ENGLISH PROPERTY REFORM AND ITS AMERICAN ASPECTS*

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SEVERANCE OF CONDITIONS—DUMPOR'S CASE

The same statute of Henry VIII that provided for the running of covenants with reversions, provided also for the running of conditions.[1] But whereas the courts held that on the severance of the reversion, or of the leasehold, a covenant might be split,[2] they held otherwise in the case of conditions unless the severance was by "act of law." [3] This was remedied in the case of rent by an act of 1859 [4] and as to conditions generally by the Conveyancing Act, 1881.[5] The Conveyancing Act, 1911,[6] allowed the breach of a condition which had not been released or waived to be enforced by a transferee, notwithstanding the breach had occurred before the transfer. Finally the Law of Property Act, 1925, extended the rules as to the severance of rights of entry for condition broken to notices to quit.[7] No such legislation seems to have been enacted in the United States. Whatever may be true as to the partial assignability of other choses in action,[8] conditions were a particularly tough kind of chose in action and, presumably, the old law as to their non-apportionability is still law in the United States.[9]

One supposed consequence of the rule against the apportionment of conditions was the rule in *Dumpor's Case*.[10] The reason-

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* Continued from the November issue, (1927) 37 YALE LAW JOURNAL 1.

[1] (1540) 32 Hen. VIII, c. 34.

[2] Twynam v. Pickard, 2 B. & Ald. 105 (1818); WOODFALL, LANDLORD AND TENANT (20th ed. 1921) 307; 1 TIFFANY, LANDLORD AND TENANT (1912) 902.

[3] Knight's Case, 5 Co. 54b (1588); WOODFALL, *op. cit. supra* note 2, at 307; 2 TIFFANY, *op. cit. supra* note 2, at 1384.

[4] (1859) 22 & 23 Vict. c. 35, § 3.

[5] (1881) 44 & 45 Vict. c. 41, §§ 10, 11, 12. These sections have now been replaced by (1925) 15 Geo. V, c. 20, §§ 140-142.

[6] (1911) 1 & 2 Geo. V, c. 37, § 2, now replaced by (1925) 15 Geo. V, c. 20, § 141 (3).

[7] (1925) 15 Geo. V, c. 20, § 140 (2).

[8] In his discussion with Professor Williston on The Alienability of Choses In Action, Professor Cook came to the conclusion that his original statement that partial assignments of choses in action were nearly everywhere enforceable only in equity needed serious modification. See Cook, *The Alienability of Choses in Action: A Reply to Professor Williston* (1917) 30 HARV. L. REV. 449, 482.

[9] 2 TIFFANY, *op. cit. supra* note 2, at 1384.

[10] 4 Co. 119b (1603).

ing behind that case seems to have been that a single dispensation with a condition destroyed the condition altogether. This would have been at least a plausible application of the rule against the apportionment of conditions. The trouble is that this reasoning did not fit the facts of *Dumpor's Case* or the situation to which the rule of *Dumpor's Case* has been most conspicuously applied. In that case the condition was not to alien without license and a license was given, so that there was full compliance with the condition and no dispensation. There was no severance either of the reversion or of the leasehold. There was no joint lease and license given to some but not all of the joint lessees. There was a condition, not absolute, but subject to an exception, and *Dumpor's Case* seems to have gone the full way of holding that the exception operated as a dispensation,[11] whereas the proper effect of the exception would seem to have been to have cut down the condition so as to have made it inapplicable within the scope of the exception. We may suspect that the real explanation of the decision in *Dumpor's Case* lies in the feeling against restraints on alienation.[12] Certainly it had no proper foundation in the law of conditions.[13]

If, as it would seem, the reasoning behind *Dumpor's Case* was that a single dispensation with a condition destroyed the condition altogether, this would have seemed just as applicable to a dispensation by subsequent waiver as to a dispensation by previous license.[14] It is not surprising, therefore, that English reform legislation has been made broad enough to cover both situations. Lord St. Leonard's Act, 1859,[15] provided that a license to do an act causing forfeiture should extend only to the act specified,[16] that licenses to one of several lessees, or applying to part only of the property, should not affect other lessees or parts [17] and that conditions for the payment of rent might be apportioned on the severance of the reversion.[18] In the following year, it was enacted that a waiver by a lessor in a particular

[11] See Willard, *Dumpor's Case* (1873) 7 AM. L. REV. 616, 618, 624.

[12] See (1925) 1 WASH. L. REV. 52, 53.

[13] See Willard, *op. cit. supra* note 11.

[14] The fact that this logic of Dumpor's Case has not generally been carried out is one of the strong arguments against the case itself. As to the logic, see (1909) 9 COL. L. REV. 627, 628. As to the weight of authority that the rule in Dumpor's Case will not be extended to cases of subsequent waiver but be confined to cases of previous license, see 1 TIFFANY, REAL PROPERTY (2d ed. 1920) 299; (1910) 23 HARV. L. REV. 630, 631.

[15] (1859) 22 & 23 Vict. c. 35.

[16] *Ibid.* § 1.

[17] *Ibid.* § 2.

[18] *Ibid.* § 3. See *supra* page 179.

instance should not have a wider extent.[19] This legislation has been re-enacted in the Law of Property Act, 1925.[20]

Aside from being bad law, the rule in *Dumpor's Case* worked very badly, as it made lessors afraid to give licenses that otherwise they might have been glad to give.[21] It was one of those rules that any proper working of the doctrine of *stare decisis* would have gotten rid of without legislative aid, but two hundred years after it had been declared, it came before an able but ultra-conservative judge[22] who said: "Though *Dumpor's Case* always struck me as extraordinary, it is the law of the land at this day."[23] Such has been the attitude of a good many judges in the United States,[24] though there has been the less excuse for them since Mr. Joseph Willard, as far back as 1873, demonstrated in the AMERICAN LAW REVIEW[25] that the rule was bad law as well as bad sense. Happily, the latest expression of judicial opinion in the United States[26] has accepted Mr. Willard's demonstration and refused to perpetuate an error because of its old age. A year earlier, however, the Massachusetts Supreme Court had affirmed[27] the rule as already binding on it because of a previous decision.[28] Probably other states, like Massachusetts, have committed themselves too far to get away from the rule without the help of the legislature, but where this is not the case, the Wyoming case should have a large following. We have adopted the common law, but there is no reason why the errors of three hundred years ago should bind us today.

ENFORCEMENT OF AND RELIEF FROM FORFEITURES

The great number of the cases involving conditions, forfeitures, and relief from forfeitures are cases of leases. Therefore, the law of leases as to forfeitures is of particular importance. Relief from a forfeiture for the non-payment of rent has been granted in equity from very early times[29] but relief from for-

[19] (1860) 23 & 24 Vict. c. 38, § 6.

[20] (1925) 15 Geo. V, c. 20, § 143, deals with licenses, § 148 with waivers.

[21] See WILLIAMS, REAL PROPERTY (24th ed. 1926) 614.

[22] Lord Eldon.

[23] Brummel v. Macpherson, 14 Ves. 173 (1807).

[24] The American authorities are to be found collected in the opinion in Investors' Guaranty Corp. v. Thomson, 31 Wyo. 264, 225 Pac. 590 (1924) and in notes in 31 A. L. R. 153 (1924); 32 A. L. R. 1080 (1924); 11 L. R. A. (N. S.) 398 (1908); (1925) 1 WASH. L. REV. 52; (1926) 14 CALIF. L. REV. 328.

[25] See *supra* note 11.

[26] Investors' Guaranty Corp. v. Thomson, *supra* note 24.

[27] Aste v. Putnam's Hotel Co., 247 Mass. 147, 141 N. E. 666 (1923).

[28] Pennock v. Lyons, 118 Mass. 92 (1875).

[29] WOODFALL, *op. cit. supra* note 2, at 399.

feiture was restricted to cases of rent by Lord Eldon unless there were fraud, accident, mistake or surprise.[30] In 1860 relief from forfeiture for rent was made possible in courts of law.[31] The common law requirements for the enforcement of forfeiture for rent were very strict. Unless it was stipulated to the contrary, demand for the exact amount of the rent had to be made upon the premises on the day it was due, a convenient time before, and at sunset.[32] A statute of George II,[33] however, allowed a forfeiture without such demand under certain conditions when the rent had been due for six months. The recent legislation in England did not affect the law of forfeitures as to rent,[34] except that relief to a sub-lessee is expressly mentioned.[35]

As to conditions other than the payment of rent, the law was vitally changed by the Conveyancing Act, 1881.[36] Relief against forfeiture for failure to insure had been granted in equity in 1859 [37] and at law in 1860.[38] The act of 1881, however, made relief the general rule and made notice a general prerequisite to enforcement. Conditions against the assigning, underletting, parting with the possession or disposing of the land leased were made an exception to the general rule as to relief and notice by the act of 1881,[39] but these exceptions have been removed by the Law of Property Act, 1925.[40] Conditions for forfeiture on the bankruptcy of the lessee or on the taking in execution of the lessee's interest were also excepted from the general rule as to relief and notice in the act of 1881,[41] but by the Conveyancing Act, 1892,[42] this exception was confined to leases of agricultural or pastoral land, mines or minerals, a public-house or beer-shop, a furnished house, or any property where the personal qualifications of the tenant are of importance for the pre-

[30] Hill v. Barclay, 18 Ves. 56 (1811); Reynolds v. Pitt, 19 Ves. 134 (1812); WOODFALL, *op. cit. supra* note 2, at 399; CHESHIRE, MODERN LAW OF REAL PROPERTY (1925) 183.

[31] COMMON LAW PROCEDURE ACT, (1860) 23 & 24 Vict. c. 126, § 1.

[32] WOODFALL, *op. cit. supra* note 2, at 391, 490.

[33] LANDLORD AND TENANT ACT, (1730) 4 Geo. II, c. 28. This statute is re-enacted in substance by the COMMON LAW PROCEDURE ACT, (1852) 15 & 16 Vict. c. 76, §§ 210-212.

[34] (1925) 15 Geo. V, c. 20, § 146 (11); GUIDE TO THE NEW PROPERTY STATUTES BY THE EDITORS OF LAW NOTES (1925) 174.

[35] (1925) 15 Geo. V, c. 20, § 146 (4); *op. cit. supra* note 34, at 174.

[36] (1881) 44 & 45 Vict. c. 41, § 14.

[37] (1859) 22 & 23 Vict. c. 35, §§ 4-9.

[38] COMMON LAW PROCEDURE ACT, (1860) 23 & 24 Vict. c. 126, § 2.

[39] (1881) 44 & 45 Vict. c. 41, § 14 (6) (i).

[40] Except as to breaches occurring before the commencement of the act. (1925) 15 Geo. V, c. 20, § 146 (8) (i).

[41] (1881) 44 & 45 Vict. c. 41, § 14 (6) (i).

[42] (1892) 55 & 56 Vict. c. 13, § 2 (2).

servation of the property or because of neighborhood to the lessor or his tenants, save that in the case of leases other than these the general rule as to relief and notice was not to be applicable after one year from the date of bankruptcy or execution unless the lessee's interest were sold within that time. These provisions as to conditions against bankruptcy and the taking in execution of the lessee's interest are re-enacted in the Law of Property Act, 1925.[43] A further exception to the general rule as to relief and notice in the Conveyancing Act, 1881,[44] and this is retained in the Law of Property Act, 1925,[45] is made in the case of a mining lease as to conditions for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof. It is clear that notice and relief are very much the general rule and the old freedom in enforcing conditions very much the exception. Forfeiture for disclaimer of the landlord's title,[46] however, and other forfeitures based on implied conditions are, it would seem from the language of the statute, left untouched.

The general rule as to the enforcement of express conditions is, therefore, that they shall not be enforceable by action or entry unless and until the lessor serves on the lessee a notice (a) specifying the particular breach complained of; (b), if the breach is capable of remedy, requiring the lessee to remedy the breach; and (c), in any case, requiring the lessee to make compensation for the breach, and then the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.[47]

On receipt of notice the lessee may apply to the court for relief or may wait for the lessor to bring action and then apply,[48] but he must not wait until the lessor has recovered possession in an action.[49] The court has the widest powers in granting relief and the House of Lords held it inadvisable to lay down any rigid rules for guiding the discretion of the court.[50] The court

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[43] (1925) 15 Geo. V, c. 20, § 146 (9) (10).

[44] (1881) 44 & 45 Vict. c. 41, § 14 (6) (ii).

[45] (1925) 15 Geo. V, c. 20, § 146 (8) (ii).

[46] 23 CHITTY'S STATUTES (6th ed. 1925) 335, n. (o), referring to Vivian v. Moat, 16 Ch. D. 730 (1881), which is a case of disclaimer but decided prior to the CONVEYANCING ACT, (1881) 44 & 45 Vict. c. 41.

[47] (1925) 15 Geo. V, c. 20, § 146 (1). What is a reasonable time varies with the case. WOODFALL, *op. cit. supra* note 2, at 405. But three months is generally considered sufficient. CHESHIRE, *op. cit. supra* note 30, at 183.

[48] (1925) 15 Geo. V, c. 20, § 146 (2).

[49] Rogers v. Rice [1892] 2 Ch. 170; CHESHIRE, *op. cit. supra* note 30, at 185.

[50] Hyman v. Rose [1912] A. C. 623.

may also give relief to an under-lessee, but the latter cannot obtain a term longer than that remaining of the original sub-lease.[51] A new provision in the recent property acts [52] makes special provision for relief where the condition relates to internal decorative repairs. The court is to satisfy itself whether the notice is unreasonable, taking into particular consideration the length of the lessee's unexpired term. The section was aimed at certain forms of extortion reported to be current.[53]

The law as to enforcement of and relief from forfeitures in the United States is about where it was in England in the time of Lord Eldon.[54] Such progress as there has been has occurred in the development of statutory summary proceedings especially for the non-payment of rent. Here a notice to quit after a certain number of days is a common prerequisite to bringing proceedings [55] and payment or tender of the rent within that period a bar.[56] Quite commonly the tenant may pay rent and costs before the judgment is rendered or before the issuance or execution of the writ, and in a few states "redemption" is allowed even after dispossession under the judgment.[57] Ordinarily, summary proceedings do not lie for the enforcement of express conditions in a lease,[58] but in some states they are allowed for the failure to perform some other stipulation than for the payment of rent.[59] But this has not gone very far.

CONVERSION OF LONG TERMS INTO FEES

Since the Conveyancing Acts of 1881 [60] and 1882 [61] it has been possible, under certain conditions, for the holder of a term which, as originally created, was for not less than three hundred years and of which a residue of not less than two hundred years remains unexpired to enlarge his term into a fee simple by a deed to that effect. The conditions, however, very much restrict the operation of this privilege. (1) There must be no trust or right of redemption in favor of the reversioner. (2) There must be no rent having a money value reserved or, if such rent has been reserved, it must have been released, barred by lapse

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[51] (1925) 15 Geo. V, c. 20, § 146 (4); Ewart v. Fryer [1901] 1 Ch. 499.

[52] (1925) 15 Geo. V, c. 20, § 147.

[53] Topham, *Lecture on the Law of Property Acts* (1926) 61 LAW JOURNAL 105, 107.

[54] *Supra* note 264; 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §§ 453, 454; 2 TIFFANY, *op. cit. supra* note 2, at 1401-1416.

[55] *Ibid.* 1760.

[56] *Ibid.* 1769.

[57] *Ibid.* 1769-1772.

[58] *Ibid.* 1751-1753.

[59] *Ibid.* 1772.

[60] (1881) 44 & 45 Vict. c. 41, § 65.

[61] (1882) 45 & 46 Vict. c. 39, § 11.

of time or in some other way ceased to be payable. (3) It must not be liable to be determined by re-entry for condition broken. Under the Law of Property Act, 1925,[62] if the rent does not exceed the yearly sum of one pound and has not been paid for a continuous period of twenty years, it shall be deemed to have ceased to be payable provided at least five years have elapsed since the taking effect of the act.

The principal application of these provisions would seem to be to "long terms" given by way of mortgage or for the raising of portions, although, no doubt, they are also applicable to the long terms taken by purchasers in the time of Elizabeth to avoid feudal incidents, many of which Mr. Joshua Williams said in 1876 were still in existence.[63] They can have little application to commercial leases, for, in the first place, few such leases, and then only building leases, are made for a longer term than ninety-nine years,[64] and the invariable custom is for the commercial lease to provide for entry on condition broken, which alone prevents the application of the section.[65] When the right of redemption is barred or any trust in favor of the reversioner gone, it is only fitting that the termor with a no-rent, indefeasible, two hundred year term left should have the fee. This is in accord with the reasons back of statutes of limitation and adverse possession and the rule against perpetuities.

This legislation is a complement to that with regard to the automatic cessation of "satisfied terms." [66] In both cases "long terms" by way of mortgage or for raising portions are principally involved, but in the former case these have not been satisfied, while in the latter case they have. The extensive use of satisfied terms *in trust to attend the inheritance* [67] marked the heighth of artificiality in the old conveyancing.[68] The Satisfied Terms Act, 1845,[69] provided for the automatic cessation of such terms and the Law of Property Act, 1925, is even more extensive in its operation.[70]

These long terms, either by way of mortgage, or for the purpose of raising portions, are unfamiliar in the United States,

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[62] (1925) 15 Geo. V, c. 20, § 153 (4). Section 153 supersedes the sections cited *supra* notes 60, 61.

[63] WILLIAMS, THE SETTLEMENT OF REAL ESTATES (1879) 253.

[64] CHESHIRE, *op. cit. supra* note 30, at 217.

[65] *Ibid.* 178.

[66] (1925) 15 Geo. V, c. 20, §§ 5, 116; First Schedule, Pt. II, § 1.

[67] See WILLIAMS, *op. cit. supra* note 21, at 645 *et seq.*

[68] All the pitfalls of merger had to be avoided. See 3 PRESTON, CONVEYANCING (3d ed. 1819-25) 460.

[69] (1845) 8 & 9 Vict. c. 112.

[70] Topham, *op. cit. supra* note 53, at 107; Cheshire, *op. cit. supra* note 30, at 220.

so that legislation of the kind in question could have little, if any, application. The long building lease for ninety-nine years, however, seems to be coming into favor.[71]

ABOLITION OF TERMS DETERMINABLE ON LIVES

As estates for life are no longer permitted as legal estates in England,[72] it would have been anomalous to have allowed the familiar term for years determinable on lives or marriage as a legal interest, and it has accordingly been abolished [73] and converted into a term terminable by a one month's notice in writing after the death or marriage, as the case may be.[74] It is not anticipated that this substitute will be extensively used.[75] It is this exclusion of a term for years determinable with life or lives or with the cesser of a determinable life interest that distinguishes the "term of years absolute," which is of such frequent use in The Law of Property Act, 1925, from the ordinary term of years.[76] A "term of years absolute" includes a term "with or without impeachment for waste, subject or not to another legal estate, and either certain or liable to determination by notice, re-entry, operation of law or by a provision for cesser on redemption." [77]

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[71] White, *Practical Considerations in the Drawing of 99 Year Leases* (1920) 18 OHIO L. REP. 311.

[72] (1925) 15 Geo. V, c. 20, § 1 (1), (3).

[73] *Ibid.* § 149 (6).

[74] *Ibid.*

[75] Topham, *op. cit. supra* note 53, at 106.

[76] (1925) 15 Geo. V, c. 20, § 205 (1) (xxvii).

[77] *Ibid.* The sections of the so-called LEASEHOLD CODE not considered in the text are 144, 145, 151 and 152. Section 144 provides, where a lease can not be assigned or sublet without consent, that unless the contrary is expressed, no fine or sum of money in the nature of a fine shall be payable for such consent. This re-enacts CONVEYANCING ACT, (1892) 55 & 56 Vict. c. 13, § 3. Even prior to that statute the payment of money for such consent seems very seldom to have been required in practice. See WOODFALL, *op. cit. supra* note 2, at 809. Section 145, requiring a lessee to give notice to the landlord of proceedings for the recovery of the land under penalty of three years rackrent, goes back to DISTRESS FOR RENT ACT, (1737) 11 Geo. II, c. 19, § 12. For similar provisions in the United States, see STIMSON, AMERICAN STATUTE LAW (1886-92) § 2040. Section 151 reenacts (1) (1705) 4 Anne, c. 16, §§ 9, 10, making the grant of reversions valid without attornment, and (2) section 11 of the DISTRESS FOR RENT ACT, 1737, declaring attornments to strangers, with certain exceptions, void. For statutes in the United States similar to (1) see 1 TIFFANY, *op. cit. supra* note 2, at 874, nn. 34, 35, and to (2) see *ibid.* 173, n. 67. Section 152 is a reenactment of the LEASES ACT, (1849) 12 & 13 Vict. c. 26, §§ 2, 4, 5, 6, 7, and of the LEASES ACT, (1850) 12 & 14 Vict. c. 17, §§ 2, 3, and makes an invalid lease because of failure to comply with the terms of the power take effect as a contract for a valid lease. An excellent summary of the changes as to leaseholds in the new property acts is given in Topham, *op. cit. supra* note 53, at 105.

CONVERSION OF PERPETUALLY RENEWABLE LEASES INTO LONG TERMS

Not in the so-called Leasehold Code, but in the original Lord Birkenhead's Act,[78] it is provided that perpetually renewable leaseholds shall henceforth take effect as terms for two thousand years subject to a power in the lessee of terminating them on ten days notice at any date upon which they would have terminated but for renewal.[79] Perpetually renewable leases have never been favored [80] and the opinion of certain conveyancers that they were inconvenient from the conveyancing point of view and costly because of the renewals and incidental costs resulted in their downfall.[81] Fines for renewal on leases existing at the commencement of the act are converted into rent,[82] but in the case of leases created afterwards, the conversion into long terms takes place without any obligation for payment of any fines, fees, costs, or other money in respect of renewal,[83] so that it is confidently expected that no such leases will be created in the future.[84] The feeling against renewals [85] resulted in the further provision that any contract, whether in a lease or not, entered into for the renewal of a lease for a term exceeding sixty years from the termination of the lease should be void.[86] Perpetually renewable leases have been even less favored in the United States than in England [87] and, it is believed, are of even less frequent occurrence.

THE REJUVENESCENCE OF THE FEE TAIL

If one be tempted to assume the role of prophet as to the future course of the law, the history of the fee tail may well cause him to pause. The power to dock the entail [88] would have seemed to have been its undoing, for why should anyone create a fee tail which the tenant in tail in possession could immediately destroy? Already at the date of Taltarum's Case,[89] in

[78] (1922) 12 & 13 Geo. V, c. 16, § 145, Fifteenth Schedule.

[79] *Ibid.* Fifteenth Schedule, § 10 (1) (i).

[80] See Sweetser, *Leases—Covenants of Perpetual Renewal* (1900) 13 HARV. L. REV. 472.

[81] Topham, *op. cit. supra* note 53, at 108.

[82] (1922) 12 & 13 Geo. V, c. 16, Fifteenth Schedule, § 12.

[83] *Ibid.* Fifteenth Schedule, § 5.

[84] Cherry, *Lecture on the New Laws of Property Act* (1925) 160 LAW TIMES 346, 349.

[85] See WOODFALL, *op. cit. supra* note 2, at 466.

[86] (1922) 12 & 13 Geo. V, c. 16, Fifteenth Schedule, § 7 (2).

[87] See Sweetser, *op. cit. supra* note 80, at 480 *et seq.*

[88] For a valuable discussion of the early history of the fee tail, see Updegraff, *The Interpretation of "Issue" in De Donis* (1925) 39 HARV. L. REV. 200.

[89] Y. B. 12 Ed. IV, fo. 19, Mich. pl. 25. The power to dock the entail by

1472, the practice of suffering recoveries for the purpose of docking entails seems to have been in full working order, and in the course of the next hundred years the common recovery became a "common assurance" for that purpose.[90] It became a commonplace of the courts that the right to dock an entail was a right inherent in the estate which no ingenuity of the conveyancer could circumvent.[91] The feeling against the unbarrable entail took shape in the term "perpetuity" and the courts set their faces against it.[92]

As a matter of fact, the possibility of docking the entail does seem in the end to have destroyed the usefulness of the fee tail in possession, although the latter continued to characterize family settlements even during the reign of Queen Elizabeth,[93] and probably did not become obsolete until about the time of the Commonwealth.[94] About that time the method of preserving contingent remainders from destruction by means of life estates to preserve contingent remainders was devised [95] and the modern strict settlement created.[96] Instead of a gift to a man and his wife and the heirs of their bodies,[97] the husband, and, sometimes, the wife, were now given a life estate with remainders in fee tail made to their unborn sons in succession.[98] As the concurrence of the life tenant was necessary to the destruction of the fee tail, neither the life tenant nor the tenant in fee tail in remainder could make any effective disposition of the property without the concurrence of the other.[99] As a result, England has had the system of settlement and re-settlement when the eldest son is of age.[100] The tenancy in tail in remainder thus had a vigorous career after the tenancy in tail in possession had run its course. In fact, in one form or other, the tenancy in tail has been the corner stone of the English system of settled land. As a system of holding land it failed.[101] The life tenant in possession took the place of the tenant in tail. But as a conveyancing device, the tenancy in tail continued to have many advantages.

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warranty appeared very soon after De Donis was passed. See Updegraff, *op. cit. supra* note 88, at 217 *et seq.*

[90] HOLDSWORTH, A HISTORY OF ENGLISH LAW (3d ed. 1922-26) 119.

[91] 7 *ibid.* 205-209.

[92] *Ibid.* 197.

[93] Williams, *On The Origin Of The Present Mode Of Family Settlements Of Landed Property* (1858) 1 JURID. SOC. PAPERS 45, 46.

[94] WILLIAMS, THE SEISIN OF THE FREEHOLD (1878) 152, 187.

[95] *Ibid.* 193; Williams, *op. cit. supra* note 93, at 53.

[96] 7 HOLDSWORTH, *op. cit. supra* note 90, at 380.

[97] WILLIAMS, *op. cit. supra* note 94, at 187.

[98] *Ibid.*

[99] *Ibid.*

[100] UNDERHILL, A CENTURY OF LAW REFORM (1901) 283.

[101] That the land is rarely allowed to go out of settlement, see *ibid.*

Except as a conveyancing device, however, there was little to be said for the fee tail. It was, of course, objectionable to those who were opposed to settled land and the dominance of the land-owning classes.[102] It was also objectionable to lawyers who were in favor of thorough-going reform.[103] The very word "entail" seemed to connote all that was feudal and medieval in property law. The fee-tail was the stronghold of primogeniture.[104] It was especially adapted to the needs of the landed aristocracy, for in the case of a peerage or a baronetage, the fee tail male enabled the family estate to go with the title.[105] Its feudal character appeared in its exclusive application to land. A fee tail could not be created in personal chattels or in leaseholds.

Because of its exclusive application to land, the elimination of "real property" law would have eliminated the fee tail.[106] This was recognized by Sir Arthur Underhill in his epoch-making pamphlet, *The Line of Least Resistance*,[107] in which he proposed that all freehold land should have the legal incidents of long terms for years. Equity had followed the law in not allowing fee tails in leaseholds and the logic of his position was to eliminate the fee tail altogether. However, he recognized that possibly a majority of lawyers would be against such elimination. If the fee-tail were to be retained as an equitable interest, the only way to accomplish this and have uniformity as to lands and chattels was to extend the fee tail to chattels, and this he proposed as an alternative.[108] It was this alternative that was

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[102] See Dicey, *The Paradox of the Land Law* (1905) 21 LAW Q. REV. 221, 227. There is a reply to Bright's attack on entails in (1864) 8 SOL. JOUR. 239.

[103] HUMPHREYS, OBSERVATIONS ON THE ACTUAL STATE OF THE ENGLISH LAWS OF REAL PROPERTY (1st ed. 1826) 173; 1 MAITLAND, COLLECTED PAPERS (1911) 184-186; T. Cyprian Williams, in THE SECOND REPORT OF THE ROYAL COMMISSION ON THE LAND TRANSFER ACTS, 52. 30 BRIT. PARL. PAPERS, 1911. Under the new property acts primogeniture and the heir remain in the fee tail. (1925) 15 Geo. V, c. 20, § 130. Although they have been abolished elsewhere. (1925) 15 Geo. V, c. 23, §§ 1, 45.

[104] Thus in WILLIAMS, *op. cit. supra* note 21, at 138, it is said: "Primogeniture, therefore, as it obtains among the landed gentry of England, is a *custom* only, and not a *right*, though there can be no doubt that the custom has originated in the right, which was enjoyed by the eldest son, as heir to his father, in those days when estates tail could not be barred."

[105] Underhill, *The Line of Least Resistance*, Appendix I to THE FOURTH REPORT OF THE ACQUISITION AND VALUATION OF LAND COMMITTEE, at 33. 29 BRIT. PARL. PAPERS, 1919.

[106] "Establish, therefore, that freeholds are only extremely long leaseholds, and estates tail disappear." 1 MAITLAND, *op. cit. supra* note 103, at 184.

[107] See *supra* note 105.

[108] *Ibid.*

adopted.[109] His proposal that the only legal estate to be recognized in land should be the leasehold failed [110] but his suggestion that fee tails be extended to chattels, which was advanced to offset the objection to the elimination of the fee tail through the logic of his general proposal, survived. It is a striking example of the survival of a reactionary minor proposal suggested to make a progressive general proposal more palatable.

Such pragmatic justification as the extension of the fee tail to chattels in equity has had has been that it will be simpler to make chattels accompany the land, where this is desired, by means of a fee tail than by complicated trusts.[111] Thus Mr. C. P. Sanger, to whom with Sir Arthur Underhill is attributed by Sir Benjamin Cherry [112] the suggestion for the change, says:

"This will save much trouble when, as often happens, it is desired to settle the family pictures or heir-looms to go with the mansion house." [113]

Sir Benjamin Cherry himself did not consider this, as had been suggested by some, a "retrograde step." [114] But his reasoning [115] is not convincing. As the reform legislation finally took shape, entails might have been preserved in equity without extending them to chattels. However, it is a consolation that this change in the law will probably have little practical effect, for, just as it is the custom in England to entail land, so it is not the custom to entail personalty, and custom in England is persistent. It does not seem possible that this extension of primogeniture to personalty can ever seem other than exceptional.

In other respects than its extension to chattels, the fee tail has not been favored. The words of art formerly necessary to create an entail by deed (not being an executory instrument) are now necessary even in the case of a will.[116] The enrolment of disen-

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[109] (1925) 15 Geo. V, c. 20, § 130 (1).

[110] See Bordwell, *Property Reform in England* (1925) 11 IOWA L. REV. 1, 9.

[111] See UNDERHILL, A CONCISE EXPLANATION OF LORD BIRKENHEAD'S ACT, (1922) 64.

[112] Cherry, *op. cit. supra* note 84, at 393.

[113] Sanger, *Estates Tail under the New Law* (1925) 2 CAMBRIDGE L. J. 212.

[114] See *supra* note 112.

[115] He says: "If we had not authorised entailed estates to be created in equity in property generally but had, as has been suggested, abolished entails altogether, we should, as a profession, have had to invent long trusts for giving effect to what is now succinctly summed up in the words 'estate tail.' After all, what does it matter to the public what equitable estates are created behind the curtain provided that they are not concerned therewith or prejudiced thereby?" *Ibid.*

[116] (1925) 15 Geo. V, c. 20, § 130 (2); see Sanger, *loc. cit. supra* note 113.

tailing assurances is no longer necessary.[117] And an adult tenant in tail in possession is given power to dispose of his interest by will in like manner as if the entail had been barred at his death.[118]

The following summary of the law of estates tail in the twenty-four states of the United States in 1824 appeared in that year: [119]

"In *four* States never known to have been in existence, viz. Vermont,[120] Illinois,[121] Indiana [122] and Louisiana.

"In *one*, viz. South Carolina, the Statute De Donis never was in force, but fees conditional at common law prevail.

"In *twelve* they have been abolished or converted by statutes into fee simple absolute, viz. New York, Ohio,[123] Virginia, North Carolina, Georgia, Missouri,[124] Tennessee, Kentucky, Connecticut,[125] Alabama, Mississippi, and New Jersey,[126] but in the last *four*, a kind of estate tail still exists, being for the life of one donee or a succession of donees *then living*.

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[117] (1925) 15 Geo. V, c. 20, § 133.

[118] *Ibid.* § 176. A gift over after a failure of issue is likely to turn a previous interest into a fee tail, but, where this is not the case, section 134 provides that the executory limitation over shall be void, if and as soon as there is living any issue of the class who has attained the age of twenty-one years. This section extends CONVEYANCING ACT, (1882) 45 & 46 Vict. c. 39, § 10, to personalty. Challis conceives the purpose of this enactment to have been to assimilate these executory limitations to executory limitations subsequent to a fee tail, which in practice usually are barred when the eldest son reaches twenty-one. CHALLIS, REAL PROPERTY (3d ed. 1911) 178.

[119] DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES (1824) 115 n.

[120] But in Giddings v. Smith, 15 Vt. 344 (1843), it was held that the old law of entails had prevailed in Vermont until the revision of 1839 and that an entail created prior to that time could not be barred by a deed, though acknowledged before a justice of the peace. In the revision of 1839 a statute like that in Missouri and Illinois, *infra* notes 121, 124, was adopted. Vt. Rev. Stat. (1839) c. 59, § 1.

[121] In 1827 Illinois adopted the Missouri Act of 1825. Ill. Rev. Laws (1833) 131. See *infra* note 358.

[122] In 1852, Indiana passed into the third group. 1 Ind. Rev. Stat. (1852) 238.

[123] Ohio's act was modeled after that of Connecticut (*infra* note 125) and was passed in 1811. Ohio Land Laws 1825, 319.

[124] In 1825 Missouri passed an act giving the donee in fee tail a life estate with remainder in fee simple absolute to the person or persons to whom the estate tail would first pass, according to the course of the common law. 1 Mo. REV. LAWS (1825) 216.

[125] In 1784 Connecticut enacted "that all estates given in tail, shall be and remain an absolute estate in fee simple, to the issue of the first donee in tail." Stat. of Conn. 1808, 43.

[126] New Jersey passed an act in 1784, Laws of New Jersey (Paterson, 1800) 54, 78, similar to that of Connecticut, *supra* note 125. This was changed in 1820 so as to give a life estate to the donee and remainder to the children in fee. Pamph. L. 1820, 178.

"In *six* they may be barred by deed, acknowledged before a Court or some magistrate, viz. Rhode Island, Maine, Pennsylvania,[127] Massachusetts, Maryland, and Delaware,[128] but in the last four may also be barred by fine and common recovery.

"And in *one* only do they exist as in England with all their peculiar incidents, viz. New Hampshire." [129]

In the twenty-four states subsequently admitted the tendency has been for the statutes to ignore the fee-tail or to change it into a fee simple.[130]

That the fee tail ever had any real vitality in the United States, even in colonial times, may well be doubted. The effectiveness of the fee tail in possession had already been destroyed by the possibility of docking it at the beginning of the colonial period. It was not long afterwards that the fee tail in possession ceased to be a customary way of settling land in England.[131] With the substitution of fee tails in remainder for fee tails in possession in strict settlements, the fee tail had become rather a conveyancing device than a method of holding land, and it is not likely that this conveyancing device was used very much in the colonies. The strict settlement has been strictly English.[132] It is manifest that entailed estates and primogeniture were in complete disaccord with colonial life and the trend of legislation.[133] The very doubt in Massachusetts as to whether lands held in fee tail should descend to the oldest son or should be partible as lands held in fee simple [134] shows at least that it was not a common thing for entailed lands to be inherited. Of the thirteen original colonies, the fee tail survived the revolutionary era unimpaired only in Delaware, Pennsylvania, Massachusetts and Rhode Island, and in these states provision was made for docking them by deed, and in Rhode Island even by will.[135]

Practically all the current solutions for the questions raised by the Statute De Donis in the United States, therefore, date back to the Revolutionary era; (1) the conversion of the fee

[127] In 1855, Pennsylvania enacted that future fee tails should be converted into fee simples. Pa. Laws 1855, no. 387, p. 368.

[128] Fines and recoveries to bar entails are still given statutory recognition in Delaware, Del. Rev. Stat. (1915) 1494, and in Pennsylvania, 2 PURDON'S DIGEST (13th ed. 1905) 1483, but apparently not elsewhere.

[129] But in Jewell v. Warner, 35 N. H. 176 (1857), it was held that fee tails had been abolished by implication in 1789.

[130] See STIMSON, *op. cit. supra* note 77, § 1313.

[131] *Supra* page 188.

[132] Hogg, *Property Law Reform at Home and Overseas* (1920) 64 SOL. JOUR. 442, 475.

[133] Morris, *Primogeniture and Entailed Estates in America* (1927) 27 COL. L. REV. 24, 50.

[134] *Ibid.* 27-32.

[135] Laws of R. I. 1798, p. 268. The right to dock the entail by will disappeared in the revision of 1896. R. I. Gen. Laws (1896) c. 201, § 14.

tail into a fee simple,[136] (2) the barring of the entail by a simple deed,[137] (3) the conditional fee,[138] and (4) the conversion of the interest of the first taker into a life estate or something like it with possibilities or something more substantial in the issue or children.[139] The merit of these solutions would seem to be in the order named. The fee tail was an anachronism as a method of holding land when the colonies were settled and there is no excuse for its retention in any form or guise. But if the words "heirs of the body" are to have any significance the fee tail which may be barred by the simple deed would seem to be an advance on the conditional fee. It is certainly the more favorable of the two to alienation. In Maine and Massachusetts, it is true, the fee tail is still supposed to carry with it primogeniture,[140] but probably not elsewhere.[141] If the conditial fee carries us back prior to 1285,[142] the fourth solution would seem to carry us still further back to the time when the struggle for the alienability of the fee was in its beginning [143] and to take the wrong side. Of all the solutions this is the least desirable. It is productive of endless litigation and not obviously calculated to carry out the intention of the donor. Where statutes are silent,[144] the example of the New Hampshire court [145] is to be commended in holding fee tails abolished by implication.

ABOLITION OF THE RULE IN SHELLEY'S CASE

The abolition of the rule in *Shelley's Case* [146] was not a part of the original scheme of reform, but was proposed by the committee of the Conveyancer's Institute.[147] The proposal was made

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[136] Georgia, Maryland (as to fee tails general), New Hampshire (by implication), New York, North Carolina, and Virginia.

[137] Delaware, Massachusetts, Pennsylvania and Rhode Island.

[138] South Carolina.

[139] Connecticut and New Jersey.

[140] Hawley v. Northampton, 8 Mass. 3 (1811); Corbin v. Healy, 37 Mass. 514 (1838); Wight v. Thayer, 67 Mass. 284 (1854); Riggs v. Sally, 15 Me. 408 (1839); Morris, *op. cit. supra* note 133, at 47-48.

[141] *Ibid.* 27.

[142] The date of The Statute De Donis.

[143] See 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1899) 13.

[144] In such a situation Iowa and Nebraska have refused to adopt De Donis and have gone back to the conditional fee. Pierson v. Lane, 60 Iowa 60, 14 N. W. 90 (1882); Kepler v. Larson, 131 Iowa 438, 108 N. W. 1033 (1906); Sagers v. Sagers, 158 Iowa 729, 138 N. W. 911 (1912); Yates v. Yates, 104 Neb. 678, 687, 178 N. W. 262, 265 (1920). While Kansas has recognized the fee tail but allowed it to be barred by deed. Ewing v. Nesbitt, 88 Kan. 708, 129 Pac. 1131 (1913); Gardner v. Anderson, Trustee, 116 Kan. 431, 227 Pac. 743 (1924).

[145] *Supra* note 129.

[146] (1925) 15 Geo. V, c. 20, § 131.

[147] *Report of the Special Committee of the Institute on the Law of*

in the interest of further assimilation of the law of real and personal property and because the rule defeated the expressed intention of the settlor. The words heir or heirs or issue, or other words which would have operated under the rule in *Shelley's Case,* are now to operate in equity as words of purchase and not of limitation. And to find out who will take in such a case by purchase, resort must be had to the old law of inheritance. The old learning as to the heir and heir of the body, therefore, is still of effect where the heir takes as purchaser in the entail or in the case of a lunatic or defective.[148]

In twenty-five[149] of the United States the rule in *Shelley's Case* seems to have been abrogated completely, and in Kentucky[150] and Vermont[151] it was rejected by the courts. In six other states[152] statutes and courts seem to be silent in the matter. In five states the rule does not apply to devises,[153] and in the United States this seems to mean that the rule is of infrequent application.[154] This leaves ten states[155] at most where the rule can be said to be in vigor, and apparently the number is reducible[156] to six, Arkansas, Illinois, Indiana, Maryland, North Carolina, and Pennsylvania. Possibly the abrogation of the rule in England will hasten the elimination of the rule in the United States, as has long seemed to be its destiny.

Property Bill (1920) 64 SOL. JOUR. 741. See Bordwell, *op. cit. supra* note 110, at 7, 9.

[148] (1925) 15 Geo. V, c. 5, Ninth Schedule. For the heir as purchaser, see (1925) 15 Geo. V, c. 20, §§ 131, 132.

[149] Alabama, Arizona, California, Connecticut, Georgia, Idaho, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia and Wisconsin. These statistics are based in part on a valuable note in 29 L. R. A. (N. S.) 965, 1159 (1911). The rule was abrogated in South Carolina in 1924. S. C. Acts, 1924, no. 698, p. 1140.

[150] Allen v. Terrell, 1 Ky. L. Rep. 336 (1880); Turman v. White's Heirs, 14 B. Mon. 560, 573 (Ky. 1854). See also 29 L. R. A. (N. S.) 1162 (1911) annotation.

[151] Smith v. Hastings, 29 Vt. 240 (1857); Johnson v. Barden, 86 Vt. 19, 27, 83 Atl. 721, 724 (1912).

[152] Colorado, Louisiana, Nevada, Utah, Washington, and Wyoming.

[153] Kansas, New Hampshire, New Jersey, Ohio and Oregon. Massachusetts and Rhode Island at one time had abrogated the rule as to devises only, but later extended the abrogation to grants.

[154] Compare, for instance, the number of cases involving the rule arising under devises in Pennsylvania with those arising under deeds.

[155] Arkansas, Delaware, Florida, Illinois, Indiana, Maryland, Nebraska, North Carolina, Pennsylvania and Texas.

[156] The scarcity of decisions in Delaware and Florida is evidence of the rule's inactivity there, for a principal argument against the rule is its tendency to promote litigation. In Nebraska and Texas the rule has been accepted with much hesitation. In Albin v. Parmele, 70 Neb. 740, 98 N. W. 29 (1904), and Moran v. Moran, 101 Neb. 386, 163 N. W. 315 (1917),

ABROGATION OF THE RULE IN WHITBY V. MITCHELL

Another change in the interest of uniformity between the law of real and that of personal property was the abrogation [157] of the rule in *Whitby v. Mitchell*,[158] whereby legal and equitable interests in land could not be limited, after a life interest to one unborn person, to the unborn child or other issue of an unborn person even though the limitation to the second generation were so guarded that it was bound to vest within the period prescribed by the rule against perpetuities, namely, a life in being and twenty-one years. The rule in *Whitby v. Mitchell* doubtless reflected the tradition of English conveyancers [159] and had some pretensions to ancestry in the almost mythical rule against double possibilities,[160] but it was difficult of application [161] and uncalled for unless the rule against perpetuities was unduly restricted.[162] The rule was held inapplicable to personalty.[163]

The decision in *Whitby v. Mitchell* gave rise to much controversy [164] and the great authority of John Chipman Gray was thrown against it.[165] Whatever the drafters of the reform legislation may have thought of the legal aspects of the controversy, they were evidently convinced that the result that Gray advocated was the more desirable and acted accordingly.[166]

In the United States there is no such conveyancers' tradition in the matter as in England, and it would seem that the very convincing argument of Gray should prevail.[167] Such legislation

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the rule was curtailed, but it was accepted unqualifiedly by the majority of the court in Yates v. Yates, 104 Neb. 678, 178 N. W. 262 (1920), and has come to be recognized as a rule of property. Sutphen v. Joslyn, 111 Neb. 777, 198 N. W. 164 (1924). In Tendick v. Evetts, 38 Tex. 275, 282 (1873), the court doubted whether the rule should be applied to wills, and in Lacey v. Floyd, 99 Tex. 112, 87 S. W. 665 (1905), while holding that it had become a rule of property, recommended its abrogation by the legislature.

[157] (1925) 15 Geo. V, c. 20, § 161.

[158] L. R. 44 Ch. D. 85 (1890).

[159] Sweet, *The Rule in Whitby v. Mitchell* (1912) 12 COL. L. REV. 199, 207.

[160] See WILLIAMS, *op. cit. supra* note 21, at 495, 435.

[161] See GRAY, THE RULE AGAINST PERPETUITIES (3d ed. 1915) § 947 n.

[162] The argument that the rule against perpetuities had no application to legal contingent remainders was a substantial argument for some other rule to keep remainders within proper bounds. *Ibid.*

[163] In re Bowles [1902] 2 Ch. 650.

[164] WILLIAMS, *op. cit. supra* note 21, at 496 (h); GRAY, *op. cit. supra* note 161, §§ 298d, 298e, 932.

[165] GRAY, *op. cit. supra* note 161, §§ 298a-298i, 931-947.

[166] Even though the rule had not been abrogated, the abolition of legal contingent remainders would have greatly restricted its application. Its anomalous character would have been increased. See WILLIAMS, *op. cit. supra* note 21, at 496.

[167] Authority in the United States on the matter is very scant. WASHBURN, REAL PROPERTY (6th ed. 1902) § 217, states a version of the rule and this statement has found its way into the opinions of the court in Lock-

as there has been in the United States [168] has questioned any "supposed rule respecting limitations to successive generations or double possibilities" and at the same time precluded its adoption.

PERPETUITIES AND ACCUMULATIONS

The abolition of the rule in *Whitby v. Mitchell* was a part of the original reform. Once the reforming spirit was in the air, however, there was a tendency to take up any suggestion with regard to reform without the deliberation that would normally be expected. Thus, apparently, a correspondent's suggestion [169] led to the validation of gifts void for remoteness because dependant on the attainment of or failure to attain an age exceeding twenty-one years, by the substitution of that age for the age stated in the instrument.[170] This is a change that will be particularly applicable to gifts to classes and will avoid the, in many respects, unfortunate result of cases like *Leake v. Robinson* [171] where a gift to an entire class was destroyed because the final membership in the class could not be determined within the prescribed period. In that case Sir William Grant said [172] he would have been inclined to adapt the limitation in the way now provided for (as above) had it been within his powers as a judge to do so. The situation is a simple one of frequent occurrence where there is little question that the donor would rather have the change as to age made than have the limitation fail altogether. As an exceptional rule there is much to be said for it, but it would seem only as an exception. The general rule that a limitation is to be read in the first place as if there were no rule against perpetuities, and not to be construed or adapted so as to make it valid under the rule [173] would seem to be sound. The rule against perpetuities is generous enough [174] in allowing the future limitation of property. It would seem a healthy rule

ridge v. Mace, 109 Mo. 162, 18 S. W. 1145 (1892), and Shepperd v. Fisher, 206 Mo. 208, 103 S. W. 989 (1907), and probably elsewhere, but the limitations in these cases were invalid irrespective of the rule in Whitby v. Mitchell. Professor Hudson expresses the belief "that the rule has not been adopted in any American case." Hudson, *The Rule Against Perpetuities in Missouri* (1914) 3 LAW SERIES, UNIV. OF MO. BULL. 3, 30.

[168] Mass. Gen. Laws (1921) c. 184, § 3; Iowa Code (1927) § 10,046.

[169] See Whitworth, *Further Suggestions for the Amendment of the Law of Property* (1920) 64 SOL. JOUR. 567. The suggestion, however, had been made previously. THE THIRD REPORT OF THE REAL PROPERTY COMMISSIONERS 40, 41. 23 BRIT. PARL. PAPERS, 1831-32.

[170] (1925) 15 Geo. V, c. 20, § 163.

[171] 2 Mer. 363 (1817).

[172] At page 389.

[173] GRAY, *op. cit. supra* note 161, § 629.

[174] See *ibid.* §§ 187, 188.

in general that the settlor or devisor should expect no favors in bringing his limitation within its very generous terms. The risk of the limitation being held void would seem a very salutary check on doubtful limitations.

Prior to the case of *Re Hollis' Hospital*[175] in 1899, it was a much controverted point in England as to whether a common law right to enter for condition broken, and to enforce a forfeiture of the fee simple subject to the condition was subject to the rule against perpetuities.[176] Despite the opinion in that case that such right of entry was within the rule, there was some hesitation in accepting this as the law,[177] but the matter is now settled for right of entry in general, in accordance with that case, by the Law of Property Act, 1925.[178] An exception, however, is made to conditions in regard to rent charges, and such exception is taken by Mr. Cheshire[179] to mean that all conditions attached to rent charges are outside the rule. Such is a possible construction, but the exception would seem to refer to the statutory provisions with regard to conditions attached to rent charges,[180] and not to include such conditions when they involve a forfeiture. As conditions for forfeiture or non-payment of rent-charges are now practically obsolete,[181] however, the matter is not important.

For many years the customary condition attached to rent-charges in England has been a condition, not to enforce a forfeiture, but to take possession by way of indemnity.[182] Such conditions, as well as the power to levy a distress, have been considered strictly remedial[183] and therefore not within the rule. The law was so declared in the Conveyancing Act, 1911.[184] Included within the general terms of this declaration, however, was the power to create a trust term for the purpose of collecting the rent[185] and the exclusion of this power from the rule, in the opinion of T. Cyprian Williams,[186] changed the law. These

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[175] [1899] 2 Ch. 540.

[176] GRAY, *op. cit. supra* note 161, §§ 299-303.

[177] Particularly by Mr. Charles Sweet. CHALLIS, *op. cit. supra* note 118, at 207 n. Re Hollis' Hospital, *supra* note 175, however, was followed in In re Da Costa [1912] 1 Ch. 337.

[178] (1925) 15 Geo. V, c. 20, § 4 (3).

[179] CHESHIRE, *op. cit. supra* note 30, at 300.

[180] (1925) 15 Geo. V, c. 20, § 162 (1) (a) (b) (c).

[181] GRAY, *op. cit. supra* note 161, at §§ 303, 282 n.

[182] *Ibid.* Such a condition is now implied unless the instrument directs otherwise. CONVEYANCING ACT, (1881) 44 & 45 Vict. c. 41, § 44, now superseded by (1925) 15 Geo. V, c. 20, § 121.

[183] 1 WILLIAMS, VENDOR AND PURCHASER (3d ed. 1922) 633; GRAY, *op. cit. supra* note 161, § 303.

[184] (1911) 1 & 2 Geo. V, c. 37, § 6.

[185] See (1881) 44 & 45 Vict. c. 41, § 44 (4).

[186] See 1 WILLIAMS, *op. cit. supra* note 183, at 635; WILLIAMS, REAL PROPERTY (22d ed. 1914) 441 n.

provisions are now included in the Law of Property Act, 1925,[187] with the further provision that the power to appoint a receiver for the collection of the rent is not within the rule.[188] The principle behind these provisions is given an independent setting and in some respects amplified in section 162 [189] of the same act.

By section 162,[190] the rule against perpetuities is also declared to be inapplicable to the grant, exception or reservation of certain easements and profits. In the absence of any comment, authoritative or otherwise, on this provision, it is a little difficult to get its exact bearing.[191] As the express purpose of the provision is to clear up doubts and not to change the law, its purpose can hardly be to allow the creation of these easements and profits in the future without limitation as to time,[192] but rather, it would seem, to emphasize the legality of legal or equitable easements and profits, notwithstanding the fact that they may not be acted upon until the indefinite future. Just as in the case of estates,[193] it is the time of vesting and not the time of enjoyment that is material. The fact that easements are likely to hope to be permanent incumbrances does not bring present easements within the scope of the rule against perpetuities,[194] and possibly section 162 (1) (d) was intended to make this

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[187] (1925) 15 Geo. V, c. 20, § 121.

[188] *Ibid.* § 122 (2) (3).

[189] *Ibid.* § 162 (1) (a) (b) (c).

[190] *Ibid.* § 162 (1) (d).

[191] Possibly the draughtsman had in mind the case of South Eastern Ry. v. Associated Portland Cement Mftrs. [1910] 1 Ch. 12, where the application of the rule against perpetuities to the reservation in a deed poll of a right to a tunnel was involved and was not handled very satisfactorily. See GRAY, *op. cit. supra* note 161, § 330 b, c. Possibly he had in mind Sir George Jessel's statement that easements were an exception to the rule against perpetuities. See London & S. W. Ry. v. Gomm, 20 Ch. D. 562, 583 (1882); GRAY, *op. cit. supra* note 161, § 279.

[192] In South Eastern Ry. v. Associated Portland Cement Mftrs., *supra* note 191, at 27, Farwell, L. J., said by way of dictum that he had no doubt of the accuracy of the passage in LEWIS, PERPETUITIES (1843) 619, 620, that the rule against perpetuities applied to easements *in futuro*. See also GRAY, *op. cit. supra* note 161, § 316, n. 2. It does not seem likely that the draughtsman of section 162 meant to reject these authorities or to intimate that their views had raised merely a doubt in the matter. It does seem likely that the draughtsman wished to approve the result in the South Eastern Ry. case, *supra*, and felt that he was merely amplifying Sir George Jessel's statement as to the non-application of the rule against perpetuities to easements, *supra* note 191. In making that statement, however, there is no indication that Sir George Jessel meant to deny the application of the rule against perpetuities to easements *in futuro*, nor would it seem that there was any such idea in the mind of the draughtsman of (1925) 15 Geo. V, c. 20, § 162 (1) (d).

[193] GRAY, *op. cit. supra* note 161, §§ 99, 205, 283, 322, 972.

[194] It would seem that that was all Sir George Jessel meant in his statement, *supra* note 191.

clear even where the easement is one that may not be acted upon for a period beyond that of the rule.[195]

No substantial change in the law as to restrictions on the accumulation of income is made by the Law of Property Act, 1925.[196] The Thellusson Act[197] and the Accumulations Act, 1892,[198] are reenacted. The draftsmanship of the former, however, has been greatly improved[199] and the exception of provisions for raising portions for "children" has been changed by adding "or remoter issue."[200] A new section makes clear that where accumulations of surplus income are made during minority under any statutory power or under the general law, this period is not to be taken into account in determining whether an express trust for accumulations is good or bad.[201] Accumulations have not been troublesome enough in the United States to have occasioned much legislation, but the Thelluson Act has had some following.[202] An apparent result of the New York real property legislation is the anomaly that trusts to accumulate may be limited for a longer period than trusts to apply.[203]

EXTENSION OF THE RULE IN DEARLE V. HALL

Ever since the decision in *Dearle v. Hall* in 1823,[204] it has been the rule in England that priority among assignees of *choses in action*[205] or equitable interests in personalty depends, not upon the priority in time of the assignments, but upon priority of notice to the debtor or trustee. But if the rule is the child of *Dearle v. Hall,* it is the grandchild of *Ryall v. Rowles,*[206] and

[195] For the restriction of leaseholds *in futuro* to twenty-one years, see BORDWELL, *English Property Reform and its American Aspects* (1927) 37 YALE LAW JOURNAL 1, 9-16.

[196] (1925) 15 Geo. V, c. 20, §§ 164-166.

[197] (1800) 40 Geo. III, c. 98, now superseded by (1925) 15 Geo. V, c. 20, § 164.

[198] (1892) 55 & 56 Vict. c. 58, now superseded by (1925) 15 Geo. V, c. 20, § 166.

[199] As to the poor draftsmanship of the Thellusson Act, see GRAY, *op. cit. supra* note 161, at 537, n. 2.

[200] (1925) 15 Geo. V, c. 20, § 164 (2) (ii) (a) (b).

[201] *Ibid.* § 165; see *op. cit. supra* note 34, at 181.

[202] See GRAY, *op. cit. supra* note 161, §§ 715 *et seq.*, 726, 726a.

[203] See Chaplin, *New York Trusts to Apply Rents during a Minority after Two Lives* (1926) 26 COL. L. REV. 671.

[204] 3 Russell 1 (1823). This was the decision by Plumer, M. R. It was affirmed five years later by Lord Lyndhurst, C. *Ibid.* 55 (1828). The opinion by the Chancellor did little more than affirm the very able opinion of the Master of the Rolls.

[205] When *choses in action* were made assignable at law by statute, the rule in Dearle v. Hall was incorporated into the statute. JUDICATURE ACT, (1873) 36 & 37 Vict. c. 66, § 25 (6). These provisions are now reenacted in the LAW OF PROPERTY ACT, (1925) 15 Geo. V, c. 20, § 136.

[206] 1 Ves. 348 (1749-50), 1 Atk. 165 (1749). See Lightwood, *The Exten-*

traces its ancestry back to the Bankruptcy Act, (1624) 21 Jac. I, c. 19. Under that act it was held that choses in action were included under "goods and chattels" [207] and, just as goods in the possession of the bankrupt were liable to pay his debts notwithstanding any former grant,[208] so choses in action were liable notwithstanding a former assignment unless notice of the assignment had been given to the debtor.[209] Notice to the debtor was therefore treated as analogous to delivery of a chattel. From an ordinary chose in action the step was easy to a claim in equity against funds in the hands of a trustee. *Dearle v. Hall* took this step and gave the rule a general equity standing, but the ancestry of the rule restricted it to personal property. Now the Law of Property Act, 1925, extends the rule to equitable interests in land [210] and, especially in view of the great extension of equitable interests in land under the new acts,[211] this is of the greatest practical importance.

After extending the rule in *Dearle v. Hall* to equitable interests in land,[212] section 137 specifies the parties to be served with notice in such a case [213] and then takes up the assignment of equitable interests without regard to the kind of property involved. A notice, otherwise than in writing, is not to affect priorities.[214] Where a valid notice cannot be served, or not without unreasonable cost or delay, a memorandum of the dealing may be endorsed on the trust instrument and shall have the same effect as notice.[215] Where there is no trust instrument the memorandum may be made on the instrument under which the equitable interest is acquired and, in particular, in case of intestacy, on the letters of administration or probate in force at the time.[216]

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sion of Dearle v. Hall (1925) 60 LAW JOURNAL 214, 215. Ryall v. Rowles was the only authority on which any reliance was placed in Dearle v. Hall. See 3 Russell 1, 22, 23-25, 25-28, 58.

[207] See Ryall v. Rowles, *supra* note 206, at 362-363, 367, 369, 371 (1749-50).

[208] *Ibid.* 360, 362, 366, 369, 374.

[209] The clearest statement is that by Parker, C. B., in 1 Atk. 177, and this is relied on by Lyndhurst, C. 3 Russell 58. Other statements quoted by Plumer, M. R., in Dearle v. Hall, *supra* note 204, at 25-27, are 1 Atk. 185 and 1 Ves. 360, 361, 362, 363, 367, 369.

[210] (1925) 15 Geo. V, c. 20, § 137.

[211] See Bordwell, *op. cit. supra* note 110, at 14.

[212] (1925) 15 Geo. V, c. 20, § 137 (1). For a most enlightening discussion of the rule in Dearle v. Hall and of the provisions of the LAW OF PROPERTY ACT, 1925, relating thereto, see Lightwood, *The Extension of Dearle v. Hall* (1925) 60 LAW JOURNAL 214; *ibid. Notice of Equitable Interests, ibid.* 239; *ibid. The New Scheme of Notice of Equitable Interests, ibid.* 264; *ibid. Alternative Methods of Notice of Dealings in Reversions, ibid.* 286.

[213] (1925) 15 Geo. V, c. 20, § 137 (2).

[214] *Ibid.* § 137 (3).

[215] *Ibid.* § 137 (4).

[216] *Ibid.* § 137 (6).

Any person interested may require production of the notice.[217] By section 138 it is provided that a trust corporation may be nominated by the trust instrument to whom notice shall be given instead of to the trustees.

The rule in *Dearle v. Hall* has had an extensive following in the United States,[218] but, as finally affirmed, it postdates Lord Eldon and has not been accepted in Massachusetts and New York and some other jurisdictions.[219] The new English provisions in furtherance of the rule may well be studied with a view to statutory adoption.

NOTICE

For over two centuries general registries of deeds have existed in the counties of Middlesex [220] and Yorkshire [221] in England, and these early gave rise to two important decisions. In *Le Neve v. Le Neve*,[222] Lord Hardwicke, C., held, notwithstanding the language of the Middlesex Registry Act,[223] that an unregistered deed was to be "fraudulent and void" against a subsequent purchaser for value, but that if the latter had taken with notice, either to himself or an agent, of the unregistered deed, the prior purchaser would be preferred in equity because this was a kind of fraud. In *Morecock v. Dickins*,[224] Lord Camden, C., held that registration was not in itself notice. Consequently a subsequent purchaser without actual notice "was allowed to make use of the doctrine of taking, and by getting in the legal estate obtain priority over a prior equitable incumbrance notwithstanding that it was registered." [225]

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[217] *Ibid.* § 137 (8).

[218] See 2 POMEROY, *op. cit. supra* note 54, § 695, nn. 3, j; AMES, CASES ON TRUSTS (2d ed. 1893) 327 n.; SCOTT, CASES ON TRUSTS (1919) 623 n.

[219] See 2 POMEROY, *op. cit. supra* note 54, § 695, nn. 4, k; AMES, *op. cit. supra* note 218, at 327 n.; SCOTT, *op. cit. supra* note 218, at 623 n.

[220] THE MIDDLESEX REGISTRY ACT, (1708) 7 Anne, c. 20. This act was amended by (1891) 54 & 55 Vict. c. 64.

[221] Registration of deeds was established in turn in the West, East and North Ridings of the County of York by the following acts: (1703) 2 & 3 Anne, c. 4; (1707) 6 Anne, c. 62 (c. 35 in Pickering); (1735) 8 Geo. II, c. 6. These were consolidated and amended by THE YORKSHIRE REGISTRIES ACT, (1884) 47 & 48 Vict. c. 54, which was amended by (1885) 48 & 49 Vict. c. 26.

[222] Amb. 436 (1747). For a discussion of Le Neve v. Le Neve and a statement of the American law, see 2 POMEROY, *op. cit. supra* note 54, §§ 591, 659(6)-660, 665.

[223] *Supra* note 220.

[224] Amb. 678 (1768). Morecock v. Dickins followed Bedford v. Backhouse, 2 Eq. Cas. Abr. 615 (1730), but is the case generally cited for the doctrine that in England until the LAW OF PROPERTY ACT, 1925, registration was not notice.

[225] Lightwood, *Registration of Land Charges* (1925) 60 LAW JOURNAL 568.

Notwithstanding the reform legislation, it is possible that *Le Neve v. Le Neve* still survives in Middlesex [226] except as to land charges, but, with this possible exception, the doctrine of both *Le Neve v. Le Neve* and of *Morecock v. Dickins* has been rejected in the Law of Property Act, 1925. A purchaser is not to be affected by notice of any instrument capable of registration under the Land Charges Act, 1925, which is void against him under that act because of non-registration.[227] Furthermore, registration is made notice as to registrations under the Land Charges Act [228] and in general in Middlesex and Yorkshire.[229] The importance of this change of front is greatly enhanced by the great extension of the land charges subject to registration so as to include a great number of miscellaneous charges or obligations, notably mortgages and restrictive covenants.[230]

Every mortgage affecting a legal estate in land, whether itself legal or equitable, not being a mortgage protected by the deposit of title deeds, is to rank according to its date of registration as a land charge.[231] As registration is made notice, priority is to be determined as in *Dearle v. Hall* [232] by priority of notice. But in *Dearle v. Hall* it is notice to the debtor or trustee, while in the case of mortgages it is notice to the world at large by means of the registry. The priority given to mortgages protected by a deposit of title deeds over those on the registry is believed to have been due to the insistence of the bankers,[233] and is an example of what was meant by "evolution not revolution." Such priority is out of place in a registry system, as has been shown in the United States,[234] and, in the opinion of Mr. Lightwood, will ultimately have to be withdrawn.[235] Mortgages protected by title deeds may be either legal or equitable. Whether the one or the other, in England the first mortgage in point of time is likely to be so protected.[236]

The establishment in general of the scheme of priority of mortgages by date of registration is contrary to the old doctrine

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[226] See *ibid.* 569. The rule of Le Neve v. Le Neve was abrogated for Yorkshire by the Yorkshire Registries Act, 1884, *supra* note 221, section 14 of which provided that priority according to date of registration should not be lost to any person "merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud."

[227] (1925) 15 Geo. V, c. 20, § 199 (1) (i). See *infra* note 250.

[228] *Ibid.* § 198.

[229] *Ibid.* § 197.

[230] (1925) 15 Geo. V, c. 22, § 10.

[231] (1925) 15 Geo. V, c. 20, § 97.

[232] See EXTENSION OF THE RULE IN DEARLE V. HALL, *supra* at 199.

[233] Lightwood, *Registration of Charges* (1926) 61 LAW JOURNAL 398.

[234] In re Assignment of Snyder, 138 Iowa 553, 114 N. W. 615 (1908).

[235] Lightwood, *op. cit. supra* note 233, at 399.

[236] WILLIAMS, *op. cit. supra* note 21, at 724.

of tacking mortgages, and the latter doctrine is expressly abandoned.[237] A difficult problem in the past has been how to abandon the doctrine of tacking and yet not unduly to hamper the making of future advances.[238] Of course there is no objection to the priority of the future advances where this is agreed to by the subsequent mortgagee [239] or where the one making the future advance has no notice, by registration or otherwise, of the subsequent mortgage.[240] In general, registration of the subsequent mortgage will be notice to the prior mortgagee under the Law of Property Act, 1925,[241] but this will not be so if the prior mortgage was made expressly for securing a current account or other further advances.[242] In such a case the subsequent mortgagee, to protect himself from subsequent advances, must notify the prior mortgagee. The prior mortgagee will also have priority as to further advances where the mortgage imposes an obligation on him to make such advances.[243] The net result of these provisions as to further advances is to bring the law in this matter in line with that in the United States.[244]

In the early stages of the reform legislation, a strong antipathy was shown to the equitable doctrine of notice. That a purchaser should be bound by an equity because he had notice of it was treated almost as a usurpation on the part of courts of equity.[245] This feeling is reflected, perhaps, in the general rejection just referred to of the doctrine of *Le Neve v. Le Neve.*[246] It is reflected also, perhaps, in the provision confining the local registries in Middlesex and Yorkshire to instruments affecting legal estates [247] whereas formerly equitable assurances were also subject of registration there.[248] Furthermore, the new construc-

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[237] (1925) 15 Geo. V, c. 20, § 94 (3).

[238] For the experience in Yorkshire, see Lightwood, *loc. cit. supra* note 225.

[239] This is provided for by (1925) 15 Geo. V, c. 20, § 94 (1) (a).

[240] *Ibid.* § 94 (1) (b).

[241] *Supra* note 228.

[242] (1925) 15 Geo. V, c. 20, §§ 94 (2), 198 (2).

[243] *Ibid.* § 94 (1) (c).

[244] For the law as to future advances in the United States, see 3 TIFFANY, REAL PROPERTY (2d ed. 1920) § 637.

[245] See, for instance, the statements of Sir Arthur Underhill. UNDERHILL, *op. cit. supra* note 111, at 33, 36, 91. In Sir Benjamin Cherry's memorandum on the original bill he said that one of the general principles adopted was that a purchaser "should, with insignificant exceptions, only be concerned with legal estates, being thus enabled to ignore equitable interests and powers." FOURTH REPORT OF THE ACQUISITION AND VALUATION OF LAND COMMITTEE ON THE TRANSFER OF LAND IN ENGLAND AND WALES, at 43. 29 BRIT. PARL. PAPERS, 1919.

[246] *Supra* page 201.

[247] (1925) 15 Geo. V, c. 20, § 11 (1).

[248] Lightwood, *loc. cit. supra* note 225.

tive notice from the registration of land charges will probably concern the priority between incumbrancers much more often than it will the one who wishes to buy the land.[249] And while the latter will be charged with the new constructive notice from the record, he will be relieved from the old constructive notice of equities in the title deeds which should have been, but were not, registered.[250] Notwithstanding all this and the extensive overreaching powers given to settlements and trusts for sale,[251] the general doctrine of notice would seem to have gained more in the last stages of the legislation by the extension of the rule in *Dearle v. Hall* to interests in land and the provision for the registration of mortgages than it lost by having so many equities put behind the curtain of a settlement or trust for sale. This general doctrine of notice is perhaps not the old equitable doctrine but rather the doctrine that came from bankruptcy through *Dearle v. Hall.*[252] Whatever its source, it tends to do away with the secrecy of transactions and to prevent fraud. At the same time it ought not to hinder the saleability of land.

Apart from the new constructive notice from the register, the doctrine of constructive notice is somewhat cut down. The definition of constructive notice in the Conveyancing Act, 1882,[253] which was supposed to eliminate some of the artificialities which had developed in the matter,[254] is re-enacted.[255] Where an intending lessee or assign is not entitled to call for the title to the freehold or to a leasehold reversion, he is no longer deemed to be affected with notice of any matter, of which, if he had contracted that such title should be furnished, he might have had notice. This abrogates the "curious rule" [256] in *Patman v. Harland.*[257]

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[249] Subsequent mortgages will now commonly be legal mortgages and will not need the doctrine of notice to protect them against purchasers. However, the constructive notice from the record should be a decided advantage as against purchasers to equitable restrictions and the like.

[250] With the abrogation of the rule in Le Neve v. Le Neve, *supra* note 227, the purchaser will be relieved even from actual notice gained from a search of the title deeds of an equity which should have been registered. Mr. Lightwood raises the question as to whether Le Neve v. Le Neve really has been abrogated but admits that "no one will wish his own client to be involved in it." Lightwood, *The Registration of Restrictive Covenants* (1927) 63 LAW JOURNAL 28.

[251] See Bordwell, *op. cit. supra* note 195, at 3.

[252] See EXTENSION OF THE RULE IN DEARLE V. HALL, *supra* at 199.

[253] (1882) 45 & 46 Vict. c. 39, § 3.

[254] See CHESHIRE, *op. cit. supra* note 30, at 59.

[255] (1925) 15 Geo. V, c. 20, §§ 199 (1) (ii), (2) (3).

[256] Lightwood, *Some Unfortunate Decisions Overruled* (1925) 60 LAW JOURNAL 162.

[257] 17 Ch. D. 353 (1881).

OTHER PARTS OF THE LAW OF PROPERTY ACT, 1925

Most of what precedes has concerned Part IV, Equitable Interests and Things in Action, Part V, Leases and Tenancies, and Part VII, Perpetuities and Accumulations, of the Law of Property Act, 1925. Some consideration has been given to the provisions with regard to covenants running with the land in Part II and to the provisions with regard to notice and priorities as between mortgages in Parts XI and III respectively. A brief summary of the other parts of the Act may help to place these parts in their proper setting.

Part I, entitled General Principles as to Legal Estates, Equitable Interests and Powers, contains three of the seven grouped as major reforms by Sir Leslie Scott and three of the five grouped by him as minor reforms.[258] The three[259] major reforms are (1) the reduction of legal estates to two, the fee simple and the term for years;[260] (2) the abolition of legal tenancies in common;[261] and (3) the keeping of most equities off the title.[262] The first two of these speak for themselves. The third is the famous "curtain scheme" for the overreaching of equities and keeping them off the title.[263] The three[264] minor reforms of Sir Leslie Scott are (1) the vesting of the legal estate in case of infancy in Settled Land Act Trustees;[265] (2) requiring death duties to be registered as land charges;[266] and (3) the extension

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258 154 H. C. Deb. 5 s. 89-107.

259 The other four were: (1) The simplification of the tenure of land, the abolition of copyhold and customary tenure. LAW OF PROPERTY ACT, (1922) 12 & 13 Geo. V, c. 16, §§ 128-137. (2) The denial to the mortgagee of the fee. LAW OF PROPERTY ACT, (1925) 15 Geo. V, c. 20, § 85. (3) The requirement that settlements should be by way of trusts. SETTLED LAND ACT, (1925) 15 Geo. V, c. 18, § 9. (4) The assimilation of the devolution of personal and real estate on intestacy. ADMINISTRATION OF ESTATES ACT, (1925) 15 Geo. V, c. 23, § 45.

260 (1925) 15 Geo. V, c. 20, § 1.

261 *Ibid.* §§ 34-38.

262 *Ibid.* § 2. Now amended by (1926) 16 & 17 Geo. V, c. 11, Schedule. See also SETTLED LAND ACT, (1925) 15 Geo. V, c. 18, §§ 21, 72.

263 See Bordwell, *op. cit. supra* note 195, at 2-4, and also *ibid. op. cit. supra* note 110, at 11-14.

264 The other two were: (1) The making the beneficial life tenant of a settlement the owner of the legal fee simple with provision that the fee should pass to the trustees of the settlement as his personal representative. SETTLED LAND ACT, (1925) 15 Geo. V, c. 18, § 4; ADMINISTRATION OF ESTATES ACT, (1925) 15 Geo. V, c. 23, § 22. (2) The extension in equity of the system of settlement and entail to personal property. LAW OF PROPERTY ACT, (1925) 15 Geo. V, c. 20, § 130; see THE REJUVENESCENCE OF THE FEE TAIL, *supra* at 187.

265 (1925) 15 Geo. V, c. 20, § 19.

266 *Ibid.* § 17.

of the system of registration of land charges to certain equities, such as restrictive covenants and contracts of sale.[267]

Part I was the center of what conflict there was over the reform. It corresponds roughly to Part I of Mr. Cherry's original Law of Property Bill. Due to the dissatisfaction of Lord Cave and others with the abolition of the fee simple and the form of the curtain scheme then proposed, Part I of that Bill was withdrawn, and when it reappeared as Part I of Lord Birkenhead's Act, the fee simple had been restored and the curtain scheme much changed.[268] The curtain scheme underwent numerous subsequent changes and has even been amended since the Law of Property Act, 1925, went into effect.[269]

Part II consists of three divisions (1) Contracts, (2) Conveyances and Other Instruments and (3) Covenants. Under Contracts are treated various matters that come up under contracts for the sale of land. The English law of vendor and purchaser is adapted to the new conveyancing. One subsection, 42 (1), provides that "a stipulation that a purchaser of a legal estate in land shall accept a title made with the concurrence of any person entitled to an equitable interest shall be void, if a title can be made discharged from the equitable interest without such concurrence (a) under a trust for sale; or (b) under this Act, or the Settled Land Act, 1925, or any other statute." The purpose of this is to insure the operation of the curtain scheme, but it has met with much criticism.[270] Thirty years is substituted for forty years as the period of commencement of title which a purchaser of land may require.[271]

Under Conveyances and Other Instruments is grouped much of the statutory law with regard to conveyancing instruments that has been enacted commencing with the Real Property Act, 1845.[272] Sections 53 to 55 are reenactments of the corresponding provisions of the Statute of Frauds.[273] Section 60 provides, like so many American statutes, that "a conveyance of freehold land to any person without words of limitation, or any equivalent expression, shall pass to the grantee the fee simple or other the whole interest which the grantor had power to convey in such land, unless a contrary intention appears in the conveyance." Henceforth "month" [274] is to mean calendar month

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[267] *Ibid.* § 2; Land Charges Act, (1925) 15 Geo. V, c. 22, § 10.

[268] See Bordwell, *op cit. supra* note 110, at 8-10, 14.

[269] *Supra* note 262.

[270] For one of the many criticisms of the section by Mr. Lightwood, see Lightwood, *No Amending Act!* (1927) 63 LAW JOURNAL 440.

[271] (1925) 15 Geo. V, c. 20, § 44.

[272] (1845) 8 & 9 Vict. c. 106.

[273] See 23 CHITTY'S STATUTES (6th ed. 1925) 271, n. (k).

[274] (1925) 15 Geo. V, c. 20, § 61.

and not lunar month[275] unless the context otherwise requires. By section 65, "a reservation of a legal estate shall operate at law without any execution of the conveyance by the grantee of the legal estate out of which the reservation is made, or any regrant by him, so as to create the legal estate reserved, and so as to vest the same in possession in the person (whether being the grantor or not) for whose benefit the reservation is made." This section and section 72, enabling a person to convey land to himself, were made necessary by the repeal of the Statutes of Uses. Section 72 settles the old question as to the necessity of a signature to a deed, for deeds after 1925, in the affirmative.

The division on Covenants brings down to date the provisions with regard to implied covenants for title in Conveyancing Act, 1881,[276] and somewhat extends them.[277] Such covenants, as well as express covenants for title, are made to run with the land.[278] The provisions for the running of other covenants have already been considered.[279] Joint covenants are presumed to be joint and several.[280] and convenants entered into by a person with himself and another are to be construed and enforceable as if entered into with the other person alone.[281] Greatly enlarged powers are given to discharge or modify restrictive covenants.[282] Such discharge or modification may be made because (a) by reason of changes in the character of the property or the neighborhood or other circumstances the restriction ought to be deemed obsolete, or its continued existence would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons or would, unless modified, so impede such user, (b) the persons interested, of full age and capacity, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified, or (c) the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction. On the application of any person interested the court is given power to declare whether freehold land is affected by a restriction, and to declare the nature and extent of a restriction, whether the same is enforceable and, if so, by whom.

Part III is entitled Mortgages, Rent-charges, and Powers of

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[275] See Lightwood, *A Further Clearance of Conveyancing Troubles* (1925) 60 LAW JOURNAL 187.

[276] (1881) 44 & 45 Vict. c. 41, § 7 is substantially reenacted in (1925) 15 Geo. V, c. 20, § 76.

[277] (1925) 15 Geo. V, c. 20, § 77.

[278] *Ibid.* §§ 76 (6) (7), 77 (5) (6).

[279] See Bordwell, *op. cit. supra* note 195, at 18-27.

[280] (1925) 15 Geo. V, c. 20, § 81.

[281] *Ibid.* § 82.

[282] *Ibid.* § 84.

Attorney. The change from the old common law mortgage to mortgages effected through long terms for years or mortgage charges was named by Sir Leslie Scott as one of the seven major reforms of Lord Birkenhead's Act.[283] The change to a mortgage by way of a charge was the natural change, but it was not in Mr. Cherry's original Bill and the fact that even now its operation is described by reference to the long term mortgage makes its usefulness doubtful.[284] Ultimately, it is the form of mortgage that will probably prevail. The power of the mortgagee to sell the mortgaged land is the only exception, except in the case of certain statutory powers, to the principle announced by Sir Benjamin Cherry that the basis of the new conveyancing is estates, not powers.[285] It alone has survived the general abolition of powers at law except where incident to the estate or exercisable in the estate owner's name.[286] Powers of attorney to deal with land must be filed at the Central Office unless the instrument relates to one transaction and is to be handed over on the completion of that transaction.[287]

Part VI, on Powers, is in the main a reenactment of the earlier statutes as to (1) the release [288] and disclaimer of powers,[289] (2) the validation of appointments where objects of the power are excluded or take illusory shares [290] and (3) the execution of powers by deed.[291] Section 157 is new. It places restrictions on the avoiding of appointments because of fraud on the power, in favor of purchasers in good faith, to the extent of the interest to which the appointee was presumptively entitled in default of appointment. Powers, except of mortgagees, are now kept off the legal title, but behind the curtain they will probably be as active as ever in the guise of equitable powers.

Part VIII, entitled Married Women and Lunatics, does away with the necessity for acknowledgment of deeds executed by married women after 1925,[292] and dispenses with the separate

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[283] See *supra* note 258.

[284] See Lightwood, *The Description of Deeds: Charges by Way of Legal Mortgage* (1925) 60 LAW JOURNAL 90, 91.

[285] Cherry, *op. cit. supra* note 84, at 370.

[286] (1925) 15 Geo. V, c. 20, § 1 (7).

[287] *Ibid.* § 125 (1).

[288] *Ibid.* § 155 replaces CONVEYANCING ACT, (1881) 44 & 45 Vict. c. 41, § 52.

[289] (1925) 15 Geo. V, c. 20, § 156 replaces CONVEYANCING ACT, (1882) 45 & 46 Vict. c. 39, § 6.

[290] (1925) 15 Geo. V, c. 20, § 158 "re-enacts the effect of the ILLUSORY APPOINTMENTS ACT, 1830, and the POWERS OF APPOINTMENT ACT, 1874." 23 CHITTY'S STATUTES (6th ed. 1925) 347, n. (d).

[291] (1925) 15 Geo. V, c. 20, § 159 replaces LAW OF PROPERTY AMENDMENT ACT, (1859) 22 & 23 Vict. c. 35, § 12.

[292] (1925) 15 Geo. V, c. 20, § 167 (1).

examination of a married woman as preliminary to any order of the court directing payment or transfer of any money or property to her or in accordance with her directions.[293] No attempt is made to incorporate the Married Women's Property Act, 1882,[294] into the Law of Property Act, 1925, but section 170 replaces section 1 of the Married Women's Property Act, 1907, in providing that a married woman may acquire property as trustee or personal representative and dispose of such property as if she were feme sole. Section 171 allows the court to direct the settlement of the property of a lunatic or defective in certain cases.

Part IX, entitled Voidable Dispositions, reenacts in modern diction the statutes of Elizabeth against frauds on creditors[295] and purchasers[296] and the Sales of Reversions Act, 1867.[297]

Part X, on Wills, besides allowing a tenant in fee tail in possession to dispose of the entailed property by will,[298] makes two other changes of considerable importance.

"A contingent or future specific devise or bequest of property, whether real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator, except so far as such income or any part thereof, may be otherwise expressly disposed of." [299]

And a will expressed to be made in contemplation of marriage shall not be revoked by the solemnisation of the marriage contemplated.[300]

Part XI, Miscellaneous, aside from the provisions as to notice already considered, includes a number of provisions as to corporations sole,[301] redemption and apportionment of rents,[302] and commons and wastelands[303] which are principally of interest in England, but there is at least one of general interest. Section 184 provides that:

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[293] *Ibid.* § 167 (2).

[294] (1882) 45 & 46 Vict. c. 75.

[295] (1570) 13 Eliz. c. 5.

[296] (1585) 27 Eliz. c. 4.

[297] (1867) 31 & 32 Vict. c. 4.

[298] See REJUVENESCENCE OF THE FEE TAIL, *supra* at 187.

[299] (1925) 15 Geo. V, c. 20, § 175 (1). For the old law and a criticism of it, see KALES, ESTATES, FUTURE INTERESTS (2d ed. 1920) §§ 207-209.

[300] (1925) 15 Geo. V, c. 20, § 177.

[301] *Ibid.* § 180.

[302] *Ibid.* §§ 190-191.

[303] *Ibid.* §§ 193-194.

"in all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court) for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder."

Part XII is entitled Construction, Jurisdiction and General Provisions, and, with the seven schedules, contains much of the machinery for putting the act into effect. Section 205 (1) contains a very comprehensive list of definitions to which constant resort must be had in reading the act. Schedule I deals with the difficult transitional provisions. Schedule II sets out in full the implied covenants in various conveyances. Schedule III gives the forms of transfer and discharge of mortgages and Schedule IV other forms relating to statutory charges or mortgages of freehold or leasehold land. Schedule V gives other forms of instruments which are said by section 206 to be sufficient. Schedule VI gives examples of abstracts of title framed in accordance with the new enactments. Schedule VII gives a list of the enactments repealed with the extent of the repeal.