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The English Law of Property Act, 1922

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By one of the ironies of history it has fallen to a Conservative ministry and a Conservative Parliament to enact one of the most radical changes in the law of property which English legal history has known. The assimilation of the law of real and personal property, the introduction of a new and severely limited code of intestate succession, the abolition of such venerable institutions as the heir-at-law, escheats, copyholds, customary tenures, tenancy in common, *interesse termini,* and the Statute of Uses, together with the subjection of all settled lands to drastic trusts for sale, which override all private intentions, seem to indicate that we shall soon be looking to the United States as the only important country in which the mediaeval rules of the English land law may still be studied in actual operation.

To the American lawyer the new act is likely to be at first sight somewhat repelling. It occupies more than three hundred pages of the statute book, and abounds with references to earlier English statutes which it repeals and alters in various ways. At the same time its leading principles are comparatively simple, and can be easily appreciated by any educated lawyer who will carefully study a few sections. A detailed examination of the very intricate text is only necessary for the English practitioner who has to apply the act in the course of his professional work. I need hardly say that in these notes I shall not attempt to do more than indicate very briefly a few of the more important features.

In examining any new legislation we have to consider, as Coke told us long ago, the end at which it aims and the means which it has employed to attain that end. The purposes of the new statute are many, but if I had to single out one aim as being of primary importance, I should say that the main object of the act was to promote free trade in land. The feudal law aimed at making the transfer of land difficult or impossible, and the traditions of the English land-owning class have for many centuries endeavored to secure the same object by the system of

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"strict settlement," the effect of which was to tie up the ownership with so many different interests that alienation became all but impossible. Half a century ago a partial remedy for this evil was attempted in the Settled Land Acts, which gave to the tenant for life, under severe restrictions, the power of disposing of the fee simple, but experience has shown that these acts did not go far enough.

Hitherto there have been two main obstacles to the free alienation of landed property. One of these was to be found in the multiplication of legal interests in the same piece of land, and the other was the institution known as tenancy in common. A testator leaves a will in which he says simply "I leave all my property among my five children equally." At his death one son is in Canada, another is in Australia, and two other children are infants. The sale of the land is probably in the best interests of everyone concerned, and yet the fee simple is hopelessly tied up.

How has the act dealt with this problem? In the first place it has greatly reduced the number of possible legal interests in land. Only two legal estates of major importance are now allowed, namely, the fee simple in possession and the term of years absolute. Minor legal estates still permitted are easements, mining rights, rent-charges, and powers of entry. All other possible interests in land are swept out of the legal field and are placed in equity behind a screen of trustees. If a settlor or testator attempts to create other legal estates the law overrides his intention and makes them equitable. Where he has failed to provide trustees the law provides them for him. The prospective purchaser of any piece of land therefore has no need to inquire into the interests which lie behind the screen of trustees. All that he has to do is to deal with the legal owners (who are sometimes trustees and sometimes the tenant for life) and then he can safely leave the holders of equitable interests to find their satisfaction out of the purchase money in the hands of the trustees. He is not concerned with the disposition of the money, provided that he pays it to at least two trustees or to a trust corporation. In every case where a testator attempts to create any interests in land extending beyond the simple legal estates permitted by the act, the law steps in and sets up either a trust for sale or a settlement. In the former case the power of conveying the unencumbered title is vested in the trustees. In the latter case it is vested in the tenant for life, unless he be an infant, when trustees are again brought into action.

As for tenancy in common, it is simply abolished, and all attempts

to create it are defeated in advance. Let us suppose, for example, that a testator says: "I devise my land to my children, John, William, and Mary, as tenants in common." In this case the act makes the will operate as a devise to the executors as trustees with a power of sale, the individual interests of the three children being placed upon an equitable footing. The executors or any two of them can sell the land, and then the beneficiaries must find their satisfaction in the purchase money. Similarly, if a conveyance *inter vivos* is made to two or more persons in undivided shares the legal result is to vest it in them as trustees with a power of sale, which can be exercised by any two of them. If the grantees are more than four in number, then the first four named become the trustees. The severance of a joint tenancy will no longer operate to create a tenancy in common, but will make the joint tenants trustees with a power of sale. Corresponding provisions are made with regard to tenancies in common created before the act comes into operation.

Let us now turn to the assimiliation of the law of real and personal property. Certain differences between movable and immovable property (to use the more logical terms of the civil law) are inherent in the nature of things, but there is no longer any rational foundation for the variety of rules which the English law has inherited from feudal times. The chief difference lies in the rules relating to intestate succession, and in this matter the new act has effected some very drastic changes. All the existing laws of descent and personal inheritance are swept away by one comprehensive sentence, and with them there pass into history such minor institutions as the crown right of escheat, curtesy, dower, and free-bench. The Statutes of Distribution are wholly repealed, and in their place we are given a new code of intestate succession which applies equally to all forms of property. The rules themselves cannot conveniently be summarised here, but they follow fairly obvious lines of ordinary family affection. Maitland once sarcastically remarked that when a man died intestate as to land the law made for him a will such as no sensible testator would have made for himself. The new law makes for him a will such as any man might reasonably instruct his own lawyer to prepare, and takes the further precaution of providing carefully drawn trusts for the protection of those interested. For the first time the sexes are placed upon an absolute equality, wives and mothers being now treated exactly the same as husbands and fathers. The scandal by which a man's mother was the last person who could inherit his

land will no longer disgrace the English law of intestacy. One very striking feature of the new code is the severe limitation which it imposes upon intestate succession. The line is drawn at uncles and aunts of the intestate, and no remoter relatives have any rights. Beyond these limits the property goes to the crown as *bona vacantia,* but the crown is permitted to make provision at its discretion for any needy dependents, whether they be kindred or not. The future English novelist will thus be deprived of a valuable asset, when he can no longer solve the financial embarrassments of his hero by the sudden death of a wealthy and intestate uncle.

The unification of the law of property is carried still further by the abolition of copyholds and of all customary tenures, so that in future all lands in England will be held upon the uniform tenure defined by the new act. Provisions are made for the extinction with compensation of the manorial rights and other valuable incidents attached to some of these old forms of tenure.

The provisions which I have described are those which appear to me to be the most important features of the new act. I shall conclude these notes by indicating as briefly as possible some other points of interest.

With regard to mortgages a somewhat curious rule has been introduced, and I do not know why the draftsmen were unwilling to accept the simple civil law principle that a mortgage is merely a charge upon the land. Under the new law a mortgage can only take effect by way of a demise of the land for a term of years, and any attempt to create a mortgage by conveying the fee simple or other means will take effect as a demise of the land for a term of three thousand years. Existing mortgages are dealt with in the same manner. Second and subsequent mortgages will take effect as demises for a term exceding that of the first mortgage by one day. Mortgages of leaseholds will similarly take effect by way of sub-demises. When it becomes necessary to realize his security the mortgagee will have the power of conveying the fee simple to the purchaser. The existing rules as to tacking and consolidation are preserved.

The rule against perpetuities is amended so as to remedy a somewhat common case of hardship. Under the old law if a testator said: "I devise my land to my son John for life, with remainder to his eldest son who shall attain twenty-five," then the gift to the grandson was wholly void. Under the new act the words "twenty-five" are read as if they were "twenty-one," so that the gift is saved from failure. In other words, where the

testator has blundered in his draftsmanship, the law will now correct his mistake instead of defeating his intention.

Some of the old technicalities concerning estates tail are also swept away. The estate tail is abolished as a legal estate and can in future only take effect in equity behind a screen of trustees, but on the other hand it will now be possible to create an equitable estate tail in personalty as well as in real estate. The celebrated "Rule in Shelley's Case" is expressly abolished, so that much venerable learning which has been expended on that doctrine will in future have a purely historical value. In spite of the abolition of the heir-at-law the word "heir" in limitations of property will continue to have the same meaning as before. The so-called "rule against double possibilities" is formally abolished, but its removal will not serve to validate any disposition that offends against the perpetuity rule. Since it is now provided that a tenant in tail may freely dispose of the property by will, the practical effect of creating a tenancy in tail will be limited to cases where the tenant dies intestate.

Since the general purpose of the act is to promote free trade in land, it follows that it is necessary to provide specially for the case of infants and lunatics, who are personally incapable of making a conveyance. All legal estates that vest beneficially in infants are therefore transferred to trustees, who will have the usual power of sale. In default of other trustees the Public Trustee will act in these matters. Corresponding provision is made for the case of lunatics, and the courts are given wide discretionary powers of settling property for the benefit of lunatics. Other sections give to trustees very ample powers for providing for the maintenance and education of infant beneficiaries. A married infant is now enabled to give a valid receipt for income.

One minor feature may perhaps interest the American lawyer, since it introduces a rule which in the United States would probably be held invalid as impairing the obligation of contracts. In the development of land for building purposes, particularly in residential districts, it is usual and proper to insert in the conveyances restrictive covenants designed to preserve the character of the locality. Such restrictions often become unreasonable with the lapse of time owing to changes which take place in the surrounding neighborhood. The act therefore gives to a defined public authority the discretionary power to remove such restrictions upon the application of any person interested who can prove them to be obsolete and no longer for the public benefit. Compensation may

be awarded to any parties adversely affected by such an order.

Other provisions will perhaps surprise the American practitioner who is accustomed to the jealousy of judicial discretion which is reflected in much state legislation. The English tradition of relying to a very large extent upon the common sense and fair judgment of the judges is strikingly exemplified in certain parts of the new act. One very sweeping section empowers the High Court to authorise any dealings on the part of trustees with the trust property which may be expedient in the interests of the estate. This discretionary power supplements not only the power conferred on the trustees by the trust instrument, but also those conferred by law. The court is at liberty to fetter the permission so granted with any conditions or restrictions which it may think fit, and at the same time may apportion the costs between capital and income at its absolute discretion. So again in the case of settled land the court may authorize the tenant for life to do anything which an absolute owner might do, if what is proposed appears to be for the benefit of the estate. In general it may be said that the very wide powers conferred upon trustees by the act are made subject to the discretionary control of the courts, which are invested with a semi-paternal jurisdiction to look after the interests of all those who may at any time need protection.

How far the main features of the act which I have sketched are of interest to American lawyers I cannot say. The reader will of course understand that I have made no attempt to deal with the numerous questions of detail involved, and some of the main rules are subject to various minor qualifications which I have passed over. The social and economic conditions of England are in many respects very different from those of the United States, and the process of reforming the land laws has followed very varying lines in different parts of the Union. All these factors would have to be most carefully considered by any legislature which wished to experiment after the English model under American conditions. To my mind the chief merit of the new act is that for the first time it gives us a scheme of property law which rests upon a single and intelligible principle. There is already a vast amount of legislation upon the subject in the English statute book, but all previous efforts at reform have been in the nature of tinkering with particular abuses. What was really needed was to tear up the whole feudal system by the roots and substitute for it a single body of rational rules governing the whole field of property law, leaving no more distinction between real and personal property than is neces-

sarily inherent in the nature of things. That is the method which has been adopted by the very able lawyers who have prepared the new English code. The conception is a bold one, and technical skill of the very highest order has been necessary to embody it in statutory form. The new law comes into operation on the first day of next year, and experience alone can enable us to judge of its value as a legal and social reform.

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[1] Note by the Editors. The following quotation taken from THE LAW TIMES of February 23, 1924, explains the present status of the Law of Property Act.

"REAL PROPERTY CONSOLIDATION.

It is also stated that steps are to be taken to consolidate the law relating to real property, but we understand that before this is attempted an amending Bill will be introduced which will also postpone the operation of the Law of Property Act 1922 for some considerable period beyond next January. And this will be necessary, for the amendments to be made cannot be rushed through Parliament, and until everything is brought into line the statutes, merely to consolidate, cannot be brought forward. When complete, the country will owe a great debt of gratitude to all who have been concerned in this great work."