

# Textbook on Land Law

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# 1

## Estates in land

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### 1.1 Introducing Trant Way—and Trant House

Since Trant Way exists only in our imagination, we must explain that we visualise it as a road on the outskirts of an old country town. The town has grown considerably over the past 50 years (although so far it has avoided a ring road), and many of the outlying houses have been built on land which was once farmland. Thus the houses in Trant Way which are nearest to the centre of the town stand in a typically suburban environment, whereas the houses at the further end of the road are in more countrified surroundings.

One of these more rural properties, Trant House, has just come onto the market, and the house agent's particulars include the following details:

... a freehold property, offering spacious accommodation... set in delightful grounds of approx. 2 acres, with open views to rear... property includes converted stables containing two self-contained flats, suitable for permanent occupation or for use as holiday lets...

Penelope Price is looking for a house in the area in which she can run a bed-and-breakfast business. She likes the sound of Trant House and arranges to view it.

### 1.2 Viewing Trant House

When Penelope arrives at the property she finds that a long drive leads from the gate to the house. Half-way up it, a smaller drive branches off and runs through a boundary wall towards a small cottage. Penelope notes that she must find out more about this.

She is shown around the property by Vernon Venables, who explains that he has lived here with his wife and family for over 30 years, having bought the house in 1979. Their children are now grown up, with families of their own, and he and his wife no longer

need such a large house. After going all over the house, which seems comfortable and well maintained, Penelope is taken out to look at the additional accommodation in the converted stables. It is obvious that both flats are currently occupied, and Vernon explains that one of them is let to a mature student, Ted Toppling, who is following a three-year course in Applied Astrology at Mousehole University. Vernon tells Penelope that the other flat was specially converted into a 'granny annexe' for his mother, who came to live with the family when his father died a few years ago. He mentions that converting the stables was a very expensive job. Fortunately for him, his mother contributed towards the cost of fitting out her flat, but he had to get quite a large loan to finance the rest of the work and intends to pay this off when he sells Trant House. He adds that his mother will be moving with them when they find a new house.

The grounds around the house prove to be most attractive. The part nearest to the house has been landscaped as a formal garden. Beyond this there are flower beds and a shrubbery, and then a large area of rough grassland, which the house agent's details describe as 'the orchard'. Penelope is rather surprised to see a pony grazing here, and Vernon tells her that it belongs to one of his neighbours, 'who has always grazed his ponies here'.

Vernon asks Penelope if she has any questions, and she takes the opportunity to ask about the drive at the front, which appears to be shared with the neighbouring property. She is told that the cottage used to belong to Trant House, and was approached by the main drive. When the cottage was sold off many years ago (before Vernon bought the property), the new owner was allowed to continue to use the Trant House drive, and occupants of the cottage have done so ever since. Talking about this reminds Vernon that, when the previous owner of Trant House sold the cottage, there was some agreement between him and the buyer that neither of them would carry on any sort of business or trade on their respective properties. He is rather vague about the details, but is sure that 'the lawyers will know'.

Penelope asks if she can have another look around the inside of the house, and having done so, goes away to think it all over. For her, as for most purchasers, thinking it over will involve all sorts of questions about how she will use the property, what sort of alterations she might make and, most important of all, how she will finance her purchase. One question that she probably will not ask herself is: what am I buying? The answer seems obvious: I'm buying a house and some land. For a lawyer, however, the answer is rather different and in the next section we will tell you what someone who is 'buying a house' is really buying.

### 1.3 What am I buying?

Under the system of landholding which operates in England and Wales, all land belongs to the Crown and the only person who is capable of owning land is the sovereign. This is an idea which dates from the Norman Conquest in 1066 and which persists even today. As a result, an individual cannot own the land on which he lives or runs his business, but he is allowed the use of the land by the Crown. What he does in fact own is a collection of rights and duties in relation to the land, one of the most important rights being to take and retain possession of the land and to make use of it. The technical name for the individual's interest in the property is '*an estate in land*', and thus a person who buys a house becomes the owner of *an estate* in it but does not own the land itself.

## 1.4 Tenure

When the new system of landholding was introduced in the eleventh century, the king gave rights over large areas of land to each of his most powerful supporters, in exchange for an oath of loyalty and the performance of services (which very often involved fighting for the king when necessary). In turn, each lord would grant to his followers similar rights over parts of the land he had received, again in exchange for loyalty and services. The relationship between the grantor (the king or lord who granted the rights) and the grantee (the tenant who received them) is called 'tenure' (from the Latin word '*tenere*' which means 'to hold'), and various forms of tenure developed, according to the nature of the services to be performed by the tenant. These forms of tenure came to be described as '*freehold tenures*', because rights in land could be held in this way only by free men (i.e., not by the unfree serfs or villeins, who were obliged to remain in the area in which they had been born and to work for the local lord).

Over the centuries, changes in society meant that the services due from the tenant were no longer performed and the link between lord and tenant was forgotten. However, the underlying theory that land is held from the Crown remained, and although most forms of tenure have been abolished a 'landowner' is still said to hold his land from the Crown by the one remaining form of tenure ('free and common socage'). Nevertheless, for all practical purposes the doctrine of tenure has little modern significance and it is very likely that the owner of Trant House is completely unaware of his tenurial relationship with the Crown.

## 1.5 Estates in land

Throughout the book, we will be talking about freehold and leasehold estates, and we need to look briefly at how these developed.

### 1.5.1 The freehold estates

An estate in land which could be held by a free man on free tenure came to be known as a freehold estate, and over the years three main types of freehold estate developed.

#### 1.5.1.1 The life estate

At the outset, it was usual to grant the right to possess and use land only for the life of the tenant, who accordingly could be said to have a life estate. The king or lesser noble who granted the estate depended on the loyalty of his tenants and would make grants only to those personally known to him.

#### 1.5.1.2 The fee simple

As time went by, grants to a tenant 'and his heirs' became more common, with the result that the right to possession would last longer than the lifetime of the original tenant. In a further development, it became possible for the tenant to transfer the estate (i.e., on a sale or by gift) and the right to possession of the land would continue as long as there was an heir to inherit on the death of the current owner. The heading to this section describes this estate as a '*fee simple*' and we need to explain the meaning of this term.

The word *fee* denoted an inheritable interest in land and the word *simple* meant that the estate could be inherited by the 'general heirs'. On the death of the current tenant,

the estate would pass to his heir—a single individual who was identified according to complicated rules. If the deceased had children, the heir would be his eldest son. If the eldest son had died before his father but had himself left a son, that grandson would be his grandfather's heir. If there were no sons to inherit, any daughters inherited the estate jointly. If the deceased had no descendants, his heir would be one of his blood relations, found among his brothers or sisters (or their descendants), or more remotely among his uncles, aunts or cousins. At a later stage, one of the deceased's ancestors, such as his father or grandfather, might be entitled to inherit. It was therefore possible for a fee simple estate to pass to a fairly distant relation.

### 1.5.1.3 The fee tail

As we explained above, the fee simple estate was inheritable by general heirs, the heir being drawn from a wide range of relatives of the deceased. In the case of a fee tail, however, the estate was still inheritable (denoted by the word 'fee'), but the heir had to come from a more limited class. This class was the 'heirs of the body', meaning the lineal descendants of the original tenant in tail. Sometimes this class was limited even further, to the 'heirs of the body male' (or, rarely, 'female'). In such a case, the estate could not pass to an heir of the wrong gender, nor could it pass to the ascendants or siblings of the original tenant. It would pass only to his direct descendants of the correct gender. The fact that the estate was limited or 'cut down' in this way led to it being described as a fee 'tail' (from the French word '*tailler*'—to cut down).

If no heir of the right sort existed, the estate would come to an end and the property *reverted* to the fee simple owner who had originally created this more limited estate (or, if he had already died, would pass to his general heir). The person who had the right to recover the property should the entail come to an end was said to have a *reversion*.

### 1.5.2 The leasehold estate

Once the owner of a freehold estate was free to deal with his estate as he chose, the practice developed of permitting another person to take possession of the land for a fixed time, usually in exchange for rent. In modern terms, we would say that the freehold owner 'let' the land or 'granted a lease' of it. This was in essence a commercial development, and although the relationship between landlord and tenant is also one of tenure (i.e., the tenant 'holds' from the landlord), the tenant usually paid for his use of the land with money, rather than by the performance of services.

Originally, letting the land in this way was regarded as creating only a contractual relationship between the parties. Over time, however, the tenant's position improved and the courts treated him as having a right to possession of the land which he could enforce against the landlord and also against any other person who dispossessed him. Recognition of this right meant that a tenant holding under a lease could be said to have an estate in the land.

## 1.6 Reducing the number of legal estates

In the past, the freehold and leasehold estates we have described were recognised and protected in the common law courts and so were described as 'legal' estates (as opposed to the equitable interests which were protected by the Chancellor). Today, however, only two of those estates retain their legal status, and the other former legal estates take effect only in equity.

This change was introduced by the 1925 property legislation (see the Introduction to Part I), as one of the measures designed to further its aim of simplifying the process of buying and selling land. Dealings with land were complicated by the existence of the three freehold legal estates. This was because it was possible for a fee simple owner to create a number of smaller legal estates out of the fee simple, so as to give successive interests in the property to current and later generations of his family. He could, for example:

- give a life estate to some elderly relative;
- create a fee tail in favour of his eldest son, which would entitle the son and his direct descendants to possession of the land when the previous life estate ended; and
- dispose of the reversion on the fee tail which would arise if the direct line died out (see 1.5.1.3).

This process was known as ‘making a settlement’, and we will tell you more about it in Chapter 15. At the moment all you need to know is that this practice of dividing up the legal fee simple could cause difficulties on a later sale of the estate, even if the settlement had come to an end. Any prospective purchaser would want to satisfy himself that the seller owned the estate he offered for sale, and the fact that the fee simple could be fragmented into smaller estates made the process of investigating the seller’s title more complicated.

The solution to this problem which was adopted in 1925 was to provide that in future the smaller freehold estates should take effect only in equity, leaving one freehold estate (the fee simple) and the leasehold estate to continue as the two remaining legal estates. As a result, there are today only two estates in land which are recognised at law.

## 1.7 The two modern legal estates

The two legal estates which exist today are set out in LPA 1925, s. 1(1):

The only estates and interests in land which are capable of subsisting or of being conveyed or created at law are –

- (a) an estate in fee simple absolute in possession;
- (b) a term of years absolute.

Section 1(3) of the Act provides:

All other estates, interests, and charges in or over land take effect as equitable interests.

### 1.7.1 Estate in fee simple absolute in possession (‘freehold estate’)

This is now the only freehold estate which can exist at law, and it is becoming increasingly common to refer to it as ‘the freehold estate’ rather than using its technical name. You may remember that the particulars of Trant House describe it as ‘a freehold property’, and this tells us that Vernon owns a fee simple absolute in possession. Although for practical purposes one may speak of ‘a freehold estate’, it is important to understand the precise meaning of the older term, which you will certainly encounter throughout the 1925 legislation. Each part of the term has a technical meaning, which we will consider briefly.

### 1.7.1.1 Fee simple

We have already explained that originally this term indicated that the estate was inheritable by ‘the general heirs’ of the current tenant (see 1.5.1.2). Rather confusingly, the 1925 legislation retains this term, although it abolished the old concept of the heir and introduced new statutory rules of inheritance, with the result that one cannot really define a fee simple today by describing it as an estate ‘inherited by the general heirs’. What remains true is that the fee simple is an estate which can last indefinitely, as long as there are persons entitled to take the property under the provisions of the will of the previous owner, or under the statutory rules relating to an intestacy. Very occasionally no person entitled to the estate can be discovered after the rules have been applied. In such cases the estate will at this point come to an end and the land will revert to the Crown.

### 1.7.1.2 ‘Absolute’

The explanation of the word ‘absolute’ gives rise to further complications. The word indicates that the fee simple should not be subject to any restriction which would prevent it lasting as long as there are persons entitled to inherit. So, if I try to give Fred a fee simple estate ‘until he qualifies as a solicitor’, the gift cannot be of a fee simple estate. The estate will not necessarily last forever (as long as there is someone to inherit) because it will end earlier should Fred ever become a solicitor. This sort of arrangement is called a ‘determinable fee’ and, together with its relative the ‘conditional fee’, it now takes effect as an equitable interest. (For further details of determinable and conditional fees, see Chapter 9.)

### 1.7.1.3 ‘In possession’

The final words in the legal term for a freehold estate are ‘in possession’. This means that the estate must be current, rather than being one which is to give the owner the use of the land at some time in the future. Thus, if I give Paul an estate to start in five years’ time, I have not given him a legal estate and he will have only an equitable interest. Future interests in land are dealt with in more detail in Chapters 15, 17, and 18.

It should be noted that the estate owner does not have to be in physical possession of the land itself in order to have a legal estate. For example, the property may be let to a tenant, in which case the tenant will be in physical possession of the land, whilst the landlord has the right to receive the rent payable under the lease. In this case the landlord still has a legal estate because LPA 1925, s. 205(1)(xix), provides that:

‘Possession’ includes receipt of rents and profits or the right to receive the same, if any.

### 1.7.1.4 Former legal estates which become equitable interests under LPA 1925, s. 1(3)

It will be obvious that there are many kinds of arrangement which one may wish to make concerning a piece of land, but which now cannot amount to a legal estate in fee simple. Examples of arrangements which fall into this category include: an interest for life; an interest to start at some time in the future—a future interest; and a determinable or conditional fee simple. Arrangements of this sort can still be made, but they create equitable interests which have to operate by means of a trust. In such a case, the legal fee simple is held by trustees on trust for those entitled to the equitable interests (see 2.5.2 and Part IV).

For some 60 years after the 1925 property legislation, an entailed interest (formerly the fee tail estate) was one of the equitable interests which operated behind a trust. However, major changes in this area of law were introduced by the TOLATA 1996, and it is no longer possible to create an entailed interest, even in equity (see 17.10.3).



### 1.7.2 Term of years absolute ('leasehold estate')

The 'term of years absolute' is the lawyers' name for what is more commonly called a lease. It has remained as a legal estate but it is inferior to the fee simple estate because it is of limited duration. The essential requirement is that a lease must be for a fixed 'term of years', though this can include periods of less than a year (LPA 1925, s. 205(1)(xxvii)) and can include arrangements such as weekly or monthly tenancies. The word 'absolute' does not seem to add anything to the meaning because a lease does not cease to be a legal estate merely because it will terminate on the occurrence of some event (e.g., if the rent is unpaid).

Section 1(1)(b) of LPA 1925 does not require that the term of a legal lease should start at the date of grant (i.e., unlike the freehold estate, it does not have to be 'in possession'). Thus, subject to certain rules (for which, see 10.1.3.4), it is possible to grant a lease now, to take effect at some time in the future.

It should be noted that the owner of a term of years does not hold the land of the Crown. The leaseholder derives his title from that of his landlord, who will be either the owner of a fee simple estate or of a longer leasehold estate.

The lease is of considerable importance in land law and it is considered in greater detail in Chapters 10, 11, 12, 13.

### 1.7.3 Legal estates in Trant House

In this section, we simply want to draw your attention to the fact that both of the two modern legal estates can be found in the Trant House property. We have already noted that the description of the property as 'freehold' tells us that Vernon holds the fee simple absolute in possession in the property. In addition, one of the flats in the converted stables has been 'let' to the student, Ted. Provided that this letting satisfies the legal requirements for a lease and has been made in the correct form (which we will tell you about in Chapter 10), a legal term of years absolute will have been created, which Ted will hold as a tenant from Vernon as his landlord.

## 1.8 What is land?

When Penelope was looking over Trant House, she was particularly impressed by the very lovely gardens. She has always dreamt of having gardens like these and thinks that they will also be a great attraction to possible guests for her business. She noticed that a major feature of the gardens is the presence of a number of statues, which appear to be antiques and to have been part of the gardens for some considerable time. She also noticed that the gardens contain a stunning display of scented roses and Vernon explained that rose growing had been his main hobby for some time and that he had won prizes for his champion roses, some of which he had cultivated himself. She is also very interested in some of the tapestries that seem to have been used as wall coverings in some of the rooms of the house, in place of wallpaper. Penelope is now worried that Vernon may want to move or sell the statues and tapestries (which seem very valuable) and that he is certainly likely to want to remove some or all of the roses.

Penelope is starting to ask herself questions about what she is actually buying. The estate agent's particulars just mention the house, gardens and orchard: they say nothing about statues, tapestries or plants. She wonders whether, if nothing is said in the

conveyancing documents about these items, she will get them if she buys the property. In essence, she is starting to wonder what actually constitutes land.

Unfortunately, the answer to Penelope's concern is one of the most complex and technical aspects of land law. Indeed, it is quite difficult to understand this issue fully until you have learnt a great deal about the estates and interests in land. Accordingly, we think it best to consider this issue at the end of the book (see Chapter 28). However, we realise that you will need a working concept of 'land' from the start of your studies, so we will give some basic ideas here. Also, in some courses this issue is tackled at an early stage. If that is true for you, we suggest that you read the first three chapters of this text and then Chapter 28.

The traditional answer to what constitutes land is that land is the physical land down to the centre of the earth and up to the 'heavens' (skies). 'Land' also includes everything physically attached to the land. Thus the house and its foundations are also land. Since the roses are necessarily embedded in the land, they are also land. As far as the tapestries are concerned, the issue of whether they are part of the land may depend on the degree to which they are fixed to the walls and the purpose of that fixing. Is it just to display the tapestries conveniently or is it to incorporate them more fully into the design of the house? The statues may well just be placed on top of the land, rather than fixed to it. In that case they may not constitute land. However, if they can be regarded as forming part of the integral design of the garden, they may be taken to have become part of the land. We discuss the cases on this important topic in Chapter 28 and you should look there if you need more detailed answers.

The whole issue of what is land is, however, made even more complex by the fact that not only physical things fixed to land are regarded by the law as being land. Thus the legal estates and most interests in land are also 'land'.

It is, of course, always possible for a document to provide its own definition of land for the purpose of that document. Thus the document transferring Trant House to Penelope could specifically exclude the roses. If it does not, they will transfer without being mentioned because they are certainly affixed to the land. If Vernon removed them, he could be sued successfully by Penelope. This can be important because vendors often forget to tell their conveyancer that they want to take such items with them. In most cases it is not worth bringing a court action but, where what is removed is significant, it may be, particularly if the items removed can be restored to the property.

As we have seen already, in fact only the monarch owns land; others can only own an estate or interest in land. Thus, part of the answer to the question, 'What is land?' is that estates and interests can be regarded as land.

For most of your work on land law, the most important definition of land will be that provided by s. 205 of the LPA 1925 because that definition applies to the 1925 legislation as a whole (see 28.1.1 for this provision). If you look at it, you will see that it mixes together physical things which are land (such as buildings) with the estates and interests that can also be land. Do not worry; we explain all of this in much more detail in Chapter 28.

## 1.9 Who else may have rights over Trant House?

In this chapter we have told you about the two legal estates in land and explained that the house agent's description of Trant House as 'a freehold property' means that the vendor, Vernon, holds the 'fee simple absolute in possession' in the property.

In addition to Vernon, a number of other people may have rights over the property. We will tell you about some of these rights in the next chapter, but suggest that before you go any further you may like to look back at the account of Penelope's visit to the property, and see if you can identify some of the other people who might claim to have rights over it.

#### FURTHER READING

Cheshire and Burn, *Cheshire and Burn's Modern Law of Real Property*, 18th edn., Oxford University Press, 2011, Chapter 2 (The Common Law System) (history of tenures and estates—very detailed—for reference only).

Cooke, *Land Law*, 2nd edn., Oxford University Press, 2012, Chapter 2 (Property Rights in Land) pp. 15–26.

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