# The Law Relating to Agriculture

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# Foreword

The general purpose of the Agricultural Adjustment Unit of the University of Newcastle upon Tyne is to collect and disseminate information to enable the agricultural industry to adapt easily and efficiently to the changing conditions which it encounters.

The environment within which farmers operate is complex, involving economic pressures and institutional, political and social factors. In recent years we have received helpful comments and suggestions for further material from a number of people who have attended our conferences and courses or have read our publications. Among the many topics which have been mentioned one of the more persistent demands has been for a new book discussing law from the farmers' point of view. In consequence Mr Stephenson of the Department of Law in the University of Newcastle upon Tyne who has co-operated with the Unit in several of its activities was invited to undertake such a task. It was then arranged that the publication should appear in the Saxon House Studies series.

We believe that this book will occupy a valuable place in the library of contemporary agricultural literature since it sets out in clear and precise terms the most relevant sections of British Law for agriculture. Although obviously not in a position to offer detailed legal advice both the author and the Unit would welcome comments or criticisms from readers either on the detailed content of the book or on wider issues arising from it.

J. Ashton
Director,
Agricultural Adjustment Unit

# Preface

This book is written for those who wish to obtain a working knowledge of the law relating to agriculture. It does not purport to do more than this; thus it is advisable to remember that, as regards virtually every chapter in the book, there are specialist works running in most cases to considerably more than the entire length of the book. Such works are admirable for the specialist, and a specialist practitioner should always be consulted by a person who realises that he has a problem of a legal nature, but in order to impel this person to do so it is first necessary that he should realise that a legal problem concerning himself has arisen which merits taking further specialist advice; this book is written in order to give him a basic grasp of the law sufficient to enable him to realise the basic legal problem which confronts him and which merits the taking of further advice. The reader should also bear in mind that the law changes from time to time; the details of the counter-inflation and tax legislation, for example, are ephemeral.

I meditated long on whether to include a chapter on the law of bankruptcy, since I have yet to meet a farmer who was not, according to his own ready admission, teetering on the verge of it; despite this state of affairs, subsequent observation led me to note that none of these despondent gentlemen in fact fell over the verge, and hence to conclude that the chapter could be omitted with some degree of safety.

I wish to express my thanks to the Agricultural Adjustment Unit of Newcastle University, since it was the comments of the Unit while I was giving a number of lectures for them which first brought home to me the probable need for a work of this type; I should also like to express my thanks in particular to Professor Ashton, Professor Rogers, Graham Ross and Paul Weightman of that Unit for their assistance and encouragement, and in particular to Alec Hayden without whose assistance with the mechanics of production it might never have been completed. I should also like to thank colleagues Professor Calvert, David Harte and John Mickleburgh who where kind enough to read individual chapters and to make many helpful comments, and to Ian Dawson who bore a particularly heavy burden in this respect.

I am responsible for the contents of the book other than the Index and Tables of Cases and Legislation, and should like to thank Richard S. Haig-Brown for his stalwart efforts in relation to the latter. The law in this book is, with tiny exceptions, that which was in force on 31 May 1973.

# Contents

# 1 The Land Law

All land in England and Wales is owned by the Crown, and consequently all land which is occupied by someone other than the Crown is held in tenure from the Crown either directly or indirectly. Nowadays, however, the occupier renders no return for his tenure (and hence the theory of tenure is of no practical significance) except in the one case of a lease. Since persons other than the Crown cannot own the land, what the law permits them to own is the right to enjoy the land for a period of time (known as their 'estate' in the land); the land law lays down in what manner and to what extent and to whom time may be sliced up and distributed for this purpose. A discussion of this now follows.

## The fee simple absolute in possession

This is the nearest equivalent to absolute ownership which the law permits and, since nowadays the tenant in fee simple renders nothing in return for his interest, it in practice amounts to absolute ownership. Thus such a person may dispose of his interest in the land either by will or by gift, sale or exchange while he lives. It is said that he owns everything 'up to the sky and down to the centre of the earth' as far as the boundaries of his land, although despite this it has been ruled that an intrusion into only the air space at a considerable height above the land does not constitute a trespass,[1] but there is some doubt concerning the correctness of this decision. In general he may use his land as he thinks fit, including the ability to allow it to deteriorate, or indeed deliberately to damage it, with legal impunity. But he is subject to any rights which third parties may have against his land, such as the right to walk over it (*post*, pages 19–26). Moreover the physical condition of his land may possibly involve him in civil liability to pay damages to a third party who is injured in consequence, such as a visitor injured by the dangerous state of his land (*post*, pages 323–7), or if his land constitutes a nuisance (*post*, pages 312–14). Most importantly, he is in many ways hampered by Acts of Parliament in the enjoyment of the ownership of his land; such Acts include the town and country planning legislation, whereby he needs planning permission to develop his land (*post*, pages 201–7); Acts relating to compul-

sory purchase, whereby public authorities may take his land from him in return for compensation on a basis prescribed by legislation (*post*, pages 219–52); the public health and housing legislation, under which the owner is restricted as regards the construction, materials, size of rooms and the like of new buildings erected by him, and may be required to repair or even demolish houses considered to be defective; all his interest in petroleum existing in its natural condition and in coal has been taken away from him.

Although he does not own wild animals on his land he has the exclusive right to catch, kill and take the carcasses of them while they are on his land. If water flows through the subsoil of the land, he cannot take it except for the domestic purposes of his household or with a licence granted by a river authority.[2] As regards water flowing in a defined channel through the land, again he cannot as a rule take it without a licence from the river authority; the main exception is when the water is taken for use on a holding comprising the land through which the water flows and any other land held with it, and the use is for either the domestic purposes of the occupier's household or for agricultural purposes other than 'spray irrigation'.[3] If he owns the land on both banks of the stream, he has the sole right to fish unless either he bought the land expressly without the right to fish or he has granted that right to someone else; if he owns the land on one bank of the stream only, he is presumed to have the sole right to fish up to the middle of the stream nearest to his bank, subject again to his having bought the land expressly excluding the right to fish or his having granted the right away.

A disposition of land either by deed or by will passes the fee simple or other interest which the grantor had power to convey in the land, unless a contrary intention appears in the deed or will.[4]

The word 'absolute' in relation to a fee simple signifies that it is perpetual and not liable to end on the happening of some particular event; such an interest can be created at law without employing the device of a trust. Fee simples which are not 'absolute', such as a gift 'to A in fee simple until he marries' can only subsist through the medium of a trust (*post*, pages 103–4); however this is not true of some, and perhaps all, conditional fee simples.[5]

In general the owner of a fee simple which is less than 'absolute' has the same rights of dealing with the land as has the owner of a fee simple absolute (see *post*, pages 7–12), save that he cannot personally benefit to any greater extent than the interest in the land which he himself owns and he may be restrained from committing acts of wanton destruction.

## The fee tail

A fee tail is created by granting land to a person and the heirs of his body; under such a grant when that person dies the right to inherit is, unless the entail has been barred (see *post*, pages 3–4), restricted to his descendants, which is to be contrasted with the grant of a fee simple which can pass to his other relatives. The word 'tail' signifies that the heirs who can inherit are a restricted category.

A fee tail may be further restricted such as by granting the land in tail male, so that only male descendants claiming continuously through males can inherit, or by a grant to a person and the heirs of his body by a named spouse, so that any descendants which he might procreate through union with another spouse would have no claim to inherit the land.

To create an entail by deed nowadays the words of the deed must either state that the land is conveyed to the grantee 'in tail', or that the land is conveyed to the grantee 'and the heirs of his body' although as regards the last three words only any expression amounting to 'of his body' will suffice.[6] The same words must be used in a will in order to create an entail.[7]

An entail nowadays can only exist through the medium of a trust (*post*, pages 7–15). If the descendants who alone can inherit under an entail die out, the entail is at an end. Apart from this danger of the interest ceasing altogether, the tenant in tail in possession, cannot (save under the express powers conferred by the Setled Land Act, 1925; (see *post*, pages 7–12), while the entail subsists convey the land to anyone else beyond the duration of the life of the tenant in tail, since if he were able to do so this would defeat the claim of his heirs and so cannot be permitted; in other respects the rights of the tenant in tail are akin to those of a fee simple owner, thus he may for example damage the land. By Act of Parliament a tenant in tail in possession may bar the entail and acquire the fee simple absolute by means of a disentailing assurance, i.e. a deed of conveyance transferring the land to someone to hold it on trust for, usually, the benefit of the former tenant in tail.[8] The tenant in tail in possession may also do this by will, provided he is of full age, the will is made or confirmed after 1925, and the will refers specifically either to the entailed property, or the instrument under which it was acquired, or the testator's entailed property generally; the purpose of this last requirement is in order to ensure that it is made absolutely clear on the face of the will that the testator intended to bar the entail, so as to avoid the possibility of doubt on the matter.[9]

If the tenant in tail is out of possession (which for this purpose includes

receipt of rent and profits or the right to receive them), he cannot bar the entail by will at all. If he seeks to bar the entail by a disentailing assurance (as previously explained) during his lifetime, the effect of this will vary, depending on whether or not he has obtained the consent of a functionary known as the protector of the settlement, who is usually the person in possession of the land but excluding a mere lessee. If the consent of the protector is obtained, the effect of the disentailment is to produce a fee simple absolute; without such consent, the effect is to produce a base fee, which is an interest which will only last so long as issue of the former tenant in tail who are entitled to inherit are in existence, and is thus a rather unsatisfactory interest of somewhat uncertain duration.

Although entails were once popular, at any rate among large landowners, they are nowadays relatively infrequent, largely because of estate duty (*post*, pages 163–82).

### Life interest

Such an interest ends on the death of the person whose life is to be the measure of its duration; this person is of course normally the grantee himself, though it is possible to make a grant 'to A during the life of B' in which event A or his successors in title are entitled to enjoy the land until B dies. Life interests of the former kind are frequently created.

In order to create a life interest words showing an intention to create no larger interest than this must normally be used, since a disposition whether by deed or will *prima facie* passes the fee simple or other the whole estate which the grantor had power to convey (*ante*, page 2).

Nowadays a life interest can only exist through the medium of a trust; the owner of the life interest has wide powers of dealing with the land conferred on him by the Setled Land Act, 1925 (*post*, pages 7–12).

A tenant for life may find himself liable for committing waste, which technically is committed by any act altering the state of the land. First there is ameliorating waste, which consists of improving the land; a claim for damages made by other persons interested in the land will not succeed because they suffer none, and an injunction (*post*, pages 273–4) will be granted only if the court thinks fit.[10] Secondly there is permissive waste, which is committed by mere inertia and usually consists of allowing buildings to fall into disrepair. The life tenant is not liable for permissive waste unless the document granting the land to him imposes an obligation to repair upon him.[11] Thirdly there is voluntary waste such as opening a mine in the land, though not working a mine already open,[12] or cutting

timber.[13] Timber comprises oak, ash and elm if the tree is at least twenty years old and has not deteriorated until it lacks a reasonable quantity of useable wood, and other trees which by local custom are considered timber. A tenant for life is liable for voluntary waste unless the document creating his interest stated that he should not be thus liable. However a tenant for life nowadays enjoys considerable statutory powers to open mines and cut timber (*post*, pages 8–10). Finally there is equitable waste, which consists in acts of wanton destruction, such as deliberately stripping the fabric of a house,[14] or cutting ornamental timber. Even if the life tenant has been exempted from liability for voluntary waste, this will not protect him if he commits equitable waste unless the document clearly showed an intention that he should be legally free to commit this also.

The remedies if actionable waste is committed are to seek an injunction to restrain this, either with or without an action for damages or for an account of the proceeds of the waste.

Even if the tenant for life is impeachable for waste he may take wood and timber for repairing his house on the land or for use as firewood in the house, or for making and repairing agricultural implements or repairing fences. Moreover if the land is cultivated mainly for the purpose of producing timber which is cut and sold regularly the tenant can do this in the course of proper management of the timber.

The tenant for life may also cut trees which are not classified as timber, and dead trees unfit for use as timber.

Beyond this, a life tenant who is expressly exempted from liability for voluntary waste may cut and sell all timber and pocket the proceeds,[15] provided he does not commit equitable waste. But if the tenant for life is liable for voluntary waste, and *prima facie* he is so liable, he can only cut timber with the consent of his trustees or a court order, and three-quarters of the proceeds of the sale must be added to the capital of the trust.[16] He will thus be entitled to the income of three-quarters of the proceeds of sale until his death, and the remaining quarter is paid wholly into his personal pocket.

As to mines, a life tenant who is exempted from liability for waste may work old mines, or open and work new ones and pocket all the proceeds. If liable for voluntary waste, he can continue to work a mine which was already open when his interest commenced, but cannot open and work new mines. Any life tenant may grant a mining lease for up to 100 years and pocket three-quarters of the rent, save that if he is liable for voluntary waste and the mine was unopened when his interest commenced he is only entitled to one-quarter of the rent.[17] The balance of the rent is added to the capital of the trust.

Since the life tenant cannot know exactly when he will die, the law confers upon his representatives the right to enter the land after his death and reap cultivated crops which the dead life tenant had sown and which were still growing when he died.

### Reversions

A reversion arises when a person entitled to an interest in land gives the possession and enjoyment of it to someone else for a shorter time than the whole of his own interest, so that when the interest so granted expires by the passage of time the land will revert to the original owner or his transferee. Thus if A owns land in fee simple, and creates a life interest in his land in favour of B, the land will revert to A or A's transferee on the death of B.

### Remainders

A remainder arises if a land owner grants the right to enjoy the land for a time to someone else, and then by the same document grants to a third person a right to enjoy the land which is to commence after the first grant has run its course. Thus if A owns the fee simple in the land and grants the enjoyment of the land firstly to A for life, secondly to B for life to take effect after the death of A, and thirdly to C in fee simple to take effect on the deaths of A and B, B and C have remainders in the land until they respectively become entitled to possession. Nowadays remainders can only be created through the medium of a trust, and the same is true of reversions unless the reversion is to take effect upon the expiry of a leasehold.

### Leaseholds

Leasehold interests are distinguished from the interests in land already mentioned in that the maximum duration of the leasehold is fixed in time. That duration will of course vary with the individual lease, and might thus be, for example, either a lease for a week or a lease for 10,000 years. The fact that the lease may not last for the full time originally specified, because for example the landlord and tenant might agree to put an end to it earlier, is not considered as an infringement of the notion of a fixed

maximum duration, because that is to be interpreted in the sense of the maximum duration being known subject to any steps which the parties may take either to curtail or extend it. Thus a periodic tenancy, such as a lease from year to year, falls within this since the duration is known, though subject to the possibility of extension if neither party gives notice to quit. A leasehold is nowadays the only interest in land where the tenant in practice renders something to the person from whom he holds the land in return for his interest. A leasehold interest can exist without employing the device of a trust, and so can the landlord's fee simple in reversion expectant upon determination of the lease because, although to be capable of subsisting without a trust the fee simple absolute must be in possession, possession is defined as including receipt of the rents and profits or the right to receive them.[18] Leaseholds are discussed further at pages 15–18.

### Settlements and trusts for sale

Settlements and trusts for sale are mutually exclusive; the latter, which will be dealt with in more detail later, usually arise either because the grantor stated when he conveyed the land that it was to be held on trust for sale or where the land is held in co-ownership.

Settlements are here considered in detail first. The primary meaning of the word 'settlement' is to connote that there are successive interests existing in the plot of land, such as on a grant of land to A for life, remainder to B in fee simple, but there is also a settlement if the land is held for the benefit of an infant and in a few other minor cases. If the land is settled, wide powers of dealing with it have been conferred by Act of Parliament on 'the tenant for life'; the term 'tenant for life' is defined to include others beyond the holder of a life interest in the property, and in fact comprises any adult who is for the time being beneficially entitled in possession to the whole of the net income produced by the property; if there is no person so entitled, as for example because part of the income is to be accumulated for a while, or if the person who would otherwise be tenant for life is an infant, then the powers which would normally be exercisable by the tenant for life in relation to the land will instead be exercised by the trustees of the settlement, unless the person creating the settlement appoints someone else to exercise the powers in the absence of the tenant for life. In addition to the exercise of this function, there must be trustees of the settlement in order to receive and manage capital money relating to the settlement which may arise, for example, on the sale of part of the settled land, and to keep an eye, at any rate to some extent,

upon the exercise of his statutory powers by the tenant for life.

The tenant for life can of course do as he wishes with his own beneficial interest in the land, such as sell it, mortgage it or give it away. In addition, in order to simplify the machinery for selling the land should it become desirable to do so, the tenant for life of freehold land will normally have the whole legal fee simple absolute vested in him, even though beneficially he does not own it and he is only capable of dealing with the land in a manner affecting interests in it other than his own so far as he is permitted to do so by the Settled Land Act, 1925. The principal powers which the Act confers upon the tenant for life are:

1 He may sell the settled land or any part of it.[19] In almost all cases he must obtain the best monetary consideration that can reasonably be found, but a purchaser who deals in good faith with the tenant for life is conclusively presumed to have given the best price reasonably obtainable. The purchaser from the tenant for life will take free from the successive beneficial interests which arose under the trusts, but will in general take the land subject to easements (*post*, pages 19–24), mortgages (*post*, pages 26–9), restrictive covenants (*post*, pages 29–32) and certain other third-party rights.

2 He may exchange the settled land for other land situated in England or Wales, and capital money belonging to the trust may be used in order to adjust any differences in value between the respective plots.[20]

3 He may lease the land for up to 999 years for the purpose of building or forestry, up to 100 years for mining and up to 50 years for any other purpose. The lease must be at the best rent reasonably obtainable, having regard to any premium taken, but in a building lease a nominal or reduced rent may be accepted for the first 5 years of the lease and in a forestry lease for the first 10 years; various other restrictions and formalities must be complied with.

4 He may carry out certain improvements to the settled land which are specified in the Third Schedule to the Settled Land Act. The list is extensive, and the improvements fall into three categories; the cost of all categories is initially payable out of the capital money belonging to the trust, but as regards some improvements the trustees cannot require the outlay to be gradually recouped out of the income produced by the land, as to others the trustees must so require, and as to the remainder the trustees have a discretion whether to so require. Before the trustees can pay for the cost of the improvement from money in their hands, there must either be an order of the court directing such payment, or the certificate of a competent engineer or able practical surveyor who has been employed independently of the tenant for life and stating that the work has been