# Words of Limitation Revisited

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## *Introduction*

The Land and Conveyancing Law Reform Bill 2006 has been passed by the Seanad but, at the time of writing, it remains unclear whether it will be passed by the Dail before the coming General Election. In a previous article in this journal,[1] dealing with various aspects of the Bill 2006, the present author argued that there were difficulties with s.65 of the Bill, which seeks to reform the rules on words of limitation in a retrospective manner. The purpose of this short article is to highlight an issue of a different sort in relation to the words of limitation provisions.

After a minor amendment at Committee stage in the Seanad,[2] which is not relevant for present purposes, s.65(1) of the Bill now reads as follows:

> A conveyance of unregistered land without words of limitation, or any equivalent expression, passes the fee simple or the other entire estate or interest which the grantor had power to create or convey, unless a contrary intention appears in the conveyance.

This provision is modeled on existing Irish legislation in the registered land context,[3] which is turn copied from an English provision from 1925,[4] which itself is based on a prior English provision dating back to 1837.[5] Notwithstanding this long history, it will be suggested that the employment of this wording in the Bill is potentially disastrous due to the fact that the Bill repeals a relevant provision of the Conveyancing Act 1881 and contains no saving clause to take this into account. The startling result would be that a standard conveyance "to Jane Murphy in fee simple" would no longer be effective to pass a fee simple and would pass only a life estate.

## *The Problem*

The issue addressed by s.65(1) is that the law currently places technical obstacles in the way of passing a fee simple in a conveyance of unregistered land. At common law, in order to pass a fee simple estate, it was necessary to use the words "heirs", essentially by means of a conveyance to Jane Murphy "and her heirs". Section 51 of the Conveyancing

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1 Mee "The Land and Conveyancing Law Reform Bill: Observations on the Law Reform Process and a Critique of Selected Provisions: Part 2" (2006) 11 Conv. & Prop. L.J. 91.

2 In the Bill as initiated, the subsection stated that the presumption of a fee simple would apply "unless a contrary intention is expressed in the conveyance". Following the suggestion in Mee note 1 above, 98, this was changed to "unless a contrary intention appears in the conveyance".

3 Registration of Title Act 1964, s.123(1).

4 Law of Property Act 1925, s.60(1). This is the current English provision, which was preceded by the equivalent s.72(1) of the Law of Property Act 1922.

5 Wills Act 1837, s.28.

Act 1881 permits the use of the alternative wording to Jane Murphy "in fee simple". However, if neither of these alternative "magic formulae" is used, only a life estate will pass. Section 65(1) tackles the matter in an indirect manner, making no attempt to abolish the common law rule that a life estate is presumed to pass in a conveyance where no other estate is validly transferred. The sub-section does *not* provide that a fee simple will pass "without the need for" words of limitation. Instead, it creates a presumption that a fee simple will pass but applies this presumption only to the case of a conveyance "without words of limitation, or any equivalent expression".

The provision obviously works successfully in the simple case of a conveyance "to Jane Murphy". Here there are neither words of limitation nor any "equivalent expression" and, therefore, Jane Murphy is presumed to get a fee simple instead of a life estate. Where there is a conveyance "to Jane Murphy and her heirs", the subsection has no application, since this is not a conveyance "without words of limitation, or any equivalent words". However, under the ancient common law rules, the use of the magic words means that a fee simple passes to Jane. So, again there is no difficulty.

Where a problem arises is in relation to a standard conveyance "to Jane Murphy in fee simple" (or any variation on this, e.g. "in fee simple absolutely"). As mentioned already, this type of conveyance currently transfers a fee simple, as is obviously intended, due to the operation of s.51 of the Conveyancing Act 1881. However, the proposed s.65(1) would appear to have no application to the conveyance under discussion, since it is not one "without words of limitation, or any equivalent expression". Furthermore, the Bill repeals s.51 of the Conveyancing Act 1881 which currently allows a fee simple to be passed by a conveyance using this phrase.[6] All one is left with is the common law rule under which, unless the magic word "heirs" has been used, only a life estate passes.[7] Thus, after the Bill, a conveyance "in fee simple" would pass only a life estate. This is, of course, the opposite of what the Bill intends.

At first sight, the problem under discussion could go beyond conveyances "in fee simple" to include any conveyances where informal words of limitation are used in an attempt to create a fee simple estate, as for example in the case of conveyances to Jane Murphy "forever" or "in fee". Each of these formulations, although not qualifying as a "magic formula" within the current law on words of limitations, might appear to count as "words of limitation, or any equivalent expression" within the terms of s.65(1). If so, then these types of conveyances would *not* be covered by s.65(1) and, so would also pass only a life estate if the Bill were enacted as it stands. However, an examination of the provenance of s.60(1) of the Law of Property Act 1925, from which s.65(1) of the Bill is copied, shows that the phrase "words of limitation" was intended to refer to the formal words of limitation required by the common law for the creation of a fee simple or a fee tail (i.e. essentially "and his heirs" or "and the heirs of his body") and the phrase "or any equivalent phrase" was intended to refer to the alternative formulae introduced in s.51 of

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6 See s.8(3) and Schedule 2, Part 4.

7 The wording of s.65(1) is essentially the same as that of s.123(1) of the Registration of Title Act 1964. If the Bill were passed in its present form, the above argument would in theory also apply in the registered land context (since s.51 of the Conveyancing Act 1881 would have been repealed by the Bill). However, given that it is standard form to convey registered property simply "to X" (i.e. "without words of limitation, or any equivalent expression") no practical issues would appear to arise in that context.

the Conveyancing Act 1881 (i.e. "in fee simple" or "in tail").[8] If one accepts this somewhat artificial interpretation, s.60(1) of the English Law of Property Act – and by extension, s.65(1) of the Bill – can be said to be effective in cases involving the use of informal words of limitation such as "in fee" or "for ever". Such formulations qualify neither as formal words of limitation recognised at common law nor as the statutory "equivalent" phrases introduced in the Conveyancing Act 1881 and, therefore, it can be presumed that a fee simple is passed by a conveyance which includes them. Unfortunately, however, this interpretation is of no assistance in the case of a conveyance "in fee simple", since this phrase clearly qualifies as "any equivalent expression".

The source of the problem with the Irish Bill is that it copies the terms of s.60(1) of the English Law of Property Act 1925 (and, like the English Act,[9] repeals s.51 of the Conveyancing Act 1881) but does not include any equivalent of s.60(4) of the English Act. Section 60(4) reads as follows:

> "The foregoing provisions of this section apply only to conveyances and deeds executed after the commencement of this Act:
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> Provided that in a deed executed after the thirty-first day of December, eighteen hundred and eighty-one, it is sufficient-
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> > (a) In the limitation of an estate in fee simple, to use the words "in fee simple", without the word "heirs";
> >
> > …."

Although this is not obvious from the way it is presented, s.60(4) is not merely a confirmatory section; it is central to the effectiveness of the English scheme. Section 60(1) has no application to the standard conveyance of a fee simple over unregistered land in England, i.e. a conveyance "to John Smith in fee simple" (since such a conveyance includes "words of limitation, or any equivalent expression"). However, this kind of conveyance falls within the terms of s.60(4), since it is a conveyance made after the end of 1881. Therefore, under s.60(4) rather than under s.60(1), it passes a fee simple. One must presume that the drafters of the 1925 Act, in phrasing s.60(4), thought that it

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[8] Section 60(1) has its origins in a proposal put forward by the Commissioners on the Land Transfer Acts in 1911 (see *Report of the Commissioners on the Land Transfer Act*, Cd 5483 (1911) p.53). The remit of the Commissioners was to advise on the land registration system but, although this was not the primary focus of their inquiries, they felt it necessary to make recommendations in relation to the reform of the general law of property. One of their recommendations was that "it should be enacted that where real estate is conveyed by deed without any words of limitation*, or the equivalent words, "in fee simple" introduced by the Conveyancing Act 1881*, such conveyance should pass the fee simple or other the whole estate or interest which the conveying party has power to dispose of, unless a contrary intention appears by the deed" (emphasis supplied). This proposal was taken up by Lord Haldane in his Real Property Bill 1913. The proposal was eventually enacted in section 72 of the Law of Property Act 1922 and re-enacted in section 60 of the Law of Property Act 1925. The wording of s.60(1) follows closely the phrasing of the Commissioners' recommendation.

[9] See Law of Property Act 1925, s.207 and Seventh Schedule.

would be safer to refer to conveyances after 1881 because including an express saver for conveyances after the coming into force of the 1925 legislation might have seemed to cast an indirect doubt on conveyances prior to this time which had relied on s.51 of the Conveyancing Act 1881. Unfortunately, the choice of the earlier date in s.60(4) of the 1925 Act appears to have deceived the drafters of our 2006 Bill into thinking that it would be sufficient to copy s.60(1) without also importing s.60(4).

## *Conclusion*

It has been argued in respect of the 2006 Bill that the combination of s.65(1) and the repeal of s.51 of the Conveyancing Act 1881 has the unintended consequence that a standard conveyance "to Jane Murphy in fee simple" would no longer be effective to pass a fee simple and would pass only a life estate. It has been pointed out that the English section from which s.65(1) is derived contains a proviso which preserves the effect of conveyances "in fee simple" but that, unfortunately, this proviso was not included in s.65. Obvious solutions to the difficulty would be to include the relevant proviso or to refrain from repealing s.51 of the Conveyancing Act 1881. It may also be mentioned, however, that the wording of s.65(1) is not very satisfactory in any case. It is not readily apparent why the words "without words of limitation, or any equivalent phrase" are included. The short answer, of course, is that they are in the equivalent English provision, s.60 of the Law of Property Act 1925. How they got into that provision becomes clear on a closer inspection.

The relevant wording first appeared (in essentially the same form) in s.28 of the Wills Act 1837[10] and applied to testamentary gifts. At the time that the relevant provision was enacted, it had been established that the rules on words of limitation in wills differed from those applicable to *inter vivos* conveyances.[11] A devise of land by will would pass the fee simple if the testator used informal words showing this intention (even if the magic word "heirs" was not used). The difficulty remained, however, that if the testator did not spell out his intention, even informally, then only a life estate would pass. Against this background, it is understandable that the reforming provision addressed only devises "without any words of limitation". Where the testator made his intention clear using words of limitation, however informal, no problem existed; it was only where no such words were used that a difficulty existed and the relevant section provided that in such cases also a fee simple would be presumed to pass. When the English legislature came to reform the rules relating to *inter vivos* conveyances, it relied on the model in the Wills Act 1837 even though the problem it addressed was rather different. The result is the inelegantly drafted s.60 of the Law of Property Act, which deals with conveyances "in fee simple" by means of a special proviso in s.60(4) and which, relying on a somewhat strained interpretation, assumes that conveyances using expressions such as "in fee" or

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10 Section 28 states that "where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

11 See Burn *Cheshire and Burn's Modern Law of Real Property* (London: Butterworths, 17th edn, 2006), pp.171-172; Harpum *Megarry and Wade: The Law of Real Property* (London: Sweet and Maxwell, 5th edn, 2000) p.47.

"for ever" do not include "words of limitation, or any equivalent expression" (since, if they did, a life estate only would be passed by a conveyance which included those expressions).[12]

Our legislature would probably do better to look elsewhere for a model for the reform of the position on words of limitation. Interesting in this connection is section 5 of Ontario's Conveyancing and Law of Property Law Act,[13] which provides (i) that it is not necessary to use the word "heirs" in a conveyance of a fee simple; (ii) that it is sufficient to use the words "in fee simple" or any other words sufficiently indicating the limitation intended; and (iii) that a conveyance "where no words of limitation are used" will pass the fee simple or the whole interest that the grantor has power to convey unless a contrary intention appears. If it is desired to adhere to the English wording, despite its imperfections, then it would be necessary to take steps, as explained above, to ensure that a standard conveyance "in fee simple" will continue to pass a fee simple.

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12 See the discussion of this issue in the paragraph of text accompanying note 8 above.

13 RSO 1990, c.C54 (available at www.canlii.org).