was not dead. The resumption of the land by the lord was not the acquisition of a new estate, but his restoration to his original estate, for the tenure or contract of holding was that the lord might re-enter for breach of any condition; being restored to his old estate, the remainder, necessarily, no longer existed. To prevent, therefore, the failure of the remainder, consequent upon a reverter to the lord of his old estate, *the tenancy for life must, in every case, continue until the moment* when, by the law of the contract, the remainder-man is entitled to demand livery of seizin." p. 23, 24.

Now, we deny that consent of the lord or direct investiture was necessary to the entry of him in the remainder, after the expiration of the particular estate. The particular estate and the remainder constituted but one freehold *quoad* this purpose; and the livery to the particular tenant enured, therefore, to the remainder-man as fully as if it had been made directly to him. It was not, therefore, *feudum sine investitura.* A second livery would, indeed, have been nugatory, for *quod semel meum est amplius meum esse non potest.*

It is true that a contingent remainder may be defeated by the entry of the grantor for breach of condition *in law*, but a vested remainder cannot be destroyed in that way. The vested remainder-man and not the grantor, has the right of entry in such case. There does not seem to be the slightest ground for saying, that a co-obligation exists between tenant for life and remainder-man, that tenant for life will not do any act amounting to a forfeiture. That is the reason, however, which Mr. Walker gives for saying, that the rule is founded upon the plainest principle of justice. It is true there was such an obligation, but it rested upon the particular tenant alone. It certainly cannot be said, that a contingent remainder-man who was not *in esse*, or who was not ascertained

was a party "in fact and in law" with the tenant of the particular estate, in his contract with the grantor. No, the destructibility of each remainder by entry, for breach of condition in law, has a different cause. And as to the vested remainder, we have already said, that a vested remainder-man had the right of entry for breach of condition in law; and therefore he was an obligee rather than an obligor.

In order to get a clear idea of the matter, let us separate it into four questions: 1. Why is a limitation of a freehold estate, in lands, to commence *de futuro* generally void at the common law? 2. Why is a limitation not a remainder, if it be not limited to take effect immediately upon the determination of a preceding estate? 3. Why must a remainder be created at the same time with the particular estate preceding it? 4. Why must a remainder vest in interest, at least, *eo instanti* that the estate supporting it determines?

First. The reason, why a freehold estate, in land, cannot generally be limited at the common law to commence *de futuro*, is that livery of seizin is necessary to pass a freehold, and it is a ceremony *in præsenti*, the operation of which cannot expect. The reason why a limitation to take effect a day or a moment after the determination of a preceding estate is void *as a limitation*, is different from the reason why such a limitation *is not a remainder*.

Second. The answer to the second question is suggested by asking another. Why is not the interest of a grantor, which is to take effect in possession after the expiration of a partial estate, a remainder? The common law, like every other system, has elementary ideas; and it is certainly one of them, that a remainder is a limitation which is to take effect immediately upon the determination of a preceding estate.

Third. We may quote a reply to the third question. "It cannot be created previous to the creation of one or more particular estates; for though an estate may well be created out of another estate, without the creation of a preceding estate, yet it cannot, with propriety, be called a remainder, which signifies a remnant or residuary part. Besides, if such an estate were of freehold and in lands, it would, as we have seen, be necessary by the common law,

to make livery of seizin, and then, instead of a remainder, it would be an estate in possession. Nor can a remainder be created subsequent to the creation of one or more particular estates; for though an estate may well be conveyed subsequently, yet such an estate would be but the part, or the whole of a reversion. As a remainder, then, cannot be created either previously or subsequently, it must, therefore, be created at the same time, *in fact or in law*, with one or more particular estates preceding it." [1]

Fourth. We come now to inquire, why it is that a remainder must vest in interest, at least, *eo instanti* that the estate supporting it determines.

If the particular estate be destroyed or its limitation regularly expire before the remainder becomes vested, then another estate, either rightful or wrongful, comes *in esse*, and the existence of such rightful or wrongful estate is inconsistent with the existence of the limitation over *as a remainder*. If it were allowed to exist, it would be as a springing interest; but it could not take effect as a springing interest, for, if of freehold in lands, it would be in violation of the rule requiring livery of seizin to pass such a freehold, and whatever its character, it would be inconsistent with the rule, that whenever a limitation is good, as a remainder, in its inception, it shall never take effect otherwise than as a remainder. But let us take another view of the matter.

It is said that a limitation cannot, strictly speaking, be a remainder, unless it be of freehold; but if this be not so, it is nevertheless true, that freehold remainders in lands were first created, and that the rules governing *remainders* were first ordered and applied to them. We must look, therefore, to them for the reasons of the rules which govern remainders generally.

Livery of seizin was necessary to pass a freehold in land, and yet livery could not expect. How, then, consistently with these principles, could a freehold remainder be allowed? It could not have been, but for the principle that the particular estate and the remainder were but parts of the same estate. Unity, therefore, was the

[1] Keyes on Remainders, 19, 20.

principle upon which the livery to him, *in præsenti*, enured to him in remainder. Departure from this principle of unity would have been an abrogation of the rule requiring livery. It was necessary, then, that the remainder should vest, at least *eo instanti*, the particular estate determined or was destroyed; because by the destruction of the unity, the limitation over would become a separate and distinct freehold to commence *de futuro*, and therefore void, not as a remainder, but also as a limitation.

Mr. Walker seems to have fallen into error, in regard to fees conditional. The judges did not determine that, upon the birth of issue, the limitation to the heirs of the body was executed in the donee.[1] The limitation to the heirs of the body was executed in such tenant in fee immediately. There was no waiting for the birth of issue. Such a tenant had no larger estate after issue born, than he had before. He acquired a right of alienation by such birth, which was transmissible from heir to heir, until it was exercised, or inheritable issue became extinct. If such tenant aliened before issue, and then had issue, and subsequently "died without issue," the lord might enter; but if he aliened after issue, and then "died without issue," the lord could not enter—and this is the diversity. But why was it held that such tenant could alien after the birth of inheritable issue, and thus defeat the lord-reverter? That he had as good right to alien *a conditional fee* as a tenant in fee simple had to alien in fee simple, is clear enough. Neither had such right at first, and so when it is said that the statute *de donis* restored the common law, it must not be understood that it restored what was peculiar to fees conditional. But that the alienation of the tenant in fee conditional, after the birth of inheritable issue should have been allowed to defeat the lord's reverter, must be conceded to have been a *judicial error* in favor of alienation. For, if there had been anything in the reason, that a condition once performed is gone forever, then such tenant would have become tenant in fee simple upon the birth of inheritable issue, and that was not true; for, as we have already said, if he died afterwards without

[1] See Theory Common Law, chap. 9.

aliening and without issue, the land reverted. The rule in Shelley's case has no peculiar application here, and it does not, as Mr. Walker insists, render any assistance in the explanation of this matter.[1]

But we have never met with a legal proposition that struck us with greater surprise than the assertion, that when an estate was given to A and his heirs, that his heir originally took by *purchase*. It is true that the ancestor could not alien, but that has nothing to do with the distinction between purchase and descent. Purchase was a taking directly, descent was a taking through an ancestor. The ancestor claimed from the lord, but he claimed directly, and therefore by purchase. The heir claimed from the lord, but he claimed *through* the ancestor, and therefore by descent. An estate of inheritance originally was but a succession of life estates without impeachment of waste, to which the right of aliening in fee was not incident—and so now it is but a succession of life estates without impeachment of waste, to which the right of aliening in fee is incident. And here we may add a question—Was it ever suspected, whilst estates tail were held to be indestructible, as they were before Taltarum's case, that the heir of the body took by purchase? But if the heir was entitled to take by purchase, at the common law as it originally was, then most certainly was the heir of the body so entitled, under the statute *de donis*, since that statute was but a restoration *pro tanto* of the common law.

In regard to the rule in Shelley's case, Mr. Walker says, "Neither the great argument of Justice Blackstone, in Perrin and Blake, nor the admirable criticism of Mr. Fearne on that case, and the rule itself, enlighten us as to its origin. It is too important, however, not to receive careful investigation."[2] Without following our learned author, however, we may re-assert that there seem to be two rules included in the discussions. Of the rule of Shelley's case, the first rule applies to cases in which the gift is to the heirs of the grantor. The second, which is properly the celebrated rule in Shelley's case, applies to cases in which the heirs are not the

[1] P. 46–49. [2] P. 45, 46.