# REAL PROPERTY LAW FOR BEGINNERS

SECOND EDITION

## Part 1

by John A. Greed

A ST. TRILLO PUBLICATION

REAL PROPERTY LAW FOR BEGINNERS GREED

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your name in every volume.

# REAL PROPERTY LAW

# FOR BEGINNERS

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## SECOND EDITION

*Prologue*
*& Part 1*

The Foundations of Real Property Law


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# REAL PROPERTY LAW FOR BEGINNERS

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*P.T.O.*

## PREFACE TO FIRST EDITION

**The Renton Committee in its report on Statute Law (May 1975) says: "It is not possible to deal in simple non-technical terms with subjects which are in themselves technical and involved".**

**This book attempts to do just that, in much the same way as a small child draws a picture of a house: the basic matter is boldly shown, but the finer details are not shown at all - and they are not meant to be. The multi-disciplinary (e.g. surveying) student for whom this book is primarily written does not need the finer points of law, and the honours law student who uses this book will do so in conjunction with the more comprehensive works found in all law libraries.**

**The subject-matter deliberately follows (more or less) the order of Megarry's "Manual of the Law of Real Property" and Megarry and Wade's "The Law of Real Property" so that the student can most conveniently use this book in conjunction with those works.**

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## PREFACE TO SECOND EDITION

*The first edition of this book having been well received, here is my second offering, somewhat enlarged and with a lot more cases. Some students at first find that such works as "Megarry's Manual" and "Cheshire and Burn's Modern Law of Real Property" are a rather large mouthful for a beginner to bite off, chew and inwardly digest. If this book succeeds in helping those students, it will have served its purpose. And if it helps people to see Real Property Law as interesting and actually enjoyable to study, that's better still.*

J.A.G.

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TABLE OF CASES AND TABLE OF STATUTES: SEE PAGE 645 et seq.

*Prologue*

# CHAPTER 1

# AN OVER-ALL VIEW - AN OUTLINE OF THE SUBJECT

*OUTLINE OF CHAPTER:-*



INTRODUCTION This book is intended as a stepping-stone. Many textbooks on Real Property Law are rather difficult, and some of them have more than a thousand pages. This book is written for the complete beginner, as an introduction to the subject and as a stepping-stone to the more detailed textbooks.

But even this book has more than 600 pages, and the new student may sometimes feel, "This isn't a stepping-stone, this is a maze!" And so this first chapter is intended to be a springboard, bouncing students high enough to give them an over-all picture - a bird's-eye view of the stepping-stone before they step onto it. This chapter is an attempt to set out a general outline of what Real Property Law is all about, in less than a dozen pages. And if you don't understand everything in this chapter at first, don't worry: later chapters will make the picture clearer.

Real Property Law is to do with matters concerning LAND - and the word "land" automatically includes the buildings, the trees and plants growing there, etc.

(The details of what it includes are on page 19.)

And ever since the reign of William the Conqueror (1066-86) no-one can *own* land in England or Wales. King William claimed the whole of the land for himself, and in theory all land still belongs to the Crown (i.e. the Queen) even today. Throughout this book we shall see, as our main example, Fred Smith and his wife Florrie, who have bought "Magpie Cottage" (see picture on front cover) - but according to the law they do not *own* it: they "hold it from the Crown". This is known as their *tenure*, their "holding" - from the French verb *tenir*, meaning "to hold". And any person holding a tenure is a *tenant*. As Fred and Florrie hold "Magpie Cottage" jointly they are called *joint tenants*.

**TENURES OF LAND**

The phrase "joint tenants" sometimes worries people because they think it means they are tenants of a landlord: but let us get it clear, right at the start, that they are nothing of the sort. They do not hold "Magpie Cottage" under a lease or a tenancy from a landlord; they have the *freehold* (what ordinary people would call the *ownership*) - but where ordinary folk would speak of joint owners the law speaks of joint tenants, because we are all tenants of the Crown. "Magpie Cottage" is freehold, not leasehold.

Leasehold land (i.e. land which is held from a landlord) is not Real Property: it is Personal Property (just as a pencil or a chair or any other chattel is) for an historical reason which will be explained on page 24.

So this book is concerned with freehold land, although it does have one chapter on leaseholds.

**LAND LAW**

Real Property Law (freeholds) plus the Law of Landlord and Tenant (leaseholds) plus Conveyancing (sales and mortgages of land) together make up Land Law.

So Fred and Florrie Smith, freeholders, do not *own* their land, they hold it from the Crown. What they *do* own is a variety of rights over the land (the right to

live there, or to sell, or to let to a tenant and so on) and also some duties (such as the duty not to cause nuisance or danger to their neighbours). This collection of rights and duties which they own is called their *estate* in the land - and *that* is basically what this book is about. *Land Law is not about land* - it is about the estates in the land.

ESTATES IN LAND

In Real Property Law until the year 1925 there were dozens of different types of estates, with differing rights and duties and lasting for different lengths of time. The whole system had become very complicated, partly because the aristocracy and landed gentry had for centuries used a method based on estates to keep their land within their families. We shall see in Chapter 19 that by using a combination of two or more estates there was a way that the landowner (and that means strictly the land-*holder* , not *owner* , of course, because he owns an estate in the land, and not the land itself) could render the land totally unsaleable until his grandson reached the age of 21 - and then the grandson could be offered a sum of money in return for his tying up the land until *his* son (or even grandson) attained 21. This method (known as "settled land") was sometimes used to keep land in one family for several generations or even centuries.

SETTLED LAND

A typical example (of which we shall make use in Chapter 19) of land tied up by the creation of several estates, is a piece of land granted

> *to Horace for his life,*
> *then to his son Charles for his life,*
> *and then to grandson George.*

How this made the land unsaleable is explained in Chapter 19.

Settled land is largely a relic of the past, but is still found in connection with stately homes and certain other land. We must not forget that although a typical Conveyancing transaction today is likely to be a sale of a property like "Magpie Cottage" standing

in perhaps one tenth of an acre (one twenty-fifth of a hectare) nevertheless until the early part of the twentieth century the greater part of the land of England and Wales was held by the great landowners - and they are far from extinct even now.

LANDED GENTRY

A survey in taken in 1874 showed that just 7,000 families held 75% of all the land, at that time: today much of this has been broken up into smaller units but it is estimated that there are still about 1,500 people who hold, between them, one third of England and Wales. (Note that in this book we are only concerned with England and Wales: Scotland has a completely different type of Land Law.)

I am told that one member of the nobility holds nearly 70,000 acres (or 28,300 hectares, there being 2·47 acres in a hectare) in or near the Lake District. That is one of the largest landholdings for an individual in this country - though it does not sound quite so much when one realises that at 640 acres to the square mile this is only about 109 square miles and so it could all be fitted into an area measuring 10 miles by 11 miles - it is only a small part of the 37 million acres (32m England and 5m Wales) making up the total acreage of our land.

The biggest landowners of all appear to be the Forestry Commissioners with over 1m acres in England and Wales, and the Ministry of Defence with over 700,000 acres; but these lands would not be held on the Settled Land system (though some of them might be held on lease from landowners who might hold the freeholds as Settled Land).

As we have seen, until 1925 there were many different types of estates, and this led to complications - but much of the Land Law system was simplified in 1925; and today, by section 1 of the 1925 Law of Property Act, there are only two types of legal estates, namely one freehold estate known as the

1925

FEE SIMPLE ABSOLUTE IN POSSESSION

and one leasehold one called the

TERM OF YEARS ABSOLUTE.

All the others were abolished by the 1925 Law of Property Act.

Anyone buying an ordinary normal freehold property today receives a fee simple absolute in possession, which is as near absolute ownership as it is possible to get in English Land Law. And anyone who buys an ordinary leasehold property receives a term of years absolute.

EQUITY

In the Middle Ages the King's common law had certain things wrong with it, and so the King's Chancellor (who was a man of the Church) created a second system of law, based on justice and fairness, which became known as Equity. We still have these two systems, common law and Equity, today, although since 1875 both systems are dealt with in the same Courts and by the same Judges.

In 1925, when all the estates except the fee simple absolute in possession and the term of years absolute were abolished, it was enacted that the abolished estates were not to disappear altogether: the 1925 Law of Property Act states that although as far as common law is concerned they are abolished, yet nevertheless as far as Equity is concerned the abolished estates can still continue to exist, in the form of Equitable interests administered by trustees.

EQUITY IN 1925

(In other words, they cannot exist under the set of rules known as common law, but they can and do exist under the set of rules known as Equity - in much the same way as picking up the ball cannot happen in a game of football, but can and does happen in a game of Rugby football. They are two different systems, with different rules.)

If you don't quite understand that, be patient: it will become clearer in later chapters. But what it often means in practice is that the 1925 changes have simplified the method of selling the land (and this is

convenient for both the Vendor and the Purchaser) but, for the sake of fairness, the rules on who receives the benefit of the purchase-money have been left as they were before the 1925 changes.

Remember it this way:- (i) the law (i.e. common law: it is often abbreviated to "law") says who can sell, but Equity says who is to receive the proceeds of sale; and (ii) the law makes the sale easy while Equity makes the final result fair. In Chapters 6 and 19 we shall see examples of this in connection with Settled Land; and we shall see further examples of these principles in connection with Trusts for Sale, and Co-ownership.

Let us look at an outline of Trust for Sale next, and then Co-ownership.

TRUST FOR SALE

In the early nineteenth century, as a result of the Industrial Revolution, a new class of people - businessmen and factory owners with no particularly aristocratic family background - came into being. These men, unlike the landed gentry, had no wish to keep land in the family; but they bought land and put it into the hands of trustees purely as a form of investment, giving the trustees such instructions as, "When I am dead and my children are grown up, SELL THE LAND when the time is right and give the money to my children". This form of investment became known as a Trust for Sale.

Trust for Sale is an efficient system - much easier to handle than Settled Land - and so the legislators who produced the 1925 legislation took advantage of this and used the Trust for Sale to solve a number of problems for which it had never been designed (rather like using a fork as a tin-opener - it was never designed for it but it works well enough!)

CO-OWNERS

For instance: here is a problem which is solved by using a Trust for Sale. Tom, Dick and Harry buy a house as co-owners. Then Tom dies, leaving his share of the property to his seven children. Dick dies, leaving his share to eight persons: and Harry leaves his to ten!

Thus there are twenty-five persons with interests in that property - twenty-five signatures were needed for any sale of the property (until the 1925 changes made the sale easier as we shall see in a moment) - and if some of those twenty-five people died leaving their property to several relatives and friends, the number of persons involved could only grow larger. How can we cut down the number of people involved in the sale of the land without being unfair to any of them?

The 1925 Law of Property Act solves this dilemma by decreeing that a Trust for Sale *must* be used in all such cases. The property will be held by the trustees (not more than four persons) who will be the owners of the legal (i.e. common law) estate, and can sell it: and then they must hand over the proceeds of sale to all those twenty-five beneficiaries in accordance with the rules of Equity.

So, just as we saw with Settled Land, common law sees to the sale of the property (and keeps it uncomplicated, as there will not be more than four persons selling it) but then Equity applies fairness and sees that all the beneficiaries receive their fair shares, even if there are dozens or even hundreds of them.

Trusts for Sale are met with in practice almost daily. Every time a husband and wife buy a house jointly, there is a Trust for Sale, because they will be co-owners of the *legal* estate in the property, and a Trust for Sale is applied to *all* cases of co-ownership.

An example is Fred and Florrie Smith in "Magpie Cottage" - and their probable comment, *"But we don't want to sell it, we want to live in it!"* will make no difference, because it is laid down in the 1925 Law of Property Act that the method of dealing with this situation is that they must be "joint tenants upon trust for sale".

Contrast Trust for Sale with Settled Land, which is only encountered occasionally - but when it *is* encountered it is usually an extremely large tract of land.

The details of these matters, resting on Real Property Law's four foundation-stones of

(1) tenures
(2) estates
(3) Equity
(4) the 1925 legislation

form the main subject-matter of Parts 1 and 2 of this book.

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EASEMENTS AND COVENANTS

Part 3 is about rights over other people's land. The most important of these rights are easements (rights of way, rights of drainage, rights of light, etc.). Another typical right is the benefit of a restrictive covenant - for example you may have a right to prevent your neighbour from keeping chickens on his land. Covenants are often used by builders of new houses to ensure that no individual householder will be permitted to carry on any activity which might lower the tone of the neighbourhood. Keeping chickens,or giving piano lessons, might well be regarded as such activities. Covenants are quite separate from Planning Conditions, which are conditions imposed by Local Authorities (e.g. District Councils) for somewhat similar reasons.

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Part 4 tries to touch on all those other matters of law which can affect Real Property Law. There are two chapters on Sale of Land, and one on Mortgages and one on Leaseholds. There is a chapter on *Registration* (see the next paragraph) and a mention of various other matters connected with Real Property Law.

SALES ETC.

REGISTRATION

*Registration* is a topic upon which students need some knowledge early on in their studies, so let us look at an outline of it right here:-

From the very beginning, students should take care to differentiate between *Registration of Land* and

*Registration of Rights over Land*. They are separate subjects.

*REGISTRATION OF LAND* is a system under which the *deeds* of land are being replaced by *Certificates*.

REGISTRATION OF LAND

For very many years, documents known as deeds have been used, to prove a person's entitlement to his freehold or leasehold estate. Every time the land changes hands a new deed is drawn up and is placed with the existing deeds. This, the system of *unregistered* land, results in large and unwieldy bundles of deeds. - This system is at present in course of being replaced in some parts (generally the more urbanised parts) of England and Wales with the system of *registered* land, in which the bundle of deeds is replaced with a Title Certificate. The registration system is designed so that the information needed is to be found in the one document, instead of scattered through a bundle of deeds.

The sale of registered land is carried out by means of a deed (usually drawn up on a Land Registry printed Transfer form) but this then has to be sent to the Land Registry, with the Title Certificate. The Registry then updates the information on the Certificate, and returns the Certificate (but normally not the deed) to the person entitled to it - this may be the purchaser, or his Bank Manager or Building Society etc.

(The author has found in practice that he can usually satisfy himself regarding the details of a registered title within less than twenty minutes; but on unregistered property he has had occasions when he has hunted through ancient and tattered deeds for *eight hours* to find a missing bit of vital information!)

REGISTRATION OF RIGHTS OVER LAND

*REGISTRATION OF RIGHTS OVER LAND* (known in some cases as "protection by entry on the Register") is a quite different matter. There are certain rights which other people may have over the land which might easily be missed at the time of the sale of that land. For example, an Equitable right of

way, which does not have to be made by deed: it can be made by informal writing on any odd scrap of paper, and so a purchaser of the land which it crosses might easily overlook it and pay a high price for the land in blissful ignorance that this highly inconvenient right of way exists right through the middle of it.

To avoid this problem, Equitable easements (and various other rights - see Chapter 15) must be put onto a Register. If the land they run across is registered land, they will be entered on the Register at the Land Registry and will appear on the Title Certificate. But if the land they cross is unregistered land, these rights will be entered on a computer at a different Registry, known as the Land Charges Registry.

Note that registration of land only applies in some areas, whereas registration of rights over land applies throughout the whole of England and Wales.

## COMPLEXITIES IN THE NATURE OF THE SUBJECT

Land is by its very nature a *complicated* form of property. Contrast it with a piece of personal property - a *chattel* - such as this book. You are most unlikely to sell *part* - e.g. one page - of this book, but it is quite normal to sell part of a piece of land (and I have known more than one case where the part of a farm which the farmer sold - to the local iron mining company - was "all that land at a depth of more than four hundred feet underground beneath my fields").

No-one has a right of way through your book, or the right to say you cannot use it on Sundays - but such rights are not unusual on land.

If you put a new cover on this book, no-one is likely to object: but to put a new roof on your house you are likely to need both Planning Permission and Building Regulation Consent from the District Council, and the work will be checked by the Council's Building Inspector, who may (within twelve months) order its demolition if it contravenes the Building Regulations.

The fact that you have this book in your possession and have written your name in it is usually evidence

enough that it is yours: but the fact that a person is in a house does not show whose property it is - he may be there on a weekly rent or may even be a squatter.

Probably you bought this book with your own money - but houses are often bought with money borrowed from a Building Society, which must be repaid (with interest!). If this book is in the way, you can move it. Not so with a building, unless you demolish it. And if you lend this book to a friend, you can ask for it back - but if you let your house to a tenant, you often cannot get it back because you would be turning him out of his home, contrary to the 1977 Rent Act.

HISTORY There is disagreement among teachers of Real Property Law as to how much historical background to the subject should be given. Gray & Symes' "Real Property and Real People" (1981 edition) states: "The English law of real property cannot be properly understood except in the light of its history" - while the preface to Dalton's "Land Law" (1983 edition) speaks of "a strengthened conviction that history can be a barrier to the understanding of the modern law". Trying to get the best of both arguments, I have included the history (for I do not see how one can otherwise explain the present shape of the subject) but those paragraphs which are purely historical are marked with a dotted line and are in smaller print (like this) so that the student frantically revising for an examination on the present-day law can see at a glance which paragraphs are entirely historical.

Remember that the student who ignores the history will often know *what* the law is but will not know *why*.

And let us not forget that the laws in this book affect *people*. For example, the successive Rent Acts (which began in 1915 and have led by many steps and vicissitudes to the 1977 Rent Act - amended now by the 1980 Housing Act, which itself is amended in respect of Local Authority Housing, but not private landlords' properties, by the 1984 Housing and Building Control Act) may seem like dry theory: but a direct result of these Statutes (which have limited the powers of

**SOCIAL EFFECTS**

landlords and the amount of rent they may charge) is that many landlords have given up letting and have sold off their properties - *which makes it harder for students to find flats*. These social themes cannot be developed much in a book of this size, but let us bear them in mind, even though the reasons for the land law being in its present form are usually historical rather than social.

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That completes our flight from the springboard to the stepping-stone, and we must now commence our study of the subject. On page 21 we begin by looking at

**WHAT IS "LAND"?**

land. The "land" may be (for example) a shop or a house, or a factory or a rubbish-dump or a field, or a tunnel, or even a twelfth-storey flat *in a building which has just collapsed* - the air-space where the flat was before it all fell down still belongs to the occupant, and a developer wishing to rebuild will have to buy it from him - though what its *value* would be is <u>no</u> part of Real Property Law: I would ask a Valuer!

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## SUMMARY

In this chapter we have seen:-

1. The foundations of the subject:
   (a) tenures - freehold and leasehold,
   (b) changes made in 1925 (primarily by the 1925 Law of Property Act)
   (c) estates since 1925 are TERM OF YEARS ABSOLUTE, and FEE SIMPLE ABSOLUTE IN POSSESSION
   (d) some rights are recognised by Equity but not by common law.

2. Matters built on these foundations:
   settled land, trusts for sale, co-ownership.

3. Rights over other people's land:
   easements and covenants.

4. Other land law matters include:
   selling, mortgaging and leasing of land;
   registration of land and of rights over land.

These 4 heads correspond with the 4 parts of this book.

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## TEST QUESTIONS on Chapter 1:-

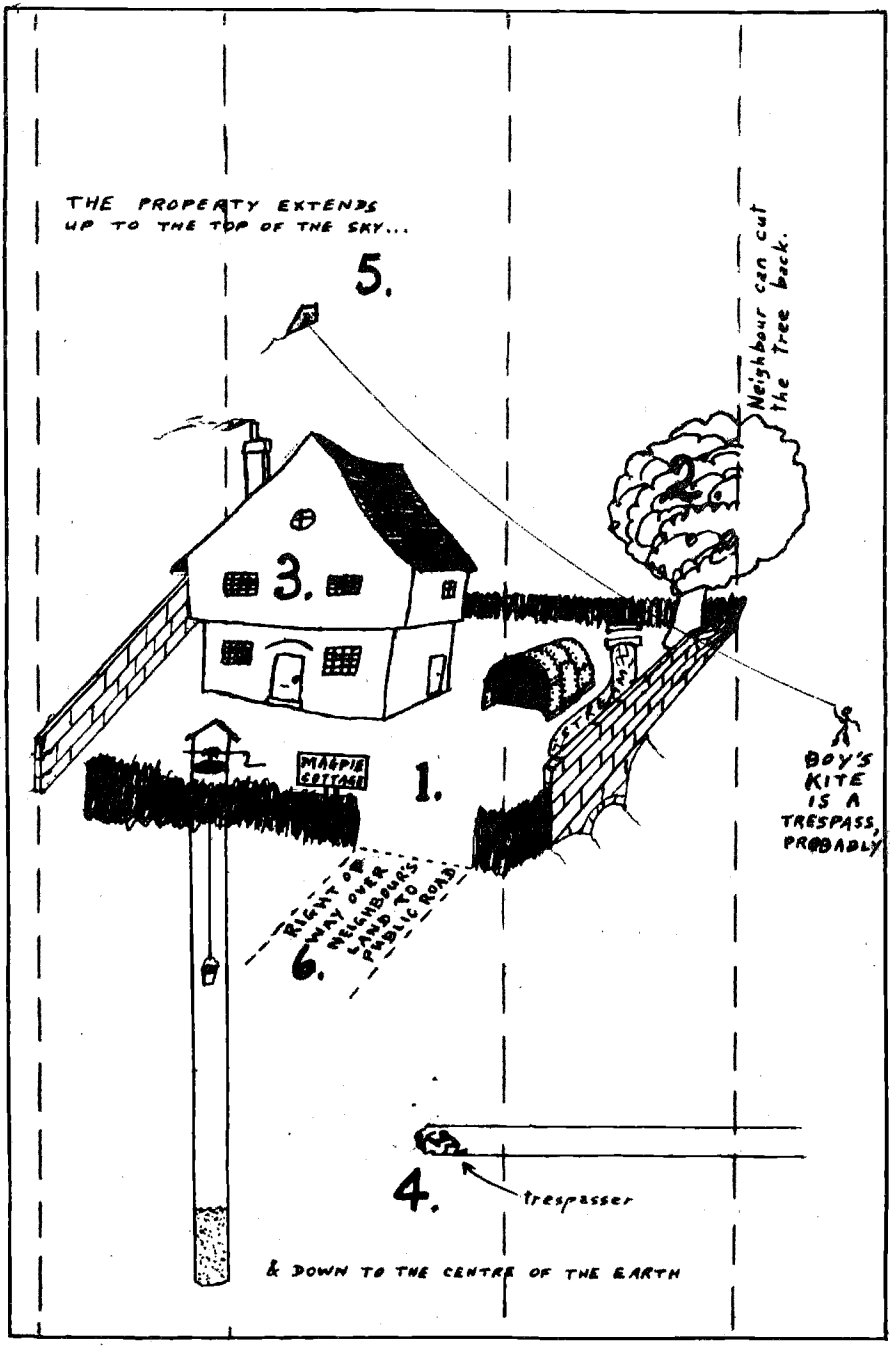
1. (a) Explain what is meant by (i) freehold tenure and (ii) leasehold tenure;
   (b) Explain what is meant by an estate, in land law, and name the present two legal estates.

2. Give 2 examples of what trusts for sale are used for.

3. What is registration of land, and how does it differ from registration of rights over land?

4. (a) Fred and Florrie Smith, the freeholders of a piece of unregistered land known as "Magpie Cottage", have just granted to their neighbour David an Equitable right of drawing water (to water his garden) from the well in their garden. Advise David as to where he should register this Equitable easement.
   (b) How would your answer differ if "Magpie Cottage" was registered land?

5. What is meant by (a) a deed, (b) Equity?



# PART 1 (CHAPTERS 2 - 14)

## THE FOUNDATIONS OF REAL PROPERTY LAW

### Section A (Chapters 2 - 4)

### Land, Tenures and Estates

# CHAPTER 2

# LAND

*OUTLINE OF CHAPTER:-*

*A: The meaning of "land"*
*B: Freehold and leasehold land*
*C: Whose land?*
*D: Real and personal property*

## A: THE MEANING OF "LAND"

Not everyone knows what land is!

For instance, if you have looked at the picture on the front cover of this book and have said, "That is land with a house on it", you are not using the word "land" in the sense in which it is used in this book. You need not have mentioned the house, for when the law talks of land it automatically includes any buildings. It includes several other things too.

"Land" includes:-

1. the ground itself (including ground covered with water, e.g. the bottom of a pond or bed of a stream)
2. all trees and other plants growing on the ground (including dead ones - but excluding plants in pots which are not fixed to the ground but stand by their own weight)
3. everything else fixed to the ground (e.g. concrete paths, and all houses and other buildings, except portable ones)
4. all things below the ground - e.g. pipes, cables,

rock, iron ore; however deep they may be - right to the centre of the earth (but not gold, silver, oil and treasure trove, which are retained by the Crown; nor coal, which is nationalised by the 1946 Coal Industry Nationalisation Act)

5. the air-space above the ground - so if, for example, your neighbour erects a balcony overhanging your garden, or swings the jib of a tower crane above your roof, he is trespassing in your air-space.

4. and 5. above are summed up in the Latin maxim *"cuius est solum, eius est usque ad caelos et ad inferos"* which can be very broadly translated as "Whoever has the ground has up to heaven and down to hell", but so far as the air-space is concerned (and note that we are only talking of the air-space, and not of the air itself which no-one can own) there are some limitations to the rule that whoever has the ground also has the air-space. First, aeroplanes are permitted to fly through the air-space at a reasonable height, by s.76 of the 1982 Civil Aviation Act; and secondly the rule is limited to such height as is necessary for the ordinary use and enjoyment of the land, as is shown in the case of *Baron Bernstein of Leigh v. Skyviews and General, Ltd. (1978)* in which the High Court held that it was not a trespass when an aeroplane flew over the Baron's house for the purpose of taking commercial aerial photographs of it without his permission.

(Note: the *references* for all the cases quoted in this book are in the Table of Cases on page 645.)

6. various other rights, such as rights of way: these (consisting of easements and certain other rights) are collectively named "incorporeal hereditaments" in English Land Law.

If we shuffle these six into the order 4 5 1 2 6 3, they give us the word MAGPIE:-

Mines
Air-space
Ground
Plants
Incorporeal hereditaments
Erections

- which (i) makes the classification easy to remember, and (ii) explains how the house on the front cover (Fred and Florrie Smith's house, to be used as an example of typical land throughout this book) came to be called "Magpie Cottage".

So when we talk of "land", we do not mean only what is in the picture on the front cover: we mean everything indicated in the picture on page 20. (The numbers 1-6 on the picture correspond to the numbers above.)

When a householder says, "I am selling my house", he does not mean just the building: he means everything indicated in the picture on page 20. He is using the word "house" to mean exactly the same as his solicitor means by "land".

His estate agent will advertise it as a "property", which has exactly the same meaning again.

Therefore, throughout this book, "land", "house" and "property" all mean everything enumerated in the picture on page 20 unless the context makes it clear that a different meaning is intended.

## B: Freehold and Leasehold Land

Some land is described as "freehold" and some as "leasehold".

The person who has a freehold is likely to say, "I own my land", and this is sufficiently near the truth to be acceptable for most purposes, though we have seen (page 8) that it is not strictly accurate because the land is held from the Crown - and we shall see more details of this in our next chapter.

The leaseholder is unlikely to say he owns his land. In most cases he has to pay a rent: but whether he is liable for a rent or not he knows that somewhere there is a landlord, and that the property will revert (i.e. return) to the landlord one day.

- - - - -

## C: Whose Land?

Under headings "A" and "B" above, I have referred to both the freeholder and the lessee (i.e. leaseholder) as "he". This is not to suggest that only men can hold land! But on the other hand it is not inaccurate, because s.61 of the 1925 Law of Property Act states that in all deeds, contracts, wills etc. taking effect after 1925, the masculine includes the feminine and vice versa, and the singular includes the plural and vice versa. There are somewhat similar provisions in s.6 of the 1978 Interpretation Act for interpretation of Acts of Parliament. So the word "he" legally includes "she" and "they".

Thus, for example, there is no inconsistency in the 1977 Housing (Homeless Persons) Act when in s.2 its definition of a person having a "priority need" includes a homeless person who is pregnant - and from then on that person is referred to as "he".

But the freeholder or leaseholder need not be a human being at all, but may equally well be a limited company - anything from Fred & Florrie Smith Ltd. to Marks & Spencer plc (plc = public limited company) - or a District or County Council, or British Rail, etc. - all these count as legal persons who have powers to buy and sell land. This book is concerned with the rights and duties (regarding land) of them all.

Animals are not legal persons and so they have no legal rights (nor legal duties) but trustees holding property for the benefit of animals are legal persons.

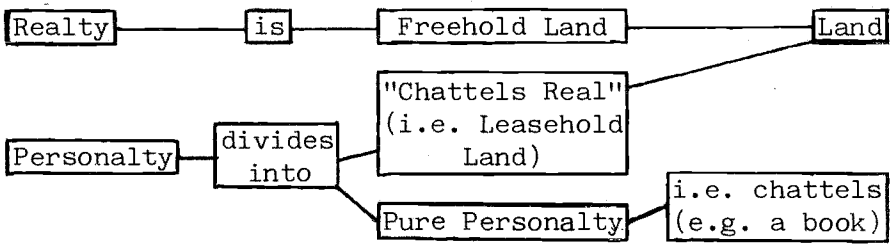
## D: Real and Personal Property

This book is concerned with the law of Real Property which is (generally speaking) the law of freehold land. Leaseholds are not Real Property and are more suitably dealt with as a separate branch of Land Law called Landlord and Tenant.

The name "Real Property" comes from the mediaeval rule that if a man were dispossessed (turned out) of

his freehold land the royal courts would restore to him the land itself (Latin *res* - the real thing) whereas if he were dispossessed of leasehold land or any other of his possessions, the courts would only give him a right against a person - e.g. a right to compensation. Thus freeholds became known as Real Property and everything else became known as Personal Property. The rule that the royal courts would not order repossession of leasehold property ceased to apply almost five hundred years ago (in 1499) but by that time the classification into Real and Personal Property (Realty and Personalty) was so firmly established that it has survived to this day.

So we see that the distinction between Realty and Personalty is, rather inconveniently, not the same as the difference between land and chattels. Leaseholds are a sort of hybrid so that the position is like this:-




Since this puts leaseholds in the same category as chattels, but they look like Realty, they are sometimes referred to as Chattels Real - though they are in fact neither chattels nor Real: they are land and Personal.

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All land is, from one point of view, freehold. Let us consider the man with some leasehold land - he knows it will one day revert to the landlord. That landlord can say - even today - "That is *my* land: the occupier is my tenant". The tenant has a leasehold but the landlord has the freehold of the land.

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So this book is about rights and responsibilities in

respect of freehold land.

But just what do we really mean when we talk about "freehold land"?

If I say that "freehold land" means a freehold estate in land of freehold tenure, you may not be very much wiser!

What is freehold tenure?

What is a freehold estate?

When we have answered these two questions, we can answer the question, what do we mean when we talk about "freehold land".

We shall look first at tenure: but before we start you will find it helpful to memorise this basic formula:

Tenure is HOW the land is held;
Estate is HOW LONG the land is held.

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## SUMMARY

In this chapter we have seen:-

1. the legal meaning of "land", being the six divisions contained in the word "MAGPIE", and
2. the division of land into { freehold (Realty) and leasehold (Personalty).

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TEST QUESTIONS on Chapter 2:-

1. How does what the lawyer understands by "land" differ from what the layman understands by it?

2. How does the classification of a man's possessions into land and chattels differ from a classification into Realty and Personalty?

3. Which of the following count as part of the land?

   (A) roses growing in flower-beds,
   (B) geraniums growing in flower-pots,
   (C) the television aerial on the roof,
   (D) an old caravan with no wheels, used as a shed,
   (E) iron, slate, granite and coal, underground,
   (F) the garden pond,
   (G) the goldfish in the garden pond.

4. Do the following count as land?

a) a plum-tree in the garden
b) plums growing on the tree in the garden
c) plums which have fallen from the tree in the garden
d) a plum which has fallen and taken root in the garden
e) a tree, cut down and waiting to be sawn up into floorboards
f) floorboards being laid in a new house
g) floorboards ripped up and thrown aside by thieves stealing the copper piping of the central heating system
h) floorboards taken and sold by the aforesaid thieves
i) old floorboards removed by the owner and advertised "For Sale"
j) a floorboard placed on brackets and used as a shelf
k) a floorboard thrown across the stream as a bridge
l) floorboards thrown away at the bottom of the garden, now completely rotten and half-buried, with weeds and a little plum-tree sprouting up through them.

# CHAPTER 3

# TENURES

*OUTLINE OF CHAPTER:-*

*A: Tenures today*
*B: History of tenures*
1. *Introduction to tenures*
2. *Mediaeval free tenures*
3. *The transition to modern freehold tenure*
4. *Freehold tenure today*
5. *Unfree tenures (copyholds etc.)*
6. *Leasehold tenure*
7. *Crownhold tenure*

*C: Conclusion*

## A: TENURES TODAY

There is really only one point to be made in this chapter, and it is a point we have already seen briefly in Chapter 1. No-one in England and Wales *owns* any land. They *hold* it on freehold or leasehold tenure. All the land of England and Wales - every square inch of it - is held from the Crown, for a reason which goes directly back to William the Conqueror. (William declared that all the land was his; and he then permitted his followers and allies who had helped him in 1066, to hold it from him in return for their doing some kind of regular *services* for him.)

FREEHOLD TENURE, which can be roughly defined as "holding the land from the Crown, free from all the old mediaeval services", is as near absolute ownership as makes no practical difference to the ordinary man, while LEASEHOLD TENURE (which usually but not always involves payment of rent) is "holding the land from a landlord, to whom it will return when the Lease ends". Whether the leasehold is a weekly tenancy or a Lease for 10,000 years, there will be a reversion (a returning) to the landlord when the leasehold ends.

The landlord holds either a freehold from the Crown,

or a longer leasehold granted to him by another landlord (who is called a "superior landlord").

Tenure describes *how* the land is held - i.e. free from the old services (which have been obsolete for very many years) in the case of a freehold; and subject to the landlord's reversion (and usually subject also to numerous conditions etc., breach of which results in forfeiture of the Lease or tenancy) in the case of a leasehold. *How long* the freehold or leasehold will last will be the subject of Chapter 4, entitled "Estates".

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That is *what* the law upon tenure is today. The rest of this chapter consists mainly of historical background showing *why* the law today is in this particular state.

(History goes in small print, as we saw on page 17.)

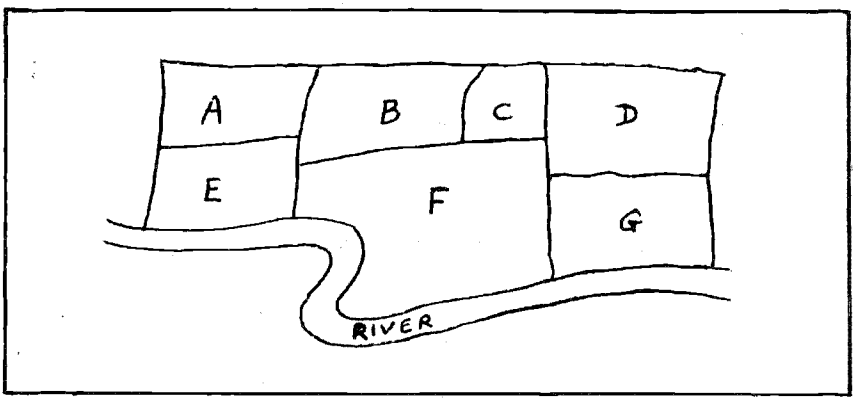
## B: History of Tenures

### 1. Introduction to History of Tenures

On many aspects of Real Property Law we shall look back at history - and on tenures we are going to look back a long way.

At the time of Jesus Christ the Roman Empire - despite all its faults - gave a large part of the known world the security of strong government. Five hundred years later the Roman Empire had crumbled and Europe had plunged into what history now knows as the Dark Ages. Culture came to an end. The man who aspired to become a poet or a playwright starved to death. The illiterate who could milk a cow and grow a few crops lived - but it was a precarious living, and if some stronger man forced him off his land there was no longer a strong system of law and government to give him a remedy.

Many a little man in this situation turned to a larger neighbour and gave up independence in return for protection. Thus in a piece of European countryside (see diagram overleaf) we can imagine C turning to his neighbour F because he fears B and D. C would swear allegiance to F: and C would thus remain on his plot of land, protected by F whenever necessary, but the land would be F's: C would hold it from F as F's "vassal" and



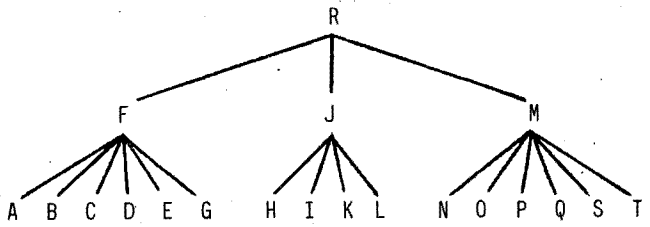

would probably do some service (such as helping F with his harvesting) in return.

Later, A and E (who are afraid of B) and G (who, like C, thinks of D as a dangerous barbarian) also become F's vassals. Then a little pressure from F, backed up by his vassals A, C, E and G, soon brings B and D into line as two more vassals.

F now has quite a large area of land and a group of vassals who have the makings of a private army: he is a powerful figure and will no doubt build a fortress at that easily-defensible site at the bend of the river.

Nevertheless F has his fears: he fears his rival X who has a similar fortress a few miles away and has vassals U, V, W, Y and Z. So F swears allegiance to the powerful R and becomes subservient to him, so that F and all his vassals come under the protection of this greater man.

So we see the formation of a pyramid, where F and two other men of like stature (J and M) have submitted to the great R.



In his turn R himself might owe service to someone even mightier. This (vastly simplified, of course) was the Feudal System.

Europe was never completely feudalised: there were always independent individuals owing homage to no-one.

## 2. MEDIAEVAL FREE TENURES

When William the Conqueror arrived in England in 1066 he claimed the whole land for himself both by heritage (as cousin of King Edward the Confessor) and by conquest. Thus he firmly established himself at the top of the pyramid. (In fact William was himself a vassal of the King of France, but as far as the people of England were concerned, William was the man at the top.)

He parcelled out the whole country among his followers, who held the land from him as "tenants in chief". There were about 1,500 of them: they were required to swear their allegiance to the King and to perform some kind of service. Most frequently this service was KNIGHT SERVICE - to provide a certain number of armed horsemen to fight for the King for forty days in each year.

These great men in turn made grants to smaller men.

Let us look at an example. Sir Alain (who is one of the Normans who came over with William) holds a large area of land from the King as tenant in chief, subject to the requirement that he will provide, for forty days, forty knights. This is his tenure, how he holds. If he does not perform the condition of providing these armed men, the land is forfeit and the King can then grant it to someone else.

As we come down to the next level of the pyramid, we find that Sir Alain has sub-granted ("subinfeudated") a part of his land to Ben in return for Ben's sworn allegiance and for a service. This too is Knight Service: Ben is to find fifteen of those forty knights each year.

In the non-commercial society of those times, money was not of major importance. The great man was the man who held land. Ben has 5,000 acres and is locally a powerful figure. He has a farm where the villagers ("villeins", who we shall see later in this chapter) work for him, while he spends his time hunting the boar in the forest, and presiding over feasts in his manor house.

Such a domain does not run by itself, so Ben soon grants part of his land - say 30 acres - to Cedric in return for a set service of keeping the masonry of the buildings in repair, and another part to Zebedee in return for the service of keeping Ben's many horses well shod. He grants a third piece to the local monastery in return for the service of praying for his soul.

These holdings in return for non-military services such as masoning and smithying formed what was to become the most widespread of all tenures, SOCAGE tenure, while the spiritual tenure held by the monastery was known as FRANKALMOIN tenure.

Within a few generations, the services of socage tenure were largely commuted to money payments - for example instead of performing the service of working as a mason the holder would make a fixed payment of a sufficient sum to employ a mason.

So the three most important tenures of mediaeval times were:-

Knight Service..providing knights..to SLAY the enemy,

Socage.....a sum of money.....to PAY to the lord,

Frankalmoin.....spiritual tenure...to PRAY for the lord's soul.

There were also other less important forms of mediaeval tenure, with such names as grand and petty sergeanty, ancient demesne, divine service, borough English, burgage, and gavelkind.

All of these were free tenures (i.e. the holders were freemen) in contrast to the unfree tenures of the "villeins" who we shall see later in this chapter.

Thus we see the system of feudal landholding in return for services. Cedric and Zebedee naturally became known in due course as Cedric the Mason and Zebedee the Smith, and as their duties normally passed down from father to son their sons too became known as Mason and Smith. After a few generations the titles had become family surnames.

For the rest of this chapter we will follow the history of the 30 acres which was granted in socage tenure to Cedric the Mason, and see how this was gradually changed into the freehold tenure which we have today. (Note this example, because it is used again to illustrate points in later chapters - this is the land on which "Magpie Cottage" and numerous other properties now stand.)

Cedric was granted the 30 acres because of his abilities as a

mason - and no doubt he would bring his son up to have similar abilities. So on Cedric's death the land - and also the duty to perform - should pass to his eldest son if he had one. Neither of them originally had an unrestricted right of selling it.

On the other hand there were less restrictions if the land was to be "subinfeudated" - that is to say, all or part of it sub-granted to another person in return for some service. So if Cedric does not wish to continue to hold the land and repair his lord's masonry, he is likely to sub-grant the land to Donald in return for Donald promising to fulfil this responsibility. Cedric remains liable to Ben, but can call upon Donald to carry out the work to Ben's satisfaction.

So the 30 acres becomes held by Donald in this manner:-

Donald is in possession:

Donald holds from Cedric.....(subject to repair of masonry)

Cedric holds from Ben.....(subject to repair of masonry)

Ben holds from Sir Alain.....(subject to providing 15 knights)

Sir Alain holds from the King..(subject to providing 40 knights).

All of them are freemen.

And here is a real-life example:- while researching his family history the author found that in the year 1242 certain lands in Devonshire were held on knight service by Robert Grede (believed to be the author's ancestor) who held from William de Tracy, who held from Henry de Tracy, who held from the King.

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As well as services, certain "feudal incidents" were required. These included the four following:-

(1)

Fealty...(Homage and fealty in the case of knight service.) Donald swore to Cedric that he would perform his obligations faithfully.

(2)

Escheat..Cedric could take the land back if Donald died without an heir, or if Donald committed a felony. (Felony originally meant a breach of the oath of fealty, but by the twelfth century had come to mean a much wider range of crimes.) Escheat for felony was abolished in 1870 but escheat for death without an heir was not finally abolished until 1925.

In certain cases regarding bankruptcy, and the dissolving of certain corporations, escheat may still exist, as shown in the case of Re Lowe's Will Trusts (1973) - escheat in connection with the Phoenix Inn at Stratford-on-Avon.

(3)
Aids.....Donald could be called on to make a payment on three occasions:-

(a) the ransom of Cedric after his capture in battle,
(b) the knighting of Cedric's eldest son, and
(c) the marriage of Cedric's eldest daughter.

(4)
Relief...On Donald's death, his son had to pay for the right to take his place. He would normally have to pay Cedric the equivalent of one year's rent on the land.

(These four can be remembered by their initial letters: FEAR.)

The incidents were not only due from Donald. Cedric (though not in occupation of the land) was required to pay similar incidents to Ben, Ben to Sir Alain, and Sir Alain to the King. Thus on Ben's death Sir Alain demands Relief from Ben's son, but on Sir Alain's death his son is called upon to pay a large amount of Relief to the King: these Reliefs formed an important part of the royal income.

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Within a century after the Conquest, changes were to be seen. Reliance on knights who will be in the field for 40 days and no longer is a far-from-efficient way of conducting a war, and soon Scutage (shield-money) was being paid in lieu of the provision of knights, so that the King could hire soldiers for himself - money was beginning to be of some importance.

Then there was the problem of subinfeudation. Let us look again at the same 30 acres, as it was held fifty years later. After Donald's death his son disposed of the property to Eric. So the situation might look something like this:-

Eric is in possession:

Eric holds from Donald's son

Donald's son holds from Cedric's nephew (Cedric had no child)

Cedric's nephew holds from Ben's great-grandson

Ben's great-grandson holds from Sir Alain's grandson

Sir Alain's grandson holds from the King.

Such a situation could lead to difficulties! And so a change was made in 1290, in the statute "quia emptores". (The name means, "on account of purchasers".)

In the year 1290 the statute *quia emptores* (which is still law today - it is one of the oldest laws on the Statute-book) said that there should be no more subinfeudation: no more perpetual ("in fee simple", as it is called) sub-granting of land.

Thus the links which had already been created in the chain remained, but no more were made after 1290. Therefore when Eric transfers what he has to Frank, Frank does not hold from Eric: Eric drops out of the picture and Frank holds from Donald's descendant as Eric's substitute. There is "substitution instead of subinfeudation".

Frank is not performing the service: he makes a money-payment in lieu - a sufficient sum to enable a mason to be employed. Let us say £3 per year. In those days when a labourer received 1d. for a day's hay-making, and a live lamb could be bought for 8d. (between 3p and 3½p) this was a considerable wage.

In many cases the services were commuted into a much smaller payment: a manuscript from the reign of King Edward II (1307-27) tells us that in the Manor of Wyke (Wick) in Somerset there were *"20 free tenants who paid 20 shillings in lieu of all services ... also 40 customary tenants* (villeins) *who performed 3,394 days' labour* (almost 100 days each) *from the Feast of Michaelmas* (29th. September) *to the Gule* (1st.) *of August at ½d. per day, and 1,306 days' labour* (about a month each) *from the Gule of August to the Feast of Michaelmas at 1d. per day...".*

(Part of the Manor of Wick is today occupied by the Hinkley Point nuclear power station, but we shall see by the end of this chapter that the tenure - the manner of holding the land - is basically the same today as it was for those 20 freemen.)

## 3. THE TRANSITION TO MODERN FREEHOLD TENURE

Of the three important mediaeval tenures of Knight Service, Socage and Frankalmoin, only Socage survived to modern times. The 1660 Abolition of Tenures Act (one of the reforms which immediately followed the time

of Oliver Cromwell - and still law today) abolished Knight Service tenure by converting all Knight Service holdings into Socage.

Frankalmoin was not abolished in 1660 and it may be that in theory it can still exist - but in fact it proved unable to survive after the Reformation (and Henry VIII's dissolution of the monasteries about 1540) and today we may safely treat it as extinct.

At the same time (1660) the feudal incidents - except Escheat and Relief - were abolished, and the Land Law of England thereupon ceased to be of a purely feudal nature.

By the seventeenth century, money had greatly decreased in value: the price of a lamb, for example, had risen from 8d. to 7s. 0d. (i.e. from 3½p to 35p). This resulted from a combination of many circumstances ranging from the acute labour shortage after the Black Death (1349) to the Renaissance and great increases in trade and the discovery of the riches of the Americas - but, whatever the cause, the payment of £3 per year which had once sufficed to pay a mason became a sum of little importance - and the incidents of the tenure, which had still been of some importance, were now abolished. (So the rights of Donald, Cedric etc. in our example were no longer worth having.)

(Though Reliefs were not abolished in 1660 the fall in the value of money caused them to become of little value because they were by this time for a fixed sum.)

The eighteenth and nineteenth centuries saw expansion of population, and the Industrial Revolution which caused many thousands to move from the countryside to the new industrial areas - and so 5 acres of the 30 acres in our example is sold by Frank's descendant to one Gerry, who is a builder.

By quia emptores Frank's descendant drops out of the picture, and so the situation is:-

Gerry holds from Donald's descendant

Donald's descendant holds from Cedric's descendant

Cedric's descendant holds from Ben's descendant

Ben's descendant holds from Sir Alain's descendant

Sir Alain's descendant holds from the King.

Gerry eventually builds a number of houses on the land, one of them being "Magpie Cottage" which stands in one tenth of an acre. Of the sum of £3 payable on the 30 acres, the proportion attributable to one tenth of an acre comes to exactly 1p: and this is just not worth the trouble of collecting.

With no services and no incidents, the rights of the descendants of Donald, Cedric, Ben and Sir Alain had become virtually worthless and were eventually forgotten. In many cases they had been forgotten already. Even the identities of the persons entitled - except the Crown, of course - are in most cases practically untraceable.

## 4. FREEHOLD TENURE TODAY

Once the old mediaeval services (or payments in lieu of them) had ceased to be worth enforcing, and had been forgotten, Gerry (the builder of "Magpie Cottage") found himself holding the property direct from the Crown, because all the intermediate owners had by this time become lost in the mist of history. Gerry held from the Crown on the old socage tenure, but free from any services.

*This* (the old socage tenure but free from the old services) is our modern FREEHOLD TENURE.

"Magpie Cottage" changed hands several times, until one day it was bought by Fred Smith and his wife. Let us briefly get to know this typical couple and their family, as they will be popping up in nearly every chapter:-

Fred is an ordinary sort of a chap: he drives a lorry and has two brothers called Bill and Phil. Bill (a bachelor) is a bus driver in Clapham. Fred's father John and uncle Adam are both retired and living in Brighton. Fred's wife Florrie works in a supermarket and they have three children, namely Jenny (a Polytechnic student aged 18) Kenny (aged 15) and Lenny (aged 12). Florrie's widowed mother (Granny Mason) lives with them in "Magpie Cottage". At present Fred's youngest brother Phil is also at "Magpie Cottage", as a lodger, and we shall see why in Chapter 23.

Fred tells his friends, "We own our house". The reader should by now be used to the fact that what this really means (though Fred and Florrie may not know it)

is that they hold it, freehold, from the Crown. They have freehold tenure. From the word "tenure" we get the word "tenant": the Smiths are "tenants of the Crown". This use of the word "tenant" to describe someone who a layman would refer to as an owner, is something we *need* to get used to. We shall see it on frequent occasions in Real Property Law.

## 5. UNFREE TENURES

Earlier in this chapter we saw mediaeval villagers working for Ben, who held the 5,000 acres which included the whole of their village and the three great fields surrounding it. The fields were worked on the traditional system of rotation (one with spring crops, one with summer crops, and one lying fallow) and the "villeins" (villagers) held strips of land in each of the fields, on unfree tenure from Ben the Lord of the Manor.

The condition of their tenure was that they had to perform whatever service the lord might demand of them: at one time it might be harvesting on his farm (the lord's demesne), later it might be ploughing, and so forth. In this way they are contrasted with the freeman, who knew just what his service was. The unfree man did not know from day to day what service might be required of him. Furthermore the unfree man had no rights in the royal courts: he could only seek justice at the local court which his lord held for the manor.

As the Middle Ages passed, the status of the unfree man improved. By the end of the fifteenth century he had gained the right to go to the royal courts. But by this time the practice had become firmly established by which an unfree man could transfer his holding of land to another person: the method was that the transfer was entered on the lord's manor court records (the court rolls) and the new holder was given a copy of the entry. So he had tenure by holding of copy: this became known as COPYHOLD tenure and survived until the end of 1925 when copyhold was abolished and nearly all copyholders became freeholders. (Just a few, about 2%, became leaseholders.)

Arrangements were made at that time whereby lords were protected or compensated in respect of any valuable rights (such as mineral rights) they still had over copyhold land.

Although copyhold tenure was abolished in 1925, the holder of freehold or leasehold former-copyhold land may find even today that rights to the minerals beneath the land, or rights of hunting over the fields, or the right to hold a fair on the land, still belong to the Lord of the Manor - e.g. (in country districts) the local squire.

## 6. LEASEHOLD TENURE

LEASEHOLD tenure must be mentioned in this chapter although it is my intention in this book to avoid leaseholds as far as possible: they are not Real Property.

If a man chose to let (i.e. to lease) his land to another, this was a purely commercial transaction, not recognised by the feudal system. At first it was not treated as a tenure at all, but developed gradually into a recognisable tenure.

Leasehold today applies to some houses, and the great majority of flats, and a lot of commercial and industrial premises etc. We have seen on page 28 that the one *vital* characteristic of leasehold tenure (HOW the land is held) is that there is a reversion: the property will return to the landlord at the end of the lease. *(Despite this general rule, we shall see in Chapter 40 that a tenant of a residential property - i.e. a house, flat, bed-sitter etc. - can stay on after the lease ends, if the 1977 Rent Act applies to his lease or tenancy-agreement.)*

*SHORTHOLD* (a creation of the 1980 Housing Act - see Chapter 40) is not a tenure, it is a form of leasehold.

Some textbooks say that a leaseholder has an estate but not a tenure, so freehold is the only tenure today. For example, Cheshire & Burn's "Modern Law of Real Property" (1982 edition) says, "There is now only one form of tenure" - it regards the leaseholder's holding from his landlord as a commercial matter, not a tenure. On the other hand "Megarry's Manual of the Law of Real Property" (1982 edition) states that "There are only two forms of tenure, namely, freeholds and leaseholds". Indeed "Megarry's Manual" describes the leaseholder's

holding from his landlord as "the most important modern form of tenure".

Either view is correct. All we are talking about is a subtle difference in what different authors mean by the word "tenure". "Megarry's Manual" uses the word in a wide sense, to include how a leasehold tenant holds from his landlord. Cheshire & Burn's book uses it in a narrower sense, to exclude how a leasehold tenant holds from his landlord (just as I can use the word "football" in a narrow sense to mean soccer or in a wide sense to include both soccer and rugby).

In this book I use the word "tenure" in the wide sense, as "Megarry's Manual" does, for I have no wish to try to convince students that the landlord's *tenant* does not have *tenure* but only has something of a commercial nature.

### 7. CROWNHOLD TENURE

Introduction of that form of taxation which was known as Betterment Levy, in the 1967 Land Commission Act, involved the creation of a new tenure, CROWNHOLD. Abolition of Betterment Levy in 1970 saw the end of crownhold: it returned to being freehold or leasehold.

## C: CONCLUSION

Thus the only present-day tenures are:-

1. freehold (held from the Crown, free from services)
2. leasehold (held from a landlord, subject to the landlord's reversion).

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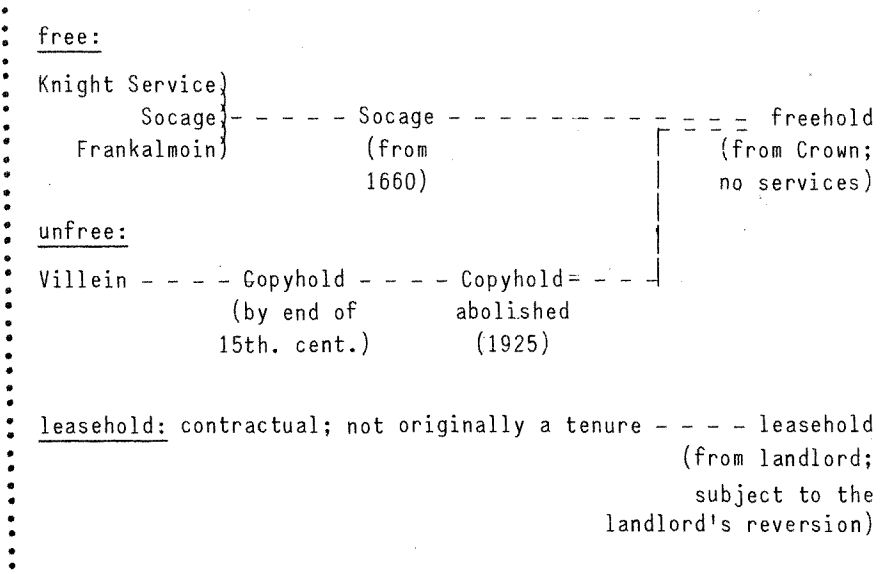
## SUMMARY

In this chapter we have seen:-

1. definitions of freehold and leasehold tenure
*(see under "Conclusion" on page 40)*
2. history of tenures:-

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TEST QUESTIONS on Chapter 3:-

1. Describe in outline the development of freehold tenure, showing the steps by which the number of former tenures was reduced.
2. What are the present-day characteristics of the two tenures which exist today?
3. Florrie Smith says, "I'm a landowner". Explain to her how far this statement is true.
4. Consider whether the abolition of copyhold tenure should be generally regarded as (a) a good thing, (b) a bad thing, (c) a mixed blessing, or (d) pointless.

# CHAPTER 4

# ESTATES

*OUTLINE OF CHAPTER:-*

*A: What an estate is (and what it is not)*
*B: The period for which an estate endures*
*C: A fundamental change made in 1925*

## A: WHAT AN ESTATE IS (AND WHAT IT IS NOT)

In Land Law, the word "estate" has a specialised meaning. It does not mean an area of land, as it would mean if we were talking of a housing estate or Lord Alain's country estate. Nor does it mean all the worldly wealth (both realty and personalty) which Fred Smith will leave when he dies - which is what it would mean if we were talking of the Law of Wills and Succession.

We are getting nearer to the meaning if we say, "Lord Alain is a gentleman of high estate, but Fred Smith is of comparatively low estate and is not at all high class!" - for now we are using the word "estate" to suggest some sort of position or *status* (although "of high estate" means "of high birth" rather than "high class") - but we are still not using the word "estate" in the way that it is used in Land Law.

The word "estate" in Land Law is to do with TIME: how long the land is held.

Read that important sentence again.

We will see a definition of an estate in a minute.

Estates are still of great importance (far more so than tenures) today, and although this chapter is only short, it is most important to understand it before going further - even if you have to read it more than once. *(So take it gently!)*

And here is a word of caution:-

Estates divide into freehold and leasehold, but these words are not used in the same sense here as they were in the previous chapter: to avoid confusion on this score let us immediately have an explanation and an example of each:-

A freehold estate is one where the date on which it will end cannot be identified.

A leasehold estate is one where the date on which it will end can be identified.

Examples:-

(i) A grant of land "to Fred Smith and his heirs" is freehold, for no-one can tell the date on which Fred will cease to have any more heirs.

(ii) A grant of land "to Fred Smith for 999 years from 29th. September 1976" is leasehold, for it will be at an end on 29th. September 2975.

A lease of land in England or Wales cannot be for ever, as was stated in the case of *Sevenoaks, Maidstone and Tunbridge Railway Co. v. London, Chatham and Dover Railway Co. (1879).* A perpetual lease - a lease whose length of time is for ever - would be a subinfeudation, contrary to *quia emptores* - see page 35. (The law is different in Scotland: there is no *quia emptores* in Scottish Land Law, so a twentieth-century subinfeudation which *looks* just like a perpetual lease from a landlord to a tenant at a rent is quite normal in Scotland.)

One way to remember the difference between freehold and leasehold estates is: "When does it end? With a freehold, only God knows. With a leasehold, your solicitor knows".

We shall see the meaning of that word "heirs" (used in Example (i) above) in Chapter 12. It can include sisters, parents, cousins etc. as well as direct descendants. It is a much wider term than "heirs of the body" which means only direct descendants.

Now let us define what an estate is:-

An estate is a certain status for a certain time.

To say that a person has a certain status means that he has certain rights and certain duties.

Thus a man's estate in his house means:-

*certain rights* e.g. to live in it or to let it or to leave it empty,
to repair it or to improve it or to leave it to deteriorate,
to do generally what he likes with it as long as he does not break the law;

*certain duties* e.g. to see that it does not fall into such disrepair as to be a danger to the neighbours or the public;

*for a certain period* - whose length we shall see below.

(Test yourself as you read: ask yourself who has a freehold estate in the house in which you live, and what are the rights and duties which this includes.)

## B: The Period for which an Estate endures

Since the year 1285 there have been three basic types of freehold estate:-

Fee Simple
*(Eq)* Fee Tail
*(Eq)* Life Estate.

The two estates marked *(Eq)* - which means "Equity" - underwent important changes in 1925: details of these changes will appear in later chapters.

A grant of a fee simple to Fred Smith ends if he ceases to have any heirs.

A grant of a fee tail (or "entailed interest") to Fred Smith ends if he ceases to have any direct descendants.

A grant of a life estate (or "life interest") to Fred Smith ends as soon as he dies.

These three estates have in common the fundamental characteristic that *no-one can fix the date they end.*

We must glance briefly at the main types of leasehold estate: again there are three:-

| | NAME | DURATION | CHARACTERISTIC |
|---|---|---|---|
| 1. | Specific term | This ends automatically at the end of a specified time (e.g. 99 years) | The date the estate will end has been fixed. |
| 2. | Periodic term | This ends when notice, given by either party, expires. (e.g. a month's notice, for a monthly tenancy) | The date the estate will end can be fixed, by either party. |
| 3. (EQ) | Tenancy at will or on sufferance | This ends on demand. | |

The leasehold estates may end before the date fixed - by forfeiture for non-payment of rent, for instance - but cannot end later than the date fixed.

Specific terms and periodic terms are both known as "terms of years". This is generally so even if they are for less than a year.

Test yourself: here is a similar tabulation for freehold estates. Fill it in from the information in this chapter before you read on.

| | NAME | DURATION | CHARACTERISTIC |
|---|---|---|---|
| 1. | F<br>S | | |
| 2. (EQ) | F<br>T | | |
| 3. (EQ) | L<br>E | | |

We have now considered the meaning of "freehold estate" and have seen (i) the sort of rights and duties inherent in it, and (ii) the period for which these rights and duties endure.

We have also considered, in Chapter 3, the meaning of "freehold tenure".

So we can return to the question which we posed in Chapter 2: What do we mean when we talk about "freehold land"?

By "freehold land" we mean a freehold estate *(rights and duties for a period)* in a piece of land of freehold tenure *(held from the Crown, free of services)*.

Thus if you see an estate agent's sign, "Freehold house for sale", what he is really advertising for sale is a freehold estate in a house of freehold tenure. (And that's why he is called an *estate* agent: he's not selling the land, he's selling the estate - the package of rights-and-duties-for-a-period.)

Since the end of 1925, if the property is freehold estate it is also freehold tenure - and if leasehold estate, leasehold tenure. Before then, this was not necessarily so: a property could be (for instance) freehold estate and copyhold tenure.

So, as we look again at Fred and Florrie Smith in their freehold home, we see that though they do not strictly own the house - as they hold it as tenants of the Crown - they jointly *own* this abstract thing called an estate: this certain status for a period of time.

If they own the fee simple, which is normal, they own the rights and duties appertaining to the holders of "Magpie Cottage" for the period until such time (if ever) as they and their heirs die out completely. That period is likely to be perpetual - until the end of the world - but on the other hand of course it might end (as a result of them and all persons who might be their heirs being completely wiped out) at any time. In that case the property returns to the Crown.

Fred and Florrie Smith's rights in the case of a fee simple include the right to sell it (which may seem obvious, but there was a time when it was not necessarily so - as we saw on page 33) and after a sale the estate belongs to the purchaser for a corresponding period: "to the purchaser and his heirs". This period is often treated as being for ever, but such treatment is not strictly correct as the heirs may die out.

What has happened is summed up in Markby's "Elements of English Law":-

> "The English lawyer ... first detaches the ownership from the land itself, and then attaches it to an imaginary thing which he calls an estate".

We shall see later that it is possible for half a dozen people to own different estates in one house.

- - - - -

The student who has not clearly understood what an estate is should read this chapter again up to this point. If after two readings he is still in difficulties, let him read the Further Note which now immediately follows. It is written especially for him.

## *FURTHER NOTE*

### *Part 1 - the Land*

1. Land is three-dimensional: length, breadth, depth.
2. This chapter is about the fourth dimension: time.
3. The land beneath the chair on which you are now sitting will be there until the end of the world (hereafter called for convenience "Judgment Day").
4. This is treated in Land Law as being "for ever".

### *Part 2 - the Estate*

5. No-one is granted the right to land for ever.
6. The right to land is granted for a period of time.
7. This right-for-a-period is known as an estate.
8. It may be an extremely long period - but it is not for ever.

*FURTHER NOTE (continued)*

*Part 3 - different sorts of Freehold Interests*

9. Different estates last for different periods.
10. A life estate ("life interest") granted to Fred lasts as long as he lives.
11. A fee tail estate ("entailed interest") granted to Fred lasts as long as he has direct descendants.
12. A fee simple estate granted to Fred lasts as long as he has heirs.

To assist the student who has real difficulty with this concept of an estate as a period of time, the pages of this book are dated (see top right-hand corner) commencing with 1985 on this page and going on at ten years to a page to Judgment Day on the last page of this book. That is our period often referred to as "for ever".

The pages up to this page (the page dated this year) represent the time that has passed. The pages from here to the end of the book represent time to come.

Suppose you are granted a Life Estate in some land.

With the book open at this page, take a few pages (not more than about eight - signifying eighty years!) in your right hand. Those represent your Life Estate: they are the period for which you have rights and duties in respect of this land. The rest of the time (the pages below your right hand) belongs to someone else: usually the person who granted you the Life Estate, or his heirs after his death.

Suppose you are granted a Fee Simple Estate.

With the book open at this page, take some pages in your right hand. *(Go on: Do it!)* How many did you take?

You may have taken the whole of the rest of the book, indicating that on Judgment Day you will still have heirs alive - heirs who are so distant-in-time from you that they know no more about *you* than *you* know of your ancestor who was alive in the days of William the Conqueror, but they are your heirs nevertheless.

Or you may have taken only a single page, signifying that you will die within ten years leaving no heirs at all.

But however long or short the period you took, that is your Fee Simple Estate. What is left after its end belongs to someone else. (Being after a Fee Simple, it belongs to the Crown.)

A Fee Tail is likely to be a period whose length is somewhere between a Life Estate and a Fee Simple.

## C: A FUNDAMENTAL CHANGE MADE IN 1925

Since 1925 the Fee Tail Estate and Life Estate can only exist in Equity.

As there is, strictly speaking, no such thing as an Equitable *estate* since 1925 - because in their modern form they are called Equitable *interests* - they now have the new names of "Entailed Interest" and "Life Interest" respectively.

But: *What is Equity?*

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## SUMMARY

In this chapter we have seen:-

1. An "estate" is a certain status involving certain rights and duties for a certain time.
2. Three freehold estates:- Fee Simple
   Fee Tail
   Life Estate
3. Three leasehold estates:- Term of Years — {Specific, Periodic
   Tenancy at Will
   Tenancy on Sufferance
4. Since 1925, Fee Tail and Life Estate (and also Tenancies at Will and on Sufferance) can only exist in Equity.
5. The phrase "freehold land" refers to both freehold tenure and freehold estate.

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## TEST QUESTIONS on Chapter 4:-

*(On questions 4 - 7, tick the correct answer(s) in the spaces provided.)*

1. Explain what is meant by (a) freehold tenure and (b) freehold estate.
2. Explain how ownership of an estate is different from absolute ownership of the land.
3. A certain piece of land is granted as follows:- "It shall go to George until he dies, then to Gigi and the heirs of her body, and then return to the Grantor and his heirs". *(Three estates in one piece of land.)* Say what the three estates are.

*(Tick the YES or NO column, as appropriate.)*

| | YES | NO. |
|---|---|---|
| 4. How long is a fee simple? | | |
| (a) for ever | ( ) | ( ) |
| (b) for one life | ( ) | ( ) |
| (c) for as long as there are heirs | ( ) | ( ) |
| 5. Zebedee has died, leaving no relatives except his mother. Will she inherit his land, if he had | | |
| (a) a fee tail | ( ) | ( ) |
| (b) a fee simple | ( ) | ( ) |
| (c) a life estate | ( ) | ( ) |
| 6. Yvonne says she owns her house for ever. What does she really have? | | |
| (a) absolute ownership | ( ) | ( ) |
| (b) a fee simple | ( ) | ( ) |
| (c) a life estate | ( ) | ( ) |
| 7. Which of the following are Xenia's direct descendants? | | |
| (a) her son | ( ) | ( ) |
| (b) her daughter | ( ) | ( ) |
| (c) her great-grandson | ( ) | ( ) |
| (d) her nephew | ( ) | ( ) |
| (e) her son-in-law | ( ) | ( ) |
| (f) her son-in-law's children by his previous marriage | ( ) | ( ) |
| (g) her son-in-law's children by his present marriage to Xenia's daughter | ( ) | ( ) |
| (h) her step-son (i.e. her husband's son by his previous marriage) | ( ) | ( ) |
| (i) her nephew's daughter | ( ) | ( ) |
| (j) her daughter's nephew | ( ) | ( ) |
| (k) her mother | ( ) | ( ) |

Section B (Chapters 5 - 8)

Equity

# CHAPTER 5

# INTRODUCTION TO EQUITY

*OUTLINE OF CHAPTER:-*

*A: Two Legal Systems*
*B: History of Equity*
*Shortcomings of the common law and the resultant development of Equity*
*C: Equity today*
*The position since the 1873-5 Judicature Acts*
*D: Maxims of Equity*

## A: TWO LEGAL SYSTEMS

England has two separate legal systems. One of them is the common law (often referred to simply as "the law") and the other is Equity. Until 1873, common law and Equity were administered by two separate sets of Courts. Today they are still two separate systems, with different rules, but both are administered in the same Courts and by the same Judges.

To see how this state of affairs has come about, we must once again look into history.

## B: HISTORY OF EQUITY

### SHORTCOMINGS OF THE COMMON LAW AND THE RESULTANT DEVELOPMENT OF EQUITY

Equity began as a result of the law's shortcomings, so we start this chapter not with Equity but with a glance at the mediaeval law and its Courts to see what shortcomings there were.

Within a few years after 1066 the King's court the curia regis was providing England with a centralised legislative executive and judicial system for the first time, and the King's Judges were travelling the land giving free men royal justice - an

innovation so successful that their successors today still travel the circuits of the Crown Courts which have replaced the ancient courts of Assizes and Quarter Sessions.

By the thirteenth century three great courts (Exchequer, Common Pleas and King's Bench, all of which survived until the Judicature Acts of 1873-5) had developed from the curia regis, and tried cases in accordance with the common law - the King's ordinary law for the ordinary (free)man. (The term "common law" is sometimes also used in other senses but this book tries to avoid them.) Common law at that time was still largely based on custom, but some of it came from Statutes and from decided cases. There were also other lesser sources.

We need to have a look at the "Writ" system - and the 30 acres granted in Chapter 3 to Cedric the Mason will provide a good example of how this system worked. On page 35 we saw that Frank held the land from Donald's descendant. The position now (fourteenth century) is that Frank's descendant Fergus holds it from Donald's descendant Derek. Both of them are freemen.

Sometime in the fourteenth century, Fergus was dispossessed by a certain Ulric, who claimed the land and turned Fergus out. Common law had a Writ, which Fergus could buy, to deal with such a state of affairs: the Breve de Recto (Writ of Right) which was in the following terms:-

*"The King to Derek: greeting. We command you that without delay you do full right to Fergus of 30 acres of land at ... which he claims to hold of you by free service of £3 per annum for all service, of which Ulric deforceth him. And unless you will do this, let the Sheriff of ... do it, that we may hear no more clamour thereupon for want of right."*

Note the indirectness of it: it is an order to Derek as the immediate overlord to do justice. But something will be done: otherwise it is contempt of the King's Writ.

Alternatively here Fergus could have used the Assize of Novel Disseisin - i.e. of recent dispossession. (For an explanation of Seisin, see Chapter 8.) Again observe its limitations: it was not concerned with Right: it was merely concerned that, if Fergus had been seised (i.e. had been the freeman in possession) and Ulric had disseised him, the status quo should be restored

by putting Fergus back in. If Ulric had a genuine claim this made no difference; his remedy was to go and buy himself a Writ of Right.

It was essential to buy the correct Writ: if Ulric had only trespassed, there was a Writ of Trespass but the Writ of Right was of no avail. If Ulric had stepped into the property on the death of Fergus' father, Fergus had never been seised and so Novel Disseisin would fail: he must buy Morte d'Ancestor or lose his claim.

Modern writs simply tell the defendant that there is an action against him and that if he wishes to defend it he must enter an "appearance" (i.e. fill up a form) within fourteen days. On the back of the writ are brief details, in the plaintiff's own words, of what he claims.

The lack of flexibility in the mediaeval writs (despite which they survived until 1833, and some even later) is in startling contrast to modern writs. Either there was a writ whose standardised wording covered your situation, or there was not: and if not, "no writ, no right". And he who erred in his choice of writ or in any other formality lost his claim. Common law was a system of form.

The number of writs grew until 1258, when the nobles, realising that the creation of new writs was creating new rights and duties, obtained the King's agreement to the Provisions of Oxford, forbidding the creation of new types of writ.

(If that sounds like a friendly agreement ... it wasn't. King Henry III unwillingly gave his oath that he agreed to the Provisions, because he needed money from the Barons to pay a huge debt to the Pope: and afterwards the Pope absolved him from his oath so he could break his agreement: and the eventual upshot was the Battle of Lewes (1264) in which the King was captured by the Barons led by Simon de Montfort: and out of this the first English Parliament (1265) came into existence.)

After the Statute of Westminster II (1285) it became possible to adapt a similar writ if there was one (this was known as a writ in consimili casu - i.e. in a similar case) but no completely new ones could be created.

There were some big gaps in the system: notably, common law did not recognise what we now call a Breach of Trust.

For example:- Fergus' mighty neighbour Sir Anthony has sworn to go to the war (it was the time of the Crusades) and, knowing he may never return, he transfers all his property to his brother Bruce, telling him to hold it for the benefit of Sir Anthony's small son Simon. Bruce promises to do so - but then uses the property for himself instead.

Common law, having no doctrine of trusteeship, took the view that either the property had been transferred or it had not; and in this case it had and so it belonged to Bruce. There was no writ, no remedy.

An aggrieved person to whom the law gave no help could petition the King - the fount of all justice - for a remedy. Soon the busy King sent such petitioners to his Chancellor.

The Chancellor was one of the greatest men in the curia regis: a sort of Secretary of State for all affairs, the keeper of the King's Great Seal, and a Church dignitary.

In his dual capacity as state official and ecclesiastic he would hear the sad tale and the reasoning of his reply would run something like this:- "Bruce cannot keep the land with a clear conscience. This concerns me as an ecclesiastic and for the good of his conscience I order him to do what he promised. And if he will not, I will use my temporal power against his person: in other words, I will lock him up".

So justice was done. This was the beginning of Equity - justice.

(There is something interesting there which we shall see again later. In common law's view, Bruce owns the fee simple. In the Chancellor's view, Simon owns it.)

As petitions to the Chancellor grew more numerous, he developed his own department: his own court (the Chancery Court) with his own system. So we see the growth of two separate systems of law: the system set up by the King became known as "common law" (or simply "law") and the Chancellor's system became known as "Equity".

Even today, some matters (notably beneficiaries' rights under a Trust) have no common law remedy to support them, and rely entirely on Equity.

Let us list three contrasts between law and Equity:-

| | COMMON LAW | EQUITY |
|---|---|---|
| 1. | developed by the King's Judges | developed by the King's Chancellor |
| 2. | Courts of { Exchequer, Common Pleas, King's Bench } | Court of Chancery |
| 3. | concerned with form | concerned with conscience. |

- - - - -

Lack of any remedy was not the only complaint against common law. Sometimes the remedy might be available but inadequate. Suppose Bruce habitually trespassed over Fergus' land. So Fergus bought a Writ of Trespass, won his case, and was awarded damages (i.e. compensation in money). Bruce paid up but continued to trespass.

Common provided (and provides today) no means of keeping Bruce out, but the Chancellor developed a new remedy, the INJUNCTION. "I order Bruce not to do any more that which he has been doing, and if he does it again I shall act against his person *(Equity is always against the person)* by locking him up."

This is a Prohibitory Injunction, prohibiting Bruce from trespassing. Occasionally one comes across a Mandatory Injunction, ordering the defendant to *do* something, such as to remove an obstruction which he has built.

Another remedy (quite separate from injunctions) which the Chancellor created is SPECIFIC PERFORMANCE, an order to someone to perform a specific action which they agreed to in a *contract*. For example, if Fergus has agreed to sell certain land to Gerry, but after the contract has become binding Fergus tries to break it, an award of damages is not an adequate remedy for Gerry. No two pieces of land are identical in siting and surroundings: Gerry has a right to *that* land, and buying other land is not a complete substitute. (Similarly no two houses, even if built to identical

plans, will ever be identical in position: one will be further up the hill, or nearer to a bus stop, etc., than the other.) Therefore Equity if it sees fit may order Fergus specifically to perform his contract: i.e. to complete the sale as he promised.

Note that Equity *may*, not *must*, make an order:- Equity has always been discretionary. At common law, whatever a plaintiff's own conduct may have been he has an absolute right to damages once he has proved his case, but in Equity "He who seeks Equity must do Equity", and if he has behaved inequitably the Court will not assist him.

In *Webster v. Cecil (1861)* for example, a vendor intended to sell certain land for £2,250. The price was shown in the offer as £1,250 and the purchaser accepted at that price, knowing it was an error. The vendor refused to complete at that price and the purchaser claimed specific performance. It was refused.

A third matter in which the common law fell short was that if one of the parties to a case was supported by some great man, the court's decision might be affected. We are told (in Trevelyan's "England in the Age of Wycliffe") that "Any fellow wearing the livery and receiving the pay of a nobleman such as the Earl of Warwick could, with comparative safety, rob the barns and stables of a neighbouring manor-house or appropriate a farm belonging to a citizen of Stratford-on-Avon, for he would be supported at the Assizes by two hundred stout fellows wearing the bear-and-ragged-staff (badge of the Earl of Warwick) in their caps".

But many a noble lord who could overawe a common law court found that to overawe so great a man - and Churchman - as the Chancellor was quite a different proposition.

- - - - -

From the time of King Henry VIII (1530 - when the Chancellor Cardinal Wolsey died and the lawyer Sir Thomas More became Chancellor) Chancellors were no longer ecclesiastics: they were lawyers. And so the Chancellors' whole approach changed. No longer was a case decided on its individual merits. "I must look back to see what previous Chancellors have done in such cases."

Common law had long been bound by precedent - i.e. the Judge is generally not allowed to make a decision which goes against a decision (of that court or any higher court) made in any previous case in which that point of law has arisen. But now the Chancellors began to treat themselves as bound by previous Chancery decisions, until by the eighteenth century they regarded themselves as almost (though not quite) totally bound by them. The change from "equity" (justice) to "Equity" (a complicated and sophisticated system involving formalities and precedents just as common law did - though sometimes conflicting with the common law) had begun.

Let us list three further contrasts between law and Equity:-

| | COMMON LAW | EQUITY |
|---|---|---|
| 4. | remedy: damages | remedies: injunctions and specific performance |
| 5. | Judges' precedents (100% binding) | Chancery precedents (99% binding) |
| 6. | an absolute right | a discretionary right. |

By the nineteenth century Equity had a blackened reputation. Charles Dickens gives us glimpses - we need look no further than his preface to "Bleak House":-

"At the present moment (August 1853) there is a suit before the court which commenced nearly twenty years ago; in which from thirty to forty counsel have been known to appear at one time; in which costs have been incurred to the amount of seventy thousand pounds, which is a friendly suit; and which is (I am assured) no nearer to its termination now than it was when it was begun."

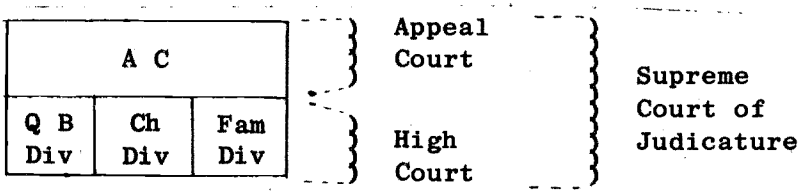
Defendants had found ways of delaying the operation of the common law writs, but even more delay took place in Equity. Both systems were cumbersome, antiquated, out of line with the requirements of the age. Until 1858 Equity could not award damages, so to obtain both damages and an injunction (e.g. after a trespass in which your property was damaged) it was necessary to bring the case twice. Equity and law sometimes conflicted. No satisfactory appeals system existed. Rulings had become so technical that a litigant sometimes brought his case in the wrong court - and there was no question of transferring it to

the right court, he had to start again at the beginning.

## C: Equity Today

### THE POSITION SINCE THE 1873-5 JUDICATURE ACTS

To deal with the inadequacies of both common law and Equity, the 1873-5 Judicature Acts abolished the old courts of Exchequer, Common Pleas, King's Bench, Chancery, and various others, and created a new structure, the Supreme Court of Judicature. It is in two parts, the upper being the Appeal Court, and the lower the High Court. The High Court sits in three Divisions, the Queen's Bench, Chancery and Family Divisions. Actions for torts (civil wrongs - Trespass, Negligence etc.) are usually heard in the Queen's Bench Division, matrimonial problems come into the Family Division, but most Land Law and matters to do with Trusts are to be found in the Chancery Division.




Though Land Law is put into the Chancery Division because there is often a lot of Equity involved in land law matters (much more than in most other branches of the law) the Chancery Division does not deal only with matters involving Equity - it deals with both common law and Equity. All three Divisions have full jurisdiction to administer both common law and Equity.

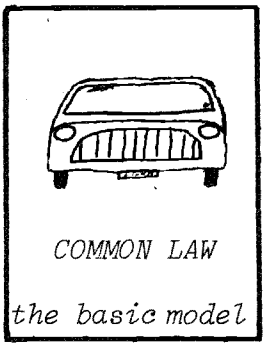
So by the 1873-5 Acts the *administration* of common law and Equity has been combined. They are still two systems, with different rules, but any Judge in the High Court has both systems in his hands. If you prove your case, you have an absolute right to the legal remedy, and at his discretion the Judge may also award you Equitable remedies if they are applicable.

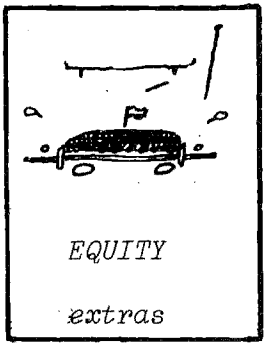
All Divisions have full jurisdiction to deal with any type of case - so if a case is brought in the wrong

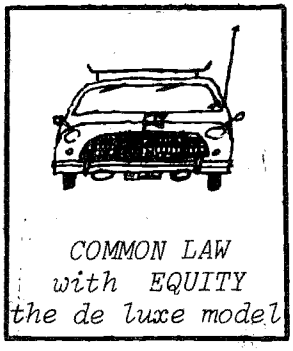
Division, that Division may deal with it or transfer it to the right Division.

Equity (unlike common law) is not a complete system. It only deals with matters on which its assistance was sought in times past. Common law would work if Equity did not exist, whereas Equity would not work if common law did not exist. Equity is the gloss or supplement which is one of the factors making English Law the finest legal system (probably) in the world.

In the event of conflict between law and Equity, it is now statutory (formerly by 1873 Judicature Act but now by s.49 of 1981 Supreme Court Act) that Equity shall prevail - though the supremacy of Equity over the common law was *first* laid down as long ago as 1615, in *The Earl of Oxford's Case*.




Good use was made of the existence of these two diverse systems - law and Equity - in the 1925 legislation. (What is the 1925 legislation? It is a series of seven Statutes - to which the reader will be introduced in Chapter 9 - making far-reaching reforms in our Land Law.) One of the chief aims of the 1925 legislation was to simplify the transferring (i.e. the conveyancing) of land.

## D: Maxims of Equity

We end this chapter with half a dozen Maxims of Equity. These are principles whose application can be seen in many of the rules which Equity has established.

1. He who seeks equity must do equity.
2. He who comes into Equity must come with clean hands.
3. Equity looks to the intent rather than to the form.
4. Equity looks on what ought to be done as if it was done.
5. Equity acts against the person.
6. Delay defeats Equity. *(e.g. Equity will not grant an injunction to stop something which has been going on a long time.)*

For further maxims, see Snell's "Principles of Equity".

*EXERCISE:- Learn the above six maxims by heart.*

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## SUMMARY

In this chapter we have seen:-

1. historical development of Equity, to remedy three defects of the common law - namely that common law sometimes (i) gave no remedy (ii) gave an inadequate remedy (iii) was overawed by some great person.

2. differences between Equity and the common law: six of them - see pages 56 and 58.

3. Equitable remedies: injunctions (prohibitory and mandatory) and specific performance.

4. the amalgamation (by the 1873-5 Judicature Acts) of the administration of common law and Equity: both are today administered by the Supreme Court of Judicature (High Ct. and Appeal Ct.).

6. Some of the "maxims" of Equity.

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## TEST QUESTIONS on Chapter 5:-

1. What is meant by: (a) an injunction, and
(b) specific performance?

2.(a) Fergus' next-door neighbour Bruce has erected a prefabricated garage at the side of his house. The garage is 6 inches wider than the space available: and so, to get it in, Bruce has knocked down Fergus' fence and dug away the flower-bed where Fergus' prize chrysanthemums were in bloom. Advise Fergus (with reasons) what action he could take against Bruce.

(b) Bruce says the problem arose because Fergus said he could get Bruce a garage 7ft. wide: but after Bruce had paid Fergus for it Fergus supplied the present one which is 8ft. wide. Bruce has a letter which Fergus wrote saying the garage would be 7ft. wide, but Fergus refuses to take the garage back. Advise Fergus (with reasons) of his position now.

# CHAPTER 6

# MORE ABOUT EQUITY

*OUTLINE OF CHAPTER:-*

*A: Overreaching*
*B: Development of the Trust*
*C: Other types of Equitable rights*
*D: Creation of Equitable rights*
*E: Equity and the 1925 legislation*

## A: OVERREACHING

*In showing how joint use was made of law and Equity to deal with one particular problem, the next five pages have a main theme which is printed in wider type and marked with a double line down the margin. First see what the main theme is by reading only the wider type. Then fill in the details by reading it again including the normal-type paragraphs. (But don't just skim over it: these pages contain the most important point we have come to on Equity so far.)*

We have seen the possibility of several estates existing at once in a piece of land - e.g. on page 50 we saw a question: "The land shall go to George until he dies, then to Gigi and the heirs of her body, and then return to the Grantor and his heirs - three estates in one piece of land - say what the three estates are" - to which the answer before the 1925 legislation would have been:-

George has a life estate,
Gigi has a fee tail, and
the Grantor has a fee simple,

but since the 1925 legislation the names are changed, and so:-

George has a life interest,
Gigi has an entailed interest, and
the Grantor has a fee simple.

In this outline we shall find it more convenient (at first) to use the old names.

If you are using the "pages" method described on page 48, then with the book open at the page bearing this year's date, take a few pages between your thumb and first finger. That is George's life estate.

Take another wad of pages between your first and second fingers. That is Gigi's fee tail. Anything left can be counted as the Grantor's fee simple reversion. Take it between fingers two and three. Even this is not bound to go to the end of the book, but if it does not, the land finally goes to the Crown.

But the point is, you have split up the *time* into pieces. None of them can say they own the whole, so none of them can sell the whole. *(Or rather, they could not if Parliament had not provided a way, which we shall see.)*

‖ This is an example of Settled Land, of which we shall learn more in Chapter 19.

Note that all three estates in the settled land exist from the beginning of the settlement:-

George has a life estate and is in possession of the property - he has the keys of the door.

Gigi can say, "I have a fee tail estate in the land *now* - it has already been granted to me - and the future aspect is merely that I must wait until George dies before I get *possession*".

It is a present estate with future possession. (And it has a present value: it is good security on which Gigi could *today* raise a loan.)

The Grantor can say, "I have my fee simple estate *now*: it has been granted: though there is no likelihood of me or any of my heirs getting *possession* until some unascertainable future date - the date when Gigi ceases to have direct descendants, which may be centuries from now".

‖ Sale of a piece of land tied up in this way formerly gave rise to difficulties,

because no individual is completely entitled.

We shall see in Chapter 19 that if Gigi were an infant the land was completely unsaleable.

The 1925 legislation made the sale of such land easy by enacting that at common law, George as "tenant for life" had - and could sell - the whole fee simple.

So in our example George sells the land to Gerry for £100,000.

"But", says the student, "That's not fair: he has deprived Gigi and the Grantor of their rights". This is where Equity comes in.

The law has done its part in making the land easy to sell. Then Equity steps in (by the same legislation) and ensures that when the purchaser pays for it, George does not take the purchase-money.

Once, while teaching this subject, I asked a class for criticisms of Real Property Law.

"It's very complicated," said one.

"It has to be, to cover all the different rights," said another.

So, with this George-Gigi-Grantor example on the blackboard, I simplified it and let George sell the whole fee simple - everything between your thumb and third finger in the "pages method" example.

"Is it fair?" I asked.

"No! What about Gigi and those after her?" was the general cry.

"I don't see why George shouldn't have the money," ventured a lone dissenter, "as long as he passes it on to Gigi when he dies".

"How do you make sure he doesn't spend it while he's alive?" a voice called out.

"Invest it and let him have the interest," said one.

So I congratulated that student on reaching the same solution as the 1925 legislators. He came to his conclusion by common sense: he had not read a textbook but he saw that if George were wise he would probably invest it anyway (unless it were required for some special purpose such as rebuilding the family's crumbling mansion-house: the 1925 legislation makes provision for this sort of thing in Schedule III of the 1925 Settled Land Act) and if he were foolish and likely to squander it - well that is the very thing we want to avoid so we must insist on it being invested. In fact, appoint some trustees to invest it and they can pay him the interest.

*Note that whenever a Trust occurs, the beneficiaries' rights will be a matter of Equity, not common law.*

So 2 (or 3 or 4) trustees are appointed.

The trustees are such persons as relatives, or the family solicitor, and the £100,000 proceeds of sale is paid by the purchaser to them direct, so George cannot get his hands on it. (A Trust Corporation - e.g. a Bank - can act as sole trustee, but otherwise 2 trustees is the minimum in such cases as this. The maximum is 4.)

The trustees invest this money.

George was entitled to an estate for life, in the land; therefore it is fair that he should have, for life, the benefit of the money. He has the Equitable, or *beneficial*, life interest. Very well: he receives the benefit - i.e. the income from the invested money - for the rest of his life.

On George's death, Gigi was entitled in tail. So she receives the income from the money, which remains invested.

Gigi and the Grantor had no say in whether the land was sold: they found the land was gone and instead of an interest in the land they had an equivalent interest

in an invested fund. So in theory they have not been deprived of any value. *(It must be admitted however that this system has been seriously marred by inflation: in many cases such land was sold in years past, and the invested proceeds today amount to a figure far below the present value of the land. To take an extreme example: there is land in East Anglia which was difficult to sell at £5 an acre in the 1930s but would be worth over £2,000 an acre today: if George in our example had sold 100 acres of that land in the 1930s, Gigi would today be receiving the interest on £500 - which might well be less than £50 a year; though it might be more, depending on what the £500 was invested in - but if she had that 100 acres of land today it could be sold for over £200,000 and Gigi could live fairly comfortably on the interest which could be over £20,000 a year.)*

OVERREACHING is the name given to this transfer of rights from land to an invested fund.

Thus the common law gives simplicity and Equity aims to give justice. (The law makes the sale easy; Equity makes sure that all the beneficiaries will receive fair shares of the money.)

So the real answer to the question with which we began this chapter is:-

| AT COMMON LAW | IN EQUITY |
|---|---|
| George has a fee simple. | George has a life interest, Gigi has an entailed interest, the Grantor has a fee simple. |
| *(so he can sell the land.)* | *(so trustees invest the money and pay the interest on it to George for life, etc.)* |

- - - - -

*Before we move to a new subject, let me mention (to avoid later confusion) that the particular method of using law and Equity with overreaching, set out above, dates from the 1925 legislation, but overreaching*

*itself was in use before 1925.)*

## B: Development of the Trust

We will now learn one of the most efficient methods of tax avoidance ever discovered. The tax in question was the Relief. We saw on page 34 an example in which on Ben's death his son had to make a payment (the equivalent of one year's rent) to Sir Alain - and on Sir Alain's death his son likewise had to make a payment to the King. These once-per-generation payments were burdensome - except to the King who was always on the final receiving end.

Suppose Ben arranges matters so that what Ben owns is put into the hands of two trustees (Tom and Dick) to the use of Ben and his heirs. Let us show it thus:-

> to Tom and Dick and their heirs
> to the use of Ben and his heirs.

Tom and Dick have the fee simple in the eyes of the common law; Ben has the fee simple in the eyes of Equity. So when Ben dies, he is no longer owner of the legal fee simple, so no Relief is payable. When Tom dies, the property is still held by Dick, so no occasion has arisen to pay Relief. Dick speedily appoints a new trustee (Harry) so that on Dick's death no occasion to pay Relief would arise. In theory this could continue for ever - as long as one trustee remained alive Relief did not become due.

This practice became widespread, and the King - Henry VIII - became more and more concerned as his financial reserves sank lower and lower. So in 1535 this strong-willed monarch forced an unpopular statute (the Statute of Uses) through an unwilling Parliament.

The statute "executed the use": that is to say, the holder of the legal estate was deprived of it, and the holder of the Equitable estate found himself with the legal estate. So, in our example

> to Tom and Dick and their heirs
> to the use of Ben and his heirs,

before 1535 Tom and Dick had the fee simple in the eyes of the common law, and Ben had the fee simple in the eyes of Equity; but after 1535 Tom and Dick had nothing, Ben had the fee simple

in the eyes of the common law - and there were no Equitable rights. (The statute held back the development of Equity for more than a century, and had repercussions whose effects are still to some extent with us today.)

So from 1535 onwards Tom and Dick in our example had no estate, and Ben had the legal fee simple - on which Relief was payable on his death.

An attempt was made to circumvent this situation by the device of a "Use on a use":-

to John and his heirs
to the use of Tom and Dick and their heirs
to the use of Ben and his heirs.

The intention was that John should (because of the Statute of Uses) have nothing, and Tom and Dick would have the legal estate - to the use of Ben so he should have the Equitable right.

The Chancellor did not dare to go against King Henry to the extent of enforcing this (particularly since the Chancellor Sir Thomas More had been beheaded by Henry in 1534) so the result at that time of such a grant was that Tom and Dick received the legal estate and Ben got nothing. This was shown in Jane Tyrrel's Case (1557).

By the mid-seventeenth century however, the financial advantage of Reliefs had gone - so had Henry - and so such a grant came to be recognised by the Chancellor. Thus from about 1650 this branch of Equity began to develop once more - Ben would have got his Equitable fee simple. This was the beginning of the modern form of what we now call a Trust. The words "in trust for" began to be used:-

unto John and his heirs
to the use of Tom and Dick and their heirs
in trust for Ben and his heirs.

Until the 1925 legislation abolished the Statute of Uses it was still necessary to insert John (or someone) to be the person to whom no legal estate passed. The form

unto Tom and Dick and their heirs
to the use of Tom and Dick and their heirs
in trust for Ben and his heirs

was acceptable, and its abbreviation

unto
and to the use of Tom and Dick and their heirs
in trust for Ben and his heirs

became the usual form, which is to be seen in the majority of pre-1926 legal deeds.

(For readers who are not familiar with what "deeds" are, there is an explanation on page 81.)

1925 saw the abolition of the Statute of Uses (and also saw the abolition of the need for such words as "and his heirs", as we shall see in Chapter 11) so that the requirements in this respect today are much simplified:-

The wording needed for the creation of a Trust today is

to Tom and Dick
in trust for Ben.

Since the 1925 legislation the words mean what they say.

## C: Other Types of Equitable Rights

Trusts are not the only branch of Real Property Law in which Equity is to be found. Some other matters which are also the concern of Equity in many ways are:-

Covenants (see page 445)
Mortgages (page 523)
Estate Contracts (page 222).

## D: Creation of Equitable Rights

Equitable rights arise today through (i) intent,
or (ii) inability,
or (iii) informality.

*(i)*
*intent*.....An owner of a legal estate can grant legal or Equitable rights, as he wishes. In creating a Trust, Equitable instead of legal rights are intentionally created: thus in our example above, Ben was intentionally given only an Equitable fee simple.

*(ii)*
*inability*....A person who himself owns only an Equitable right can only grant Equitable rights. So in our example if Ben wants to grant a right of any sort he can only grant an Equitable right, due to his inability to grant legal rights.

*(iii)*
*informality*..A legal right in most cases has to be created by deed. If a right is created by writing not in a deed (e.g. by writing a letter) it is not enforceable at law, due to the lack of the essential formality - the deed - but Equity will in many cases enforce it.

But in *what* cases will Equity enforce it?

The question of *when* Equity or common law will enforce a right forms the subject of our next chapter.

## E: Equity and the 1925 Legislation

Equity was affected by the 1925 legislation in three major ways:-

1. Legal estates, of which there were many kinds, were reduced to two, and legal interests (see Chapter 9) to five. All others are now Equitable.
2. The system of Overreaching was extended.
3. The system of Registration (of land, and of rights in respect of land) was extended.

These three important points are considered and explained in Chapters 9 and 10.

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## SUMMARY

In this chapter we have seen:-

1. Overreaching: what it is *(a transferring of rights from land to money)* and how it works.
2. Statute of Uses (1535) and development of the Trust.
3. Other types of Equitable right (i.e. concerning 1: covenants, 2: mortgages, 3: estate contracts).
4. Creation of Equitable rights (i.e. the result of three INs: INtent, INability and INformality).
5. Three ways the 1925 legislation affected Equity:-
   (1) reduction of legal estates to 2 and reduction of legal interests to 5;
   (2-3) extension of Overreaching and Registration.

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## TEST QUESTIONS on Chapter 6:-

1. What is (a) Settled Land, (b) a Trust?
2. (a) If Fred Smith's Uncle Adam makes a Will leaving his freehold house in Brighton to Fred for life and then to Fred's daughter Jenny in fee simple, who can sell the house after Adam's death, and who will get the benefit of the money from the sale?
   (b) If Jenny raises a loan on the security of her rights in the property by granting a mortgage on it to her friend the wealthy Winifred, why will it have to be an Equitable Mortgage?

# CHAPTER 7

# ENFORCEABILITY OF LEGAL AND EQUITABLE RIGHTS

*OUTLINE OF CHAPTER:-*

*This chapter deals with the "bona fide purchaser for value of a legal estate without notice".*

## THE BONA FIDE PURCHASER ... WITHOUT NOTICE

Let me introduce a friend: the *bona fide purchaser for value of a legal estate without notice* - henceforth called (for convenience) "the B.F.P. without notice".

Legal (i.e. common law) interests are enforceable against anyone.

Equitable interests are enforceable against anyone except our friend the B.F.P. without notice.

But who is he?

In the picture on page 74, Fred and Florrie Smith and their near neighbour Clara each have a right of way (an example of an "easement") over the garden of Alan's property "Tiny Nook", between the points X and Y, to reach South Road. (Forget the other two properties - David's and Shylock's - for the moment: they will become relevant in Chapters 10 and 30.)

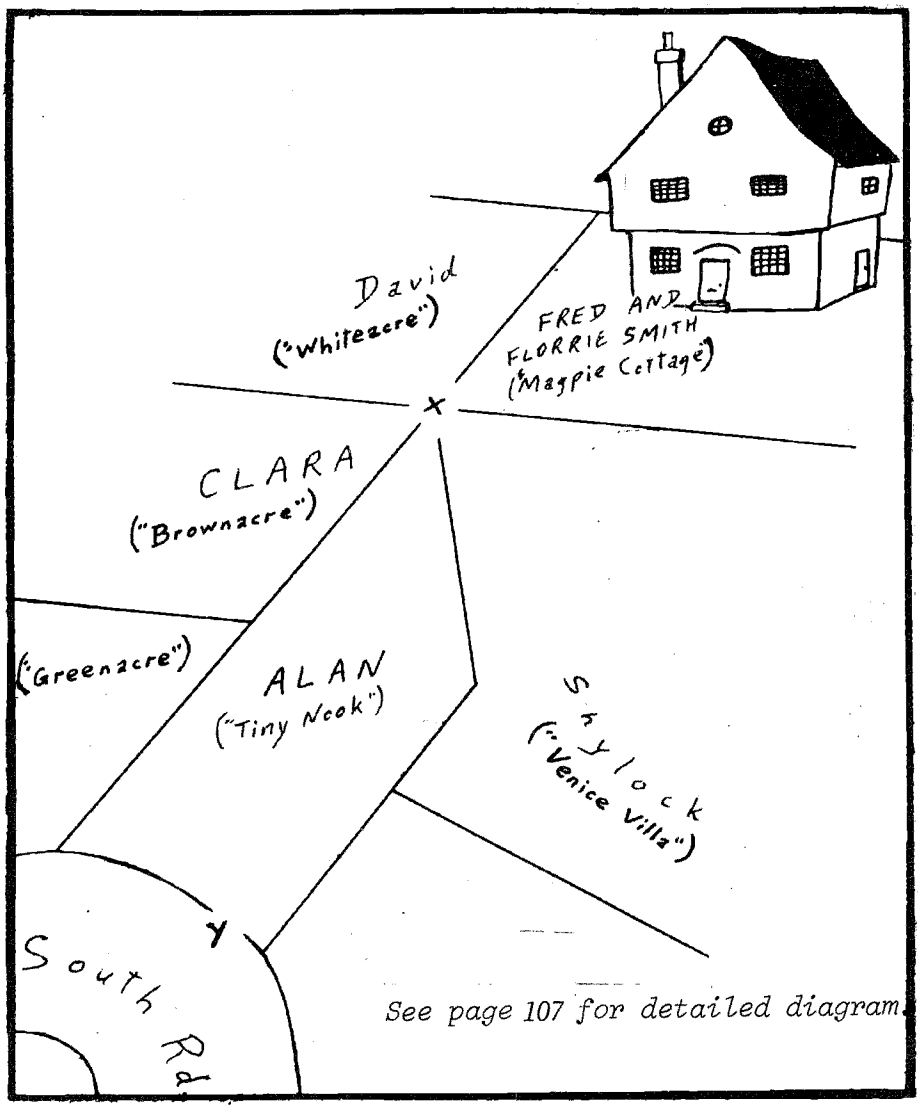
Alan's property is unregistered land. (See page 15 if you've forgotten what that means!)

Mr. and Mrs. Smith's right was granted by deed and is a legal right.

Clara's right is not a legal right. (Note that this certainly does not mean it is illegal! It is nothing of the sort! It is Equitable, as we shall see in a moment.)

Clara's right was granted (to her predecessor, for £1, in 1879 - the year her house was built) by the writing of a letter: so, due to its informality, this right is not legal (i.e. not recognised by common law) - it is only Equitable.

But it is a right over *land*: and as such it can last longer than a purely personal right arising under the Law of Contract, which normally ends when the person who has the right dies. A right over land "runs with the land" - i.e. it goes with the land. In other words, this right of way (even though it was only made




*See page 107 for detailed diagram.*

by an informal contract - agreeing a right of way for £1 - written in a letter) can continue to go with the land "Brownacre" for ever, regardless of how many times that property or "Tiny Nook" changes hands, as long as the requirements of Equity (which we are about to look at) are complied with.

- - - - -

Common law states that the only way for a person to make a grant of an easement is by deed, and so it does not recognise Clara's right; but "Equity looks to the intent rather than to the form" - and the *intention* to create an easement was there, so Equity recognises it as long as there was (a) something in writing *(in this case, the letter)* and (b) consideration *(i.e. something given in return for the right - in this example it was £1 which was paid).*

At first there is no apparent practical difference between Fred and Florrie's legal easement and Clara's Equitable easement: both Clara and the Smiths have a right of way. The difference arises when Alan's property changes hands.

Barney buys Alan's property, and for some reason or other does not find out about these rights of way until afterwards. He says he wants to stop them.

Fred and Florrie Smith have a legal right: good against the whole world including Barney. Barney will find he cannot stop the Smiths: nor can he stop anyone who acquires "Magpie Cottage" after the Smiths: in fact if he tries to do so they can sue him for damages and/or an injunction.

This is true even if there was no way that Barney could have found out about their right - as in the case of *Wyld v. Silver (1963)* in which a builder found that there was a legal right for the parishioners to hold a fair once a year on the land upon which he was hoping to build: and he was bound by the legal right even though the fair had not actually been held since 1875 and there was no practical way that he could have known about it.

Clara has an Equitable right, good against everybody except our friend the B.F.P. without notice.

Does Barney qualify for the title of B.F.P. without notice?

(a) He must be *bona fide* - i.e. in good faith - not buying Alan's property as a result of some wicked scheme or ulterior motive. "He who seeks Equity must do Equity".

(b) He must be a *purchaser for value*. A "purchaser" includes someone acquiring the property in exchange for another one, or as a payment of a debt owed to him; but does not include someone receiving a gift. The value need not be full market value, as long as it was real: e.g. in *Midland Bank Trust Co. Ltd. v. Green (1981 - see page 111 for details)* the House of Lords held that a sale of a property worth £40,000 for £500 (which was genuinely handed over) was a real sale; on the other hand a "sale" where the money is not handed over is a "gift disguised as a sale" - not a real sale but a sham sale. The House of Lords is the highest Court in the land, and its precedents bind all other Courts. (The student who is not familiar with the doctrine of binding precedent and the hierarchy of Courts will find an explanation on page 83 . *(Have a glance at it now, if you've never heard of it!)*

(c) He must be getting the *legal* estate - either the fee simple absolute in possession or the term of years absolute. (Details of these estates appear in Chapters 12 and 40 but we saw an outline of them on pages 10-11.)

(d) He must be *without notice* (of Clara's right):-

he has ACTUAL NOTICE if he knew of it,

he has CONSTRUCTIVE NOTICE if he *ought* to have known,

he has IMPUTED NOTICE if his solicitor or agent knew or should have known.

(An example of "ought to have known" is where a purchaser fails to make enquiries which a normal prudent purchaser would make, as in *Jones v. Smith (1841)* - not to be confused with *Smith v. Jones (1954)* which was a case on a "mere equity", namely a right, for

the sake of fairness, to have a mistake in a tenancy agreement rectified.)

If he has neither actual, constructive, nor imputed notice of Clara's right, Barney is "without notice".

If Barney qualifies on all the above four points (a) - (d), he is a B.F.P. without notice, and Clara cannot enforce her right against him: she must stop using the path. If there is any point on which Barney does not qualify, Clara can continue to use the path. The case of *Pilcher v. Rawlins (1871)* makes this clear.

Equity is trying to be as fair as possible here, when it says that if Barney in good faith bought the legal estate, for value, in circumstances where he neither knew nor should have known of the Equitable easement, it is not fair that Barney should be subjected to it - but in any other case it *is* fair that he should be subjected to it.

If Barney is a B.F.P. without notice, not only is Clara's right void against *him*, but when Barney sells his property to Ivor who *did* know about Clara's right, he too can stop Clara. Though Ivor is not a B.F.P. without notice, he is successor to a B.F.P. without notice and so the Equitable easement is dead and it does not resurrect. *Wilkes v. Spooner (1911).*

This example will be continued on page 105.

The above provisions do not apply only to rights of way: they apply to easements and profits à prendre (see Chapter 28) and various other types of right.

"Tiny Nook" (the land over which the path runs in the above example) is unregistered land: on registered land the provisions are different and we shall see them in Chapter 10.

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Finally in this chapter, students reading for a *law* degree are reminded that this outline is not intended to be sufficient for them - that's why there is no mention of the case of *Hunt v. Luck (1901)* (which says that the fact that a tenant is in occupation of a

property gives a purchaser of that property notice - either actual, constructive or imputed - of the tenant's rights, but does not give the purchaser notice of the landlord's rights) and many other cases. Any person in occupation (e.g. a tenant, mother-in-law, lodger, wife, mistress, boy-friend) should be asked what rights they have over the property - and we shall see more on this in the Chapter on Matrimonial Homes, Chapter 23.

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## SUMMARY

In this chapter we have seen:-

1. legal rights are enforceable against everyone;
2. Equitable rights are enforceable against everyone except a bona fide purchaser for value of a legal estate without notice;
3. there are three kinds of notice:- {actual, constructive, imputed.

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TEST QUESTION on Chapter 7:-

An Equitable easement was granted to X across A's land in 1920. It is now used by Z who bought X's property in 1982.

A sold his land in 1950 to B who knew of the easement; and in 1984 the land passed to D.

Explain (with reasons) whether D can stop Z from using the easement, in each of the following cases:-

a) When D bought the land he did not know of the right because there was no copy of the document creating it with the deeds and no-one told him of it;

b) When D inherited the land from B he did not know of the right because there was no copy with the deeds and no-one told him of it;

c) When D bought the land Z told him of the right, but D is a bit deaf and did not hear what Z said;

d) the land was bought by C (a bona fide purchaser who did not know of the right) in 1975, but C sold it to D who knew of the right before he bought the land.

# CHAPTER 8

# SEISIN, DEEDS, PRECEDENTS, WILLS AND TRUSTS

*OUTLINE OF CHAPTER:-*

*A: Note on Seisin*
*B: Note on Deeds*
*C: Note on Precedent*
*D: Note on Wills*
*E: Note on Trusts*

This chapter is a collection of five miscellaneous subjects which the student of Real Property Law needs to know of. Let us look at them now, before returning to our main theme in the next chapter.

## A: NOTE ON SEISIN

Seisin is the protected possession of the freeholder in possession.

The law is much more complicated on Realty than on Personalty.

With Pure Personalty (chattels) there are the two basic concepts of Ownership and Possession, and both of them are comparatively straightforward. Look at this book. Either it is yours or it is not - and if it is yours it is absolutely yours. If I borrow (or steal) it, you still have ownership, but I, temporarily, have possession.

With Realty, on the other hand, no-one has absolute ownership (a holding from the monarch is the nearest anyone comes to that) but many people may own estates in one piece of land and be mutually affected by each others' rights and duties.

Even today, despite great simplifications in the 1925 legislation, Realty is by no means as straightforward as Personalty; and in feudal times (before feudal incidents and services ceased to be of importance) ownership of estates in Realty could become very complicated indeed.

We have seen on page 63 a piece of land which was limited (i.e. granted) to George for life, then to Gigi and the heirs of her body (fee tail) and then shall return to the Grantor and his heirs (fee simple). In other words, three separate freehold estates, three separate legal estates (prior to the 1925 changes) in the one piece of land. - That is half the story: the other half is that the Grantor did not hold directly from the King. The Grantor was in fact Frank whom we saw on page 35, so George, Gigi and Frank held as Frank had up to then held:-

from the heirs of Donald
who held from the heirs of Cedric
who held from the heirs of Ben
who held from the heirs of Sir Alain
who held from the King.

So we see (1) George (2) Gigi (3) the Grantor, and the heirs of (4) Donald (5) Cedric (6) Ben and (7) Sir Alain, all having a certain ownership. They all owned freehold estates in the one piece of land, and all of them were able to say, "I have definite rights and duties in respect of this land at this moment" - but only one of them (George) is in occupation. In fact, we have this:-

| | TENURE | NAME OF HOLDER | AREA HELD | ESTATE |
|---|---|---|---|---|
| | | The King | all England | supreme overlord |
| subinfeudated | knight service: (40 knights) | Sir Alain | half a county | fee simple |
| | knight service: (15 knights) | Ben | 5,000 acres | fee simple |
| | socage: (mason) | Cedric | 30 acres | fee simple |
| | socage: (mason) | Donald | 30 acres | fee simple |
| became freehold | socage: (service commuted to a £3 payment per year) | George | 25* acres of Settled Land | life estate |
| | | Gigi | | fee tail |
| | | Grantor (Frank: or his heir) | | fee simple (reversion) |

* Originally 30 acres, but George sold 5 acres to Gerry (builder of "Magpie Cottage") about 1883 - see pages 36, 65, 150 and 238.

Such complications led the mediaeval courts to protect not ownership but the possession of whatever free man was in possession. This is seisin: seisin is

*the protected possession of the freeholder in possession.*

Always there was somebody seised: common law abhorred an "abeyance of seisin" and would not allow it to arise.

We saw in Chapter 2 that Real Property is so called because the mediaeval royal courts would restore the res - the property itself. The person seised was the person (the only person) able to claim this right.

If George has let the property to Harold, Harold is not seised, for he is only a leaseholder. George remains seised as the freeholder in possession. (George is receiving the rent, which counts as equivalent to being in occupation, so George is legally regarded as being "in possession".)

On the sale of freehold land it is quite normal even today for the Deed of Conveyance (by which the sale of the legal estate takes place) to contain an introduction, saying: "The Vendors are seised of the property for an estate in fee simple..." - that is to say, the persons selling are freeholders and they have this protected possession, and they have it for the length of time known as a fee simple.

## B: Note on Deeds

The deeds of a piece of land are the pieces of paper - or sometimes parchment - showing (among many other things) who is the owner of the legal estate.

In mediaeval times, if Alan wanted to sell his land to Barney he dug a spadeful of earth or cut a twig on the property, and handed it to Barney symbolic of the whole land with some such words as: "Let Barney and his heirs enter into this land with God's blessing on them", said in the presence of witnesses. This was known as a feoffment with livery of seisin; it remained legal until 1925, although from 1677 onwards the Statute of Frauds required that there must additionally be some writing (formal or informal) as evidence of the transaction.

Since 1925 a deed has been essential for the sale of a legal estate in land.

A deed consists of writing (or typing etc.) which is

***signed, sealed and delivered*** - i.e. it bears not only a signature but also a seal, which was formerly made of sealing wax but is today usually a red paper wafer (about the size of 1p as shown in the diagram, and available in packets of 100 from law stationers). "Delivery" (formerly the handing over of a twig etc. as mentioned above) now takes the form of placing the first finger of the right hand on the seal and saying in the presence of a witness, "I deliver this my act and deed".

Instead of describing the deed as *signed, sealed and delivered* it can be described as *executed*; the meaning is the same.

In the days when most people could not write their names, the seal - the blob of sealing wax into which the person would press his personal brass seal or gold signet ring, leaving a permanent impression of the pattern - was an important means of identification. (No two people had the same design or pattern on their seals.) Today the seal serves no useful purpose - but without a seal, the document is not a deed, and will not (between living persons) grant a legal right in land - though it may well grant an Equitable right, since the *intention* to make the grant is there.

The position after a death is different, for historical reasons. A Will is not a deed, and has no seal.

The man who puts a letter into an envelope, and licks the flap and sticks it down, saying, "It's sealed," is using the word "sealed" in a different sense. For that letter to be *legally* sealed (making it a "document under seal" and thus a deed) he must go and find sealing wax and his signet ring, or a paper wafer seal.

And, as we have seen above, "delivery" does not mean something that the postman does!

- - - - -

There are many types of deed. Some which the student is likely to come across include:-

| | |
|---|---|
| Deed of Conveyance | (for sale of unregistered freehold land) |
| Deed of Assignment | (for sale of unregistered leasehold land) |
| Deed of Transfer | (for sale of all registered land - see page 15) |
| Deed of Lease | (for creating new Leases) |
| Deed of Legal Charge | (a mortgage: see page 525) |
| Deed of Gift | |
| Deed of Grant of Easement | (of way, drainage, etc.) |
| Deed of Settlement | (for creating Settled Land) |
| Vesting Deed | (on Settled Land - page 242) |

Deed of Appointment of New Trustees ..... etc.

A contract is not a deed unless it has a seal.

The word "document" has a wider meaning than "deed". It includes deeds, wills, and all other types of writing, formal and informal, giving rise to legal or Equitable rights. It includes for instance the letter held by Clara in our example on page 73.

## C: Note on Precedent

The doctrine of binding precedent is that once a decision on a point of law has been given by a Court, a Judge in a later case in which the same point comes up is not allowed to make any decision in the later case which would contradict the decision made in the earlier case. The decision made in the preceding case *must* be followed. It is not merely good advice: it is binding, as law, just as much as if it were laid down in an Act of Parliament.

But a higher Court could overrule it.

Example:- The High Court decided in *Baron Bernstein of Leigh v. Skyviews and General, Ltd. (1978 - see page 22)* that an aeroplane flying round over a man's property a few hundred feet up (photographing the property) is not a Trespass. The actual point of law laid down in this case is that an owner's rights in the

air-space above his land are restricted to such height as is necessary for the ordinary use and enjoyment of the land and structures upon it, and above that height he has no greater rights than any other member of the public.

So if a farmer finds that the members of a local gliding club are going round and round - to his intense irritation - a few hundred feet above his land, on frequent occasions, and he claims damages and/or an injunction in the County Court: he will find that he will lose his case, because the Judge is bound to follow the decision (i.e. the precedent) laid down in the previous case.

But if the glider-pilots sometimes drop cigarette-ends onto the land and have set the farmer's hayrick on fire, that's *different* from what happened in the previous case, and the farmer would probably have a good case because of the pilots' Negligence.

And as this particular precedent is a High Court case, the Court of Appeal or the House of Lords could overrule this decision in a later case. The "hierarchy" of the Courts is as follows:-

House of Lords precedents are binding on all other Courts.. The House of Lords is not absolutely bound by its own precedents, but in general is unlikely to go against them - though it probably *would* (for example) go against some outdated Victorian precedent of the type that seemed good for the likes of Oliver Twist but is totally out of keeping with modern times.

Court of Appeal decisions are binding on the Court of Appeal itself, and on all the Courts below it.

High Court decisions are binding on the Courts below it but are not completely binding on the High Court itself. (It is possible for a High Court Judge not to know that another High Court Judge has dealt with the same point of law in an earlier case: for instance a barrister pleading the case may fail to discover that a precedent case exists.) Similarly on the criminal side the Crown Court is bound by the House of Lords and the Court of Appeal, just as the High Court is.

County Court (and on criminal side, Magistrates' Court) decisions are not binding precedents. These Courts are of course bound by the decisions of all the Courts above them.

The Judge's words giving the decision on the point of law arising in the case are known as the *ratio decidendi*: this is the binding precedent. Other things which the Judge says - e.g. the comment by the Judge in the *Bernstein* case that if there had been harassment of the landowner by the photographer the decision could have been different - are called *obiter dicta* (i.e. things said by the way) and are not binding, though they may be good advice.

## D: Note on Wills

Wills, unlike deeds, do not need a seal. The essential requirement of a will (by 1837 Wills Act, as amended by 1982 Administration of Justice Act) is that it must be signed by the testator (the person making the will) in the presence of two other persons who must add their signatures as witnesses.

The witnesses are not allowed to receive any benefit under the will. Contrast them with the executors (the persons appointed in the will to deal with it after the testator's death) who *can* benefit from the will.

Let us learn the vocabulary:-

| | |
|---|---|
| testator (testatrix if female) | one who makes a Will. |
| intestate (used as noun or adjective) | died without leaving a Will. |
| the deceased | the person who has died. |
| executor (executrix if female) | the person appointed by the Will to carry out the testator's wishes after his death. |
| Administrator (or administratrix if female) | person (usually next-of-kin) who deals with the intestate's property after his death. |
| Personal Representatives | executors and administrators. |

| | |
|---|---|
| Probate | the document issued by the Probate Registry when it is satisfied that the Will is genuine. This is the document which authorises the executors to deal with the property. |
| Letters of Administration | the document issued by the Probate Registry which authorises the administrators to deal with the intestate's property. |
| legacy | a gift of money. |
| codicil | a document (signed and witnessed like a Will) making a minor change to a Will - e.g. altering a legacy from £500 to £800. |
| beneficiaries (Beneficiaries must not sign the Will as witnesses. If they do, they lose all rights of receiving the benefit.) | persons who benefit from the Will. (Until they actually receive the property their interest is Equitable: the legal owners are the executors who normally are trustees for the beneficiaries.) |
| Death Certificate | a certificate issued by the local Registrar of Births Marriages and Deaths to show the date and place of death, the cause of death, etc. It counts as legal proof, in years to come, that the person has died. |

The will takes effect the moment the testator dies. At any moment before that, the testator can revoke the will by burning it, or tearing it up, or getting married, or making a new will. (Writing "revoked" across it is NOT sufficient to revoke it.)

A gift to a husband or wife in a will does not apply

if they become divorced before the testator's death. In *re Sinclair (1985)* this gave rise to a problem. The facts of this case were that the testator died in 1983, leaving a will dated 1958 in which he gave his property to his wife if she survived him by over a month, but if she died before him or within one month after him his property should go to the Imperial Cancer Research Fund. The gift to the wife lapsed because they were divorced - but as the wife had not actually died, the Imperial Cancer Research Fund was not entitled either! So the property went to the testator's other relatives, as if he had died intestate.

A will may be on any substance (unlike a deed which must be on paper or parchment) - in *Hodson v. Barnes (1926)* a will written on an eggshell only failed because no witnesses had signed it: the Court held that the eggshell will - made by a Manchester Ship Canal Pilot - was *not* the will of a "seaman at sea" which can be made without witnesses. (Wills of "soldiers on actual military service" can also be made without witnesses.)

A person may leave property to whoever he likes, except that if a person dies (testate or intestate) leaving a widow, widower, children etc., not adequately provided for, such persons may claim "reasonable provision" under the 1975 Inheritance (Provision for Family and Dependants) Act. The "etc." (above) can include step-children, and in *Malone v. Harrison (1979)* it was held to include the deceased's part-time mistress. (She got £19,000.)

We shall see the rules for the division of property on intestacy on page 139. If it were not for the 1975 Act, step-children and mistresses would receive nothing if the deceased died intestate. Similarly if a man makes a will "cutting his wife off with a shilling" (i.e. 5p) she can claim reasonable provision under the 1975 Act if she was financially dependent on her husband - but not if she was financially totally independent of him. In *Jelley v. Iliffe (1981)* it was held that a widower, who had lived with his brother-in-law's widow, could make such a claim against her property on these grounds, after her death.

The document whereby the executor or administrator passes land on to a beneficiary is known as an ASSENT. It is usually under hand, not under seal (i.e. it is not a deed: it is signed, not signed-sealed-and-delivered). If the land is settled land it is passed on to the next tenant-for-life (see pages 238-240) by a VESTING ASSENT.

Wills of deceased persons are kept by the Probate Registry (unless the person died before 1837, in which case the will may be at the Public Record Office or various other places) but there is no generally adopted system of registration or storage for wills of people who are still alive. The result sometimes is that when a person dies, no-one knows if he left a will or not, or (if he did) where it is. Wills may be discovered months or even years after the testator's death, with embarrassing results - money and other property which has been handed over to the wrong beneficiary has to be given back, and it is no excuse that the person required to give it back has spent it.

But if because of such a situation an innocent purchaser has bought the deceased's property from a vendor who we now find had no right to sell it, s.37 of the 1925 Administration of Estates Act says that the purchaser can keep it. The rightful beneficiary would have a claim against whoever had received the purchase money.

There is much more to Wills and Intestacy than appears in this outline: for further details see Parry and Clark's "The Law of Succession" (487 pages!).

## E: Note on Trusts

All benefits under a Trust are Equitable.

There are three types of Trusts:-

(1) Trusts of a Settlement (Settled Land)
(2) Trusts for Sale
(3) Bare Trusts.

Let us remind ourselves of the examples we have already seen of all three of them:-

(1) TRUSTS OF A SETTLEMENT. In our examination of Overreaching (page 63) we saw an example, settled land, in which George the tenant for life could sell, but the money went to a couple of trustees who ensured that the benefit of it went to George for only his life, and then went to Gigi and so on. These benefits were the Trusts of the Settlement.

(2) TRUST FOR SALE. This, which I regard as the most important of the three types of Trust, will be dealt with in Chapters 21 and 22, but we saw an outline of it on page 12. Originally a method of investment, it is now used daily in connection with wills, intestacy, co-ownership, etc. Trustees hold (and normally eventually sell) the land, and hold the proceeds for the benefit of the beneficiaries.

A major procedural difference between (1) and (2) is that on (1) the tenant for life sells, though the trustees receive the money, whereas on (2) the trustees both sell and receive the money.

On both (1) and (2) since 1925, the number of trustees must normally be not more than four; and it must be at least two (except that a Trust Corporation, such as a Bank, can act alone) for any sale of the property. The purchaser's solicitor should insist on this, because if the purchaser of any settled or trust-for-sale land pays the purchase-money to a single trustee (other than a Trust Corporation) the purchaser is not safeguarded. In other words, if the single trustee runs off and disappears with the purchase-money the defrauded beneficiaries can make the purchaser compensate them in full for their loss. If the money was paid to two or more trustees, who have run off, the purchaser is safeguarded and the beneficiaries' remedy is to find the trustees and sue them.

This at-least-two-trustees rule does not apply to a Trust for Sale arising under a will or intestacy in which there happens to be only one Personal Representative: that one is permitted to act as trustee on his own. The rule also does not apply to Bare Trusts.

(3) BARE TRUSTS. These have a long history: in the small print on page 55 we saw Sir Anthony transferring his property to Bruce to hold for the benefit of Simon, as Sir Anthony departed to the Crusades. In larger print, on page 70 we saw a grant

to Tom and Dick
in trust for Ben.

These are bare trusts, involving neither a settlement nor a trust for sale. This last example could equally well have been

to Tom
in trust for Ben,

as the requirement of at least two trustees does not apply to a bare trust: but there can be inconvenience if a sole trustee suddenly dies.

All the above examples are EXPRESS TRUSTS, but sometimes trusts are implied, or resulting, or constructive. (Some books lump these three together and call them all constructive. Terminology varies.)

If a person has entered into a contract to sell his property to a purchaser, but has not yet signed sealed and delivered a Deed of Conveyance (a frequent occurrence, because - as we shall see in Chapter 37 - there is often about a month between the contract and the Conveyance) the vendor (seller) is regarded as holding the property on IMPLIED TRUST for the purchaser and must maintain it and take care of it accordingly.

If Fred Smith and his brother Bill bought a piece of land, providing the money half each; and in the deeds the property was put into Bill's name alone (possibly because Fred didn't want Florrie to know he'd spent his savings!) the result of this is a trust - a RESULTING TRUST. Bill is sole owner of the legal fee simple, but on trust for Bill and Fred as joint co-owners of the Equitable (beneficial) fee simple.

(As all co-ownership is subject to a statutory trust for sale as we noted on page 13, this example is a resulting trust for sale, not a resulting bare trust, and so a second trustee ought to be appointed.

*Bull v. Bull (1955)* is a case where this situation arose. If Bill sells the land, the purchaser's solicitor should insist on two trustees if he knows of Fred's interest - but things can go wrong, because there is no possible way that the purchaser's solicitor can know of Fred's interest unless someone happens to tell him!)

If a trustee uses his position to get trust property transferred to himself for his own benefit (a breach of trust) he may possibly succeed in removing the property from the trust, but he is still regarded as holding it on a CONSTRUCTIVE TRUST for the benefit of the beneficiaries. (Constructive trusts usually arise, it would seem, where there are overtones - or at least a hint - of dishonesty or sharp practice.)

Though Equitable interests - unlike legal rights - do not need to be made by deed, they do need to have something in writing. But this requirement as to writing does not apply to resulting and constructive trusts, and because of this we shall meet them again in the chapter on Matrimonial Homes, Chapter 23.

Sometimes an express trust is granted

> to Tom and Dick
> in trust for those of my children who in my trustees' opinion have the greatest need of the money, in such proportions as my trustees think fit.

This is a DISCRETIONARY TRUST, because who gets the money has been left to the trustees' discretion. This particular one is a discretionary bare trust, but a discretionary trust for sale is more common:-

> to Tom and Dick
> on trust to sell
> (with power to postpone sale)
> and to pay the money to those of my children who in my trustees' opinion have the greatest need...

\- - - - -

Separately from all the above classifications, we

have trusts which are not for specific beneficiaries. Such trusts may benefit the general public, or a fluctuating body of persons - e.g. a trust to use the property as a Cricket Club, or as a Nonconformist Chapel, or as a Public School - or it may be for non-human benefit, e.g. to care for my cats after my death. The trustees have the legal estate and are in breach of trust if they do not do as they promised.

- - - - -

Trustees may be appointed by deed or will, or by the Court. From time to time new trustees are required (as old ones die or retire) and sometimes the Trust Deed will nominate a person who shall have the power to appoint new trustees. If there is no such nomination, the trustees themselves can appoint new trustees, as long as the total number of trustees does not go above four. If all the trustees are dead, the Personal Representatives of the last one can appoint new ones, under s.36 of the 1925 Trustee Act. In case of difficulty, the High Court (or County Court on small trusts) can appoint new trustees, under s.41 of the same Act.

The trustees are likely to be solicitors, or accountants, or relatives - or any upright persons.

As long as the appointment of the new trustee(s) is by deed, and not merely by writing, s.40 of the 1925 Trustee Act provides that the trust property shall then automatically be vested in (i.e. granted to) these trustees without any further deed being necessary.

The 1925 Trustee Act also provided a list (now greatly extended by the 1961 Trustee Investments Act) of "authorised investments" in which trustees may invest trust money. If an authorised investment drops in value, it is the beneficiaries' misfortune: the trustees are not blamed. But if the trustees invest in unauthorised investments: if a profit is made it will go to the beneficiaries, but if a loss is made the trustees must repay the loss out of their own pockets.

## SUMMARY

In this chapter we have seen:-

A: Seisin: the protected possession of the freeholder in possession.

B: Deeds: must be under seal. Legal estates (and other legal rights such as legal easements) are created by deed. If an informal (i.e. unsealed) document is used, only an Equitable interest is created.

C: Precedents: *ratio decidendi* is binding; *obiter dicta* are persuasive advice. There is a hierarchy of Courts.

D: Wills: not under seal but must have two witnesses.

E: Trusts: see Question 1 below.

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## TEST QUESTIONS on Chapter 8:-

1. Give a definition or an example of each of the following eight:-
   (1) Trusts of a Settlement
   (2) Trust for Sale
   (3) Bare Trust
   (4) Express Trust
   (5) Discretionary Trust
   (6) Implied Trust
   (7) Constructive Trust
   (8) Resulting Trust.

2. Fred Smith's Uncle Adam is landlord of a house in Hillingdon which he lets to Fred's brother Bill on a monthly tenancy. Adam is going to make a will leaving this house to his trustees Fred and Florrie Smith for the benefit of Bill for his life and then for Jenny (Fred and Florrie's daughter).

   Explain who has the seisin of the house (a) before Adam dies, and (b) after.

3. List the chief differences between a deed and a will.

4. "Precedent makes the law certain: without it we would be at the mercy of every Judge's personal opinions." Discuss this statement.

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Section C (Chapters 9 - 10)

Changes in 1925

# CHAPTER 9

# THE 1925 LEGISLATION

*OUTLINE OF CHAPTER:-*

*A: WHY was the 1925 legislation enacted?*
*1. Assimilation of realty and personalty*
*2. Simplification of Conveyancing*
*3. Abolition of anachronisms*
*B: WHICH Acts are comprised in the legislation?*
*C: WHAT did the 1925 legislation do?*
*D: WHEN did the 1925 legislation come into effect?*
*E: HOW did the legislation simplify Conveyancing?*
*1. Reduction of legal estates to two, and legal interests to five*
*2. Extension of overreaching*
*3. Extension of registration*
*F: Amendments to the 1925 legislation, since 1925.*

## A: WHY WAS THE 1925 LEGISLATION ENACTED?

The 1925 legislation had three main objects:-

1. to make the law of Real Property similar to the law of Personal Property as far as conveniently possible
2. to simplify Conveyancing (i.e. the transfer of land from one person to another)
3. to abolish matters which had outlived their usefulness.

Let us look at each of these in turn:-

### 1. ASSIMILATION OF REALTY AND PERSONALTY

The numerous differences in the laws of Realty and Personalty had long been inconvenient - particularly because leasehold land is Personalty. The 1925 legislation brought the two systems much closer

together, especially with regard to inheritance on intestacy.

*Example:-* If X (a widower) died before 1926, intestate, and left six children, his Personalty was divided equally between the six, but his Realty went to his *eldest son*. Since the 1925 legislation both Personalty and Realty are divided the same way - i.e. equally between the six.

(Inheritance on intestacy was the only important social and ecenomic reform made by the 1925 legislation - the only reform through which after 1925 the final benefit went to a different destination. The rest of the 1925 reforms were not intended to give the benefit to some different person, but to provide simpler and better procedures for giving the benefits to the persons who were entitled anyway.)

## 2. SIMPLIFICATION OF CONVEYANCING

Until 1925, as we have seen, a piece of land could be of freehold, leasehold or copyhold tenure, and even if it were freehold it was by no means certain that any one person owned the whole legal estate in the land: there could be a series of life estates, fees tail and fees simple of various kinds (we shall see some of the more important kinds in Chapters 11-14) and they could all be legal - or conversely some might be legal and some Equitable. In our example "to George for life, then Gigi in tail, then back to the Grantor in fee simple", no-one owned the entire legal estate (i.e. the period of time from that day to the end of the world) and we saw on page 65 that originally if Gigi were not of full age the land could not be sold at all. (Full age used to be 21: but today it is 18, by the 1969 Family Law Reform Act.)

(We shall see in Chapter 19 a means whereby from 1883 onwards George could sell the fee simple - which was not his - and the rights of Gigi and so on were protected by Overreaching: but the fact remains that until the 1925 legislation there were three important separate legal estates in that piece of land.)

One of the great improvements brought about by the 1925 legislation is that since 1925 there is *always* some person or body (e.g. a group of trustees) owning the *whole* legal estate - the whole period from now to when the fee simple ends. This person is called the *"estate owner"*. He has the whole *legal* fee simple.

Glance again at the example set out in two columns on page 67, in which George has the whole legal fee simple, but the Grantor has the Equitable fee simple and George has only an Equitable life interest.

- - - - -

A person buying land wants to be sure of two things. First he wishes to be sure that he will receive a legal estate. The above provisions have greatly simplified this. Secondly however he wishes to be sure that he will receive that legal estate free from any unexpected incumbrances. Incumbrances include such things as rights of third parties (e.g. rights of way, rights to run drains under the land, shooting rights etc.) and covenants that the land shall not be used for certain purposes. It is still common for land to be subject to such matters today, but the task of finding out what incumbrances a purchaser will be bound by has been made much easier by the 1925 legislation. Overreaching and Registration (see below) are made use of in this connection.

### 3. ABOLITION OF ANACHRONISMS

Copyhold tenure, and the 1535 Statute of Uses, are two examples of matters which by the twentieth century had become both (a) useless and (b) a nuisance. These, and numerous other matters of which the same could be said, were abolished by the 1925 legislation.

## B: WHICH STATUTES MAKE UP THIS LEGISLATION?

"The 1925 legislation" means a series of seven Statutes, one of which was passed in 1922, and the other six in 1925.

The legislation was originally prepared as one large

Act, the 1922 Law of Property Act, which in theory was intended to come into effect on 1st. January 1925. Before that date problems became apparent, and most of this Act was repealed before the day it was due to come into force, and was replaced with six Acts. A few fragments of the 1922 Act were not repealed (though their introduction was postponed for a year, until 1st. January 1926) and "the 1925 legislation" therefore means:-

| | *Name* | *Abbreviation* |
|---|---|---|
| 1) | the 1925 Law of Property Act ..... | LPA |
| 2) | the 1925 Settled Land Act ..... | SLA |
| 3) | the 1925 Land Registration Act ..... | LRA |
| 4) | the 1925 Land Charges Act ..... | LCA |
| 5) | the 1925 Administration of Estates Act .. | AEA |
| 6) | the 1925 Trustee Act ..... | TA |
| 7) | the unrepealed fragments of the 1922 Law of Property Act ..... | 1922 LPA |

and, less important, the unrepealed fragments of another Act, the 1924 Law of Property (Amendment) Act which suffered the same fate as the 1922 LPA. ..... LP(A)A

## C: WHAT DID THE 1925 LEGISLATION DO?

1925 LPA. This - the longest of the seven Acts - made many changes, the most fundamental being the reduction of the number of legal estates to two - see page 99. Another major change made by this Act was the creation of statutory trusts for sale - see page 260.

1925 SLA. This improves the machinery for dealing with Settled Land - see page 240.

1925 LRA and LCA. The LRA is concerned with the registration of land, while LCA is concerned with the registration of rights over unregistered land - see Chapter 10.

1925 AEA. This provided that if a person died intestate after 1925 leaving children, his freehold property should no longer pass to his eldest son but

should be divided equally between all his children, as personal property already was - see page 95. It also made many other changes in connection with this - see page 139.

1925 TA. This governs trustees' activities in connection with the above ... etc. - see page 92.

1922 LPA. One of the unrepealed fragments of this Statute abolished copyhold tenure - see pages 38-39.

## D: WHEN DID THE 1925 LEGISLATION TAKE EFFECT?

1st. January, 1926.

To be exact, it was the midnight moment when 31st. December 1925 gave way to 1st. January 1926. This is why it is correct, as well as convenient, to use the phrases "before 1926" and "after 1925" to signify the old and new positions. Note however that the 1925 legislation - though far-reaching - did not replace the old system with a new one: it pruned and streamlined the old one into a much-simplified and modernised shape, but it is still the old system, designed (so far as it was ever designed at all) for an agricultural country with tenanted cottages under wealthy landowners. It was never meant for an industrialised money-based society with widespread owner-occupation, high-rise buildings, elevated motorways and annual inflation. In view of this, it is quite surprising that it works as well as it does.

## E: HOW DID 1925 SIMPLIFY CONVEYANCING?

Three major ways in which the 1925 legislation simplified Conveyancing involved Equity, and to this extent this chapter is a continuation of Chapter 6. We saw in that chapter that the three ways were:-

1. Reduction of legal estates to two, and legal interests to five,
2. Extension of Overreaching (applicable to various Equitable rights, e.g. life interests)
3. Extension of Registration (applicable to various legal as well as Equitable rights).

We must now look further at these three. (There were certain other ways of simplifying Conveyancing - e.g. the abolition of copyhold - which did not involve Equity and will not be examined further in this chapter but are referred to under heading C, above.)

## 1. REDUCTION OF LEGAL ESTATES TO TWO AND LEGAL INTERESTS TO FIVE.

Before the 1925 legislation many varieties of legal estates could exist. We have seen their division into three main types - fee simple, fee tail and life estate - and in Chapters 12-14 we shall see how each of these types sub-divided into various categories. The 1925 LPA reduced these to two.

### (a) The two legal Estates

S.1 of LPA enacted that there should henceforth exist, at common law, only one freehold estate

THE FEE SIMPLE ABSOLUTE IN POSSESSION

and one leasehold estate

THE TERM OF YEARS ABSOLUTE.

All other estates became, as from 1st. January 1926, Equitable interests. (And there will therefore be trustees to protect the Equitable owners' rights.)

The meaning of "fee simple absolute in possession" will appear in some detail in Chapter 12. It is enough at this moment to remember that "fee simple absolute in possession" is the normal present-day estate in respect of a freehold house (it is the estate Fred and Florrie Smith own in respect of "Magpie Cottage") - and "term of years absolute" (dealt with in Chapter 40) is the equivalent estate in respect of a leasehold property.

### (b) The five legal Interests

S.1 of LPA further enacted that only five categories of interests over land should henceforth be capable of existing as legal interests, these being:-

(1) EASEMENT, RIGHT or PRIVILEGE (see Chapter 27) for a period equivalent to a fee simple absolute in possession or a term of years absolute. (This also includes profits à prendre - see Chapter 28.)

(2) RENTCHARGE in possession (see Chapter 26) either perpetual or for a term of years absolute.

(3) CHARGE BY WAY OF LEGAL MORTGAGE (see Chapter 39).

(4) TITHE RENTCHARGE and any other similar charge on land, *not* created by a deed or document. (No practical examples appear to exist today, though Parliament could create one - e.g. as a new kind of tax - if it wanted to. Tithe rentcharge was superseded in 1936 by tithe redemption annuity - see Chapter 26 - and this in turn was abolished in 1977.)

(Therefore the words "tithe rentcharge" were repealed from the 1925 LPA in 1977, but the words "and any other similar charge" (etc.) were left in; and so, in the above paragraph, I have left the words "tithe rentcharge" in - because otherwise the student would not know what sort of thing the "similar charge" was similar to!)

(5) RIGHTS OF ENTRY (e.g. the rights of a landlord to enter tenanted property in certain circumstances, such as non-payment of the rent - see Chapter 40).

*(These five legal interests are sometimes remembered as METRE - Mortgages, Easements, Tithes, Rentcharges and Entry - but now that tithe has gone and we are left with only four which actually exist, the student may prefer to remember the mere four as MERE.)*

Equity recognises all these as well: so the above five interests can be legal or Equitable, but all other interests in land (e.g. annuities charged on the land) can only be Equitable.

(Annuities charged on the land are very rare today but were useful in Victorian times when there were no Old Age Pensions. An annuity might have been arranged like this: Vendor sold land to Purchaser at less than its market value, with a condition attached to it that the Vendor should receive a certain sum per year for

the rest of his life. If Vendor died the next year, the land had cost the Purchaser very little. But if the Vendor lived to be 100, the Purchaser had made a bad bargain!)

Note:- there are legal estates and legal interests, but all Equitable rights are now referred to as Equitable interests. There is no such thing (since 1925) as an Equitable estate.

## 2. EXTENSION OF OVERREACHING

Equitable interests can only exist behind a Trust, the legal estate being held by the trustees (except in the case of Settled Land, where the legal estate is held by the tenant-for-life - i.e. George in our now-familiar example on page 67 - and see also page 89) who can sell the land.

Many sorts of Equitable interest are overreached - i.e. transferred (on a sale of the property) from the land to the proceeds of sale. We are already familiar with this concept, having learnt it on pages 63-67. *(Look at it again if you've forgotten about it!)*

Overreaching is a useful device, and the number of situations to which it applies was increased by the 1925 legislation. Today it applies to settled land, intestacy, joint ownership (we shall see it applying to Fred and Florrie Smith as the joint owners of the fee simple of "Magpie Cottage") and various other situations.

## 3. EXTENSION OF REGISTRATION

This is such a major topic that it must have a chapter to itself. See Chapter 10 (page 105).

# F: AMENDMENTS TO THE 1925 LEGISLATION

1925 LPA has been amended in various mostly-minor ways by a number of statutes, including:-

1926 Law of Property (Amendment) Act - see page 143

1929 Law of Property (Amendment) Act

1932 Law of Property (Entailed Interests) Act
1964 Law of Property (Joint Tenants) Act - see page 283
1969 LPA - see page 459.

1925 SLA has received no major amendments.

1925 LRA has been amended and supplemented by:-

Land Registration Rules (1925-1983)
1936 LRA
1966 LRA
1971 Land Registration and Land Charges Act, Part I
1977 Administration of Justice Act
1980 Housing Act - see page 546.

1925 LCA is actually no longer with us. It was amended by the 1967 Matrimonial Homes Act and by Part II of the 1971 Land Registration and Land Charges Act, and then the provisions as to Land Charges in all three of these enactments were consolidated into a new Act, the 1972 LCA, which was passed at the time that the Land Charges Registry was being computerised. There are also Land Charges Rules (1974). - References later in this book to "registration under LCA" may refer to either 1925 LCA or 1972 LCA, depending on whether the particular registration happened to be before or after the passing of the 1972 Act.

1925 AEA is amended and supplemented by:-

1952 Intestates' Estates Act
Probate Rules (1954 plus later amendments)
1969 Family Law Reform Act - see page 95
1971 AEA
1975 Inheritance (Provision for Family and Dependants) Act - see page 87 .

1925 TA is amended by:-

1958 Variation of Trusts Act
1961 Trustee Investments Act - see page 92.

Separately from all these, there have been, since 1925, whole series of Rent Acts and Landlord and Tenant Acts, Housing Acts, Town and Country Planning Acts, Public Health Acts etc. Important current ones include

1927 and 1954 Landlord and Tenant Acts
1936 and 1961 Public Health Acts

1957 1961 1964 1969 1974 and 1980 Housing Acts
1971 Town and Country Planning Act
1977 Rent Act

At this stage it is enough if the student knows that these Statutes exist, and knows where to find them in the Library.

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## SUMMARY

In this chapter we have seen:-

Three reasons for the 1925 legislation:
1. assimilation of realty and personalty,
2. simplification of conveyancing,
3. abolition of anachronisms.

Seven Statutes making up the 1925 legislation:
LPA SLA LRA LCA AEA TA and fragments of 1922 LPA.

Three ways conveyancing was simplified:
1. reduction of legal estates and interests,
2. extension of overreaching,
3. extension of registration.

Two legal estates: fee simple absolute in possession,
term of years absolute.

Five legal interests:
1. easements etc. 2. rentscharge
3. charges by way of legal mortgage,
4. tithes etc. 5. rights of entry.

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TEST QUESTIONS on Chapter 8:-

1. Mervyn died intestate before 1926 leaving a leasehold house and a freehold stable with some horses in it. He left five children: Meg (aged 39) Mary (37) Mike (30) Maude (28) and Mark (26).

(a) Who would have inherited (i) the house (ii) the horses and (iii) the stable?

(b) Who would have inherited them if Mervyn had died after 1925?

2. Describe the 2 legal estates and 5 legal interests, showing how the system today differs from that before 1926, and showing the reasons for the changes.

# CHAPTER 10

# 1925 - EXTENSION OF REGISTRATION

*OUTLINE OF CHAPTER:-*

*A: Registration of Incumbrances over Unregistered Land*
*B: Registration of Land*
*C: Registration of Incumbrances over Registered Land*
*D: More on Registration - etc.*

## A: REGISTRATION OF INCUMBRANCES OVER UNREGISTERED LAND

Look again at the picture on page 74 - or at the one on page 107 which you probably recognise as the same diagram with a few extra details filled in. We have so far considered the right of way of Fred & Florrie Smith (legal - by deed) and Clara (Equitable - by letter) over the path X-Y on Alan's property. See pages 73-77.

We saw that legal easements hold good against anyone; and so Barney who bought Alan's property "Tiny Nook" (unregistered land) over which the path runs, is bound by Fred and Florrie's legal easement whether he knew of it when he bought "Tiny Nook" or not. Normally he would know of it because a copy of the Deed of Grant of the easement would be with the deeds of "Tiny Nook", although the original Deed of Grant will not be there because it will be with the deeds of "Magpie Cottage"; but if the copy has gone astray (or was never made) and so Barney does not know of it, he is still bound by it.

Clara's right over the same path is only Equitable: so if Barney did not know of it, and had no reason to know, he is a B.F.P. without notice and can stop it.

- - - - -

We now consider Clara's neighbour David. He, like Clara, has an Equitable right, granted by letter. But the great difference is that Clara's right was

granted in 1879, whereas David's was granted in 1979 - *i.e. after 1925.*

For Equitable easements created after 1925 we have to ask a different question: not "Was there Notice?" but "Was there registration in the Land Charges Registry as required by the LCA?"

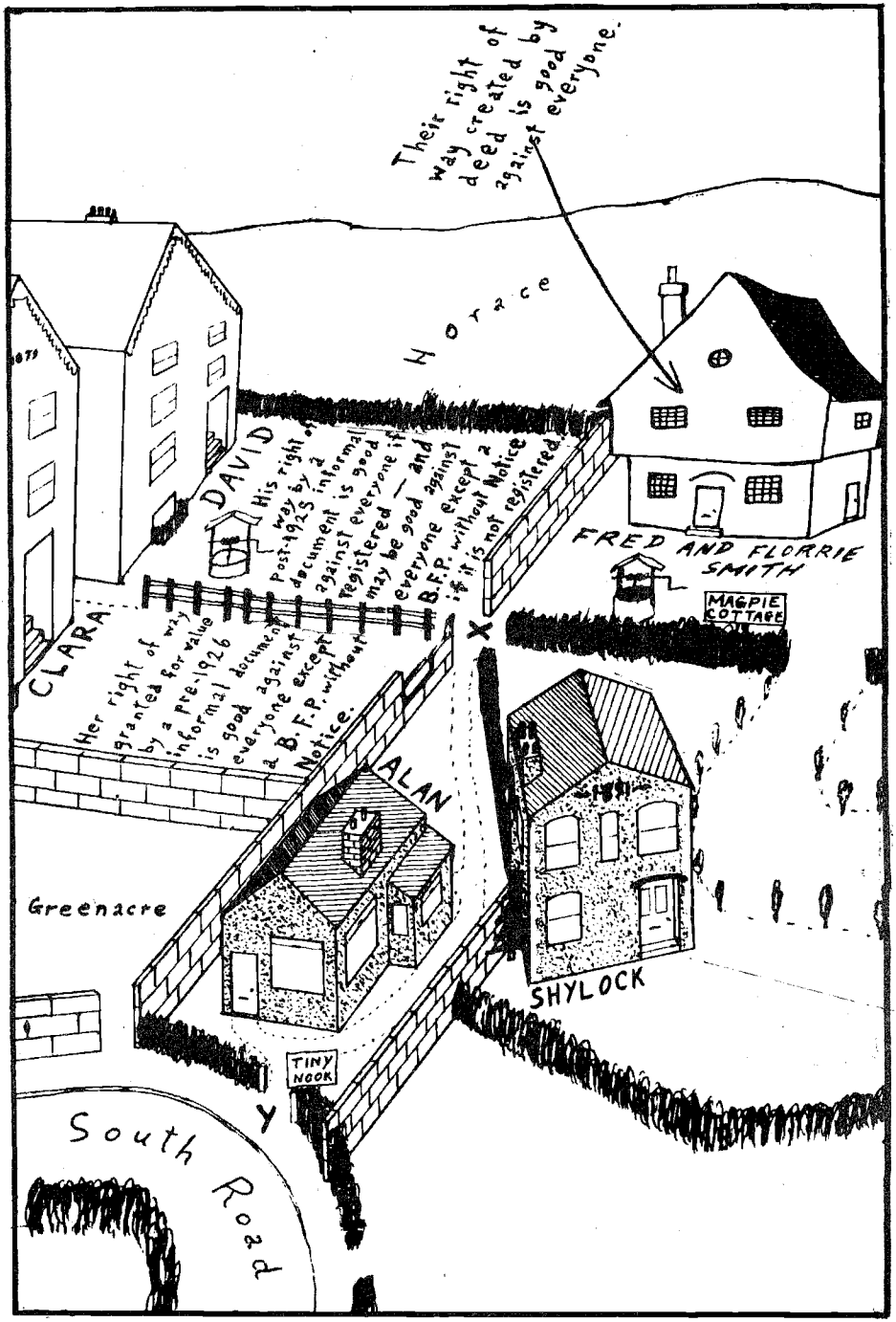
The 1925 legislation required that many incumbrances, including restrictive covenants and Equitable mortgages etc. and all Equitable easements created on or after 1st. January 1926, should be registered in a central Register. So David's Equitable easement should have been registered, by David.

Clara's right will not be registered, because no provision was made in 1925 for registration of already-existing easements. (The practical problems would have been too difficult. How could you have expected every 90 year old widow to hear about the new law and to realise that she might need to register some right which her late husband had quite informally bought more than half a century earlier? It's just not on!) So already-existing easements and covenants etc. were left on the old system, and are still on it today. But new ones created after 1925 need to be registered.

If David's Equitable easement is registered, Barney is treated as having Actual Notice of it: so David can enforce it against Barney - even if Barney did not look in the Register and did not know of the right. Barney is not a B.F.P. without notice if the right is registered.

If David's Equitable easement is not registered, Barney is treated as having no notice of it: so David cannot enforce it but must stop using it - this is so, even if in fact Barney *did* know about it! (This seems remarkably inequitable, but *see next paragraph!*) Barney is allowed to stop the right even if he knew of it before he bought the land, and David has no remedy against Barney. That is what the LCA says.

This became what I will call the "traditional" view. No-one really queried it much from 1926 until the case



of *E. R. Ives Investment Ltd. v. High (1967).* But one of the exciting things about English Law is that doctrines which everyone has accepted for years can be upset by judicial decision without the slightest warning. In *E. R. Ives Investment Ltd. v. High*, Lord Denning in the Court of Appeal interpreted the wording of the LPA and LCA on registration of Equitable easements as meaning that the Equitable easements which are registrable are *those which before 1926 would have been legal but after 1925 are Equitable.*

Thus an easement (or a profit à prendre) granted by deed for life would be registrable, because a life interest is something which before 1926 could be legal but after 1925 must be Equitable; but David's right of way in our example is not registrable, says Lord Denning, as this is an *informal* grant (in fee simple, but *without a deed*) - which is something the common law would not have recognised even before 1926.

*If* this is so, it would seem that the old rule of Notice would still apply between Barney and David, just as it does between Barney and Clara.

The facts of *E. R. Ives Investment Ltd. v. High* (not to be confused with *High Trees* - see page 428 - which is another of Lord Denning's far-reaching judgments) were as follows:-

Mr. High's neighbour Mr. A, erecting a block of flats on unregistered land in Norwich, allowed the foundations to encroach, by mistake, about a foot onto Mr. High's land. It was agreed orally (and later confirmed by letters) that the foundations could remain and Mr. High could have a right of way over A's yard at the rear of the flats. In due course A sold the block of flats including the yard, to B. Later, relying on the agreement he had made with A, Mr. High built a garage, which his car could only reach by crossing the yard. B knew of this: indeed he came and admired the garage. Then when the flats were 13 years old, B sold the block of flats, including the yard, to E. R. Ives Investment Ltd.

E. R. Ives Investment Ltd. were fully aware of Mr.

High's regular crossing of the land, but said he had no right of way against *them* because his enjoyment of the way was neither legal (not being made by deed, and not having been used long enough for prescription - i.e. a right because of twenty years or more's use - see page 401) nor Equitable (not being registered). They said he had nothing more than a licence (i.e. a permission) which they could revoke (i.e. cancel) whenever they liked.

I am going to summarise the judgments of all the three Appeal Court Judges in this case, with the warning that they include several points which we have not yet covered and so if the student reads on to the end of Chapter 32 and then re-reads this page, some of the details will then become clearer. But this will not stop us from understanding the main themes now. All three Judges decided the case in Mr. High's favour, but they did so for differing reasons.

Lord Denning declared that a person should not have the benefit if he will not bear the burden. (This is a doctrine we shall see on page 463, in *Halsall v. Brizell (1957).*) In Mr. High's case this means that the neighbour should not have the benefit of leaving his foundations encroaching onto Mr. High's land if he will not accept the burden of allowing Mr. High to cross the yard.

Next, Lord Denning spoke of the acquiescence: the previous owners of the block of flats had knowingly allowed Mr. High to expend money on building his garage, in reliance on the right of way.

But then Lord Denning stated that, on his reading of the 1925 legislation, the only Equitable easement which requires registration is an easement, Equitable after 1925, *which could have been legal before 1926:* he gave the example of a profit à prendre *for life*. Mr. High's right, being by letter, could not have been legal even before 1926, so Lord Denning was able to find that Mr. High had an Equitable easement which was *not* void for non-registration, and - as the purchasers were not without notice - Mr. High's right must stand as an enforceable Equitable easement.

Lord Denning does not specifically mention estoppel - but both the other Judges do. Estoppel is a rule of evidence by which, if a person says something to another (e.g. "You can cross my land,") and the other person does some act (such as spending money) relying on what was said, the party who said it is not allowed, after that, to give evidence saying that what was originally said is not true.

Lord Danckwerts spoke of "proprietary estoppel", under which he dealt with two of Lord Denning's points: (1) Mr. High expended money in building a garage which his car could only reach by crossing the yard, and the plaintiffs' predecessors acquiesced, so it would be inequitable to deprive Mr. High; and (2) the plaintiffs cannot have the benefit (of the foundations) without the burden (of Mr. High using the agreed right of way). He then made the point that *this* - the inability to have the benefit without the burden - is not registrable: so, as long as the foundations remain, Mr. High may continue to use the right of way.

Lord Winn judged Mr. High's right to be an Equitable easement, and did not contradict counsel's submission that it was made void by non-registration. But then he stated, "It is no anomaly that a person should have a legal answer to a claim and yet be estopped from asserting it", and (leaving open the question of whether a right arising through "mutual benefit and burden" or "acquiescence" should be registered) he decides in Mr. High's favour on the grounds of the plaintiffs being incapable, through estoppel, of denying the existence of the right.

So: Lord Denning says it is an Equitable easement and that Equitable easements of this nature do not need registration; Lord Danckwerts says the plaintiff cannot enjoy the benefit without the burden, whether there has been registration or not; and Lord Winn says the right is an Equitable easement, and it is void for non-registration but the plaintiffs cannot say so because they are estopped from saying so and non-registration makes no difference to the action of estoppel.

Does Lord Denning's pronouncement, that Equitable easements of this nature do not need registration, amount to a binding precedent? No: his words are counteracted by the other two Judges. Let us see their actual words:-

Lord Denning says it is not void for non-registration: "They do not need to be registered as land charges so as to bind successors, but take effect in Equity without registration".

Lord Winn takes the opposite view: "I accept counsel's submission that such easement was void against any subsequent purchaser for value, if unregistered, despite any notice which such purchaser might have had before purchasing". *(abbreviation of Lord Winn's words.)*

Lord Danckwerts leaves the point open: "The effect of the provisions of LCA is to make the defendant's right of way, so far as it ought to have been registered ... either void or unenforceable, and LPA prevents express notice being effective..." *(abbreviated again.)*

I regard Lord Denning's view as nearer to justice than the "traditional" view (though I feel he strained the meaning of the words of the 1925 statutes to get there) so I had hoped we might one day see it adopted generally.

In view of this, I find the 1981 House of Lords decision in *Midland Bank Trust Co. Ltd. v. Green* a disappointment. The case was not on the same point as *E. R. Ives Investment Ltd. v. High*, as it involved the non-registration of an Equitable "estate contract" instead of an Equitable easement - i.e. a class C(iv) instead of a class D(iii) registration, as we shall see on page 222 - but it shows the thinking of the House of Lords on registrable rights. The facts were:-

In 1961 Walter Green granted his son Geoffrey Green an option to purchase the freehold of a certain farm (unregistered land) which Walter owned in Lincolnshire. This option, for which Geoffrey paid Walter £1, granted Geoffrey the right to buy the farm for £22,500 whenever it suited Geoffrey to do so, within ten years.

The option should have been registered as an "estate contract" (i.e. a contract to sell a legal estate in the land) at the Land Charges Registry, but Geoffrey's solicitor omitted to register it. The combined effect

of s.199 of 1925 LPA and s.13 of 1925 LCA (now replaced by s.4 of 1972 LCA) is that unregistered estate contracts are void against any "purchaser for money or money's worth" of the land. I stress that it does *not* say "purchaser in good faith" or "purchaser without notice".

Six years later there was a family dispute, and Walter and his wife Evelyne wanted to stop Geoffrey from having the farm. So Walter sold the farm (then worth £40,000) to Evelyne for £500. She obtained a Bank overdraft and handed over the money. She then informed Geoffrey that his option was void as she was a purchaser for money. Geoffrey sued his mother in the High Court - and he lost, because she *was* a purchaser for money, though perhaps not bona fide, and she certainly knew of the option.

The case then went to the Court of Appeal, where the majority of the three Judges (Lord Denning being one) held that the High Court decision should be reversed. Lord Denning could not use the argument on registration of Equitable easements which he had used in *E. R. Ives Investment Ltd. v. High*, because in *Midland Bank Trust Co. Ltd. v. Green* the question is not about an Equitable easement but an estate contract, to which that argument is inapplicable. Even Lord Denning had to agree that the wording of the statutes requires estate contracts to be registered. By this time inflation etc. had pushed the value of the farm up to over £400,000 which Lord Denning described as "a prize worth a fight" - and he took the attitude that the sale of this land at a mere £500 was not a real sale at all but a gift disguised as a sale, and so Evelyne was not truly a purchaser for money, and so Geoffrey's option would hold good against her.

The losers appealed to the House of Lords. By this time Walter and Evelyne and Geoffrey were all dead, and

*OPTIONS and PRE-EMPTION*

An Option to Purchase granted to me is a right for me to buy the land if and when I want to. (The decision on when is up to me.)

A Right of Pre-emption (sometimes called Right of First Refusal) granted to me means that if the owner decides to sell, he will offer the property to me before offering it to anyone else. (But the decision as to when is up to the owner: I have no say in it.)

An Option requires Registration. A Right of Pre-emption does not.

so the appeal was by the Midland Bank Trust Co. Ltd. and Geoffrey's widow Margaret (as the Executors of Geoffrey's will) against Geoffrey's brother Robert (as the Executor of Evelyne's will).

The House of Lords firmly put the decision back to what the High Court had said: Evelyne *was* a purchaser for money, and so Geoffrey's claim must fail because of its non-registration. Lord Wilberforce gave the judgment and the other four Law Lords concurred with what he said. He stated:- "The Act *(LCA)* is clear and definite ... any temptation to remould the Act to meet the facts of the present case, on the supposition that it is a hard one and justice requires it, is, for me at least, removed by the consideration that the Act itself provides a simple and effective protection for persons in Geoffrey's position - viz. - by registration".

In non-judicial language, that means (more or less) that if you had a registrable right and didn't register it in the Land Charges Registry (because you forgot, or didn't know there was a registration system) you lose your right and it's your own silly fault.

I suspect that if a case like *E. R. Ives Investment Ltd. v. High* were to come before the House of Lords now, this would be their Lordships' attitude to the non-registration - though Mr. High would still probably have won on the basis of the other points in his case.

(Students who look up Law Reports may know there is also a case of *Midland Bank Trust Co. Ltd. v. Hett Stubbs & Kemp (1979)* in which the solicitors who omitted to register Geoffrey's option were held liable for the tort of Negligence (even though the solicitor who actually handled the matter had died before 1979) - and there is a *Midland Bank Trust Co. Ltd. V. Green (No. 2) (1979)* in which the Executrix of Walter's will, Geoffrey's sister Mrs. Kemp*(!)* found herself in danger of being held personally liable for Walter's breach of contract against Geoffrey over the option, because she made an error in the legal procedure by which she could have avoided such liability; and a *Midland Bank Trust Co. Ltd. v. Green (No. 3) (1981)* upon the question of

whether a man can commit the tort of conspiracy with his wife. The Court's answer to that question was "Yes", and so the question which next arises is whether Walter actually *did* conspire with Evelyne in this instance! This may be settled out of Court, or could provide material for yet another case. With such material, Charles Dickens could have written another "Bleak House"!)

Remember that both *E. R. Ives Investment Ltd. v. High* and *Midland Bank Trust Co. Ltd. v. Green* were concerned with unregistered land.

## B: Registration of Land

We had a brief look at this subject on page 15. It could be argued that it belongs to Chapter 15 and is out of place here as it has little to do with Equity: but the reason for mentioning it here is to stress to the student the importance of not confusing registration of land with registration of rights (or incumbrances) over land.

We saw that the "registered land" scheme is the system whereby a purchaser receives a neat and tidy Title Certificate issued by H.M. Land Registry, instead of a bulky and old-fashioned set of title deeds, to prove his ownership of the *legal* estate (either fee simple absolute in possession or term of years absolute) in the land. The Title Certificate shows the whereabouts of the land, with a scale Plan; and who the freeholder (or leaseholder) is; and certain other information. Before 1926 the system was seldom used (except in London where it has been compulsory since 1897) but today it covers most major built-up parts of England and Wales.

A peculiar but important detail of the land registration system is that (by s.19 of 1925 LRA) the ownership of what is transferred does not legally pass to the purchaser until it has been registered. Thus, if the purchaser's solicitor does not register the purchase until a few days after it has taken place (which is normal, because he has to satisfy the Inland

Revenue with regard to Stamp Duty before he can register the change of ownership) the purchaser has paid for the house and moved in, but legally it still belongs to the vendor (who technically is trustee for the purchaser) until the registration is made.

We shall begin to look at the details of the registration system on page 167.

## C: Registration of Incumbrances over Registered Land

Everything that we have seen above on the B.F.P. without notice and on registration in the Land Charges Registry has been in respect of unregistered land. The Land Charges Registry is designed solely for the registration of incumbrances (such as Equitable easements) over *unregistered* land.

Equitable easements and many other rights (and most legal easements too) need to be noted on a Register also if they are over *registered* land, but in this case the Register is one which is not at the Land Charges Registry but is at the Land Registry.

This section really belongs to the chapter on Registration (Chapter 15) but is relevant here too, and is inserted here because of the importance of showing the contrast between the unregistered-land system of "legal and Equitable interests" and the registered-land system of "overriding and minor interests".

Let us therefore consider the same three examples of rights of way as we saw before - i.e. Fred and Florrie Smith with their right of way created over the garden path of Alan's property "Tiny Nook" by deed as a legal easement, Clara with a pre-1926 Equitable easement over the same path, and David with a post-1925 Equitable easement over the same path - but now let us suppose that "Tiny Nook" happens to be registered land.

Whether the rights granted are legal or Equitable, or before or after the 1925 legislation, does not matter. What matters is whether the particular right is an OVERRIDING INTEREST (in which case it is

enforceable against any purchaser of "Tiny Nook" even though the right is not protected by entry on the Register) or a MINOR INTEREST (in which case it is enforceable against a purchaser of "Tiny Nook" if the right is protected by entry on the Register at the Land Registry but not otherwise).

Note the Land Registry's terminology: a fee simple absolute in possession and a term of years absolute can be registered, but Minor Interests concerning the registered land are not actually "registered" but are "protected by entry on the Register". Equitable easements, estate contracts and such like are protected by the entry of a notice (given on the appropriate Land Registry printed form) but other matters can be protected by entry of a restriction, a caution or an inhibition - see page 603.

But although it does not matter whether the rights granted are legal or Equitable, nevertheless the system will be easier to follow if we consider Equitable easements (and similar Equitable rights) first, and then legal ones. There are problems: the matter is based on 1925 LRA which in places is muddled and not well drawn - it is by no means as clear as 1925 LPA.

(i) EQUITABLE EASEMENTS:- With regard to Equitable easements the wording of LRA is not clear, but the Land Registry takes it as meaning that all Equitable easements (whether created before or after the 1925 legislation) are required to be protected by entry of a notice on the Register, and do not hold good against a purchaser of the land otherwise.

Observe that pre-1926 Equitable easements *can* be protected by entry on the Register - contrast the unregistered-land system in which registration of pre-1926 Equitable easements is impossible.

So, in our example, both Clara with the pre-1926 Equitable easement and David with the later one must have their rights protected by entry on the Register, or else Barney the purchaser of "Tiny Nook" can stop them - whether he knew of them before he bought "Tiny Nook" or not. Compare this with the unregistered-land

system's "traditional view" (page 106) and contrast it with what Lord Denning said in *E. R. Ives Investment Ltd. v. High*.

There would appear to be common-sense in this: when a piece of land is registered for the first time, a pre-1926 Equitable easement which is known of should be protected by entry on the Register. If no-one realises that there is such an easement, the chances are that a bona fide purchaser of the land wouldn't have notice of it either, and so we (generally though not always) get the same result as we would have got on unregistered land. But the intention of the 1925 legislation was definitely to replace the uncertainties of the system of notice with the certainty of "If it's not registered it fails". This gives conveyancing efficiency - but sometimes does so at the expense of justice.

(ii) LEGAL EASEMENTS:- On legal easements, s.70 of LRA states that they are overriding interests (and thus are binding without being protected by entry on the Register) but this must be read subject to the proviso in s.19 of LRA, explained on page 114 above, that the thing transferred does not pass from the transferor to the transferee until it is put onto the Register. So a legal easement, made by deed but not entered on the Register, is *not* an overriding interest, because until it is protected by entry on the Register, it is not a legal easement at all! It lacks the necessary legal formality of being not just a sealed deed but a sealed deed-duly-entered-on-the-Register, and so common law cannot accept it, because of its informality. But "Equity looks to the intent rather than to the form" and both parties *intended* it to be an easement, so in all fairness it ought to be - and so Equity recognises it as an Equitable easement!

But we have already seen (page 116) that an Equitable easement will not hold good against a purchaser unless it is protected by entry on the Register!

So Fred and Florrie's easement, created by deed, is a legal easement good against the whole world if it is on the Register; but if it is not on the Register the

easement counts as an Equitable easement - and is therefore void against Barney for not being protected by entry on the Register, just as Clara's and David's Equitable easements on page 116 were void against Barney for not being protected by entry on the Register - even if Barney was fully aware of the position, at the time of his purchase.

On the other hand, s.19 of LRA does not catch legal easements which were made by deed before the land became registered land, nor does it catch legal easements which arise by implication without a deed (e.g. a right of "way of necessity", to reach land to which there is no other access - see page 394) nor does it apply to legal easements arising by prescription (for which there is no deed but there is twenty years or more of unhindered use - see page 401). All these legal easements, if not entered on the Register, are overriding interests and hold good against such persons as Barney - whether he knew of them or not. The legal easements caught by s.19 of LRA are only those *granted* since the land became registered land - not those legal easements arising without a grant, or granted before the land was registered.

The student will have noticed that the question of whether Barney is a B.F.P. without notice simply does not arise. Entry on the Register counts as notice, and non-entry counts as no-notice and so the purchaser takes free of it whether he knew of it or not.

The moral of course is to safeguard yourself on registered land by entering every right, new or old, legal or Equitable on the Register. And that is basically what the legislators intended.

## D: Still on Registration

The various rights we have seen in this book can be classified into half a dozen types. Let us list them first for unregistered land and then for registered land, and compare the two lists.

*The two lists are below the black band on pages 120 and 121. Lay a ruler across them and compare the two*

*lists item by item.*

Having examined these lists, we can see what the intention in the LRA is with regard to rights over registered land. It is apparent that the question of whether an Equitable easement (etc.) over registered land is binding against a purchaser of that land is meant to depend on whether that right was protected by an entry on the Register at the Land Registry - quite regardless of whether the purchaser knew of it. So we would expect the case-law on registered land to be at least as strict as the rule which *Midland Bank Trust Co. Ltd. v. Green* has given us for unregistered land. But in the High Court precedent of *Peffer v. Rigg (1977)* we find just the opposite.

The facts of *Peffer v. Rigg* were:-

Mr. Peffer and Mr. Rigg married two sisters - so both men had the same mother-in-law, Mrs. Bingle. Mr. Peffer and Mr. Rigg bought a house, which was converted into two flats, for Mrs. Bingle. She lived in one flat and a tenant was in the other.

The house was registered at the Land Registry in Mr. Rigg's name but he informally agreed that he held it on trust for himself and Mr. Peffer and that they would each contribute equally to the expenses.

Mr. and Mrs. Rigg separated - Mrs. Rigg went to live with her mother Mrs. Bingle in mother's flat.

Mr. Peffer became anxious as to whether his rights over the house were protected, and so a formal Trust Deed was drawn up between Mr. Peffer and Mr. Rigg - but was not entered in any way on the Register at the Land Registry.

Four years later, Mr. and Mrs. Rigg got divorced, and, as part of the financial arrangements of the divorce, Mr. Rigg purported to transfer the house to her for £1. Both of them knew that Mr. Rigg held the house on trust for himself and Mr. Peffer.

The question of whether £1 was a purely nominal consideration, in which case Mrs. Rigg would not count

as a real purchaser at all, was raised, but the Court gave no definite answer on this point.

But the Court held that Mrs. Rigg was bound by Mr. Peffer's interest, even though it was not on the Register, because she had notice of it and was therefore not bona fide - and in any event, even if she was not bound by the actual Trust Deed because it was not on the Register, she was still a trustee (by general Equitable principles - fairness) holding on behalf of herself and Mr. Peffer.

This decision has been much criticised but did not go to Appeal.

But contrast it with the words of Lord Wilberforce in the 1981 House of Lords case of *Williams & Glyn's Bank Ltd. v. Boland*: "The registered land system is

*(continued on page 121)*

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On unregistered land the rights we have seen can be classified into:-

(1) two legal estates (fee simple absolute in possession and term of years absolute - see page 99).

(2) legal mortgages (see Chapter 39)

(3) legal interests (i.e. legal easements etc.)

} Note: (2) and (3) together make up the "five legal interests" which we saw listed on pages 99-100).

(4) various Equitable interests (such as life interests and entailed interests, fees simple in remainder etc.) which can be overreached.

(5) various Equitable interests (such as estate contracts and Equitable easements etc.) which can be registered in the Land Charges Registry.

(6) a residue, consisting of Equitable interests covered by neither registration nor overreaching, to which the old doctrine of notice still applies: pre-1926 Equitable easements are an example of these.

designed to free the purchaser from the hazards of notice - real or constructive ... The only kind of notice recognised is by entry on the Register". (I do not set out the details of *Williams & Glyn's Bank Ltd. v. Boland* here, as it was to do with rights of persons in occupation, which are overriding interests binding without entry on the Register. We shall see it again on page 314.)

I like the decision in *Peffer v. Rigg*. I believe it is time that the law admitted that efforts to make the general public aware of the requirements of entering informal Equitable rights on the Register have been unsuccessful, and that if such a right is not entered, a purchaser with actual notice (or do I mean "any notice"? - Think about it!) should not be permitted to use the law as an "instrument of unconscionability" for

*(continued overleaf)*

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On registered land the rights we have seen can be classified into:-

(1) registered legal estates (fee simple absolute in possession and terms of *more than 21 years* - shorter ones are mostly overriding interests).

(2) registered charges (i.e. legal mortgages).

(3) overriding interests (e.g. legal easements by prescription - these hold good against a purchaser even though unregistered).

(4) minor interests (life interests etc.) which can be overreached.

(5) minor interests (estate contracts, Equitable easements etc.) which can be "protected by an entry on the Register" at the Land Registry.

*(6) There is no category (6) equivalent to the one opposite, because one of the basic ideas of the registration system is that (to help the purchaser) it makes entry on the Register the only form of notice it recognises.*

taking unfair advantage of the other chap's ignorance. The 1925 changes moved us from a system of notice (a system which was generally fair, but sometimes hard to work under, and a cause of delay) to the system of registration (easy to prove, certain, efficient, but not necessarily fair).

It's alright for commercial firms that have a legal adviser. But is it reasonable to expect Fred Smith to run to a solicitor every time he makes an agreement about land with his brother or his neighbour - or else be perhaps penalised because of a registration-system he has never even heard of? For centuries, Equity has enforced informal agreements when the intention is there but the form of the documentation is wrong: if in the registration requirements we have provided a hurdle preventing this, I think we are all the poorer for it. And yet, if we want to achieve the most efficient Conveyancing system, then the less off-register rights we have to check on, the better.

Today we have perhaps largely forgotten that up to 1925 a lot of delay and difficulty was caused by what the 1927 edition of Cheshire's "Modern Law of Real Property" (at p.93) called the *terrors* of constructive notice. I am thinking of such cases as *Hervey v. Smith (1856)* in which a house had 14 chimney-pots but only 12 fireplaces, and the Court held that this was enough to give the purchaser constructive notice of the fact that the adjoining house had an Equitable easement to use 2 chimneys. Applying the doctrine of constructive notice (i.e. "should have known") so strictly cannot fail to lead to delay while all sorts of unlikely possibilities are being checked.

(Mind you, it is still necessary today to look at the property and even count chimneys: if those chimneys had been used for over twenty years without permission, but the owner had made no complaint about it, there could be a legal easement by prescription. This is not shown on any Register nor in any deed or writing, and yet is enforceable against any purchaser - even one without notice - on both the unregistered-land and the registered-land systems. Over unregistered land it is

a legal easement good against the whole world; and over registered land it is both a legal easement and an overriding interest.)

There is a world of difference between the notice in *Hervey v. Smith* and that in *Peffer v. Rigg*; for in the former case the purchaser and/or his solicitor needed to be wide awake, while in the latter case Mr. Peffer's claim was obvious. If the entire registration system were to be given an overhaul (which it needs, in some respects) I should like to see a doctrine of notice drawing a line somewhere between the amounts of notice in these two cases. Possibly it could provide, in respect of incumbrances on both registered and unregistered land, that *either registration or proof that the purchaser had actual knowledge of the incumbrance prior to the purchase* should be counted as Actual Notice. Or possibly it should include a moderate (whatever that may mean!) doctrine of Constructive Notice. - But I shall say no more on this, because what I personally think the law *ought* to be is of no importance and is not the subject of this book. What matters is what the law *is* - just as (to take a parallel example) you may think that students' grants *ought* to be higher, but what immediately matters is the life-or-death question of how much your grant for this term actually *is*.

So, to sum up:-

(1) Lord Denning in the Court of Appeal allowed an unregistered Equitable easement over unregistered land to hold good, because the purchaser had notice of it, in *E. R. Ives Investment Ltd. v. High (1967)*.

(2) The House of Lords refused to do the same for another Equitable right, namely an unregistered estate contract, over unregistered land in *Midland Bank Trust Co. Ltd. v. Green (1981)*.

(3) The High Court allowed a third Equitable right, a trust, which had not been protected by entry on the Register, to hold good in respect of registered land, because there was notice, in *Peffer v. Rigg (1977)* - but this decision has been much criticised.

*(This is the stuff exam questions are made of!)*

The account we have just seen is not an exhaustive study of this subject. We have not looked at *Shiloh Spinners Ltd. v. Harding (1973)* which is a House of Lords case on unregistered land, in which tenants of a leasehold property (who had demolished the building, in breach of covenant!) claimed that an Equitable right of entry for their landlord to take the premises back was unenforceable because it was not registered at the Land Charges Registry - and Lord Wilberforce delivering the Lords' main speech held that the right was not void for non-registration, as this type of right is not on the list of registrable rights contained in LCA - and so the doctrine of Notice applied, and the tenants had actual notice of their landlord's right.

And we have not looked at *Poster v. Slough Estates Ltd. (1968)* (on a right of entry to remove a fixture on termination of a Lease) and various other cases.

But in a beginners' textbook such as this, I would rather quote three cases and be understood than quote twenty and leave the student permanently baffled. If you are at present temporarily baffled, read the chapter again: it becomes clearer on a second reading.

And watch the legal journals or "Estates Gazette" etc. for reports of further cases.

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## SUMMARY

In this chapter we have seen:-

A: Incumbrances over unregistered land
(and registration of them in Land Charges Registry)

B: Registration of land at the Land Registry

C: Incumbrances over registered land
(and the protection of them by putting an entry onto the Register at the Land Registry)

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## TEST QUESTIONS on Chapter 10:-

1(A) Fred Smith's neighbour Shylock claims that he has the right to use a drain which runs under the garden of "Magpie Cottage". ("Magpie Cottage" is unregistered land.) Can he use it if he has
(i) a deed of easement,
(ii) a letter giving permission, dated 1923,
(iii) a letter giving permission, dated 1943.
Give reasons for your answers.

(B) How would your answers differ if "Magpie Cottage" was registered land?

2. "You can have unregistered rights over unregistered land, and registered rights over unregistered land; and you can have unregistered rights called overriding interests over registered land, and registered rights over registered land."

Explain whether this statement is true and give examples of the different types of rights mentioned, and say in each case which Registry (if any) deals with them.

3. Is the system based on registration of incumbrances better than the system based on notice? Could the registration system be improved, and if so, in what ways? Who should it protect?

Section D (Chapters 11 - 14)

More about Freehold Estates

# CHAPTER 11

# THE CREATION OF FREEHOLD ESTATES

*OUTLINE OF CHAPTER:-*



## A: INTRODUCTION

The two questions to be considered in this chapter and the next three chapters are:-

1. How is a freehold estate created? and
2. What are its characteristics after it has been created?

A practical example in which both questions arise :- supposing John Jones' Aunt Agatha has a house which she wants to grant to John Jones for as long as he lives, and then to John's cousin Fred Smith, the two questions are:- (i) how does she do this, and (ii) what are the rights and duties of John and Fred respectively when she has done it - in particular what sort of provisions are there for ensuring that John will not sell it, or destroy it, or give it away in his will, depriving Fred?

*(We shall see in the chapter on Settlements that in fact there is a way that John can sell it and Fred's rights will be protected by Overreaching - but forget that for the time being: let us take it step by step or we shall get confused.)*

Let us see first how a freehold estate is created.

## B: Words of Limitation

A house is a physical thing, made of bricks and/or other materials; but an estate is an abstract thing ("a bundle of rights and duties for a time") - how is this created?

The answer is: by the use of particular words in a deed or other legal document such as a will. For example "to John Jones *and his heirs*" gives John Jones a fee simple.

Until the late nineteenth century, common law was very strict that in all deeds the correct wording must be used. For a fee simple, the use of the word "heirs" was essential. If this word was not used, then only a life estate was created, whatever the intention might have been. This was very narrowly interpreted: if the word "heir" was used - that is the wrong word, the right word is "heirs", so only a life estate was created. If the words "in fee simple" were used - that is not the word "heirs" so it created only a life estate, not a fee simple. It was as strict as that.

If the grant was made in a will the requirements were not so strict. There were two main reasons for this: (i) the grantor, being dead, could not be called on to correct any errors, and (ii) the law of wills has its origins largely in Equity, which was always more concerned with the intention than with the form.

Under heading C in this chapter, there is a table of the requirements as they were at different times. The law student needs to know these: they are still of importance today when old deeds are being looked at to "investigate a title" - i.e. to check that a purchaser will receive a legal estate and will receive it free from any unexpected incumbrances. But the student who is studying land law for some other professional qualification (e.g. Surveying) need only have a general understanding of these, plus a detailed knowledge of the present-day requirements, which are not difficult.

The present-day requirements are:-

for a FEE SIMPLE ..... no special words are needed;

for a FEE TAIL
*(now known as an "ENTAILED INTEREST")* ... words "heirs of his body" or "in tail";

for a LIFE ESTATE
*(now known as a "LIFE INTEREST")* ..... any words showing that a life interest is intended.

Thus a grant

"to John Jones for life", or
"to John Jones until he dies" } gives a life interest;

"to John Jones in tail", or
"to John Jones and the heirs of his body" } gives an entailed interest;

"to John Jones and his heirs",
"to John Jones in fee simple",
"to John Jones for ever",
"to John Jones and his descendants",
"to John Jones and his direct descendants",
"to John Jones", } gives a fee simple.

(This is assuming that the grantor has a fee simple, for *nemo dat quod non habet* - i.e. no-one can give what he has not got.)

Do not forget, however, that if the words were in a deed dated earlier than 1st. January 1926, such words as "to John Jones", or "to John Jones for ever", etc. only gave John Jones a life estate - and that made the land Settled Land.

For leaseholds (which are not the subject of this chapter) any words making the meaning clear can be used.

So the answer to the question which we raised on page 126, asking how Aunt Agatha could grant the property to John Jones for as long as he lives and then to Fred Smith, is that appropriate Words of Limitation must be used by Agatha, in a deed or a will. Since 1925, the words "to John Jones for life and then to Fred Smith" are sufficient.

## C: Table of Words of Limitation

Note: the necessary words ("words of limitation") for estates created *inter vivos* (i.e. between living persons) are shown on the left, and those by will (on death) on the right. In each case the words originally required by common law appear first, followed by the changes made by Statute in the nineteenth century and in 1925.

### (A) Words of Limitation for a fee simple

*Note: this is a quite ordinary situation. John Smith is transferring his house [selling, giving, leaving it by will, etc.] to John Jones. What words are or were necessary to grant John Jones the fee simple?*

**The words are/were:-**

| (1) - *inter vivos* | (2) - *by will* |
|---|---|
| *(a) at common law* | *(a) at common law* |
| "to John Jones *and his heirs*". | no special words as long as the intention was clear. |
| If the word "heirs" did not appear, John Jones only received a life estate, which reverted to John Smith - or his heirs - when John Jones died. | Thus "to John Jones in fee simple" or "to John Jones for ever" was sufficient, but "to John Jones" only gave a life estate. |
| If the property was being transferred to a corporation the rule was slightly different, as a corporation can live for ever. In the case of a corporation aggregate (e.g. a | |

| (1) - *inter vivos* | (2) - *by will* |
| --- | --- |
| limited company)<br>no special words<br>were needed; but in the case of a corporation sole (e.g. the Vicar) the words<br>"to the Vicar of... ...., *and his successors*" were required.<br>(Further explanation appears in the note on corporations at the end of this chapter.) | |
| *(b) changes by nineteenth century legislation*<br>1881 Conveyancing Act permitted the words *in fee simple* as alternative to *and his heirs*. | *(b) changes by nineteenth century legislation*<br>1837 Wills Act: fee simple now passes unless intention is shown for it not to pass.<br>Thus "to John Jones" since 1837 passes the fee simple. (This is the present law.) |
| *(c) changes by 1925 legislation*<br>No special words are now necessary.<br>Thus "to John Jones" now grants John Jones the fee simple (or the whole of whatever estate John Smith *[Vendor]* had if it was less than the fee simple). | *(c) changes by 1925 legislation*<br>No change. |

## (B) Words of Limitation for a fee tail

*Note: fee tail is not normally found today, except in connection with Settlements which we shall examine later.*

| (1) - *inter vivos* | (2) - *by will* |
|---|---|
| *(a) at common law* | *(a) at common law* |
| "to John Jones *and the heirs of his body*". | No special words were required as long as the intention was clear. |
| Essentials:- (i) the word "heirs"; (ii) words cutting the estate down to less than a fee simple (e.g. "of his body", "of his flesh", etc.) | Thus (for example) "to John Jones and his descendants" was sufficient. |
| "To John Jones and his descendants" lacked the word "heirs" so only gave John Jones a life estate. | |
| *(b) changes by nineteenth century legislation* | *(b) changes by nineteenth century legislation* |
| 1881 Conveyancing Act permitted the words *in tail* (note: not "in fee tail") as alternative to *and the heirs ... etc.* | No change. |
| *(c) changes by 1925 legislation* | *(c) changes by 1925 legislation* |
| No change. | Showing of intention is no longer sufficient: the formal words *in tail* or |
| Thus it is still | |

| (1) - *inter vivos* | (2) - *by will* |
| --- | --- |
| necessary today to use the formal words *in tail* or *and the heirs ... etc.* | *and the heirs ... etc.* must now be used.<br><br>This minimises the risk of creating one by mistake. |

Notes:-

(i) Fee tail, unlike fee simple, can be limited to one sex (e.g. "and the heirs male of his body" - tail male) and to children of one marriage (e.g. "and the heirs of his body begotten upon Mary" - tail special).

(ii) Since the 1925 legislation, which made all fee tail estates Equitable, their correct name has been Entailed Interests. It is incorrect to talk of a post-1925 fee tail, though for the sake of simplicity this book does so in several places.

## (C) Words of Limitation for a Life Estate

| (1) - *inter vivos* | (2) - *by will* |
| --- | --- |
| *(a) at common law* | *(a) at common law* |
| Any words were sufficient.<br><br>Life estates were created either<br>(i) intentionally, or<br>(ii) by any words which failed to create a fee tail or a fee simple. | Any words were sufficient.<br><br>A life estate was given unless the intention was shown of giving a fee tail or fee simple. |

| (1) - *inter vivos* | (2) - *by will* |
|---|---|
| *(b) changes by nineteenth century legislation* | *(b) changes by nineteenth century legislation* |
| **No change.** | **1837 Wills Act: any words showing intention of giving a life estate are sufficient.**<br><br>**A fee simple is given unless the intention is shown of doing otherwise. (This is the present law.)** |
| *(c) changes by 1925 legislation* | *(c) changes by 1925 legislation* |
| **Any words showing intention of giving life estate (now Equitable life interest) are sufficient.**<br><br>**A fee simple is given unless the intention is shown of doing otherwise.** | **No change.** |

**Note: since the 1925 legislation, which made all life estates Equitable, their correct name has been life interests.**

## D: A Trap for the Unwary

This is a trap which could affect both deeds and wills before 1926, and is known as "the rule in Shelley's Case" (1581).

"To John Jones for life, remainder to his heirs."

This appeared to give a life estate to John Jones, and then after his death a fee simple to his heirs.

But let us look carefully at the words of limitation: "to John Jones for life, remainder to his heirs".

The necessary wording for a fee simple is there, so John Jones got the fee simple - and could sell it if he wanted to.

This rule was abolished by the 1925 legislation, so in deeds and wills taking effect after 31st. December 1925 these words mean what they say: John Jones now only receives the (Equitable) life interest.

## E: Words of Limitation for Corporations

Corporations are bodies having legal rights and duties. They include limited companies (ranging in size from two members to thousands of members) nationalised industries, County Councils, nearly all Building Societies, etc.

Partnerships, trades unions and sports clubs are not corporations: they are unincorporated associations - and are not the subject of this section, as they cannot hold land, though their members or trustees can hold it on their behalf.

The corporations given as examples in the first paragraph of this section are all CORPORATIONS AGGREGATE - i.e. each of them has at least two members.

There are also one-man corporations: CORPORATIONS SOLE. Examples of these are the Monarch, the Bishop, the Vicar.

The Monarchy never dies - hence the traditional cry on the death of a King: "The King is dead; long live the King". "The King" (or "the Monarch") is a "legal person" which continues notwithstanding the death of the individual who until that moment embodied it. Thus in 1910: "The King *(Edward VII)* is dead; long live the King *(George V)*".

Similarly, land granted to "the Vicar" is normally intended to be held by whatever clergyman holds that position as the years pass. If Rev. Green is succeeded by Rev. Brown, lands of "the Vicar" (the corporation sole) are held by Rev. Brown, but lands of Rev. Green

(the private individual) remain in Rev. Green's hands.

As to words of limitation for corporations: the position is that with corporations aggregate, no words of limitation are needed. Thus "to Avon County Council" gives a fee simple. But with corporations sole, it is possible that (for example) a grant to "the Vicar" might be intended for the present Vicar as an individual - so these words at law gave only a life estate. To avoid this difficulty, common law came to require the words "to the Vicar *and his successors*" to make a valid grant of a fee simple to a corporation sole.

Since 1925 LPA, the words "and his successors" are no longer needed. A grant to "the Vicar" is recognised as being intended for the corporation sole (and not the individual) in fee simple. On the other hand, a grant to "Michael Green the Vicar" is recognised as being for the individual, in fee simple.

- - - - -

Now that we have seen how to create these different sorts of limitations - fee simple, fee tail, and life estate - we come to our second question: what are their characteristics?

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## SUMMARY

In this chapter we have seen:-

Words required today to create a life interest: any words as long as the intention is clear,

Words required today to create an entailed interest: either "in tail" or "... and the heirs of his body" (or heirs of his flesh, or heirs begotten of him) - any versions not containing the words "in tail" or "heirs ..." are not accepted,

Words required today to create a fee simple: no special words, as the grant is fee simple automatically if it is not for life, in tail or leasehold.

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TEST QUESTIONS on Chapter 11:-

1. What words are needed today to create a freehold legal estate?

2. What estate or interest would be created by a grant "to John Brown" if these words were contained in
   (a) a deed dated 1984?
   (b) a deed dated 1884?
   (c) a will proved in 1884?

3. What estate or interest would be granted today by a grant, contained in a deed or a will,
   (a) "to John Brown absolutely"?
   (b) "to John Brown on an entailed interest"?
   (c) "to the Prime Minister"?
   (d) "to Prime Minister Margaret Thatcher"?

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TEST QUESTIONS on Chapter 14:-

*(These questions belong to page 162.)*

1. A house is granted to Grandma for life and then to X.
a) Grandma loves privacy and therefore refuses to have workmen on the premises for any reason whatever;
b) She will not allow X onto the premises;
c) She proposes to remove the whole of the built-in gas-fired central heating system because she prefers a coal fire;
d) She has cut down an apple-tree for firewood;
e) She is threatening to sell the property.
She says, "I can do as I like with my own property".
Advise X as to his legal position.

2. Summarise from memory, in not more than two sides of A4 paper, what this volume is all about. (Check your answer from the book after you have written it.)

3. Would you regard fitted carpets as fixtures? Give reasons for your answer.

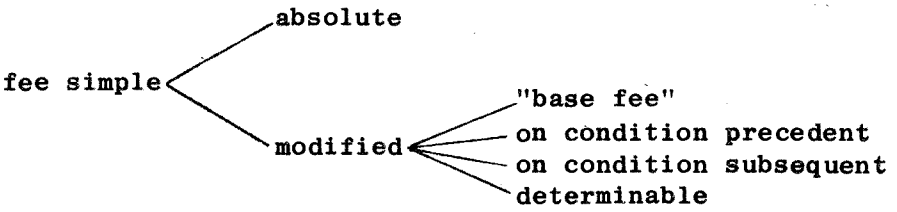
# CHAPTER 12

# CHARACTERISTICS OF THE FEE SIMPLE

*OUTLINE OF CHAPTER:-*

*A: Types of fee simple*
*B: The fee simple absolute*
*C: The legal estate of fee simple absolute in possession*
*D: The modified fee simple*

## A: TYPES OF FEE SIMPLE




## B: THE FEE SIMPLE ABSOLUTE

This estate is the nearest approach to absolute ownership which is possible with land in England and Wales. The ordinary person who says he owns his house almost always owns an estate in fee simple absolute.

He can sell it or give it away at any time - or keep it until he dies - or let it to a tenant - or leave it empty - or let it fall down - or improve it - raise money on it on mortgage - live in it - leave it to someone in his will - etc.

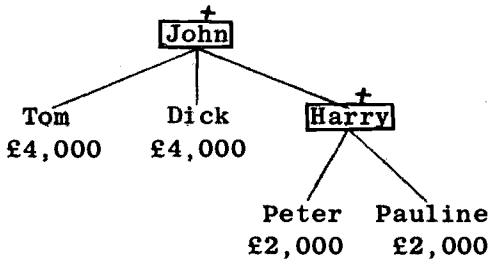
But if when he dies he has not sold it, nor left it to somebody by will, it passes to what this book will continue to call his "heirs" (though since the 1925 legislation "next of kin" has been the more usual term). Basically this meant before 1926 the eldest son, after 1925 the children equally; but the widow (or widower if the deceased landowner was a woman) also has rights. If there are no widow or children, other blood-relatives

have rights. The present-day list (i) - (x) below is worth learning.

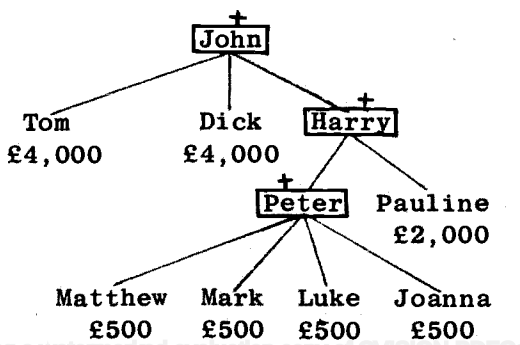
Before we look at the list we need to understand a phrase which occurs in it several times, namely, "on the statutory trusts". This phrase means that if someone who would have inherited died before the death of the owner, but left one or more children, the share which that person would have taken goes to his children - or to grandchildren if children too have died. (The children and grandchildren and generations following are sometimes known as "the issue".)

Two examples:-

(1) John Jones, a widower, had three children, Tom, Dick and Harry. Harry died before his father but left two children, Peter and Pauline. John Jones dies intestate (i.e. without leaving a will) but leaves £12,000. Tom would receive £4,000 and Dick £4,000; Harry's £4,000 would go to Peter and Pauline, £2,000 each.




(2) If Peter had also died, leaving four children, Matthew, Mark, Luke and Joanna, the position on John Jones' death would have been that Tom, Dick and Pauline would have received the same amounts as before, and Peter's £2,000 would then be divided between Matthew, Mark, Luke and Joanna, £500 each. (It is held in trust for them until they reach the age of 18.)



The present-day list of inheritors, applicable to both realty and personalty, is as follows (by A.E.A., as amended by 1952 Intestates' Estates Act and other subsequent enactments, statutory instruments etc.):-

(i) if the deceased leaves a widow (no children) she takes all: except that above £85,000 special rules apply. (For widow read widower throughout if deceased is female.)

(ii) if the deceased leaves a widow and one or more children, the widow is entitled to the first £40,000 and all the personal chattels (furniture, ornaments, car etc.) absolutely. She also receives a life interest in half of the rest of the property (i.e. half the "residue") but this goes to the children, equally if more than one, on her death. The other half of the residue goes at once to the children absolutely, in equal shares, on the statutory trusts. "Children" includes adopted ones, and (since 1969 Family Law Reform Act) illegitimate ones. But it excludes step-children (e.g. any children the widow has from her previous marriage - hers but not his). No-one receives property under an inheritance until reaching age 18.

The amount the widow receives under (i) or (ii) above is changed from time to time, to keep pace with inflation. The amounts quoted above are laid down in the Family Provision (Intestate Succession) Order 1981 statutory instrument (S.I. 1981 No. 255).

(iii) if no widow, but there are one or more children, the children take all, equally if more than one, on the statutory trusts.

(iv) if no children, but deceased leaves one or more parents, they take all. Note that if the deceased had a spouse (wife or husband) who died before the deceased, the spouse's relatives normally have no claim.

(v) if there is no-one in classes (i)-(iv) but deceased leaves one or more brothers/sisters, they take all, equally if more than one (but *not* if either they or the deceased are illegitimate) on the statutory trusts.

(vi) if no-one in classes (i)-(v), but deceased leaves

one or more half-brothers/half-sisters, (i.e. same father but different mother, or vice versa, within wedlock, as one parent was married twice) they take all, equally if more than one, on the statutory trusts.

(vii) if no-one in classes (i)-(vi), but deceased leaves one or more grandparents, they take all, equally if more than one.

(viii) if no-one in classes (i)-(vii), but deceased leaves one or more uncles/aunts, they take all, equally if more than one, on the statutory trusts (i.e. first cousins and their issue).

(ix) if no-one in classes (i)-(viii), but deceased leaves one or more half-uncles/half-aunts, they take all, equally if more than one, on the statutory trusts.

(x) if no-one in classes (i)-(ix), any relatives more distant have no claim: the property goes to the Crown as *bona vacantia* (vacant property).

If the deceased died intestate before 1926, the property passed according to the corresponding earlier rules - basically the same type of provisions except for the fundamental difference that for realty they were based on inheritance by the eldest male, instead of inheritance equally by all members of a class.

## C: The Legal Estate of Fee Simple Absolute in Possession

An estate or interest may be (i) in present possession, that is to say, the owner has the property - or receives the rent if it is let - now; or it may be (ii) future.

In our example on page 126, "to John Jones for life, and then to Fred Smith", John Jones' interest is in possession: he is in occupation of the property now. Fred's interest is future: though he has a definite interest in the property (a future fee simple) he has no right to possession until after John Jones' death.

LPA enacts that the only freehold estate which can

exist at law after 1925 is the fee simple absolute in possession. Thus Fred's fee simple is Equitable, and will not become legal until it falls into possession on John Jones' death.

It is most important to know the meaning of fee simple absolute in possession:-

FEE means inheritable - in contrast to an interest only lasting for life (and note that "fee" does *not* necessarily mean *paying* anything!)

SIMPLE means by heirs generally - the list on pages 139-140 - in contrast to an interest in tail which passes to direct descendants only;

ABSOLUTE means not modified - see below: page 142;

IN POSSESSION means acquiring the occupation (or the right to receive the rent, as in *District Bank Ltd. v. Webb (1958)*) immediately: not future.

This is the estate of the ordinary normal freehold householder.

The leasehold equivalent (the only legal leasehold estate) is the TERM OF YEARS ABSOLUTE. This book is not generally concerned with leasehold, but the meaning of "term of years" has been seen in Chapter 4 (see page 45) and "absolute" has the same meaning as in "fee simple absolute". It should be noted that the legal leasehold estate does not necessarily have to be in possession. Thus if John Brown leases his property to John Jones for 99 years to commence from 1st. January next year, that is a legal term of years absolute - but if John Brown sells his property in fee simple to John Jones with effect from 1st. January next year, this fee simple, not being in immediate possession, is only Equitable and cannot become legal until 1st. January.

Before we leave this section, I must stress one point:- the fact that we have dealt with the fee simple absolute in possession in a mere couple of pages does not mean it is unimportant. It is the estate you will come across in practice *every day*, whereas the Equitable interests, which are complicated and fill the next twenty pages (and give rise to the Settled Land rules which fill a further thirty pages in Chapters 19 and 20)

are met with only occasionally.

- - - - -

In everyday speech, to say an estate in land is owned by John Jones "and his heirs" or by John Jones "in fee simple" (or even just to say it is owned by John Jones) means it is owned on the provisions set out above - or before 1926 on the corresponding earlier provisions. It does not include the four types of modified fee simple - which are not commonly met with in practice, though we must briefly look at them now.

## D: The Modified Fee Simple

(i) The BASE FEE SIMPLE (sometimes shortened to "the base fee"): the meaning of this term will be found on page 151.

(ii) The FEE SIMPLE ON CONDITION PRECEDENT: is a fee simple which does not commence until a specified event (which may never happen) has happened: e.g. "to John Jones when he marries".

(iii) The FEE SIMPLE ON CONDITION SUBSEQUENT: is a fee simple which can be brought to an end if the specified event happens: e.g. "to John Jones - but if John Jones marries, it shall go to his cousin Fred Smith instead".

(iv) The DETERMINABLE FEE SIMPLE: is a fee simple which automatically ends if the specified event happens: e.g. "to John Jones until he marries and then to his cousin Fred Smith".

(iii) and (iv) above are very similar, but the wording of (iii) seems to imply the thought, "It's meant to be fee simple absolute, but (famous last words!) if he marries it shall stop"; whereas (iv) seems to imply the thought, "It's not absolute, it's only until he marries".

There is a practical difference: in the case of (iii), if John marries, his cousin has the right to claim the property but until he does so it continues to belong to John; but in the case of (iv), if John marries, his fee simple automatically ends and his

cousin's immediately begins.

One problem. In certain parts of the country (notably Manchester and Bristol) many freehold properties are subject to a yearly rentcharge *(see page 342)* and limitations are sometimes found to this effect: "to John Jones in fee simple but if he fails to pay the rentcharge the property shall revert to the grantor" (i.e. a fee simple on condition subsequent). Such grants were intended to be legal, but it was realised - too late - that by the 1925 legislation they became Equitable (as they were not fee simple *absolute*) and it was not at all clear who had the legal estate.

The 1926 Law of Property (Amendment) Act remedied this by saying that "a fee simple subject to a ... right of ... re-entry is for the purposes of this Act a fee simple absolute", but as the 1926 Act is drawn in wide terms it appears that it may make most - if not all - fees simple on condition subsequent into legal estates.

Except for this, all modified fees are Equitable.

The owner of a modified fee simple can generally use his property in any way that the owner of a fee simple absolute can, except that the owner of a modified fee simple cannot commit Equitable waste (i.e. wanton destruction - see page 158).

In certain circumstances a modified fee simple can enlarge into a fee simple absolute: e.g. "to John Jones when he marries" becomes a fee simple absolute in possession the moment his wedding takes place.

Fees simple (absolute or modified) *not* in possession are future interests and are explained in Chapter 16.

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And finally, note that we can have an Equitable fee simple absolute in possession as well as a legal fee simple absolute in possession. We saw an example of this on page 70, where we saw a grant

to Tom and Dick
in trust for Ben.

Tom and Dick have the legal fee simple absolute in

possession. Ben has the Equitable fee simple absolute in possession.

---

SUMMARY

In this chapter we have seen:-

the fee simple
the fee simple absolute (with details of who inherits)
the fee simple absolute in possession (the only legal freehold)

the modified fee simple (non-absolute)

(fees simple in remainder and reversion are on page 174.)

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TEST QUESTIONS on Chapter 12:-

1. It is enacted in s.1 of LPA that thenceforth there shall be only 2 legal estates and 5 legal interests; all other interests in land shall be Equitable.

(a) Describe the two legal estates,

(b) Describe the five legal interests,

(c) Name, in the spaces below, any TEN Equitable interests which we have seen so far in this book:-

| | |
|---|---|
| 1 ..... | 6 ..... |
| 2 ..... | 7 ..... |
| 3 ..... | 8 ..... |
| 4 ..... | 9 ..... |
| 5 ..... | 10 ..... |

2. Florrie Smith says she and her husband own "Magpie Cottage. Explain in detail what estate they have and what rights and duties this involves. On Fred's death the property goes to Florrie (see page 274) but on her death intestate it passes under the intestacy rules. Who will receive it? (Her relatives are listed on page 37.)

# CHAPTER 13

# CHARACTERISTICS OF THE FEE TAIL
*(post-1925, entailed interest)*

*OUTLINE OF CHAPTER:-*

*Introductory outline*
*Phase I - before 1285*
*Phase II - from 1285 to some date prior to 1472*
*Phase III - from some date before 1472, to 1833: Suffering a common Recovery*
*Phase IV - from 1540 to 1833: Levying a Fine*
*Phase V - from 1833 to today: the 1833 Fines and Recoveries Act*

## INTRODUCTORY OUTLINE

"To Horace and the heirs of his body" is a typical example of this type of grant.

To study the fee tail we need to start with the situation before the year 1285, and then see the changes made by the enactment de donis conditionalibus (i.e. "concerning conditional gifts") which forms part of the 1285 Statute of Westminster II.

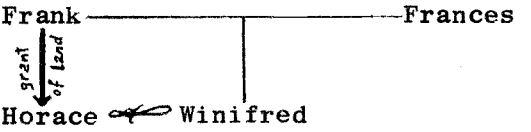
In case this seems irrelevant, it is worth making the point that the student is unlikely to see much point in the present-day arrangements for entailed interests unless he has seen the centuries-old battle which makes the background and created the problems which the present law is intended to remedy - and if he does not understand the present law on entailed interests he will be in difficulty with the chapter on Settlements, based largely on entailed interests - and if this happens he is unlikely to grasp clearly the difference between Settlements and Trusts for Sale - which will place him at a disadvantage in studying the Trust for Sale - which will result in difficulties with Co-ownership (and the problems on Matrimonial Homes arising therefrom) which is based on Trusts for Sale.

Before 1285, fee tail was unknown: the two freehold estates were the fee simple and the life estate. Consider Frank: a free man with a fee simple absolute in possession. We first saw him on page 35, holding 30 acres of land from the descendant of

Donald. The discerning reader may have noticed that the land in that example remained in the hands of Frank and his family for more than five centuries! Here is how it happened:-

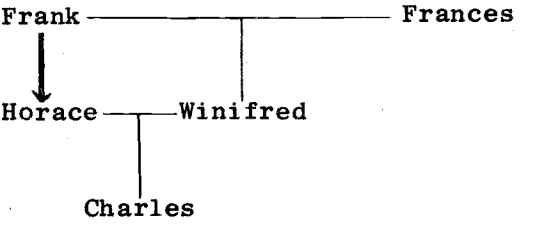
## PHASE I - BEFORE 1285

Frank was a member of the landed gentry: this 30 acres was only a fraction of his lands. He and his wife Frances had a beautiful daughter, Winifred. Along comes an eligible bachelor, Horace, and so - let us in our diagram unite them with a lovers' knot! - Horace and Winifred become Husband and Wife.




Her father Frank, determined to see daughter and son-in-law well set up, makes a grant of land - including this 30 acres - to Horace, for himself and the descendants who he and Winifred shall jointly produce. This later became known as a fee tail special: "to Horace and the heirs of his body by Winifred", but prior to 1285 only two types of freehold estate - life estate and fee simple - were known; so this arrangement came to be treated as a life estate until a child was born but as a fee simple thereafter.

In due course they rejoice in the birth of a child, Charles.



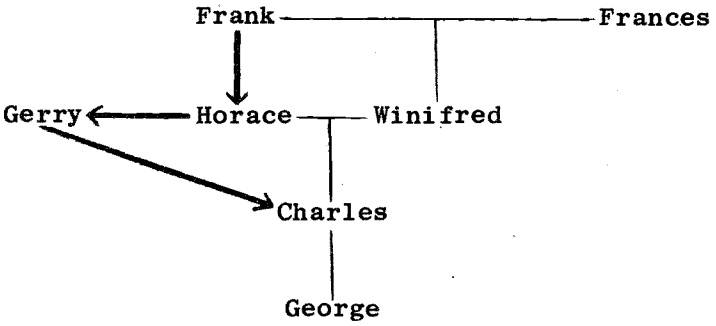

But then Horace, entitled to treat his estate as a fee simple, sells the land - so Charles will never receive it and Frank's wishes are frustrated.

## PHASE II - FROM 1285 TO SOME DATE BEFORE 1472

To eliminate this possibility, the King (Edward I) decreed in

de donis conditionalibus (1285) that henceforth the words "and the heirs of his body" should mean just what they said - the property was to go to the descendant, generation by generation. This created what was in effect a new estate, the Fee Tail. ("Tail" is from the French taillé - cut down.)

So, using the same example but placing the date after 1285, if Horace sells the land to a purchaser (Gerry), Gerry has only the right to keep it until Horace's death, when Charles, as heir of the body, can recover the land from him.




Realising that Horace may fall off his horse and die tomorrow, the price that Gerry is prepared to pay for the land is so small that the land is for practical purposes unsaleable.

The diagram shows Charles recovering the land from Gerry after the death of Horace. Incidentally the next generation, Horace's grandchild George, has arrived; if Charles were to resell to Gerry (or to anyone) George could recover the land on Charles' death.

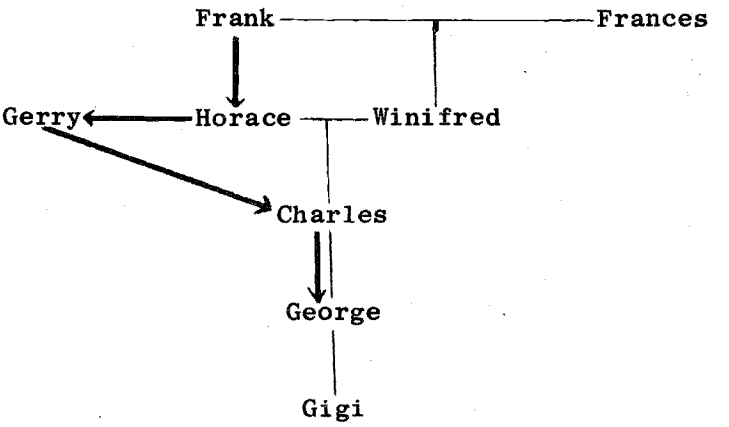
These first two phases show the opening moves in the battle, centuries-long, between on the one side the great landowners seeking to tie up their land so that it would remain in their family, and on the other side the common law Judges who saw the necessity for land to be freely alienable (i.e. transferable).

For more than a century after de donis, fee tail estates were for practical purposes unsaleable. Similar difficulties arose also, in due course, on any attempt at leasing them or raising money on the security of them.

So we can imagine the situation a little later (dating it any year between 1472 and 1833, in fact!) - Charles has died and the property has passed to George. On his death it is to go to the

next generation, Horace's great-grandchild Gigi.

(If the diagram below is dated much later than 1472 it is evident that quite a number of generations of the family must have been omitted; but, whatever century we date it, let us keep to Charles, George and Gigi as the last three generations, all of them descendants of the long-dead Horace.)




As an only child Gigi will inherit, for this entail is not limited to sons. If it had been a tail male, the property would have reverted (on George's death without a son) to the owner of the fee simple, i.e. the heir (whoever that may be) of the original grantor (fee simple owner) Frank.

The different types of fee tail are:-

tail general ("to Horace and the heirs of his body")
tail male ("to Horace and the heirs male of his body")
tail female (unlikely to be met with in practice)
tail special ("to Horace and the heirs of his body produced by Winifred")
tail male special ("to Horace and the heirs male of his body produced by Winifred")
tail female special.

Like fee simple these can be absolute or modified, and can be in possession or future.

Note that a fee simple, unlike a fee tail, cannot

be limited to male or female: fee simple is always to the heirs generally - those listed on pages 139-140.

After Charles' death, George wants to sell 5 of the 30 acres to Gerry, but Gerry knows he will not have a secure title to the property, because on George's death Gigi can demand it back. It is actually in Gigi's interests that the land should be sold, for the family is urgently in need of funds for the improvement of the property which is being kept. It is of little comfort to say, "Land is wealth", if none of it can be turned into money when money is urgently needed. This was the problem which became widespread and led to Phase III of this battle.

Should the law be changed? Parliament was chiefly in the hands of great landowners who wanted their families to remain great landowners, and the law was not changed; but an answer was found by the common law Judges, who developed a legal fiction - that is to say, they adopted the practice of accepting certain statements as true when everyone knew they were false, in order to bring about a good result: "the end justifies the means" - a dangerous doctrine.

There were two methods. The first one was "suffering a common recovery".

## PHASE III - FROM SOME DATE BEFORE 1472, TO 1833: "SUFFERING A COMMON RECOVERY"

The exact date that this began is lost in the mists of history, but it is known that the system had been developed and was in use by the time of Taltarum's Case in 1472.

Gerry, unable to buy the land because of the problem we have seen, comes to an agreement with George that he will pay him for the land and will lay claim to it in court. He will claim the fee simple.

If Gerry claimed it and George did not defend the case, Gerry should win - but that was not sufficient. That appeared to be depriving Gigi of her future estate, which was not acceptable.

So the case, played out in court before a sympathetic Judge, went something like this:-

Gerry: "I claim that land in fee simple." (untrue, of course!)

George: "I dispute the claim: it is mine, for I hold it from Simon." (untrue again: we know the grantor was Frank, who held through Donald as we saw on page 35 - but no matter: Simon is the "Man of Straw" - often a court official - who has been paid to take this part. Note that he is a man who has no land.)

Simon: "George is right" (there we see another untruth!) "but before I prove it to the court, I would like to have a discussion with Gerry outside the Court, as we may be able to reach some agreement over this matter."

(Simon and Gerry leave the court, and Simon runs away. Gerry returns alone.)

George: "My warranty Simon has gone, without proving anything. He has let me down. I cannot defend the case."

Judge: "In that case I must give judgment in favour of the demandant Gerry. But you have been wronged by Simon, and furthermore Simon is in contempt of court: and I therefore order that you and your issue may recover lands equal in value to what you have lost, from Simon."

Thus Gigi is not left without a legal right. The fact that her right is against the landless Man of Straw is irrelevant: the court has a duty to see that she has a legal right, and it has done so. Common law was concerned as to the form - and the form is correct.

Gigi is not complaining: in fact she is very glad that her father now has the money to enable him to carry out necessary improvements, the benefit of which she will inherit.

Gerry is happy: he has the fee simple, absolute in possession.

The only loser is the present heir of Frank who knows that the property will now never revert to him. But he has lost very little: the property would not have reverted to him anyway unless Gigi (or one of her descendants receiving the property after her) were to die childless, and so the court is prepared to "sacrifice him upon the altar of free alienability". (In other words, his rights are sacrificed but the untransferable land is transferred.)

This process known as "suffering a recovery" was the earliest method of converting a fee tail to a fee simple or (to give it

its proper name) "BARRING THE ENTAIL".

Sometimes part of the arrangement was that the day after the case Gerry would return the property to George - but in fee simple of course.

## PHASE IV - 1540-1833: "LEVYING A FINE"

From 1540 an alternative method of barring the entail was developed, known as "levying a fine". This too consisted of a fictitious court action, but instead of the Judge giving judgment an agreement was reached between the parties, which was entered on the court record. This was the "Fine", meaning "finalisation". Note that it had nothing to do with paying fines.

Once it was on the court record, that was final and could not be denied.

For various technical reasons, levying a fine had one advantage and one disadvantage when compared with suffering a recovery.

(i) The Advantage:- Only a tenant in tail in possession could suffer a recovery: a tenant in tail with a future estate could not - but he could levy a fine. (Note: if the use of the word "tenant" instead of "owner" here puzzles you, see pages 37-38.) Thus in our example George being in possession (as Charles is dead) can suffer a recovery, but Gigi cannot until George's death.

Gigi may well wish to bar her entail - change her future fee tail into a future fee simple - because a future fee simple is a valuable asset on which she could, for instance, raise a loan. During George's lifetime she could not bar her entail by suffering a recovery, but could do it by levying a fine. There was however an important disadvantage.

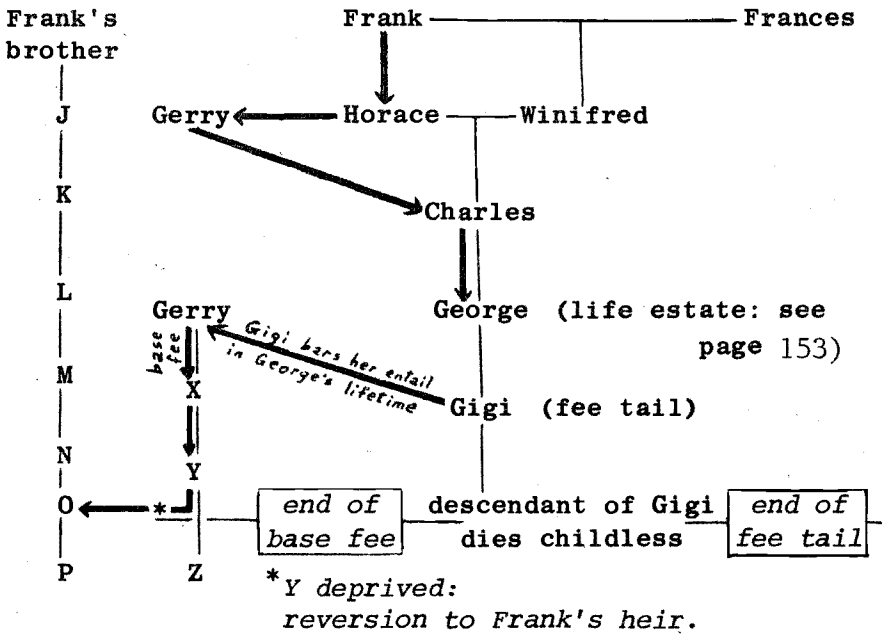
(ii) The Disadvantage:- Suffering a recovery produced a fee simple absolute, but levying a fine only gave a base fee simple.

A base fee is a fee simple which only lasts as long as the fee tail would have lasted.

Thus if the entail is barred by suffering a recovery, the purchaser Gerry receives a fee simple absolute which continues for as long as he has heirs.

But if the entail is barred by levying a fine, Gerry receives

a base fee, not a fee simple absolute, and if Gigi's line of direct descendants were to die out, the fee simple would at that moment end, and the property would revert to the heirs of the original grantor Frank.




## PHASE V - FROM 1833 TO THE PRESENT DAY: THE 1833 FINES AND RECOVERIES ACT

The 1833 Fines and Recoveries Act, "a masterpiece of Parliamentary draftsmanship", abolished the fictitious actions of suffering a recovery and levying a fine, and made it possible instead to bar the entail (i.e. change the fee tail into a fee simple) by means of a deed known as a Disentailing Assurance. Thus if George were selling Gerry the property which George held in fee tail after 1833, no court action would be necessary: George would merely enter into the Disentailing Assurance barring the entail and giving Gerry the fee simple absolute. If desired, Gerry could transfer the property back to George next day, to give George the fee simple absolute.

But since 1833, issue in tail (Gigi) cannot bar until coming into possession on George's death - the reason being that at any time before his death George might bar his entail and leave the land (fee simple) in his will to someone else, so until George is dead, Gigi cannot be sure that she will ever receive it.

: Before 1833 Gigi could bar (by levying a fine) before George's death and the bar became effective when (and if) George died without having barred his entail.

Let us change our example a little so that George has only a life estate (so he can neither bar an entail nor leave the property to anyone in his will, since he only has it for his life) - and Gigi (instead of being merely daughter and thus prospective heir-of-the-body of the fee tail owner) has herself the fee tail. Thus:-

> to George for life,
> then to Gigi in tail,
> and then a reversion to the grantor (Frank)
> and his heirs in fee simple.

This is of course the example which we used when we looked at Overreaching - page 67 - and we used it again on pages 80 and 89.

(Changing the example in this way isn't cheating: we are changing it to what had in fact become the normal form for Settled Land by the nineteenth century, though we shall not see why this became normal until we reach Chapter 19.)

The 1833 Act preserved the difference between suffering a recovery (giving a fee simple absolute) and levying a fine (giving a base fee simple):-

Since 1833, if the tenant in tail Gigi wishes to bar her entail during tenant-for-life George's lifetime, she can with George's consent do so and give Gerry a future fee simple absolute. If George will not consent, she can do it without his consent but this only gives Gerry a base fee. After George's death Gigi is free to bar her entail and give Gerry the fee simple absolute.

A base fee can today be enlarged into a fee simple

absolute by Gigi executing a fresh deed of Disentailing Assurance after George's death, or by various other means.

The 1833 Act is still applicable today, though since the 1925 legislation it has only been applicable in Equity. We caught a glimpse of this type of situation on pages 63-67, where Gigi found herself with an entailed interest in a trust fund of £100,000. By a Disentailing Assurance under the 1833 Act she can today bar her entail - that is, transform her Equitable entailed interest in the £100,000 into an Equitable future fee simple, which is a useful piece of property for investment purposes.

The likelihood that sooner or later the entail would be barred, and the land would be sold, greatly displeased the great landowners who wanted to ensure that the land stayed in their family. In due course they developed a means of counteracting the barring of the entail, but we must wait until Chapter 19 to see what this was.

New Zealand, whose law comes from the same foundations as ours, has abolished entails altogether, and does not seem to be any the worse for it.

Before leaving the subject of fee tail we should observe one special case, the "tenant in tail after possibility of issue extinct" - sometimes shortened to "tenant in tail after possibility". An example of this situation would have occurred with our limitation "to Horace and the heirs of his body by his wife Winifred" if Winifred had died childless. After her death, although Horace was still alive the possibility of his having children by Winifred was gone. Such an entail could not be barred and was subject to certain other restrictions.

There are also just a very few entails (granted by Parliament as a reward for services to the country) in respect of which the Act of Parliament granting them declares that they can never be barred. An example is the land granted to the first Duke of Wellington as a reward for winning the Battle of Waterloo (1815).

And here is one final point which ought to be too obvious to mention: Goerge cannot bar an entail if he has not got an entail. Surely I should not need to say that - but you would be surprised how many students try to make a life tenant bar a non-existent entail in their examination answers.

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## SUMMARY

In this chapter we have seen:-

the fee tail (Equitable entailed interest since 1925) and its development in five phases:

1. before 1285
2. from 1285 to some date prior to 1472
3. from some date prior to 1472 until 1833 ("suffering a recovery")
4. from 1540 to 1833 ("levying a fine")
5. from 1833 to today (1833 Fines and Recoveries Act)

"Barring the entail" means: changing the entail into a fee simple.

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## TEST QUESTIONS on Chapter 13:-

1(a) Explain in your own words what can be done under the 1833 Fines and Recoveries Act.

(b) A property is granted to George for life and then Gigi in tail, and then back to the Grantor in fee simple. Gigi, who is married to a Vicar, is not wealthy. Advise Gigi.

2(a) On what type of property is one likely to find an entailed interest?

(b) What is a base fee simple? What are its disadvantages, and what can be done about them?

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# CHAPTER 14

# CHARACTERISTICS OF THE LIFE ESTATE

*(post-1925, life interest)*

*OUTLINE OF CHAPTER:-*

*A: General outline*
*B: Waste*
*C: Minerals*
*D: Timber*
*E: Emblements*
*F: Fixtures*

## A: GENERAL OUTLINE

"To George for life" is a life interest.

This is again the example we saw on pages 63-67 (to do with Overreaching) and we saw there that George can sell the legal fee simple. But forget that for a moment, because George does not get the money - it is invested by trustees and all George gets is the interest on it, because *beneficially* (i.e. in Equity) he is only entitled for his life.

In this chapter, we are considering his *beneficial life interest* - his right to live in the house for his life (but *no* right to leave it in his will or to have any say in what happens to it after his death) and his right to interest but not capital for his lifetime if the property is sold. *That* is his life estate (or since 1925 his Equitable life interest). *That* is what he is entitled to for his own benefit. And the question in this chapter is: what can he do with *that*?

Can he sell that bundle-of-rights-and-duties-which-lasts-for-his-life-and-no-longer and put the money into his pocket to spend on himself? Yes he can, if he can find a buyer. (But not many people would be interested in buying it. Any normal purchaser wants a legal estate, not an Equitable interest which (a) would be overreached if the legal estate were sold, and (b) will

end at the death of George - who might die in an accident tomorrow. If George sold this Equitable life interest to our friend Fred Smith, George remains (by s.104 of SLA) the person who can sell the *legal* fee simple - and if George later did so, Fred would be overreached and would find himself with income from an invested trust fund, but no land.)

If George sells this life interest to Fred, Fred only has the property for the length of George's life, not his own life. He has a life interest *pur autre vie* ("for the life of another", *pur* being the Norman French equivalent of the modern French *pour*.)

Similarly a grant "to George for the life of Fred Smith" is a grant of a life interest *pur autre vie*.

In our earlier example the property went to George for life and then to Gigi in tail; but if it had been to George for life *and nothing further was said*, this would amount to a grant

> to George for life,
> and then a reversion to the original grantor (or his heirs if he is deceased) in fee simple.

All grants end with a fee simple (implied if not expressed) because *somebody* has to own that period of time up to the end of the world.

- - - - -

But what if George has no wish to sell anything: he wants to stay there - but he would like to make some changes. Can he demolish the house? (No: see heading B, below.)

Can he let the property fall down? (Maybe: see heading B.)

Can he chop down old apple trees in the orchard? (Yes - but not oak trees: see heading D.)

Regarding such matters in general, what are his rights and his duties? We shall answer this question under the five headings of Waste, Minerals, Timber, Emblements and Fixtures.

## B: WASTE

The owner of a life estate, i.e. a "life tenant", is expected to keep its nature unaltered so that what he passes on, on his death, is the same as what he received. Alterations are termed Waste. There are four types:-

1. AMELIORATING WASTE occurs if the life tenant carries out alterations which amount to improvements. The Court is most unlikely to grant an injunction to restrain such waste as this. An example is the case of *Doherty v. Allman (1877)* in which the Court refused to grant an injunction which would have prevented the conversion of a dilapidated barracks into houses.

2. PERMISSIVE WASTE occurs if the life tenant allows the property to fall into disrepair. If he is not subject to a covenant stating that he is liable for repairs, he is under no obligation to do them and can let the property decay.

3. VOLUNTARY WASTE occurs if the life tenant commits "spoil or destruction ... to the damage of the heir or of him in remainder or reversion". This includes such acts as cutting "timber" (definition of "timber" appears under heading D, below) or opening a mine. If the deed granting him his life estate made him *unimpeachable of waste* he is not liable for Voluntary Waste, so he can cut timber and open new mines freely. If however he is *impeachable of waste* he is liable, although he is free to extend any mine which is already open. If nothing is said either way, the life tenant is impeachable.

4. EQUITABLE WASTE (so called because Equity will stop it) occurs if the life tenant commits wanton destruction - e.g. tears off the roof so that there will only be a ruin left to inherit. He is liable unless he is expressly made "unimpeachable of Equitable waste". In *Vane v. Lord Barnard (1716)* for example, the life tenant, having taken some displeasure against the person entitled on his death, "got two hundred workmen together, and of a sudden, in a few days,

stript the castle of the lead, iron, glass, doors, and boards etc. to the value of £3,000". Equity granted a prohibitory injunction to prevent further destruction, and also a mandatory injunction: "Put it all back!"

## C: MINERALS

The main provisions are set out under Voluntary Waste, above.

Notwithstanding these provisions, SLA enacts that a life tenant, whether impeachable or not, may grant mining *leases* for up to 100 years, unless expressly forbidden from doing so. If (a) he is impeachable, *and* (b) it is a new mine, not one already open, the life tenant receives one quarter of the rent; three quarters goes into the capital money of the Settlement. In all other cases, the life tenant receives three quarters; one quarter goes to capital.

## D: TIMBER

"Timber" is oak, ash and elm, at least twenty years old but not too old to contain a reasonable quantity of usable wood. (Other trees are included in certain parts of the country - e.g. willow in Hampshire and beech in Buckinghamshire.)

A life tenant can take reasonable quantities of *estovers* (or *botes*) - i.e. wood and timber for:-

(i) house-bote: for house repairs or house fuel;

(ii) plough-bote: for making or repairing agricultural implements; and

(iii) hay-bote: for repairing fences.

On a timber estate (plantations etc.) the life tenant can cut timber (even if impeachable) in accordance with the rules of good estate management; but it is Equitable waste to cut timber (or other trees such as chestnut) planted for ornament or shelter.

On any estate he can cut dead trees and non-timber trees (though if the non-timber trees were ornament or shelter this might be vandalism - Equitable waste) but

he cannot cut immature (under twenty years old) timber trees. During the "Dutch elm disease" epidemic of the 1970s, the cutting of many diseased elms was required by Parliament which overruled any provisions to the contrary.

On a non-timber estate the life tenant can if unimpeachable cut and sell timber: if impeachable he had at common law no such right but has been given certain rights by the 1882 and 1925 SLAs - but an impeachable life tenant cutting timber under these statutory provisions can only keep one quarter of the proceeds. The other three quarters go into the capital money of the Settlement.

Timber which has been cut or torn down (by the life tenant or someone else, or by a storm) belongs to the life tenant if he was entitled to cut it, but otherwise to the owner of the next vested estate or interest of inheritance - Gigi in our example.

## E: EMBLEMENTS

The grant was "to George for life", or "to Fred for the life of George", and George has died.

George's executors or administrators (or Fred, as the case may be) can enter onto the land (which now belongs to Gigi of course) to take emblements: that is, when harvest time comes they are entitled to reap artificially-produced crops, e.g. corn or carrots, which George (or Fred) sowed - but not such crops as apples and timber, which need no sowing.

## F: FIXTURES

Fixtures must normally be left for the person next entitled. There is a maxim: *"quicquid plantatur solo, solo cedit"*, which may be roughly paraphrased as: "Whatever is joined to the land becomes part of the land". Thus if the life tenant instals electricity (or if the student reading this book instals electric power-points in his rented flat - the same basic rules apply) he cannot subsequently remove the installation.

Even though he installed it at his own expense, it is not his property. On the other hand, if he fits an electricity bulb he can remove it, for it has been decided (in *British Economical Lamp Co. v. Empire, Mile End Ltd. (1913) - a case about all the light bulbs in a theatre*) that electricity bulbs are not fixtures.

Generally, items which stand by their own weight are not fixtures unless it is shown that they are - as in *D'Eyncourt v. Gregory (1866)* in which stone lions etc. forming part of an architectural layout were held to be fixtures and therefore part of the property.

On the other hand:- generally, items which are attached are fixtures unless it is shown that they are not - there have been numerous cases, particularly where the items have been only slightly attached. The degree of annexation (i.e. how firmly it is fixed) is relevant. For example, a built-in bookcase is a fixture, but a bookcase attached to the wall with two screws so that it will not tip forward is not.

More important than the degree of annexation is the purpose of annexation: see *Holland v. Hodgson (1872)* and *Berkley v. Poulett (1976)*. The question is: *is it fixed to make the article a better article, or to make the house a permanently better house?* If the attachment can properly be regarded as a permanent improvement to the premises, one can expect the Court to treat it as a fixture. In the House of Lords case of *Leigh v. Taylor (1902)* a tapestry which was attached by tacks to wooden strips nailed to the wall was held not to be a fixture, because it was mounted thus to display the tapestry and not to make a permanent improvement to the house.

In Planning Law, on the question of what constitutes "development" (with regard to prefabricated buildings etc.) somewhat similar provisions can apply.

Fixtures must normally be left by the life tenant for the person next entitled. There are however two exceptions:- (i) the life tenant may at any time remove TRADE FIXTURES - i.e fixtures attached by him for the purposes of his trade or business; and (ii) he may remove ORNAMENTAL AND DOMESTIC FIXTURES attached by him - these have been held to include such things as

mirrors, window-blinds, stoves and ovens, but not a conservatory on brick foundations. Ornamental and domestic fixtures generally include only articles which can be removed entire (which can include dismantling into sections, but not demolishing the article) and without substantial injury to the freehold.

So, if the life tenant has installed electricity, he can remove bulbs, which are not fixtures; he can remove those fittings and accessories which come into the category of ornamental and domestic fixtures; but he has no right to remove the basic installation.

Between landlord and tenant, similar rules as to the removal of fixtures apply, together with further rules as to the removal of AGRICULTURAL FIXTURES - as to which, see s.13 of 1948 Agricultural Holdings Act.

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SUMMARY

In this chapter we have seen:-

1.(a) the life estate (life interest since 1925) including the estate *pur autre vie*, and
(b) things which a life tenant can or cannot do, under five headings (2-6 below):-

2. Waste ..... (i) ameliorating (i.e. improvements)
(ii) permissive (i.e. doing nothing, while the property deteriorates)
(iii) voluntary (e.g. cutting timber; or opening a new mine - is the life tenant "impeachable of waste"?)
(iv) Equitable (wanton destruction)
3. Minerals
4. Timber (including Estovers)
5. Emblements
6. Fixtures (with mention of Trade Fixtures, and Ornamental and Domestic Fixtures)

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TEST QUESTIONS on Chapter 14:- these are on page 136.

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*THE END of Part 1 of this book.*