REAL PROPERTY LAW FOR BEGINNERS

SECOND EDITION

Part 2

by John A. Greed

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My Land and I - Rights and Duties over one's own Land

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REAL PROPERTY LAW FOR BEGINNERS

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of

Part 2

Introduction to Part 2:-

We have now looked at the four "foundation stones" of Real Property Law, namely (i) tenures, (ii) estates, (iii) Equity, and (iv) the 1925 changes which included a major expansion of Registration.

Now let us build some superstructure on these foundations which we have laid.

Preliminary Note:- If by this time the reader is wondering why most of the examples in this book concern houses, apparently at the expense of commercial and industrial property, the answer is that if the commercial/industrial property is freehold, it is subject to the same basic rules as a freehold house; and if it is leasehold (as commercial and industrial property often is) it is outside the scope of Real Property Law and comes within the sphere of the Law of Landlord and Tenant.

PART 2 (CHAPTERS 15 - 24)

MY LAND AND I -

RIGHTS AND DUTIES OVER ONE'S OWN LAND

Section A (Chapter 15)

Registration of Land, and of Rights in Land

CHAPTER 15

AN INTRODUCTION TO REGISTRATION

OUTLINE OF CHAPTER:-

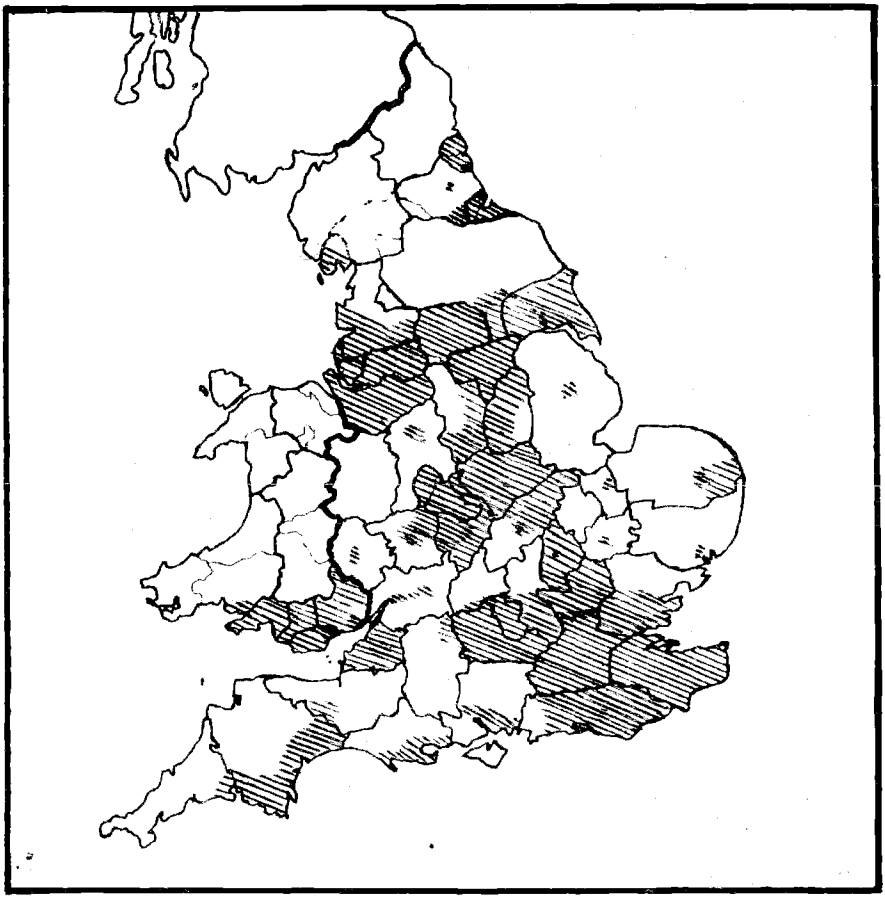
This chapter consists mainly of 50 "Frames" which give an introduction to Registration by a form of "programmed learning".

Note: This system provides an easy way of learning about Registration, but has disadvantages when revision time comes as the information is scattered on too many pages for revision. The main information in the frames is therefore repeated, with some further points, in a more "normal" form in Chapter 44.

A major difficulty in learning about Registration is the terminology: it almost seems as if it were *designed* to be confusing.

Just one example:- we shall look at the Land Charges Registry, and (quite separately) at the Land Registry. The Land Registry has a Charges Register. Let us be quite clear from the outset that the Land Registry's Charges Register is nothing whatever to do with the Land Charges Registry's Registers!

It is to avoid such difficulties as this that Registration is introduced one step at a time by the following series of frames. Start with Frame 1 on page 169 and work through until you reach the final frame which is Frame 50.



REGISTERED LAND IN 1985

The shaded portions represent approximately the main areas of compulsory land registration.

Section B (Chapters 16 - 18)

Rules against Remoteness

CHAPTER 16

FUTURE INTERESTS

OUTLINE OF CHAPTER:-

A: What is a future interest?
B: Vested and contingent interests
C: Reversions and remainders
D: The two types of reversion
E: Remainders:-
  1. Three types of "remainders"
  2. "Remainders" before 1926
  3. Remainders today
F: Summary of future interests today
G: Introduction to the Rule against Perpetuities

Please turn over!

****

Frame 1:

INFORMATION: All land in England and Wales is in either a compulsory land registration area or a non-registration area.

Compulsory areas include London and the whole of south-east England, Liverpool and Manchester, West Midlands, Yorkshire (except part of North Yorkshire) and Humberside, Glamorgan, and most other cities and populous areas.

The only English counties which have no land in compulsory areas are Shropshire and Isle of Wight.

The shaded areas on the map on page 168 show generally the chief compulsory registration areas.

QUESTION: Which are the correct underlined words:-

The greater part of the Welsh Mountains and Dartmoor are registered unregistered but most large cities are registered unregistered.

INSTRUCTION: Turn to frame 2 on page 171.

This chapter leads up to a rule known as the Rule against Perpetuities, or "Perpetuity Rule", which we shall examine in Chapter 17. If you can understand the Rule against Perpetuities, you are capable of understanding everything in this book.

The Rule against Perpetuities is a rule concerning the vesting of contingent future interests.

Let us progress step by step, and see (1) what is a future interest, (2) what is a contingent future interest (and how the different types of them vary) and (3) how the Rule against Perpetuities affects contingent future interests.

A: What is a Future Interest?

Future interests are not new to the reader: we have already seen a grant (on pages 126-8) "to John Jones for life, and then to Fred Smith in fee simple".

John's interest is present (a life interest, in possession) but Fred has no possession while John is alive: i.e. Fred has a future interest which will come into present possession on John's death.

B: Vested and Contingent Interests

But Fred knows that on John's death no-one can stop him (Fred) from getting possession. (And if the land has been sold under the provision we saw on page 67, Fred gets possession of the money when John dies, and no-one can stop him from doing so.)

So Fred's future interest is a VESTED future interest - i.e. (i) he knows that he will receive it, and (ii) there are no conditions awaiting fulfilment. He can say, "I know it will come to me, free from conditions".

(Even if Fred dies before John it makes no difference, for the grant to Fred is a fee simple and so Fred's heirs would take it, on John's death, free from conditions.)

Contrast that with these two examples:-

Example A:- "to John Jones for life, then to Fred Smith in fee simple if he qualifies as a Surveyor within John's lifetime - but otherwise the property shall go to Fred's brother Bill in fee simple".

Neither Fred nor Bill can say (yet), "I know it will come to me, free from conditions". Fred can only say, "It comes to me if I fulfil the contingency of qualifying as a Surveyor": on the other hand Bill says, "It comes to me contingent on Fred not qualifying as a Surveyor".

Fred and Bill each have a CONTINGENT future interest.

Something has to happen (a contingency) before anyone can say who will receive the property. There can be all sorts of contingencies such as getting married, or staying single, or being ordained as a priest, or joining a particular religious denomination or political party or trade union, or keeping out of a particular denomination or party or union ... but in our example here the condition is: becoming a Surveyor. If Fred qualifies as a Surveyor the grant vests: Fred knows the property will one day come to him. And if Fred dies without qualifying as a Surveyor the grant vests: Bill knows the property will one day come to him.

Example B:- "to John Jones and Fred Smith for their

****

Frame 2:

Answer to question in frame 1, page 169: The greater part of the Welsh Mountains and Dartmoor are unregistered but most large cities are registered.

INFORMATION: All property which has been bought by the present holder on the unregistered system (the old system) should have deeds to show the ownership of the legal estate.

QUESTION: If you bought a house in west Cornwall would you expect deeds?

INSTRUCTION: If your answer is "yes", turn to frame 3 on page 173. If "no", turn to frame 4 on page 175.

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joint lives, then in fee simple to the survivor".

Neither can say, "It will be me", for it depends on which one lives the longer. That is the contingency. As soon as one of them dies, it vests in the other.

Summarising, then, what we have seen so far: the future interest is a vested one if someone can say, "I know it will come to me, free from conditions"; it is a contingent interest if it is not yet possible to say which person will receive it, or if there are conditions which have not been (and may or may not be) fulfilled.

Note four points of detail before we continue.

(i) The man-in-the-street sometimes uses the phrase "vested interest" to mean something totally different from what is described above (e.g. Fred Smith has been heard to mutter, "Bill has a vested interest in stopping me from revising for my Surveying exams!"). Put that right out of your mind: it is quite different from what we are considering here. In Real Property Law, a vested interest is a future interest which is certain to come to that person (e.g. Fred's interest, once he has passed the exams).

(ii) If Fred in Example A above has qualified as a Surveyor, his interest is vested but he has not got possession yet - nor will he until the life tenant John Jones dies. In this section we are not considering possession: we are considering whether a person has a vested interest or a contingent interest - i.e. whether he can say, "It *will* come unconditionally to me at some future date", or not.

(iii) In our example "to Charles for life, then to George for life, then to Gigi", George might say, "I know it will come to me *if* I live longer than Charles". This is not a contingency: the law is prepared to assume that he will do so. Similarly with a limitation "to Peter in tail, then to Paul in fee simple", Paul has a vested interest. It is not contingent on the entailed interest coming to an end; it is assumed that a fee tail will be shorter than a fee simple. A contingency must be something other than merely

surviving until the expiry of the previous interest. (Death is not a contingency: it is not something which may never happen; although such matters as "death under the age of 21" are a contingency.)

(iv) The possibility that an interest, which a person knows will come to him, may be reduced in value by some subsequent happening, does not prevent it from being vested. For example: property worth £12,000 is left "to Fred for life, then to such of Fred's children as reach 18". Fred has three children, Jenny (aged 18) Kenny (15) and Lenny (12). If Kenny and Lenny die before reaching 18, Jenny's interest is worth £12,000. If Kenny and Lenny reach 18, then Jenny Kenny and Lenny get £4,000 each. Fred might of course have further children, which would lower the value of each one's share even further. But the present position is that Jenny has an interest worth £12,000 because the others have not (yet) become entitled to anything. The possibility that this interest may be reduced to a smaller figure because of other children reaching 18 does not alter the fact that Jenny's interest is vested.

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The Rule against Perpetuities, which we shall see in our next chapter, concerns the vesting of contingent interests: *it tells us how long a contingent interest can be allowed to remain contingent*. But before we look

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Frame 3:

Answer "yes" is correct.

INFORMATION: All property which has been bought by the present holder on the registered system (the new system) should have a Land Registry Certificate instead of deeds, to show the ownership of the legal estate.

QUESTION: Would you expect deeds or a Certificate for houses in (1) London (2) Birmingham (3) Cardiff? 17

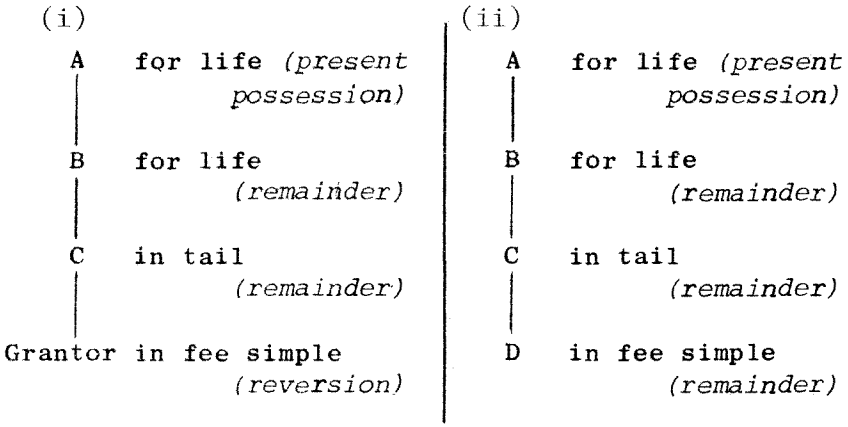
INSTRUCTION: Turn to frame 6 on page 179. 3.

at the rule, we ought to see where contingent interests arise.

There are two kinds of future interest, namely (i) reversions, and (ii) what for the moment we will call remainders.

C: Reversions and Remainders

Several times we have seen a grant (or, as it is sometimes called, a limitation) "to George for life, then to Gigi in tail". What happens if the entail comes to an end through Gigi ceasing to have any descendants? The property returns to the Grantor (or if he is dead, to his heirs) in fee simple. This is a reversion: a *returning* to the Grantor and his heirs. If it had *remained away* from the Grantor and had been granted to someone else, that would have been a remainder. Here are two examples:-



In (i) above there are two remainders plus one reversion. In (ii) there are three remainders and no reversion. (D has the fee simple so the Grantor can never get it back, because if D leaves no heirs the property goes to the Crown.) There can be many remainders, but never more than one reversion.

In (i) above, the Grantor knows that on the ending of the life and entailed interests the property is bound to return to him and his heirs, and there are no

conditions. "I know it comes to me, unconditionally" - it is vested.

Reversions are always vested, so we can discount them when we come to the Rule against Perpetuities. Remainders may be vested (those of B, C and D above all are - they know it goes to them, unconditionally) or may be contingent. Nevertheless we will look briefly at reversions now, to clear up any confusion which students might otherwise have in their minds about them.

D: The Two Types of Reversion

The type of reversion described above is not the same as the type of reversion which a landlord holds over tenanted property, as an example of each will show.

The "future interest" reversion

"To John Jones for life ..." - if nothing further is said, the property reverts to the Grantor or his heirs, on John Jones' death.

Note:

1. The Grantor has a future interest (a fee simple absolute in reversion)
2. The Grantor therefore has only an Equitable interest,
3. John Jones has seisin, as freeholder in possession,
4. The Grantor has no present right to hold the deeds,

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Frame 4:

Answer "no" to question in frame 2 on page 171 is wrong; west Cornwall is shown on the map on page 168 as a non-registration area. Unregistered properties require deeds: therefore you should expect your house in west Cornwall to have deeds.

QUESTION: You are buying a farm in west Wales: would you expect deeds?

INSTRUCTION: If "yes", turn to frame 3 on page 173;
If "no", turn to frame 5 on page 177.

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5. The Grantor has no present rights over the property except certain rights to restrain John Jones from committing Waste etc.

The landlord's reversion

"To John Jones for seven years ..." - the fee simple is still the Grantor's, though the right of occupation is not. At the end of the leasehold term of years (in this case seven years) the right of occupation of the property reverts to the Grantor: and meanwhile he is landlord and receives the rent.

Note: *(for comparison with 1-5 above)*

1. The Grantor has a present estate (a fee simple absolute in possession - because "in possession" can mean either (a) in occupation or (b) letting it and receiving the rent)
2. The Grantor therefore has a legal estate,
3. The Grantor has seisin, as freeholder in possession,
4. The Grantor holds the freehold deeds,
5. The Grantor has various present rights over the property, including certain rights to exercise forfeiture of the Lease (i.e. take the property back) if the tenant breaks his side of the agreement.

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In this book care has been taken to differentiate between the two types of reversion by referring to the latter type as "landlord's reversion" or "reversion to the landlord", but the student will find that not all textbooks make the distinction clear.

And now let us turn our attention to remainders.

E: REMAINDERS

1. THREE TYPES OF "REMAINDER"

What I have rather loosely termed "remainders" divide historically into three classes:-

(a) legal remainders
(b) Equitable remainders (these are usually called future trusts, nowadays) and
(c) legal executory interests.

Since 1925 these things can only exist in the form of (b) above, but the pre-1926 law can still rear its head from time to time (especially in old deeds showing a person's title to land) and the reasons for the shape of the present law are to be found in the past, so let us take a look at these three. Any student whose tutor has advised him that he does not need to know the background of where remainders come from, can conveniently jump from this page to the Summary on page 183: and any student in difficulties with this chapter is advised to do so, for he will thus have less complications to bear in mind when he first meets the Rule against Perpetuities.

2. "REMAINDERS" BEFORE 1926

Before 1926 the position was complex, and the culprit for this was Henry VIII with (1535) his Statute of Uses. Basically (you remember?)

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

- before 1535 this gave Tom and Dick the legal fee simple, and Ben the Equitable fee simple; but after 1535 it gave Tom and Dick nothing, Ben got the legal fee simple, and there was no Equitable right. (If you have forgotten everything about this, look back and re-read pages 68-70, or the next few paragraphs will not mean much to you.)

In the years immediately before the Statute of Uses, some

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Frame 5:

Answer "no" to question in frame 4 on page 175 is wrong: west Wales is a non-registration area, and unregistered properties require deeds.

INSTRUCTION: You have not yet understood the basic division into two systems: return to frame 1 on page 169 and start again.

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limitations were drawn in such a way that they were actionable at common law, and some in Equity.

Let us take the example of a Grantor who wants to grant land to Ben - but not while Ben remains a bachelor. If Ben is always going to be a bachelor the Grantor would prefer Adam and his heirs to have the land. So he grants the land

> to Adam and his heirs,
> but if Ben marries it shall go to Ben and his heirs.

Here we have a contingent remainder. Ben, not knowing if he will ever marry, does not know if he will ever receive the property: nevertheless he has a future interest, in remainder, contingent upon his getting married.

(From the time of the Reformation - sixteenth century - onwards, such contingencies as "if he shall become a Roman Catholic", "if she shall marry a Presbyterian", etc., are found.)

We will now look at four situations, and see what Ben has at the end of each.

Situation 1: The Grantor (before 1535) intends his grant to be enforceable at common law. He makes his grant:-

> to Adam and his heirs,
> but if Ben marries it shall go to Ben and his heirs.

So Ben claimed a legal contingent estate in remainder - an example of type (a) - a legal remainder.

It so happens that this particular legal remainder was void: common law had several strict rules as to the making of legal remainders, one of which was that any remainder after a fee simple was void. "To Adam and his heirs" were the words of limitation for a fee simple, and any further fee simple to Ben after that was void. Common law did not recognise conditional fees simple, and such-like grants, before 1535.

Situation 2: The pre-1535 position is different if the Grantor intended the grant to be enforceable in Equity instead of at common law. Equity did not submit to these strict form-rules. So the Grantor could take advantage of the system of the Use, and, appointing Tom and Dick as "feoffees to use", made his grant:-

> to Tom and Dick and their heirs
> to the use of
> Adam and his heirs
> but if Ben marries it shall go to Ben and his heirs.

Common law is satisfied: Tom and Dick (pre-1535) hold the fee simple, and common law is not concerned with anything further.

The Chancellor however recognises Adam and Ben as Equitable owners: Adam if the contingency does not happen (fee simple on condition subsequent) and Ben if it does happen (fee simple on condition precedent).

So Ben had an Equitable contingent estate in remainder - an example of type (b) - an Equitable remainder. And it is valid.

Situation 3: 1535 and the Statute of Uses is upon us. Let us see what this does to our example of type (b), the Equitable remainder.

We saw that the Statute's effect, executing the use, left the legal owner with no estate, and gave a legal estate to the owner of the Equitable estate. So from 1535 onwards,

> to Tom and Dick and their heirs,
> to the use of
> Adam and his heirs,
> but if Ben marries it shall go to Ben and his heirs

had this effect: Tom and Dick who formerly would have received the legal estate now received nothing; and Adam and Ben received

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Frame 6:

Answer to question in frame 3 on page 173: Certificates in all three cases. (If you got any wrong, look back to find out why.)

INFORMATION: The registered system is more convenient and is gradually being extended: e.g. Birmingham became a compulsory area in 1966, Bristol in 1967, Leeds in 1970, Cardiff in 1974; Avon County, Merthyr Tydfil, Stratford on Avon, East Yorkshire and others in 1985. It is intended that it shall eventually cover the whole of England and Wales.

QUESTION: By the end of this century a greater smaller area of England and Wales will be subject to compulsory registration.

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INSTRUCTION: If "greater", turn to frame 7, page 181;
If "smaller", turn to frame 8, page 183.

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valid legal estates corresponding to their former Equitable estates.

So Adam received a legal fee simple on condition subsequent, and Ben a legal fee simple on condition precedent - a state of affairs whose existence the common law had always refused to recognise prior to 1535: but the Statute said Adam and Ben were to hold legal estates in corresponding form to their former Equitable estates.

So Ben had a valid legal contingent estate in remainder: and this new legal state of affairs is an example of type (c) - a legal executory interest.

Compare the examples of type (a) (legal remainder) and type (c) (legal executory interest) reproduced here side by side.

Type (a)	Type (c)
to	to
	Tom and Dick and their heirs,
	to the use of
Adam and his heirs,	Adam and his heirs,
but if Ben marries it shall go to Ben and his heirs.	but if Ben marries it shall go to Ben and his heirs.

They are of course identical, except that (c) has had the underlined words added. Yet (a) was void for breaking the legal remainder rules, while (c) was valid because the underlined words gave no estate but the rest of the wording gave valid legal estates by the Statute of Uses. So it was essential that the underlined words giving no estate should be put in. If they were omitted from a deed they could not be implied: it was a legal remainder instead of a legal executory interest. (In a will, however, it was possible to imply them.)

Situation 4: From 1535 until the middle of the seventeenth century the Statute of Uses saw to it that there were no Equitable remainders, for all examples of type (b) became type (c), legal executory interests. But from about the mid-seventeenth century, the Chancellor was willing to create Equitable remainders once more by enforcing a Use upon a Use. Keeping to the same example, we add a little more:-

to Harry and his heirs,
to the use of
Tom and Dick and their heirs,
IN TRUST FOR
Adam and his heirs,
but if Ben marries it shall go to Ben and his heirs.

The result: the underlined words gave no estate so Harry received nothing, but Tom and Dick received the legal estate by the Statute of Uses: they hold it in trust for Adam and Ben, the Equitable owners, who have once again respectively an Equitable fee simple on condition subsequent and an Equitable fee simple on condition precedent as they had in Situation 2 above.

So the wheel had turned full circle and Ben again had a valid Equitable contingent interest in remainder: an example of type (b) - an Equitable remainder, or, to give it its modern name, a future trust.

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Frame 7:

Answer "greater" to question in frame 6 on page 179 is correct.

INFORMATION: When an area is made a compulsory area all land in the area must be registered. This means that all deeds and other documents relating to the property must be sent to the Land Registry, which ascertains that the applicant is the person entitled to the legal estate, and then issues him (or his mortgagee) with a certificate in place of the deeds.

This is known as FIRST REGISTRATION. *422,787 First Registrations took place in the year 1982-3.*

QUESTION: You have a property in Shropshire which has not yet been registered. Which of the following would you do:-

(a) nothing (turn to frame 9 on page 185)
(b) sue the person you bought it from (turn to frame 10 on page 187)
(c) apply to the Land Registry for First Registration (turn to frame 11 on page 189)
(d) sell it quickly (turn to frame 10 on page 187).

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In this way, a right "in remainder" could exist as type (a), (b) or (c), until 1925.

3. REMAINDERS TODAY

The 1925 legislation made two changes which are especially relevant here:-

A: it abolished the Statute of Uses,

B: it made all future rights Equitable: Ben's fee simple (future, contingent) becomes necessarily Equitable because it is not a fee simple absolute in possession.

Therefore:-

(a) Any examples of type (a) (legal remainders) cannot exist since 1925 except behind a Trust, which transforms them into type (b) (Equitable remainder - future trust) by virtue of A above.

(b) Any examples of type (b) (future trusts) continue to exist.

(c) Any examples of type (c) (legal executory interests) are affected by both A and B above and end up as Trusts - an example again of type (b).

Types (a) and (c) thus no longer exist.

We must omit the underlined words, now that the Statute of Uses has been repealed: so the modern wording for future trusts (keeping to the same example) is:-

to Tom and Dick
in trust for
Adam,
but if Ben marries it shall go to Ben.

The words of limitation "and his heirs" have also been omitted, because since 1925 it is assumed that a fee simple is intended unless it is shown otherwise - as we saw on page 128.

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Our next step will plunge us headlong into the Rule against Perpetuities.

Before we take the plunge, let us summarise what we have seen so far.

F: Summary of Future Interests existing Today

In this chapter we have seen that some future interests *(note: do not speak of "future estates" since 1925)* are vested, and some are contingent.

If vested, the right is bound to go to the certain person, on the ending of the particular interest before his. He can say, "Though I must wait for possession, I know it will come to me, free from conditions".

If contingent, either the identity of the person to benefit is not yet clear, or there is a condition not yet fulfilled which may or may not one day be fulfilled.

Future interests are either reversions or remainders.

Reversions are always vested.

Remainders only exist now as future trusts, though the effect of other (pre-1926) forms may still be felt.

Remainders may be either vested or contingent.

The Rule against Perpetuities (or Perpetuity Rule) is concerned with when contingent future interests will vest - see below.

G: Introduction to Rule against Perpetuities

The Rule against Perpetuities tells us how long a contingent interest may be allowed to remain contingent.

- - -

Frame 8:

Answer "smaller" to the question in frame 6 on page 179 is wrong; it is intended to extend the registered system until it covers the whole country. 183

INSTRUCTION: Return to frame 6 on page 179. 8.

A contingency *may* never happen (e.g. in our example Ben *may* never get married) and even if it does happen, it possibly may not happen for many years. How far into the future may a contingent interest be allowed to remain contingent, with no-one knowing if it will ever vest or not? That is the question which the Rule against Perpetuities answers.

We shall see in our next chapter that the answer is based on a period of "a lifetime plus 21 years".

SUMMARY

For summary of this chapter, see page 183.

TEST QUESTIONS on Chapter 16:-

1. Explain what is the difference between
   (a) present and future interests,
   (b) vested and contingent interests,
   (c) reversions and remainders.

2. A property is granted
   to Charles for life
   then to George for life
   then to Gigi in tail (but if Gigi goes bankrupt
   the property shall go to Fred in tail)
   and finally back to the Grantor.

   How many reversions and remainders are there in this grant, and are they vested or contingent?

3. What does the Rule against Perpetuities do?

CHAPTER 17

THE RULE AGAINST PERPETUITIES

OUTLINE OF CHAPTER:-

A: A reason for the rule
B: A statement of the rule
C: Explanation and examples
D: Whose lifetime?
E: Further explanation and examples
F: Class gifts
G: The class closing rules
H: The 1964 Perpetuities and Accumulations Act
I: Class gifts and the 1964 Act
J: Powers of appointment
K: Dangers of the Rule against Perpetuities
L: Exceptions to the Rule against Perpetuities

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Frame 9:

Answer "nothing" to the question in frame 7 is correct because Shropshire is not a compulsory area.

INFORMATION: When an area is made a compulsory area, the Registry staff could not cope with registration of all properties in the area at once. Therefore property does not have to be registered until it changes hands.

If you buy a property which has not been registered, in a compulsory registration area, you must send the deeds and other documents to the appropriate Land Registry for First Registration within two months. (If you do not do so, it is possible to lose your legal estate.)

QUESTION: You have just bought an office-block in Birmingham but it is not registered. The vendor had owned it since 1964. Which of these would you do:-

(a) nothing (turn to frame 12 on page 191)
(b) sue the vendor (turn to frame 13 on page 193)
(c) apply to the Land Registry for First Registration (turn to frame 14 on page 195)
(d) sell it quickly (turn to frame 15 on page 197).

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A: A Reason for the Rule against Perpetuities

Some people try to ensure that their influence will still be felt when they are in their graves. One way to do this is by making grants (in a deed or in a will) contingent upon certain conditions being fulfilled: e.g. "I grant this bungalow to Tom and Dick (trustees) on trust to hand it over in fee simple to my grandson Kenny provided that he qualifies as a barrister before his fortieth birthday - but if he does not do so he shall not have it and his sister Jenny shall have it instead". (Poor Kenny: he wants to be an architect but his grandfather has other plans for him!) This grant is of course a grant in contingent remainder to Kenny.

If an entailed interest was made subject to a contingency which might not happen for many years, the tenant in tail did not know whether his estate would ultimately be his or not. So he could not bar his entail and sell the fee simple absolute. So this was another way of keeping the land within the family, unsaleable. But the common law Judges, not liking unsaleable land, took steps to set time-limits to this practice.

Influencing the future of property in this way by means of contingent remainders is something which can be done - but only for a limited period. Over the last 300 years, in such cases as *The Duke of Norfolk's Case (1683)* and *Cadell v. Palmer (1833)* the courts have developed a rule that such influence can be extended over a lifetime (the life of the grantor or any other chosen person or persons) plus a further 21 years - but normally no longer than that. That rule is the Rule against Perpetuities.

But the Rule casts a wide net in which it catches many contingencies regarding which the student may well think it might be better if the Rule did not apply.

B: Statement of the Rule against Perpetuities

A contingency may never happen at all, but if it is going to happen, is it bound to happen within the lifetime of someone alive when the grant takes effect, or within twenty-one years after their death?

If it is bound to happen either within that period or not at all, the grant is valid.

If it could possibly happen outside that period the grant is invalid, whether the contingency does in fact happen outside that period or not. (Exception for grants made since 15th. July 1964 : see page 201.)

Here is the secret of how to understand the Rule against Perpetuities:- DO NOT ask, "Will this thing ever happen?" (because the very fact of its being a contingency means it may possibly never happen) - and DO NOT ask, "When will it happen?". The secret is: ASK ONLY THE ONE QUESTION, "Could this thing happen outside the lifetime-plus-21-years time limit?" If the answer is, "Yes it could", the grant is void.

C: Explanation and Examples

The example we saw just now regarding Kenny becoming a barrister presents no problem. People do not become barristers after they have died. If Kenny becomes a barrister it will be within his own lifetime. There is no way this condition could be fulfilled outside the lifetime-plus-21-years time limit.

But let us take a different example. Suppose a house was granted in 1960

to Tom and Dick,
in trust for
Adam in fee simple,
but if the house becomes a ruin, then the property shall go to Ben in fee simple.

****

Frame 10:

Your answer to the question in frame 7 on page 181 is wrong; there is no need to sue anyone or to try to dispose of the property. It does not need to be registered because it is in a non-registration area.

INSTRUCTION: return to frame 7 on page 181.

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10.

The house *may* never become a ruin - they may go on repairing and replacing it for ever. But if it becomes a ruin, this may possibly be several centuries hence:- i.e. longer than a lifetime plus 21 years. So the grant to Ben is void - *even if the house collapses in ruins next week*.

Note that even if it happened within the perpetuity time limit the rule is broken, because the contingency is one that *could* have happened outside the time limit.

The effect is thus to give Adam the whole Equitable fee simple, and Ben receives nothing.

The law, in applying this rule, looks at what is legally possible, not what is likely. Thus if there were a limitation (made in 1961 - the year of the launching of the liner *Canberra* which later became famous in the Falklands campaign):

> to Tom and Dick,
> in trust for
> Adam in fee simple,
> but when the ocean liner *Canberra* is sold for scrap, the land shall go to Ben,

this limitation breaks the Perpetuity Rule. The liner *may* never be sold for scrap: if she is, it is extremely unlikely to be more than a lifetime away (as ocean liners do not normally run for more than about 35 years) but it is legally *possible* that she eventually may be sold for scrap more than a lifetime plus 21 years hence, so the grant to Ben is void.

- - - - -

Examples concerning the *Canberra* are unlikely to be encountered in practice unless you have an eccentric client, but the *principle* may be encountered - e.g. in a grant of a building to the Education Authority for use as an annexe to the Polytechnic, "but if it ceases to be required for educational purposes, it shall go to Fred Smith in fee simple" - it is a contingency which might possibly happen outside the perpetuity period of a lifetime plus 21 years.

On the other hand our earlier example "if Ben

marries" is valid (assuming that Ben is alive when the grant is made) because Ben cannot get married outside his own lifetime.

D: Whose Lifetime?

There may be one person, or a choice (whoever shall live longest) of several.

If no persons are specified, the relevant lives are the lives of the persons connected with the limitation (e.g. Adam and Ben) but on the other hand lives may be specified, and these need have no connection with the grant. Thus "... within the lives of all descendants now living of His late Majesty King George VI or within 21 years of the death of the last of them ..." (this being a fairly common type of formula) is valid.

The person or persons must be alive at the date the instrument comes into effect - i.e. in the case of a deed, alive at the date the deed is made; and in the case of a will, alive at the date the testator (maker of the will) dies. Such persons are known as "lives in being".

If such a person is conceived but not yet born on the relevant date, such person is counted as a life in being.

The person or persons must be human. (There is an Irish case, *Re Kelly (1932)* in which money was left for the benefit of certain dogs, and then after the dogs' death, to a charity. In a judgment which refers

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Frame 11:

Answer to question in frame 7 on page 181 - caught you; wrong answer! Shropshire is a non-registration area as shown on the map on page 168.

INSTRUCTION: return to frame 7 on page 181 and try again.

189

11.

to the lives of dogs, butterflies, tortoises and Californian redwood trees, the Court held that the perpetuity rule of human lives plus 21 years must be applied - so the gift over to the charity was void as it could occur outside the time limit.)

E: Further Explanation and Examples

A series of examples will show how the system works. It needs reading rather carefully but is quite logical.

Let us look, for our first eight(!) examples, at John Smith, father of our friend Fred Smith. We saw on page 37 that John Smith had three children, Fred, Bill and Phil. Fred was born in 1946 and has three children Jenny (aged 18) Kenny (15) and Lenny (12). Fred's brother Bill (born 1950) is a bachelor, and their youngest brother Phil who was born in 1955 is separated from his wife, and like Bill he has no children.

Note: (i) In some of these examples we consider the first child (or in other examples the first grandchild) "to reach the age of 21". This is contingent: e.g. Jenny may die at 20, leaving Kenny to be the first grandchild to reach 21, or maybe Jenny Kenny and Lenny will all die, leaving Minnie - who is not here yet - to be the first. *[See family tree diagram on page 214.]*

Note: (ii) For the moment, we must say that the grants in all these examples were made before 16th. July, 1964. If they were made after that, they would be affected by the 1964 Perpetuities and Accumulations Act which we shall see under heading H of this chapter.

(So we shall be assuming in some of these examples that John Smith died before 16th. July 1964. And if you wonder why the will of someone who died in 1964 or earlier could come up for discussion today, the answer is simple: he could have left property to his widow for life, and then to his children on certain conditions to which the Perpetuity Rule applies. If the widow died yesterday, the question of whether the children receive the property under this pre-1964 will needs to be considered today.)

The first four examples we shall look at are grants by John Smith to one of his children:-

(1) *by will* "to the first of my children to reach 21" *(valid)*

(2) *by will* "to the first of my children to become a Surveyor" *(valid)*

(3) *by deed* "to the first of my children to reach 21" *(valid)*

(4) *by deed* "to the first of my children to become a Surveyor" *(void)*

After we have seen these we will look at four grants by John Smith to one of his grandchildren:-

(5) *by will* "to the first of my grandchildren to reach 21" *(valid)*

(6) *by will* "to the first of my grandchildren to become a Surveyor" *(void)*

(7) *by deed* "to the first of my grandchildren to reach 21" *(void)*

(8) *by deed* "to the first of my grandchildren to become a Surveyor" *(void)*

Examples (1) and (2): by will, "to the first of my children to reach 21", and "to the first of my children to become a Surveyor". No problem here. John's will takes effect from the day he dies. All his children must have been born - or at least conceived - by then, so they are all "lives in being". Even if the first child to become a Surveyor is the youngest one, who does so 60 years later, he has fulfilled the contingency during his lifetime, and he was a life in being at the date the will took effect: the grant is valid.

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Frame 12:

Your answer to the question in frame 9, page 185, is wrong; you run the risk of losing your legal estate if you do nothing.

INSTRUCTION: Return to frame 9 on page 185 and try again.

191

12.

Example (3): by deed, "to the first of my children to reach 21". A deed takes effect the day it is made. When this deed took effect, John's children Fred, Bill and Phil were alive: they were lives in being. But there might have been further children in the future: for instance, John might have had a daughter Susie three years after making the deed. (In fact he didn't, but he might have done - and at the time he made the deed he didn't know whether he would have another child in the future or not.) It might also have happened that Fred, Bill and Phil all died under 21, so that Susie - who would not be a life in being - would be the first to reach 21. (It didn't happen, but John was not to know that it wouldn't, at the time he made the deed. It *could* have happened.)

But John himself was alive on the day he made the deed, so he was a life in being; and Susie (if she is ever going to come into existence) is bound to be born, or at least conceived, before John's death - so if Susie reaches 21 she is bound to do so within 21 years of John's death, or at the very most within 21 years and 9 months.

The law always permits this "period of gestation" of up to 9 months to be allowed for where there is birth after the parent's death.

Therefore, since the contingency is bound to be fulfilled (if at all) within 21 years (plus 9 months) after the death of the life in being John, the grant is valid - because there is no way it could happen outside the perpetuity rule time-limit.

Example (4): by deed, "to the first of my children to become a Surveyor". The position is the same as in Example (3) except that the contingency is becoming a Surveyor instead of reaching 21. And we can see the following possibility:- (i) The grant is made. (ii) Susie is subsequently conceived - so she is not a life in being. (iii) Fred, Bill and Phil all die. (iv) John dies - so all possible lives in being have died. (v) More than 21 years later, John's daughter Susie becomes a Surveyor. In other words, the interest *could possibly* vest outside the perpetuity period.

Common law gives no power to wait and see if in fact it vests inside the period: the grant is void from the start. (So if in actual fact Fred does not die, but becomes a Surveyor, you have to explain to him: "The grant is void from the start - so you don't get the property. I'm sorry!")

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Now we must consider the four grants by John which mention his grandchildren.

Example (5): by will, "to the first of my grandchildren to reach 21". The will takes effect at the date of John's death. Lots more grandchildren may be born after that, and one of those may be the first to reach 21: they are not lives in being. But all John's *children* (Fred, Bill, Phil, and any others there might be) were bound to be born or at least conceived before John's death and so they are all lives in being; and any grandchild reaching 21 is bound to reach it within 21 years of his parent's death - as we saw with Susie in Example (3). So: any grandchild of John reaching 21 must do so within 21 years of the death of his parent (John's child) who is a life in being, so the grant is valid as it could not possibly vest outside the time-limit.

Example (6): by will, "to the first of my grandchildren to become a Surveyor". The same problem arises here as in Example (4). We can see the possible situation:- (i) John dies and the will takes effect. (ii) Later, a grandchild is born (and so is not a life in being, having been conceived after the date of John's death). (iii) Fred and Bill and Phil die. (iv) If there were any grandchildren alive at the date

Frame 13:

Your answer to the question in frame 9 on page 185 is wrong; if Registration is necessary it is the duty of the purchaser, not the vendor.

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INSTRUCTION: return to frame 9 on page 185; try again.

13.

the will took effect, they die (so now there are no more lives in being). (v) More than 21 years after this, a grandchild who is not a life in being becomes a Surveyor. So the grant is void from the start.

Even if the grandchild had become a Surveyor *less* than 21 years after the last life in being had died, the grant would still have been void - the grandchild would not have received the property - because what is outlined above *could* have happened: so it could have vested outside the perpetuity period even if in fact it did not. [So the next of kin take it, by intestacy.]

A competent draftsman could have avoided the problem by making the grant "to the first of my grandchildren to become a Surveyor within 21 years of my death". *That* contingency will have to be fulfilled within 21 years of the grantor's death, or never.

Falling foul of the Perpetuity Rule is not inevitable for the draftsman: it only arises where he has not provided wording in the document to avoid it.

Examples (7) and (8): by deed, "to the first of my grandchildren to reach 21", and "to the first of my grandchildren to become a Surveyor". The deed takes effect when it is made - and at that date John is still very much alive. So it follows that he can have more children. He may think that both he and his wife are too old for that, but the law does not ask what is likely, it asks what is legally possible. And in *Jee v. Audley (1787)* the court applied the Perpetuity Rule on the basis that Elizabeth Audley (aged 70) was still *legally* able to have children - there was no law against it!

So the following sequence of events was legally

Frame 14 continued:

QUESTION: if you bought a shop at Land's End, would it be
(a) definitely registered *(turn to frame 16, p. 199)*
(b) definitely unregistered *(" " " 17, p. 201)*
(c) possibly either ..... *(" " " 18, p. 203)*

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Frame 14:

Your answer to the question in frame 9 is right: you would apply for First Registration within two months.

INFORMATION: When an area is a non-registration area it is not normally possible to register property. Nevertheless some registered property is found in non-registration areas, for five main reasons:-

(i) Until the 1966 LRA it was possible to register property in a non-registration area if you wished to do so. Such voluntarily-registered properties remain registered, although since 1966 pressure of work has prevented the Land Registries from accepting any further new voluntary registrations.

(ii) There is sometimes registration in special cases - e.g. if a person's deeds have been destroyed by fire or flood, or have been lost.

(iii) Registration of building estates of 20 or more plots is permitted in non-registration areas. (It is intended that one day the whole country will be registered, and it is easier to deal with a new estate *en bloc* now, rather than as 20 or more plots separately at some future date.) Local authorities may also register land in non-registration areas which they propose to sell to a developer, etc.

(iv) If the freehold has already been registered, all Leases of longer than 21 years must be registered - whether the land is in a compulsory registration area or a non-registration area. (And if the Lease is registered and the freehold is not, but the leaseholder is now buying the freehold - which will merge the leasehold into the freehold because he will own both of them - the leaseholder can register the freehold, even in a non-registration area, if he wants to.)

(v) All people who buy their council houses under the 1980 Housing Act must register, even if the property is in a non-registration area.

For QUESTION, please see foot of previous page.

possible at the date the grant was made:- (i) The grant is made. (ii) Three years later, John has a daughter Susie - so she does not count as a life in being. (iii) John, Fred, Bill, Phil and any others who could have been lives in being all die. Jenny, Kenny and Lenny die too. (iv) Many years later, Susie has a son Percy who is John's first grandchild to reach 21 - or become a Surveyor. The grant could vest outside the perpetuity period: the grant is void from the start.

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Our final two examples in this series concern the grant which John Smith made to his bachelor son Bill, Fred's brother. This was:-

> "to Bill for life,
> remainder for life to any widow he may leave,
> and
> then to the eldest of Bill's brothers and sisters living when the widow dies".

(Evidently John wanted to ensure that in the end the property would come back to the Smith family and would not go to the widow's relatives.)

"To Bill for life" presents no problems.

"To any widow he may leave" is also valid, for she is entitled on Bill's death and Bill is a life in being.

But what about the grant, "to the eldest of Bill's brothers and sisters living when the widow dies"? This is void if John made it by deed, but valid if by will. (It is called "The Notorious Trap of the Unborn Widow" and arises because Bill might marry a girl who is not yet born.) But it is absolutely logical: let us see how.

Example (9): by deed. The deed took effect as soon as it was made, and at that moment John was still alive. So the following unlikely series of events was legally possible at the moment that the deed was made:- (i) Three years after the making of the deed, John might have another child, Susie, just as we saw in our last example. (ii) After that, a neighbour's child, Dollie Birde, is born. (iii) (at least 16 years later!) Bill marries Dollie. (iv) Bill dies. (v) John, Fred,

and everybody else connected with this matter who was alive at the date of the grant all die. (That is the end of the lives in being: there is 21 years to go.) (vi) More than 21 years later, the widow Dollie dies. Susie (sister of Bill) is still alive, but neither she nor Dollie was a life in being: all lives in being have been dead for more than 21 years. - Because this is possible, the grant is void *ab initio* (i.e. void from the start).

Example (10): the same grant, by will. The will took effect at John's death, and at that date all John's children were lives in being. (If Susie had been conceived she was a life in being, and if she had not been she wasn't going to be!) So, even though the events (ii)-(vi) in Example (9) above can happen, at the end Susie is a life in being, so the grant is valid.

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The development of sperm banks and artificial insemination could pose some most difficult questions on this Rule in the not-too-distant future.

F: Class Gifts

A grant "to the first of my children to become a Surveyor" is a grant to an (as-yet-unascertained) individual, but a grant "to all of my children who become Surveyors" is a grant to a class of persons - i.e. a class gift.

A class gift by John Smith (whether by will or deed) "to all my children who reach 21" presents no problem, because all of John's children who reach 21 must do so

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Frame 15:

Your answer to the question in frame 9 on page 185 is wrong; a quick resale does not alter the fact that properties in a compulsory registration area need to be registered.

197

INSTRUCTION: Return to frame 9 on page 185; try again.

15.

within 21 years (plus 9 months perhaps) after John's death.

But consider a gift by John by deed "to all of my children who become Surveyors". His children Fred Bill and Phil were alive on the day the deed was made, and so, as lives in being, there is no way they can fulfil the condition outside the Perpetuity Period. They cannot become Surveyors after the end of their own lives. But suppose John has another child, Susie, born three years after the deed is made (so she is not a life in being) ... and after that Fred and Phil become Surveyors (Bill doesn't: he fails his exams) ... and then, possibly in a motor accident, John, Fred, Bill and Phil all die ... *and more than 21 years after that* Susie becomes a Surveyor. It *could* happen.

In that case the class who would have fulfilled the condition would consist of three, Fred, Phil and Susie: of whom Fred and Phil could not have fulfilled it outside the Perpetuity Period, but Susie could.

And so the *whole* gift fails, for *all* the children, for breach of the Rule against Perpetuities. In other words, if Fred, Bill, Phil or Susie, or all of them, fulfil the condition, they will not receive the property. On a grant taking effect before 16th. July 1964, the gift cannot be partly good and partly bad: and so it is wholly bad.

In *Re Dawson (1888)* there was a gift to the plaintiff's children at 21 (or if any child of the plaintiff died under 21 leaving children, then his children, on reaching 21, could take his share). Plaintiff was 60 and all her children were over 21. The court held that as the plaintiff could *legally* have another child, who would not be a life in being, and as children of that child could reach 21 more than 21 years after all lives in being had died, the membership of the class might not be known until outside the Perpetuity Period; and so the entire gift, to all members of the class, was void.

G: The Class Closing Rule

The point of the Class Closing Rule, also known as

the Rule in *Andrews v. Partington (1791)*, is that when one of the persons in the class fulfils the condition, he is entitled to say, in effect, "I want my share *now*".

Consider for instance the example we saw above, in which John by deed made a gift "to all of my children who reach 21". As soon as Fred (the eldest of John's three children Fred, Bill and Phil) reached 21 he was entitled to say, "I want my share *now*". But as John was still alive at that date, he could yet have more children (Susie etc.) and so Fred would then be one of four or five instead of one of three. The Class Closing Rule overcame this by saying that any further children of John conceived after the date that Fred fulfilled the condition must be disregarded.

So Fred gets his one-third; Bill and Phil also get one third on reaching 21 (and if, for example, Bill were to die under 21, Fred and Phil would take his share) but any further children will receive nothing.

Those children who receive nothing on reaching 21 will reach 21 within the Perpetuity Period, as we saw in the last paragraph on page 197. But if any child could be conceived before the class closed and then bring about the fulfilment of the contingency outside the period, the whole gift to all of them would be void, which is what happened in *Re Dawson* above. We shall see how it happened in that case in a minute.

Let us see how the Class Closing Rule applies to the example on page 198, the gift by John by deed "to all of my children who become Surveyors". The grant was void, for the reasons we saw on page 198.

But if at the date of the grant Fred was already a Surveyor, he could say, "I want my share *now*", and the class closes: only those alive at that date (Fred, Bill

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Frame 16:

Your answer to the question in frame 14 is wrong; the map on page 168 shows that Land's End is in a non-registration area.

199

INSTRUCTION: return to frame 14 on page 195; try again.

16.

and Phil in the example) are entitled. But all of them are lives in being. So the gift is not void for breach of the Perpetuity Rule after all, because by the Class Closing Rule Susie is not in the class because it has closed before she could be conceived.

So Fred receives his one-third, Phil when he later qualifies as a Surveyor gets his one-third - and as Bill never passes his exams the third third eventually goes between Fred and Phil (or their heirs).

The situation would be totally different if Fred became a Surveyor a month *after* the gift was made, for the gift (if made before 16th. July 1964) would have been void *ab initio* because it was contingent - it was not known, at the date of the gift, whether Fred would pass his exams - or whether a little Susie would be conceived before the class closed - and so the gift was void for all of them: and nothing happening afterwards could make a void gift valid.

But why did not the Class Closing Rule validate the gift in *Re Dawson* (page 198) since all the children in that case were over 21? Could they not say, at the moment that the grant took effect, "We want it now"? - The answer is that they could not, because the grant (in the will of the plaintiff's father) left the property to the plaintiff for life and then in the manner stated on page 198. So the grant took effect on the plaintiff's father's death, but the children could not say, "We want it now" until the plaintiff's own death. Meanwhile the class remained open - and during this open period the 60 year old plaintiff lady might give birth to another child, so the Perpetuity Rule was broken. And the court applied the Perpetuity Rule relentlessly, to the point where the general public might possibly regard it as ridiculous.

H: The 1964 Perpetuities and Accumulations Act

So far, this chapter has set out the law prior to the 1964 Act. This is far from obsolete, for the 1964 Act only applies to instruments taking effect on or after 16th. July 1964. Any deed made before that date,

and any will of a testator who died before that date, is not affected by the 1964 Act.

Applying this to Example (10) on page 197: if John died in 1963 the old law will still be the appropriate law when Susie inherits, which may be well after the year 2000. (It could even be after 2050.)

For instruments taking effect on or after 16th. July 1964, the following changes (as some of the most important made by the 1964 Act) should be noted.

1. A female can have a child up to the age of 55 but not over that age. (This presumption is one which can be rebutted by showing that it is not true in the particular case.)
2. There is a "Wait and See" rule - see below.
3. There is an amended "Reduction of Fixed Ages" rule - see below.
4. The "Notorious Trap of the Unborn Widow" has been dealt with - see below.
5. There is an "Alternative Fixed Period" rule - see below.

THE "WAIT AND SEE" RULE:- In some of our examples, particularly Example (9), we saw grants which probably would vest within a lifetime plus 21 years, but possibly (if a certain sequence of events happened) might not, so were void. The 1964 Act permits one to wait and see what actual events happen, instead of looking at the (sometimes unlikely) possibilities.

Thus if Example (9) were to occur in a deed made on

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Frame 17:

Your answer to the question in frame 14 is wrong: the property will not definitely be unregistered, because it may be registered for one of the reasons given in frame 14.

INSTRUCTION: Return to frame 14 on page 195 and try again.

201

17.

or after 16th. July 1964, "wait and see" whether any further child is born to John. If not, then all John's children (Fred, Bill and Phil) were lives in being at the date of the grant - which makes the grant valid. If a further child (Susie in the example) is subsequently born, we can still "wait and see" whether Bill marries a girl who was not born at the date of the grant. If he marries a girl who *was* alive on that date she is herself a life in being - which makes the grant valid. But if all the events listed in Example (9) actually happen, it "becomes established" that the grant is going to vest outside the Perpetuity Period - not just *may* but *will* vest outside the time-limit if it ever vests at all - so the grant is void.

The old law has one definite advantage over the new. By the new law there can be many years of uncertainty during which no-one can tell whether the grant will finally be valid or not. With the old law it is known at once.

THE "REDUCTION OF FIXED AGES" RULE:- This rule dates from the 1925 legislation but was amended by the 1964 Act. It applies where (a) the grant has specified an age of more than 21 (e.g. "to the first of my children to reach 25") and (b) the circumstances are such that the grant will fail, but (c) would not have failed if 21 had been specified.

For instance, in Example (3) on page 192, although Susie is bound to reach 21 within 21 years of her father's death (plus gestation period if applicable) she is not bound to reach 25 within 21 years of her father's death. (That is commonsense: if he dies when she is 2 years old she will only be 23 when he has been dead for 21 years.)

So, using Example (3):- before 1926 a grant by deed "to the first of my children to reach 25" was void.

The 1925 legislation (s.163 of LPA) said that in instruments taking effect after 1925, 21 could be substituted for 25 (or for any other offending age) in such cases. (Note that it does not apply in any *other* cases - e.g. it does not apply in Example (1) on page

191 where the children are the lives in being and a grant "to the first of my children to reach 25" would be valid.)

The 1964 Act provides that for instruments taking effect on or after 16th. July 1964, there shall be a two-stage remedy.

i) One should first "wait and see" whether the grant will be valid without alteration. For instance, if in Example (3) John Smith dies when Fred is 22, Bill 18 and Phil 13, and there are no other children, then the first to reach 25 - even if it is Phil, the youngest - will reach 25 within 21 years of John's death (and they themselves were all lives in being when the deed was made anyway).

ii) If the grant is not saved by "wait and see" - e.g. John made the grant by deed in late 1964 but died in 1968 when Fred was 22, Bill 18, Phil 13 and Susie 2 so Susie was not a life in being when the deed was made - the required age can be reduced: but it is not reduced to 21. It is reduced to whatever age (21 or more) will bring it within the Perpetuity Period. Thus: John has died when Susie is 2. A week later, Fred, Bill and Phil are all killed in an accident, so all the lives in being have died. Susie is going to be the first of John's children to reach 25 (assuming she does not die

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Frame 18:

Your answer to the question in frame 14 is correct; in non-registration areas the great majority of properties are unregistered, but it may have been registered for one of the reasons we have just seen in frame 14.

QUESTION: If the shop you have just bought at Land's End is unregistered and you have the deeds, can you register it?

INSTRUCTION: If "yes", turn to frame 19, page 205,
If "no", turn to frame 20, page 207.

203

18.

before reaching that age) but she is not going to get there within the normal Perpetuity Period. When the last life in being died, Susie was 2. So Susie cannot reach 25 within 21 years from then: she will only reach 23 within that time. So reduce the required age (for Susie only) to 23.

If Susie had only been 1, the required age would have been reduced to 22.

And so, whichever of John's children reaches the required age first - even if it is Susie - will reach it within the Perpetuity Period of a lifetime plus 21 years.

The Reduction of Fixed Ages Rule only applies to ages: it cannot be applied to such conditions as becoming a Surveyor, becoming a Clergyman, getting married, etc.

Test yourself as you read:- Fred Smith is not dead: but he and his wife Florrie executed a deed in 1985 declaring that "Magpie Cottage" shall go to the first of their children to reach 40. Is this grant valid? Florrie is not yet 55 years of age.

Work it out!

THE "NOTORIOUS TRAP OF THE UNBORN WIDOW":- A grant "to all the children of Bill *[who is a bachelor]* who are alive at the date that both Bill and his wife are dead" is void under the pre-1964 law because Bill may marry a girl who is not yet born. (So neither she nor the children are lives in being, and she may outlive Bill by more than 21 years.)

In instruments since the 1964 Act, (i) "wait and see" whether Bill actually does marry a girl who at the date of the grant was not born. And if he does (in which case the "wait and see" rule does *not* make it valid) then (ii) the 1964 Act makes it valid by making it vest not later than 21 years after Bill's death.

Example:-

1980: the grant was made.

1999: Bill marries a girl born in 1982 (so she is

not a life in being, and "wait and see" has not saved it).

2005: Bill dies.

21 years after the death of Bill, the grant vests even though the widow is still alive - the children do not take possession, but there is a vested future interest for all the children alive at that date, even if any of them subsequently die before the widow.

THE "ALTERNATIVE FIXED PERIOD" RULE:- This is a rule whereby, instead of a life or lives in being plus 21 years, there may be a fixed period - any period up to 80 years.

Thus (using examples which will validate Example (4) on page 192):- before the 1964 Act Example (4) could be made valid by including in the deed such words as "to the first of my children to become a Surveyor in my lifetime or within 21 years after my death" or "to the first of my children to become a Surveyor within the lifetime of Her Majesty the Queen plus 21 years"; but since the 1964 Act there is the alternative permitted period "to the first of my children to become a Surveyor within 80 years and the said 80 year period shall be the Perpetuity Period for the purposes of this deed".

The grant must expressly specify that the period mentioned is to be the Perpetuity Period for that grant. If not so specified, the period remains "a life in being plus 21 years".

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We must now glance briefly at changes made to class gifts by the 1964 Act:-

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Frame 19:

Your answer to the question in frame 18 is wrong; you cannot register the property as it does not come within any of the categories specified in frame 14.

INSTRUCTION: Return to frame 14 on page 195 and work forward again.

205

19.

I: Class Gifts and the 1964 Act

Let us again use the example of a gift made by John, by deed, "to all of my children who become Surveyors" - but this time John is making the deed today, the day you are reading this book. Fred, Bill and Phil are lives in being but none of them are as yet Surveyors: there is the possibility of others being conceived in the future (e.g. Susie) who might fulfil the condition more than 21 years after all the lives in being have died. So if the grant had been made before 16th. July 1964, it would have been wholly void for all of them.

What is the effect of the 1964 Perpetuities and Accumulations Act on this?

First, apply the "wait and see" rule.

If we "wait and see", what shall we see? Let us consider four possibilities:-

1. Fred and Phil become Surveyors, and no more children are born to John. (There is no Susie.) There is no problem: Fred and Phil each take one third; the remaining third does not go to Bill because he never qualifies and so it is eventually shared, after Bill's death, between Fred and Phil (or their heirs).

2. Susie (not a life in being) is born. Fred and Phil later become Surveyors. All the lives in being then die. Wait and see further ... and *less* than 21 years after the death of the last life in being, Susie becomes a Surveyor. She is entitled. So, when the class closed (the day that Fred - the first of them to become a Surveyor - fulfilled the condition) there were four living persons to consider, Fred, Bill, Phil, and Susie; and Fred could demand his quarter - later increased, on Bill's death without fulfilling the condition, to one third. The gift therefore goes to Fred, Phil and Susie one third each.

3. Susie (not a life in being) is born. Fred and Phil later become Surveyors. All the lives in being then die. Wait and see further ... and *more* than 21 years

after the death of the last life in being, Susie becomes a Surveyor. The "wait and see" rule has not saved her and she is not entitled. So the gift goes to Fred and Phil, half each. For them the gift is good but for Susie it is bad for breach of the Perpetuity Rule. CONTRAST this with the pre-1964 position, where a gift cannot be part-good and part-bad.

4. (In this example Fred fulfils the condition before his sister Susie is conceived.) Fred becomes a Surveyor. Three years later his sister Susie is born. But Susie has come too late! As soon as Fred fulfilled the condition he could say, "I want my share now" - and so the class closed on that date, when there were only the three children Fred, Bill and Phil. So Fred then took one third - increased to one half later because although Phil became a Surveyor, Bill died without doing so. So the class consists of the two, Fred and Phil. Even if Susie fulfils the condition within the Perpetuity Period she will not get any share of this gift, because she was not conceived until after the class was closed. Even if Susie qualifies as a Surveyor a year before Phil does, she gets nothing.

J: Powers of Appointment

Powers of Appointment are beyond the scope of this book but there is room here for one example. If John Smith in his will (taking effect after 1964) leaves

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Frame 20:

Your answer to the question in frame 18 is correct.

INFORMATION: The two systems are mutually exclusive: land is either registered or it is not. No half-measures.

QUESTION: Do you wish to study the registered or the unregistered system first? (It doesn't matter which you answer: you'll come back to the other one later!)

INSTRUCTION: for registered, turn to frame 22, p.211, for unregistered, turn to frame 21, p.209.

property to his son Fred "on trust that in due course Fred will give it to one or more of my grandchildren, as and when Fred shall think fit and on such terms as Fred shall set down in writing", this is a Power of Appointment, and the Rule against Perpetuities (as amended by the 1964 Perpetuities and Accumulations Act) will apply.

Let us suppose that Fred decides to give half the property "to the first of John's grandchildren to be ordained as a Clergyman". Two questions on Perpetuity arise:- (i) Can the power be exercised outside the Perpetuity Period? (The answer is, "No": Fred cannot make a written appointment outside his own lifetime - dead men can't write.) (ii) Can the appointment, which Fred makes within the Perpetuity Period, come about outside the Perpetuity Period? (The answer is, "It might": possibly Fred and all other lives in being may die, and more than 21 years after that one of the grandchildren who is not a life in being becomes ordained.) As this example is post-1964 the "wait and see" rule applies: if the condition is in fact not fulfilled within a lifetime plus 21 years, it is a void appointment.

And if Fred were so unwise as to sign a document granting the other half of the property "to all of John's grandchildren who reach the age of 35", he would create a Perpetuity Rule problem to which the "wait and see" rule, the "reduction of fixed ages" rule and the "class closing" rule might all have to be applied.

K: Dangers of the Rule against Perpetuities

The Perpetuity Rule can crop up at the most inconvenient moments. How about this one? You are buying a house on a housing estate. When the house was built the housing estate was only half finished and drainage rights for the house were granted "through all drains which now are or may hereafter be laid on the estate".

Drains which "may hereafter be laid" ... this is a contingency - perhaps there will never be any - but

if there are, they may be laid more than a lifetime and 21 years later - i.e the contingency may happen outside the Perpetuity time-limit. So the right to use such future drains is void - at any rate if the house was built before 1964 when there was no "wait and see" rule to save it. This situation actually arose in *Dunn v. Blackdown Properties Ltd. (1961)* in which the right of drainage was held to be void.

Any student who has looked ahead to Chapter 30 will know that if drains are used without any right at all for 20 years, a right by Prescription can arise. So if the deed (and the temporary drain) were created in 1962 and the permanent drain was laid in 1965, the problem may well have solved itself because even though there is no right by the deed, the drain has been used and so there is likely to be a right by Prescription.

But here is a situation in which the problem could arise today: the deed and temporary drain were created in 1962, but the present drain (which follows a different route) was not laid until 1979. The right granted by the deed is void because (being a pre-1964 deed) the "wait and see" rule does not rescue it. And there is no right by Prescription because the present drain has not been in use 20 years. And now the drain

Frame 21: UNREGISTERED SYSTEM

INFORMATION: On the unregistered land system, the ownership of the legal estate (fee simple absolute in possession or term of years absolute) does not appear in any Register. It is shown by title deeds. If these are lost or destroyed it is unlikely that duplicates will be obtainable, and the owner - unable to prove his entitlement to his legal estate - may have to rely on a Possessory Title. (Details of Possessory Title appear in Chapter 44.)

QUESTION: Your deeds have been completely shredded by a family of mice. Would you regard this as serious or unimportant? Give a reason.

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INSTRUCTION: Turn to frame 23 on page 213.

21.

is blocked and there is an awkward neighbour who will not allow anyone onto his property to unblock it.

Without drains, the house is unfit for habitation, which lowers its value rather a lot...

The grant in the deed would have been valid if words had been added shortening the period of the contingency to bring it within the Perpetuity Period: and so "... a right to use any drains which may hereafter be laid within the lives of the descendants now living of His late Majesty King George VI or any of them or within 21 years thereafter" would be valid.

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A contract by a Development Company to purchase land "if Planning Permission is granted for building on it" is subject to the Perpetuity Rule, as this is a contingency which could be fulfilled outside a lifetime plus 21 years. But on contracts made on or after 16th. July 1964, the "wait and see" rule applies.

Options to purchase, such as we saw in *Midland Bank Trust Co. Ltd. v. Green* (on page 111) are subject to the Perpetuity Rule, and if made since the 1964 Act they are limited to a total period of 21 years only.

A gift (by deed or will) by a bachelor "to my first child" could break the Perpetuity Rule if by means of sperm banks and artificial insemination the child is born more than 21 years after the father's death, and the mother was not a life in being when the gift was made. The law has not yet faced up to the implications of this possibility - and for the time being we can expect the "wait and see" rule to deal with the majority of problems which might thus arise.

The Perpetuity trap claimed another victim in *Re Wood (1894)*. In this case a testator, who was a gravel cutter, directed his executors and trustees to carry on his business until his gravel pits were worked out, and then sell the land and hold the proceeds of sale on trust for such of his children as were *then* alive, and also children of any deceased children on their reaching 21. There's the contingency. The

testator knew that the gravel pits were almost exhausted, and in fact they were completely worked out within six years after his death; but the gift to all the children was held to be void because it could have been more than a lifetime plus 21 years before the last of the gravel was extracted, and the identity of the beneficiaries would not be finally established until that date.

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Frame 22: *REGISTERED SYSTEM*

INFORMATION: The Land Registry was formerly at Lincoln's Inn Fields in London but has been decentralised: the headquarters remains at Lincoln's Inn Fields but all registrations are carried out at the thirteen District Land Registries:-

NAME	AREA COVERED (approximate)
1. Durham	North and north-east England
2. Lytham St. Annes	Manchester and Lancashire
3. Birkenhead	Cheshire and Merseyside
4. Nottingham	North Midlands
5. Peterborough	East Anglia (northern part)
6. Stevenage	East Anglia (southern part)
7. Harrow	North London
8. Croydon	South London
9. Tunbridge Wells	South-east England
10. Gloucester	From West Midlands to Berkshire (inclusive)
11. Weymouth	Hampshire, Isle of Wight, and West Sussex
12. Plymouth	South-west England
13. Swansea	Wales and certain Welsh-border English counties.

QUESTION: To which District Registries would you apply for details of registered properties in (i) Dover (ii) Devon (iii) Darlington?

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INSTRUCTION: Turn to frame 30 on page 217.

22.

L: Exceptions to the Rule against Perpetuities

1. Certain limitations following an entailed interest are not subject to the Perpetuity Rule. For instance a grant "to John Jones in tail and then equally between all the descendants of his cousin Fred Smith alive when the entail ends". Such a grant is valid (even though the entail may not end for several centuries) provided that the interests of the persons entitled will vest *immediately* after the ending of the entail.

2. An option for a lessee (tenant) to renew a Lease, and an option (since the 1964 Act) for the lessee to purchase the landlord's reversion, are exempt from the Perpetuity Rule. So is a Proviso for Forfeiture of a Lease; and so are, generally, matters to do with normal leasehold covenants.

3. A gift to a Charity is subject to the Perpetuity Rule just like a gift to an ordinary person. And a gift to a person, with a proviso that if a certain contingency happens, the property shall go to a certain Charity, is affected by the Perpetuity Rule if the contingency could happen outside a lifetime plus 21 years. But a gift to a Charity, with a proviso that if a certain contingency happens, the property shall go to a second Charity, is an exception: the right of the second Charity is exempt from the Perpetuity Rule.

4. There are also various exemptions to the Perpetuity Rule in respect of mortgages, rentcharges, registered Pension Funds, etc.

SUMMARY

In this chapter we have seen:-

1. the rule against perpetuities

basically, if a contingency will happen
either (i) within a lifetime plus 21 years
or (ii) never,
the grant is valid;

if a contingency will happen
either (i) within a lifetime plus 21 years
or (ii) outside a lifetime plus 21 years
or (iii) never,
the grant is void.

2. the 1964 Perpetuities and Accumulations Act, which introduces
   a "maximum age of child-bearing" rule,
   a "wait and see" rule
   an amended "reduction of fixed ages " rule
   an "alternative fixed period" (up to 80 yrs.) rule

3. class gifts, etc.

Frame 23: UNREGISTERED SYSTEM

Your answer to the question in frame 21 is: it is serious, because you cannot now show that you own any fee simple or term of years estate. Your solicitor may possibly be able to find copies of some of the deeds in old files, but if not, you must rely on the fact that you are in possession of the property and no-one has ever challenged your right to be there.

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INSTRUCTION: Turn to frame 24 on page 215.

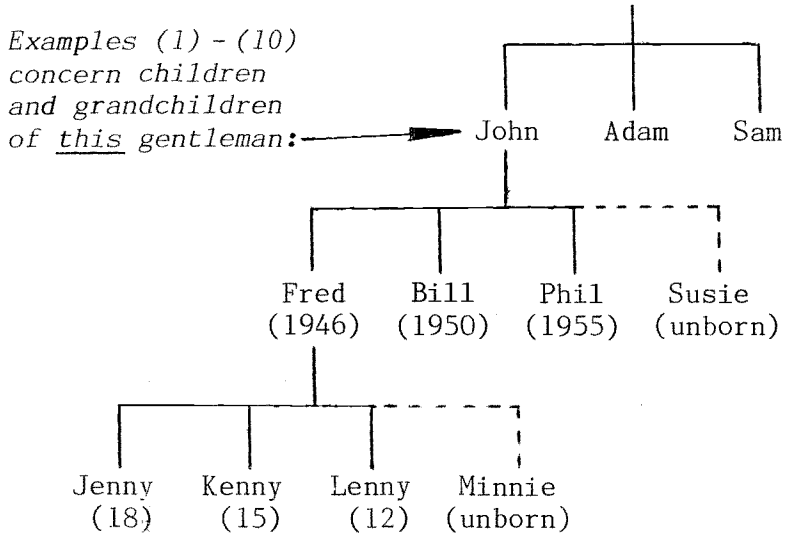
23.

TEST QUESTIONS on Chapter 17:-

1. State in your own words the Rule against Perpetuities and state how the way it applies today differs between a deed dated 1962 and one dated 1982.

2. X left property in his will to the first of his granddaughters to reach 28. What was or is the effect of such a limitation, made (a) before 1926, (b) between 1925 and 1964, and (c) since 1964?

3. Fred Smith wishes to make a will leaving certain property "to my daughter Jenny if she marries a doctor, but otherwise to my son Kenny", and leaving other property "to the first of my grandchildren to get married" and other property "to all of my grandchildren who join the police force". Advise Fred (with reasons) whether any of these limitations is in breach of the Rule against Perpetuities.



Family tree of the Smith family.

CHAPTER 18

OTHER RULES AGAINST REMOTENESS

OUTLINE OF CHAPTER:-

A: The rule in Whitby v. Mitchell
B: The rule against inalienability
C: The rule against accumulations

The Rule against Perpetuities is one of four rules against remoteness of which we need to be aware. The other three are:-

Frame 24: UNREGISTERED SYSTEM

INFORMATION: There is a register of *incumbrances*, the Land Charges Register, used in the unregistered land system for the following reason:-

Although the vendor has the deeds, it is possible that (for example):
(i) he is bankrupt and therefore not entitled to sell; or (ii) he has charged his property with his debts *(this can give his creditors certain rights against the land)*; or (iii) he has already made a contract to sell the land to somebody else.

Matters such as these (which generally cannot be found out by looking at the property or at the deeds) can be registered at the Land Charges Registry by the person having the benefit of the incumbrance - e.g. the creditor in (ii) above and the person who agreed to purchase in (iii). They can thus protect their interests.

QUESTION: You have lent Alfred £15,000 on mortgage, on the security of his unregistered house in Dorset, but he has failed to hand you the deeds. What action should you immediately take to protect yourself?

INSTRUCTION: Turn to frame 25 on page 217.

215

24.

A: the rule in *Whitby v. Mitchell* (abolished in 1925)
B: the rule against inalienability (still applicable)
C: the rule against accumulations (still applicable).

A: The Rule in Whitby v. Mitchell

We saw on page 149 that by 1472 an entail did not guarantee to keep land in the family generation after generation, because any generation could bar the entail and sell the fee simple.

Could not this be overcome by granting a series of life estates? - Let us make our page 146 example do so:-

"to Horace for life,
remainder to his son (i.e. Charles, not then born) for life,
remainder to his grandchild (i.e. George, not born) for life,
remainder to his great-grandchild (i.e. Gigi) for life..."

and so on.

The rule in Whitby v. Mitchell (which is much older than the 1890 case after which it is named) prevented this by saying that a limitation to an unborn child of an unborn child was void. Thus in the above example the limitations to Horace (born) and Charles (unborn) were valid, but the limitation to George (unborn son of the unborn Charles) was void, as were all limitations after it.

By 1925 the rule had become unnecessary, as the Perpetuity Rule covered all situations which needed to be covered. (Whether your unborn child will have a child is a contingency which may be fulfilled more than 21 years after your death. Think of it this way: suppose a grant is made

to yourself for life,
then to your first son for life,
then to your first grandson for life,
then to your first great-grandson for life,
etc.,

Will you ever <u>have</u> a great-grandson? And if so, is he bound to be born within (or within 21 years after) the lifetime of yourself and any children you have alive today? Not necessarily so - and even under the "wait and see" rule it is quite likely that the grant to the great-grandson would be outside the Perpetuity period and therefore void. And it is even more likely for the next generation, the great-great-grandson.)

As the Perpetuity Rule thus covers the situation, the Rule in Whitby v. Mitchell was abolished by the 1925 LPA.

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Frame 25: UNREGISTERED

Answer to question in frame 24 on page 215: register your right against Alfred's name in the Land Charges Register.

INFORMATION: four facts about the Land Charges Registry:

1. Until 1974 it was at Kidbrooke in south-east London, but it is now at Plymouth.

2. Registration is made against persons' names. (There are about twelve million names on the Register.)

3. The system is governed by LCA (and by the 1974 Land Charges Rules).

4. The Registry contains five Registers.

QUESTION: Have you learnt the above four facts?

INSTRUCTION: If "no", go back and learn them!

If "yes", turn to frame 26 on page 219 to see what the five Registers are.

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Frame 30: *REGISTERED*

Answer to question in frame 22 on page 211: (i) Tunbridge Wells, (ii) Plymouth, (iii) Durham.

INFORMATION: four facts about the Land Registry:

1. It is situated in the thirteen centres we have seen; more may be set up at a future date.

2. Registration is made against title numbers. (Each piece of registered land is allocated its own separate title number.)

3. The system is governed by LRA (and also by the 1966 LRA and numerous rules, orders, etc.)

4. The system is divided into three Registers: the

Property
Proprietorship } Registers
Charges

QUESTION: Which part of the 1925 legislation governs the registered system?

INSTRUCTION: Turn to frame 31 on page 227.

217

25.

30.

B: The Rule against Inalienability

In this book we have seen several attempts by the landowners throughout the centuries to keep their land in their family, unsaleable. The fee tail was used - but then "barring the entail" was developed. Contingencies producing an unbarrable entail (see page 186) were later used, and largely in reply to that, the Perpetuity Rule was developed. A series of life estates was tried as a means of making the land unsaleable, but the rule in Whitby v. Mitchell put paid to that idea.

But why not simply make a grant, "to Horace and his heirs but on condition that neither Horace nor his heirs will ever sell it - and if they try to sell it then it shall revert to the Grantor and his heirs"?

Why not? The Rule against Inalienability tells us why not.

The Rule against Inalienability shows that property cannot be made inalienable (i.e. untransferable) for ever: a grant "to Horace and his heirs to be retained in the family for ever" appears to be void.

This rule is aimed against too-remote control of vested interests, in contrast to the Perpetuity Rule which is aimed against too-remote vesting of contingent interests.

For how long can a property be made inalienable? There seems to be no specific ruling, but it appears that a period (now familiar to us) of "a life or lives in being, plus 21 years" is probably the maximum.

The rule does not apply to gifts made for charitable purposes.

The 1964 Perpetuities and Accumulations Act makes no alteration to the Rule against Inalienability.

C: The Rule against Accumulations

This rule, like the previous one, is against the too-remote control of vested interests.

In 1797 a Mr. Thellusson directed in his will that the income from his property should be accumulated (i.e. collected, re-invested, but not paid out to anyone) for

the lives of his sons, grandsons and their issue living at his death. On the death of the last of these lives in being, the accumulated fund was to be divided between certain of his descendants. The court held in *Thellusson v. Woodford (1799 - affirmed on appeal 1805)*

Frame 26: UNREGISTERED SYSTEM

INFORMATION: The five Registers at the Land Charges Registry are:-

(a) Register of Land Charges. *(This is by far the most important of the five Registers: 236,488 new items were registered in it in the year 1982-3. It is divided into 6 classes which are described in Frame 27 on page 221.)*

(b) Register of Pending Actions: i.e. any impending court case which affects the land (e.g. a claim to ownership). This includes the owner's impending bankruptcy. *(9,475 new entries were made in this Register in the year 1982-3.)*

(c) Register of Writs and Orders of the Court, affecting land. This includes the owner's bankruptcy. *(6,456 new entries made in 1982-3.)*

(d) Register of Deeds of Arrangement with creditors if they affect the land. *(27 new entries 1982-3)*

(e) Register of Annuities created and registered before 1st. January 1926. (The registration of annuities began in 1777.) *(No more entries will be made in this Register: modern annuities are registrable as Class C(iii) Land Charges, as shown in Frame 27.)*

QUESTION: James, a builder, is selling a new house. Meanwhile his partner John is preparing to sue him on the grounds that the property should have been put in their joint names in the deeds, and he paid half the purchase price and did half the work. He fears that a purchaser not knowing these facts may pay all the money to James. The plot is unregistered land. What should John register to protect himself?

INSTRUCTION: turn to frame 27 on page 221.

that this was valid: accumulation for any period not exceeding the Perpetuity Period was permissible at that time. But Parliament was disturbed by it. Counsel for the appellants had alleged: "Mr. Thellusson's will is morally vicious; as it was a contrivance of a parent to exclude every one of his issue from the enjoyment even of the produce of his property during almost a century; and it is politically injurious, as during the whole of that period it makes an immense property unproductive both to individuals and the community at large; and by the time, when the accumulation shall end, it will have created a fund, the revenue of which will be greater than the Civil List; and will therefore give its possessor the means of disturbing the whole economy of the country".

When Mr. Thellusson died (1797 - at which time a farm labourer's pay was a shilling - 5p - a day) it was possible that the accumulation could finally amount to more than £100,000,000 - though when the money was eventually paid out in 1856 it was nowhere near this figure, because of the bad management of the fund and the cost of the prolonged litigation.

(I am told that Mr. Thellusson's intention was to build up such a fund as should get one of his descendants into the House of Lords - and that his hope was fulfilled.)

Parliament decided that such an accumulation as this must not be allowed to happen again, and therefore passed the (ill-drafted) Accumulations Act, in 1800.

Accumulation is now allowed for any one of six periods. The first four of these come from the 1800 Act (though now included in LPA) and the other two come from the 1964 Perpetuities and Accumulations Act. The periods are:-

i) the life of the grantor (or, in the case of a settlement, the life of the settlor)

ii) 21 years from the death of the grantor, settlor or testator,

iii) the minority or respective minorities of any

continued on page 223

Frame 27 UNREGISTERED SYSTEM

Answer to question in frame 26 on page 219:
a Pending Action.

INFORMATION: The Register of Land Charges at the Land Charges Registry (i.e. Register (a), in the list in Frame 26) is divided into six Classes.

The six Classes are as follows:-
(note: those underlined are of particular importance)

A Rent, annuity, etc. charged on the land by Statute on the application of some person. *(These are possible under the Tithe Act, Land Drainage Act, Agricultural Holdings Act, etc., but there are not many of them. Only 3 new ones were registered in the year 1982-3.)*

B Rent, annuity, etc. charged on the land by Statute *other than* on the application of some person. *(i.e. they are imposed by the Statute automatically, without any application to any Court or Government Minister being necessary. Such matters are rare but they include charges imposed on the land under the 1974 Legal Aid Act in respect of repayable legal aid contributions which the recipient has failed to repay: 2,811 new ones were registered in this class in the year 1982-3.)*

C(i) Puisne Legal Mortgage: i.e. a legal mortgage where the deeds have not been handed over to the lender. Most of them are Second Mortgages where the deeds have been handed over to the First Mortgagee. *129,007 new ones were registered in the period 1982-3.*

C(ii) Limited Owner's Charge: e.g. a tenant for life's charge on the land, for Capital Transfer Tax (or formerly Estate Duty) which he paid. *(179 new ones registered in 1982-3.)*

C(iii) General Equitable Charge: i.e. any Equitable charge not secured by deposit of deeds and not

[frame continued overleaf]

Frame 27 (continued) UNREGISTERED SYSTEM

included under any other head: it includes annuities created since 1925, and Equitable mortgages. *5,074 new ones registered, 1982-3.*

C(iv) Estate Contract: e.g an agreement to sell or lease all or part of the property. Or an option to purchase. *27,726 new ones were registered in 1982-3.*

D(i) Charge on land, acquired by the Board of Inland Revenue in respect of unpaid Capital Transfer Tax. *236 new ones registered 1982-3.*

D(ii) Restrictive Covenant (other than between landlord and tenant): e.g. a covenant not to keep pigs on the property. *62,291 new ones were registered in the period 1982-3.*

D(iii) Equitable Easement: David's right of way granted by letter (see page 106) is an example of an Equitable easement registrable as a D(iii). *1,482 new ones were registered during 1982-3: the small number may indicate that many Equitable easements which ought to be registered are not.* Note: LEGAL easements are not registrable in the Land Charges Registry. Nor are Equitable easements and restrictive covenants which were created before 1926.

E Annuities created before but registered after 1st. January 1926. *No new entries 1982-3; and no more expected.*

F Protection of Spouse under 1967 and 1983 Matrimonial Homes Acts. *(Example: Henry owns a house. He deserts, leaving his wife living there. She has a right to stay there and can prevent Henry from selling the house over her head, if she has registered a Class F Land Charge. 7,679 new registrations in this class were made during the year 1982-3.)*

For QUESTION, see top of next page.

Frame 27 (continued) UNREGISTERED SYSTEM

QUESTION: Jack has a house. It is mortgaged to a Building Society which is holding the deeds as security. There is a second mortgage to a Bank. There is a covenant against using the house for trade or business, and a neighbour has been granted an Equitable right of way through the garden. What entries would you expect to find registered against the name of Jack (or his predecessors in title)?

INSTRUCTION: turn to frame 28 on page 225.

person or persons living or *en ventre sa mère* (i.e. conceived) at the date of the death of the grantor, settlor or testator,

iv) the minority or respective minorities only of any person or persons who (under the terms of the instrument) would, if of full age, be entitled to the accumulation,

v) 21 years from the making of the grant,

vi) the minority or respective minorities of any person(s) alive at the date the grant was made.

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And here let us conclude the examination of Future Interests and the Rules against Remoteness to which they are subject, which have occupied us for the last three chapters. We have not looked very deeply into these matters - even though the student to whom these things are new may think otherwise. We have omitted all mention of the thorny question of how the rules for ascertaining lives in being have been altered by the "wait and see" rule - and we have left out all details of the application of the Rule against Accumulations - and numerous other topics: all are omitted in an attempt to keep the explanation as simple as the subject-matter will permit, which admittedly is not very simple. The student who wishes to delve more deeply should consult heavier tomes than this one.

SUMMARY

In this chapter we have seen:-

the rule against inalienability
(by which property cannot be made untransferable for a longer period than a lifetime plus 21 years)

the rule against accumulations
(by which property cannot be tied up to accumulate for longer than one of 6 periods)

TEST QUESTION on Chapter 18:-

Compare and contrast what is done by
(a) the Rule against Accumulations,
(b) the Rule against Inalienability,
(c) the Rule against Perpetuities.

Section C (Chapters 19 - 21)

Settlements and Trusts for Sale

CHAPTER 19

SETTLEMENTS

OUTLINE OF CHAPTER:-

A: Introduction
B: Development of the Settlement
1. before the 1882 Settled Land Act
2. 1883-1925
3. since 1925: the present position.

A: INTRODUCTION

In this chapter we shall look at the Settlement and its refinement the Strict Settlement.

By now the student should be used to the fact that words have different meanings in different contexts. For instance, in Divorce Law the Settlement is the division (some would call it the carve-up!) of the

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Frame 28 UNREGISTERED SYSTEM

Answer: Second Mortgage (Bank not holding the deeds, because the Building Society already has taken them) should be registered as C(i); the restrictive covenant as a D(ii); and the neighbour's Equitable easement as a D(iii). The mortgage to the Building Society is not registrable because the Building Society is protected by having the deeds.

INSTRUCTION:

If you learnt the registered system first (so you have now learnt both systems) turn to frame 29 on page 235.

If you learnt the unregistered system first, turn to frame 22 on page 211 for the registered system.

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property between the ex-husband and the ex-wife. This type of settlement has nothing whatever to do with what we are talking about in this chapter.

The student for whom this book is designed will probably know enough about Soil Mechanics to know that Settlement is movement of the soil, particularly under the foundations of buildings. This too has nothing to do with what we are looking at in this chapter. Land Law is after all based on the assumption that land is immovable!

So what is this chapter to do with? Chiefly, the estates of the aristocracy and landed gentry, and the efforts which were made to keep these estates in the family, generation after generation.

Any grant to two or more persons in succession: e.g.

"to A for life,
then to B..."

creates Settled Land (unless it is expressly stated to be a Trust for Sale instead of a Settlement). And when such a grant to persons in succession was used (in the way which we shall see in this chapter) for the purpose of keeping land in one family, generation after generation, the result was something (usually a long and complicated deed, though it could be a will) which is known as a Strict Settlement.

Often the Strict Settlement was drawn up just prior to the landowner (or his eldest son) getting married. This is known as a Marriage Settlement. It is said that in the 1850s, two thirds of all land in England and Wales was tied up in Marriage Settlements - but Settlements today are of much reduced importance.

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We saw in Chapter 13 how landowners used the fee tail to keep their land in their families; but a future generation could frustrate their wishes by barring the entail - changing the fee tail into a fee simple.

If the landowner granted the land to someone who was unable to bar the entail, the land would be inalienable,

i.e. unsaleable. (Alienation is another word which has different meanings in different situations: in Sociology we hear of people being alienated, or estranged, from their neighbours: but in Land Law an alienation means a sale, or a gift, of the land.)

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Frame 31: *REGISTERED SYSTEM*

Answer to question in Frame 30 on page 217: the Land Registration Act.

INFORMATION: The three Registers of the Land Registry are:-

A: Property Register: *this describes the property and states whether it is freehold or leasehold. It normally includes a Plan, drawn to scale.*

B: Proprietorship Register: *this gives the full name and address of the present proprietor of the legal estate.*

C: Charges Register: *this may contain various entries such as covenants, legal and Equitable easements (e.g. rights of way or drainage), mortgages, etc. - It includes virtually all items which would be registrable in the Land Charges Registry on the unregistered system, and various other items.*

At the beginning of 1983 there were 8,325,098 registered titles, which is twice as many as in 1973.

If the entries in the Charges Register include a Mortgage, the title certificate issued will be a Charge Certificate. In all other cases it will be a Land Certificate. The Certificate issued is only a copy of the original record which is kept by the Land Registry: so, if a Certificate is accidentally destroyed, the Registry can supply a duplicate copy.

QUESTION: You have inherited £1,000,000 and have bought a luxury flat in London. Would you expect to end up with (i) deeds (turn to frame 32, page 229)
(ii) Charge Certificate (turn to frame 33, page 231)
(iii) Land Certificate (turn to frame 34, page 233)?

227

31.

A grant

> to Charles *(aged 21)* for life,
> then to Charles' first child *(it will be George but he is not born yet)* in tail,

created unsaleable land, because George was obviously not in a position to take action to bar the entail.

But here we have two persons, Charles and George, holding the land successively, one after another: and *that* is the hallmark of a Settlement, as defined by s.1 of the 1925 SLA. Similarly the grant which we saw on page 126 "to John Jones for life and then to Fred Smith" is a Settlement: the estate *(the wad of pages representing the time from today to when the fee simple ends, if you are using the "pages" system described on page 48)* has been split between two successive owners.

The hallmark of the type of Settlement known as the *Strict* Settlement is that it was designed to keep land in the family. Its use was widespread, particularly in the eighteenth and nineteenth centuries. So if for our example of a Strict Settlement throughout this chapter we take the example we have used several times, our old friends the Horace-Charles-George-Gigi family, and picture Horace as the nineteenth-century Lord Horace in his stately home surrounded by his 20,000 acres, we shall not go far wrong.

This stately home is typical of the sort of property for which the rules in the 1925 SLA (to which all Settlements are subject) are primarily designed. In other words, "Settlement" legislation today is really designed for the Strict Settlement and for large properties.

Nevertheless we find examples of Settlements which affect very ordinary little properties. Maybe the commonest example is provided by home-made wills (the lawyer's delight: sorting them out can bring in a far greater fee than drawing a proper will) containing such clauses as, "I leave my house to my dear wife for her life and then to my son Samuel". That grant is to two successive owners and has thus created a Settlement: all the legal paraphernalia intended for the

controlling of landed gentry's great acreages will apply to that little terraced house.

(Far better to have consulted a solicitor who could have advised that the property be left to two trustees on a Trust for Sale. The trustees can be instructed to hold the proceeds of sale for "dear wife" for her life and then for Samuel, and they can be forbidden to sell without the wife's consent. In such cases as this the Trust for Sale is generally much more advantageous for all concerned, as we shall see.)

Before 1926 a Trust for Sale was regarded as a type of Settlement - and indeed it can be used to make provision for persons in succession, just as a Settlement can - but since 1925, Settlements and Trusts for Sale are separate. If a grant today is a Trust for Sale, it is not a Settlement - and vice versa.

(We must watch our terminology here, because some textbooks speak of a "Trust for Sale Settlement" - but such a "Settlement" does not come within the 1925 SLA. So perhaps we should re-phrase the final sentence of that last paragraph, to say: "If a grant today is a Trust for Sale, it is not a SLA Settlement - and vice versa".) Trust for Sale is governed by 1925 LPA.

Strict Settlement was designed to keep land in the family, whereas Trust for Sale was intended as a means of investment, with no particular wish to keep land in a family.

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The method by which a Strict Settlement (which is a

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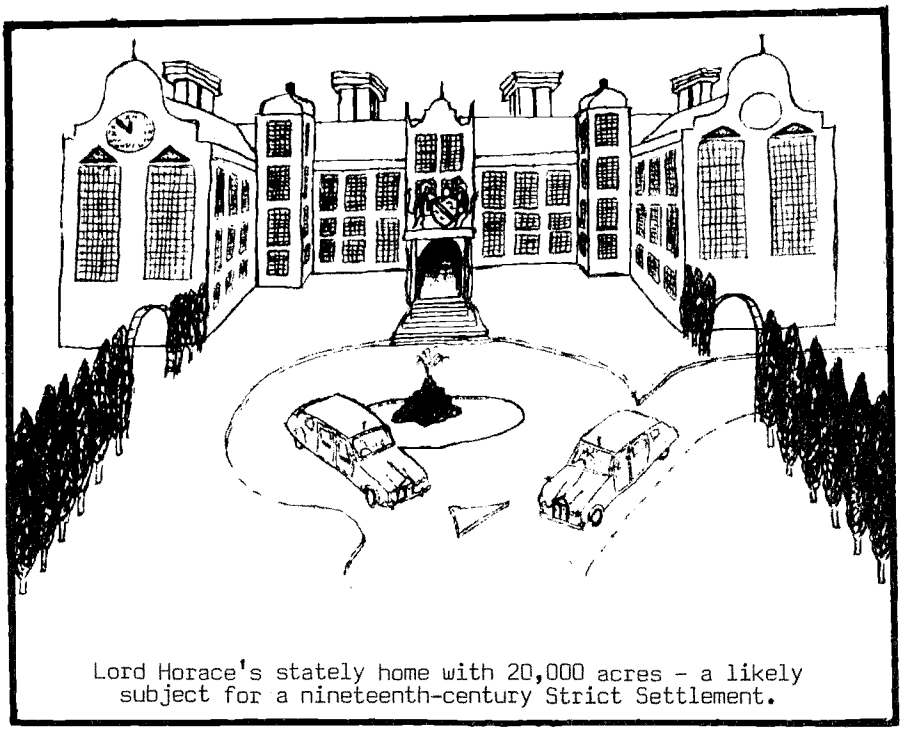
Frame 32 *REGISTERED SYSTEM*

Your answer to the question in frame 31 is wrong; the property is in a compulsory area, so if it is not already registered you must apply for First Registration. Therefore you will not finally end up with deeds but with a Land Registry Title Certificate.

INSTRUCTION: return to frame 31 on page 227 and make another choice.

229

32.

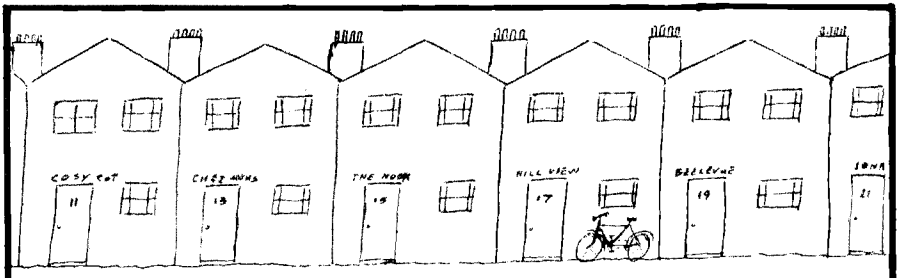


Lord Horace's stately home with 20,000 acres - a likely subject for a nineteenth-century Strict Settlement.

quite complex type of SLA Settlement) kept land in the family basically involved the creation of one or more life estates, followed by a fee tail.

By the nineteenth century other ancillary provisions had been added, making a Strict Settlement into a sophisticated set of arrangements in a lengthy document incorporating many Trusts, but basically on the following lines. (This particular one is a Marriage Settlement, such as might be entered into by the wealthy young Horace shortly before his marriage if he so wished. It is in respect of land of which he owns the fee simple - perhaps he bought or inherited it in fee simple, or perhaps he received it in fee tail but now has the fee simple because he has barred his entail.)

(Note: we shall see later in this chapter how this device was used to keep the land within the landowner's family.)



Row of tenanted terrace-houses - a likely subject for a nineteenth-century Trust for Sale.

MARRIAGE SETTLEMENT

1. DETERMINABLE FEE SIMPLE: to himself until he marries Winifred. (This is just a precaution to ensure that he will not lose the land if, at the last moment, the marriage does not take place.)

   Then, from the date of the marriage:-

2. PIN MONEY: a rentcharge (see Chapter 26) payable to Winifred. (This provides Winifred with an income to cover her personal expenses.)
3. LIFE ESTATE: to Horace.
4. JOINTURE: a larger rentcharge payable after Horace's death, to Winifred for the duration of her widowhood. (This provides the widow Winifred with an income sufficient to live on.)
5. PORTIONS: payment of a capital sum (to be raised by mortgage or other means) to each child - except the eldest, who is provided for in 6. below - on

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Frame 33 *REGISTERED SYSTEM*

Your answer to the question posed by frame 31 is wrong; Charge Certificate signifies that there is a mortgage. Millionaires do not need mortgages! 231

INSTRUCTION: return to frame 31 on page 227 and make another attempt. 33.

reaching full age. (This provides for all the children - except the eldest, Charles, who is to receive the estate.)

6. ENTAIL: to the (as yet unborn) eldest son, in tail male.
7. FURTHER ENTAILS: provisions that if the above entail ended the property should pass to the next son in tail male; and if no sons had male heirs, then it should pass by tail general; and if no sons had heirs at all it should pass to the daughters and devolve from them on a tail general basis.
8. REVERSION: if all entails failed, a reversion to the grantor Horace and his heirs (fee simple reversion).
9. APPOINTMENT OF TRUSTEES: Tom and Dick - i.e. relatives, or the family solicitor etc.
10. A POWER TO APPOINT NEW TRUSTEES.
11. MISCELLANEOUS: any other provisions.

Clauses 3. and 6. (the life estate, and the entail to the unborn eldest son) are the provisions which we shall see used for keeping the land in the family.

Though Settlements are far from extinct, their importance has greatly declined during the last century, and this book will therefore not look at their workings in detail. The aim of this chapter and the next two is to give a general picture of what a Settlement is, showing the reasons for its development and its decline, and comparing and contrasting it with the more popular (and more convenient) Trust for Sale.

B: Development of the Settlement

The history of Settlements falls into three parts:-

1. before the 1882 SLA,
2. from 1st. January 1883 to 31st. December 1925,
3. since the 1925 legislation.

1. BEFORE THE 1882 SETTLED LAND ACT

We have seen (pages 146-155) the centuries-long battle between, on the one side, the great landowners striving to tie up land so that it remained in their family, and, on the other side, the common law Judges seeking to make land freely alienable. The chief weapon in this battle was the fee tail, and we saw on pages 146-155 how the struggle passed through six main stages:-

1. Until 1285, land was alienable (either by subinfeudation or other means - subinfeudation was abolished by quia emptores in 1290, but was replaced by substitution - see page 35),
2. 1285 statute de donis made fee tail land inalienable,
3. 1472 Taltarum's Case, by which time the Judges would by a fictitious court action ("suffering a recovery") allow the fee tail to be barred (i.e. converted to a fee simple) so that the land could be alienated,
4. 1540 Statute of Fines, giving a similar result (by "levying a fine") except that a base fee instead of a fee simple absolute was created,
5. 1833 Fines and Recoveries Act abolished recoveries and fines, and enabled the entail to be barred (and the land alienated) by a "Disentailing Assurance": and this is still so today,
6. The 1925 legislation abolished fee tail at law, but in Equity it continues to exist (as entailed interest) - and "Overreaching" (pages 64-67) applies to it.

Summing up therefore: since the latter part of the fifteenth

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Frame 34 *REGISTERED SYSTEM*

Your answer to the question in frame 31 is correct.

INSTRUCTION:

If you learnt the unregistered system first (so you have now studied both systems) turn to frame 29 on page 235.

If you learnt the registered system first, turn to frame 21 on page 209 for the unregistered system.

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34.

century it has been possible, by barring the entail, to alienate entailed land. But (and here is the secret of the Strict Settlement) an entail can only be barred by a person of full age.

(Throughout the period when Settlements were important "full age" meant 21, as we saw on page 95: it is only since 1st. January 1970 - by the 1969 Family Law Reform Act - that it has meant 18.)

Faced with the fact that a tenant in tail of full age could bar his entail and sell the property, the great landowners developed a method whereby the tenant in tail would (if all went well) always be a person under 21. (Since 1925, only a person of full age can own a legal estate in land, but this was not so before 1926.)

Let us look again at Lord Horace. In the example which has run through this book we have seen him with a fee tail, until the beginning of this chapter where we saw how he might create a Marriage Settlement if he so wished. Let us suppose he did not create such a Settlement, so he still owns the fee tail. The date is any time up to 1882. Horace is aged about 50 and his eldest son Charles is just 21. Let us step into Horace's shoes and survey the facts:-

Fact: if Horace dies, the fee tail passes to the young and irresponsible Charles who (Horace fears) would bar the entail, sell the property and squander the money in riotous living.

Fact: if the fee tail were owned by someone under 21 that person could not bar it until reaching 21.

Fact: Horace is anxious that the land should remain in the family - any by barring his own entail he can bring this about.

So Horace bars his entail - this gives him the fee simple to do as he likes with. And then he makes the following grants:-

(1) to himself, Horace, for life,
(2) a remainder to Charles for life,
(3) a remainder to Charles' first child (this would be George, not yet born) in tail,
(4) a reversion (if the entail ends through failure of issue) back to himself, Horace, and his heirs in fee simple.

There could also be the provisions as to pin money etc. which we do not need to go into but which would give the whole

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Frame 29 UNREGISTERED

INFORMATION: On sale of unregistered property, a vendor proves that he owns what he is selling by sending the purchaser an Abstract, i.e. a copy of the deeds showing the vendor's entitlement to the property. Abstracts are often complicated and occasionally run to more than 50 pages.

The purchaser will make a Search in the Land Charges Registry (cost: 50p per name) a few days before he is to complete his purchase, to ensure that no incumbrances (except any the vendor has told him of) exist. *5,275,990 Searches were made in the year 1982-3.*

QUESTION: You are buying property in Birmingham. The vendor has been there since 1960 so it is still unregistered, and so you must apply for First Registration. Would you search in:-

i) Land Charges Registry?
(go to frame 35, p.235)
2) Land Registry?
(go to frame 36, p.237)
3) both? (frame 37 p.239)
4) neither?
(go to frame 38, p.241)

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Frame 35 *REGISTERED*

Answer to question in Frame 29: Land Charges Registry.

INFORMATION: On sale of registered property, vendor proves that he owns what he is selling by means of an Office Copy of the Title Certificate, available from the Land Registry free of charge. *1,065,904 of them were issued in 1982-3.* It shows all the entries which are on the three Registers on that date.

The purchaser will make a Search in the Land Registry (no fee) a few days before he is to complete his purchase, to ensure that no entries (other than any the vendor has told him of) have been added since the Office Copy was issued. *1,384,473 Searches were made in the year 1982-3.*

QUESTION: you are buying a registered house in Leeds. You know the vendor has a Legal Charge [mortgage] on it, and the lender has the Charge Certificate. Would you expect to find the Charge registered in:-

1) Land Charges Registry?
(turn to frame 39, p.243)
2) Land Registry?
(turn to frame 40, p.245)
3) both? (frame 41, p.247)
4) neither?
(turn to frame 42, p.249)

Settlement the pattern which we saw in the Marriage Settlement on pages 231-2.

Once Horace had executed the deed containing these limitations, neither he nor Charles had any power to alienate the land. Each of them had only a life estate so had no way of disposing of any interest longer than his own life. The first person to have a fee tail (and therefore the first person to be able to bar an entail and sell any of the land) is George - and as he cannot bar the entail until he reaches full age the land is completely inalienable until George reaches 21.

Let us look ahead a quarter of a century. Horace has died, and Charles who is in possession as life tenant has "matured" and is now strongly of the opinion that it is his duty and his desire to keep all this ancestral land in the family. He fears that if he died the young and irresponsible George (who has the fee tail and has just reached 21) would bar the entail, sell the property and squander the money in riotous living. (At worst, George could sell a base fee even before Charles dies.) Charles must have a few words with George:

"George, my son: I know that you are unable to afford to do many of the things you would like to do: would you like me to grant you an annuity - an annual allowance to help you with your expenses? All I want you to do in return is to execute a deed of re-settlement."

George is acutely aware that his younger brothers and his sisters receive Portions sums (see page 231) but he does not, and - deciding that a bird in the hand is worth two in the bush because Charles may live for many years - he executes the deed and is granted his annuity.

In the deed, George first bars his entail, then immediately re-settles the property as follows:-

(1) to Charles for life,
(2) remainder to George for life,
(3) remainder to George's first child (this would be Gigi, not yet born) in tail,
(4) a fee simple reversion.

Once George has executed this deed, the land is once again inalienable until such time as Gigi reaches 21 and can bar her entail. At that time another deed of re-settlement will be

prepared and the process will take place again:-

"Gigi, my dear, would you like an annuity ..." and so the land is tied up again, for another generation.

Alternatively the legal estate could have been vested in trustees, giving Horace etc. Equitable interests; but this did not leave the land any more saleable because the Equities directly incumbered the land: purchasers bought subject to them because there were no overreaching provisions at that time.

Inalienable land had serious disadvantages - disadvantages from the family's point of view, because if money was suddenly needed no estate in the land (except for a comparatively not-very-valuable life estate) could be sold, leased or mortgaged (unless special provisions allowing this had been included in the settlement deed - but all too often they hadn't) - and disadvantages from a social point of view: a growing industrial town surrounded by settled estates could not expand, for none of the surrounding landowners had any power to sell land. This could become a contributory cause of overcrowding and slums - as in Nottingham for example, which had the highest building density in England in the mid-nineteenth century and yet was surrounded by undeveloped and unenclosed land. Furthermore, no life tenant could open a new mine, however valuable the mineral deposits might be, unless the Settlement expressly made him unimpeachable of waste.

During Victorian times certain statutory powers were given to the life tenant - including powers from 1856 onwards to grant certain Leases if the court authorised them - but the freehold remained inalienable and the position remained generally unsatisfactory. An agricultural depression in the 1870s made matters worse, and the eventual result was the 1882 SLA, which

Frame 36 UNREGISTERED SYSTEM

Your answer to the question in frame 29 is wrong; the property is still on the unregistered system, so the Land Registry is at present unaware of its existence and cannot help you.

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INSTRUCTION: return to frame 29, page 235, and make another choice.

36.

was intended to prevent the decay of agricultural and other interests occasioned by the deterioration of land and buildings in the possession of impecunious life tenants, and "to strike off the fetters against alienation".

2. SETTLED LAND 1883-1925

From 1883 to the present day, the rule is: the TENANT FOR LIFE CAN SELL SETTLED LAND - though the method by which this takes place was changed in 1925.

By the 1882 SLA, which took effect on 1st. January 1883, the person in possession (whether he was a life tenant or a tenant in tail) was given the title of "tenant for life" and received the power to sell the fee simple. So, in our example

to Charles for life,
then George for life,
then Gigi in tail,

the tenant in present possession (Charles, with his life estate) became "tenant for life" and had power to sell the fee simple. If he died without selling, the next life tenant George became tenant for life with the same power, and on his death Gigi (tenant in tail) became the tenant for life and had the same power to sell the fee simple.

The tenant for life did not *own* the fee simple, but had one of those interesting creations of English law, the *power to sell* a fee simple which he did not own. As it was not his, he had no just claim on the capital of the proceeds of sale, and the statute provided that he should not receive it: it would be paid to trustees who would see that it was used for the benefit of the estate in accordance with strict rules, or would invest it and see that the benefit of the investments went to the persons who had been entitled to the benefit of the land; thus Charles for life, then George for life, then Gigi in tail - in other words, Overreaching applies. *(Overreaching is of course the transferring of rights from land to money - we saw it on pages 63-67.)*

Gigi, having a fee tail, could bar her entailed interest in the proceeds of sale and eventually receive

the capital (after George's death) unless meanwhile she were persuaded to execute a re-settlement deed.

So freedom of alienability won the day.

Nevertheless the new system had its disadvantages. Important among these were two which we may label as:

(1) the lack of logicality, in selling something which was not his; and

(2) the lack of security for family secrets, in having to produce the family Settlement Deed to a purchaser of any tiny bit of the land.

These two problems had to receive attention in the 1925 legislation, so let us see just what the problems amounted to:-

(1) There is a basic lack of logic in any system based on a person being able to sell something which is not his.

(2) Security for secrets:- To be satisfied as to the title of the property it was necessary for a purchaser to peruse the whole deed of settlement. Basically Gerry (the purchaser) only wanted to see (i) that George (tenant for life now that Charles had died) was the person entitled to sell, (ii) that Tom and Dick had been properly appointed as trustees who could receive (and give a receipt for) the purchase money, and (iii) that there were no other conditions which affected the sale - but to satisfy himself on these three points the purchaser (or his solicitor) had to read the whole deed, which (a) was many pages long and consisted mainly of trusts and other provisions of no interest whatever to the purchaser; and (b) might contain family secrets of the greatest interest ... e.g. why is there this financial provision for that teenage chambermaid's son? What's that got to do with the family? - They told us his father was an unknown sailor!

Frame 37 UNREGISTERED SYSTEM

Your answer to the question in frame 29 is wrong; the two systems are mutually exclusive so they cannot both apply.

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INSTRUCTION: go back to frame 29 on page 235 and choose another alternative.

37.

3. SETTLED LAND AFTER 1925 - THE PRESENT POSITION

The 1925 changes were aimed at providing a cure for these two problems.

(1) The first problem - the lack of logic in letting someone sell something which was not his - was dealt with by the abolition at law (though not in Equity) of the fee tail. So the tenant for life is now the legal owner of the fee simple absolute in possession, which is the only legal freehold estate now existing.

As we saw on pages 63-67, the tenant for life (George in the example) can thus sell the fee simple which he *owns*, and in Equity the trustees who receive the proceeds pay the income to George - Gigi - etc. - by Overreaching.

Any attempt (by contract, or gift, or any other inducement) to prevent the tenant for life from exercising his powers is regarded as void, by s.106 of SLA.

Note that although the tenant for life has the legal fee simple absolute in possession, it is an unusual fee simple in at least two respects, namely *[1]* although he can sell it, the money is not paid to him, because the purchaser must always pay it to the trustees, and *[2]* he cannot leave it in his will, because on his death it passes (despite any instructions to the contrary in his will) to the next tenant for life.

Thus if George during his lifetime does not sell the land, on his death his legal fee simple does not pass under his will or the normal intestacy rules, but - because it is Settled Land - the legal fee simple passes to the next person in line, i.e. Gigi. It has to be vested in her (i.e. granted to her) by a document known as a Vesting Assent.

We need to be a bit careful about the terminology. Charles, until he died, was the *tenant for life* holding the legal estate, and in Equity he was a *life tenant*. Upon Charles' death, George became the tenant for life,

and in Equity he was a life tenant. When George dies, Gigi becomes the tenant for life, but in Equity she is of course not a life tenant but a tenant in tail. The person who is called tenant for life is not necessarily a life tenant.

So, after George's death, Gigi as tenant for life can sell the legal fee simple, but the money will go to trustees to invest: and Gigi as beneficial tenant in tail will be entitled to the interest on it. But if she were to bar her entail after George's death, this would transform her beneficial entailed interest into a beneficial fee simple. Thus Gigi with the legal fee simple (as tenant for life) and Equitable fee simple (the barred entail) would be entitled to the capital for her own benefit absolutely, and this brings the Settlement to an end.

Observe carefully the difference between how Gigi gets the legal fee simple and how she gets the Equitable fee simple. The legal fee simple - the right to sell - is Gigi's because the 1925 legislation says so (because she is the tenant in present possession - so this has nothing whatever to do with whether she bars an entail or whether she even *has* an entail). But the Equitable fee simple - the right to receive the capital - is Gigi's because she had an entailed interest which she barred by executing a deed of Disentailing Assurance.

If the tenant for life is a life tenant, he is subject to the rules as to waste, minerals, timber, emblements and fixtures which we saw on pages 157-162. If the tenant for life is in fact a tenant in tail in possession (like Gigi) he is not bound by these rules,

Frame 38 UNREGISTERED SYSTEM

Your answer to the question in frame 29 is wrong: a Search must always be made somewhere, or the purchaser runs the risk of numerous pitfalls which he could have discovered.

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INSTRUCTION: return to frame 29 on page 235 and try again.

38.

and in any case could bar his entail and bring the whole Settlement to its end.

(2) The second problem created by the 1882 SLA was the problem of the skeletons in the family cupboard and how to keep them there - because anyone buying a piece of the settled land had to inspect the Deed of Settlement, and so they found out all the family's private secrets.

This problem was solved by inserting a requirement into the 1925 SLA that henceforth there should be two documents, the Trust Instrument and the Vesting Deed. (If the Settlement is made by will, the will acts as the Trust Instrument.) A purchaser is allowed to inspect the Vesting Deed, which gives him all the information he needs, but is not entitled to look at the Trust Instrument, which contains the family's private matters.

The TRUST INSTRUMENT (deed or will) deals with the Equity:-

(1) It sets out the details of the trusts,

(2) It bears any Stamp Duty that is payable,

(3) It appoints the trustees,

(4) It gives any special powers that there may be for appointing new trustees,

(5) It gives any additional powers which were intended, beyond those in 1925 SLA.

The lengthy Trust Instrument is not seen by the purchaser. For his benefit, there is the short VESTING DEED, which:-

1. describes the settled land *(so that the purchaser can confirm that the land he is buying is included in it)*
2. vests the legal estate in the tenant for life and declares that the land is held on the trusts of the Settlement *(note: it does not tell the purchaser what trusts there are; it merely tells him the property is "on trust" so he knows he must pay the purchase money to trustees, and not to the tenant for life)*
3. says who the trustees are - *(the Trust Instrument having appointed them)*

4. gives the name of any person empowered (by the Trust Instrument) to appoint new trustees, and
5. states any further powers which the Trust Instrument has conferred.

It will be noted that points 3-5 in the Vesting Deed are merely statements of what has been done in points 3-5 of the Trust Instrument.

The purchaser of settled land is thus saved the labour of reading through a lengthy document and is also deprived of the opportunity of learning the local lord's family secrets.

The Vesting Deed tells the purchaser all he needs to know. He cannot "look behind the curtain" at the Trust Instrument - with two exceptions outside the scope of this book. (Law degree students should consult other books for these exceptions: one concerns Settlements made before 1926; the other concerns attempts to make a Settlement by a single document after 1925.)

Since 1925, if a Settlement is made by only one document, that document counts as the Trust Instrument, and the trustees must execute a further deed (or document - after a will it could be a Vesting Assent, which is not necessarily a deed) to act as Vesting Instrument. By s.13 of 1925 SLA ("the paralysing section") it is enacted that until they have done so, no land within the Settlement can be disposed of, except in four cases which do not come within the scope of this book. (Again law degree students should consult other books here.)

If additional land is brought into an existing

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Frame 39 *REGISTERED SYSTEM*

Your answer to the question in frame 35 is wrong. The Land Charges Registry is applicable to the unregistered system; this house is registered. 243

INSTRUCTION: return to frame 35, page 235, and try again. 39.

Settlement, a Subsidiary Vesting Deed is executed to deal with this.

An awkward situation concerning settled land arose in *Weston v. Henshaw (1950)*. The facts were:-

1921: a father sold land to his son in fee simple, by an ordinary Deed of Conveyance.

1927: son sold it back to his father.

1931: father died, leaving the land by his will as Settled Land, to his widow for life, then to his son for life, and then to a grandson.

1940: the widow died, and the property was vested in the son as tenant for life, by a Vesting Assent.

The son then concealed the existence of the will and the Vesting Assent, and used the 1921 Deed of Conveyance to pretend that he was the owner in fee simple for his own benefit alone. By this trick he borrowed money on a mortgage on the land. There was no way that the lender could have known that the grandson had the Equitable fee simple absolute in remainder. The court held that the grandson's right held good against the lender, so the lender lost his money. This is an exception (the only one) to the general principle that a B.F.P. (or bona fide mortgagee) without notice can stop an Equitable right. But a later case, *Re Morgan's Lease (1972)* has cast some doubt upon certain aspects of the judgment in *Weston v. Henshaw*.

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If the land ceases to be Settled Land (e.g. if Gigi in our example bars her entail after Charles and George have died) there is an ordinary freehold estate of fee simple absolute in possession, and no Vesting Deed is necessary - as in *Re Alefounder's Will Trusts (1927)*.

The student may feel that if he is not dealing with stately homes in practice he will not come across Settled Land very much. But I could take you to a village (near one of the major stately homes) where the whole village is Settled Land. Even the Estate Agents'

office is Settled Land, and the Estate Agents hold it as leasehold tenants, from the tenant for life who is their landlord.

For SUMMARY of this Chapter, see page 246.

TEST QUESTIONS on Chapter 19:-

1. In the Marriage Settlement on page 231, what problem will Horace face when Charles reaches the age of majority, and what can Horace then do about it?
2. Lord X says to you: "My family has had Settled Land for ten generations, but I don't really understand what it is. All I know is that I've got 3,000 acres of it". - Write a letter to Lord X (in plain English, as he has no legal knowledge) explaining what Settled Land is, and what he can and cannot do with it.

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Frame 40 *REGISTERED SYSTEM*

Your answer to the question in frame 35 on page 235 is correct; the Legal Charge will be registered in the Charges Register of the Land Registry.

INFORMATION: The registered system is much more convenient than the unregistered one: the main advantage of the registered system is that the vendor or his solicitor obtains an office-copy from the Land Registry (free of charge) which relieves him from having to prepare an Abstract (often a lengthy document) and relieves the purchaser or his solicitor from having to read the Abstract.

Unregistered title can be faulty; registered title is state-guaranteed in certain circumstances. 245

QUESTION: which system involves the least work and delay before the purchaser can move into the property? 40.

INSTRUCTION: turn to frame 43 on page 251.

SUMMARY

In this chapter we have seen:-

the meaning of "settlement" and "strict settlement", and their development

(1) before 1882 SLA .. (no-one but tenant in tail barring his entail could sell)

(2) 1883-1925 ..... (tenant for life could sell, and other beneficiaries' rights were protected by overreaching)

(3) since 1925 ..... (the present position: tenant for life is at law the fee simple owner and can sell: tenant for life is in Equity not the fee simple owner: other beneficiaries' rights are protected by overreaching)

the Trust Instrument and Vesting Deed (or Instrument) and their respective contents:-

TRUST INSTRUMENT	VESTING DEED
1. stamped with stamp duty	1. describes the land
2. says what the trusts are	2. says there are trusts
3. appoints the trustees	3. says the trustees' names
4. gives any special powers to appoint new trustees	4. says who has any powers to appoint new trustees
5. gives any other powers	5. states any other powers

CHAPTER 20

OTHER PROVISIONS AS TO SETTLEMENTS

OUTLINE OF CHAPTER:-

A: Powers of the tenant for life
B: Functions of trustees of a Settlement
C: ad hoc and compound Settlements
D: Termination of a Settlement

This chapter is only an outline, as Settlements are much less important now than they were a century ago.

The student has already a general picture of the tenant for life and the trustees, and no detailed definition of who they are will be given here. Furthermore, such fascinating subjects as "curtesy" and "dower assigned by metes and bounds" are not discussed.

A: POWERS OF THE TENANT FOR LIFE

Some attention must however be given to the powers of the tenant for life. It is right that his powers should not be unlimited, since his actions affect not only himself but all those with Equitable interests in the property. He, the holder of the legal estate, is entrusted with the property on behalf of them all.

The tenant for life can sell, exchange, lease, mortgage, charge or grant an option on settled land, provided he previously gives notice of his intention to the trustees. He does not have to obtain their consent. Furthermore the notice need not specify

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Frame 41 *REGISTERED SYSTEM*

Your reply to the question in frame 35 is wrong: the two systems are mutually exclusive so they cannot both apply.

INSTRUCTION: return to frame 35, page 235, and have another go.

precisely what he intends to do:- *"I hereby give notice that I intend from time to time to exercise any or all of my powers under the 1925 Settled Land Act"* will be sufficient to satisfy the requirements of the SLA, although it really tells the trustees nothing. But the tenant for life must give further information as to his current intentions if the trustees on receipt of the notice request it.

The tenant for life's right to grant Leases is limited (by SLA) to the following:-

1. building or forestry leases *(see explanation below)*.. must not exceed 999 years,
2. mining leases ..... must not exceed 100 years,
3. leases for any other purpose must not exceed 50 years.

A building lease is one which is made partly in consideration of the payment of rent but partly also in consideration of the lessee (or some other person) erecting, improving, or doing substantial repairs to buildings.

A forestry lease means a lease to the Minister of Agriculture, Fisheries and Food, to whom the powers in this respect formerly held by the Forestry Commissioners were transferred by the 1967 Forestry Act.

Every lease by a tenant for life must:-

(a) be made by deed

(b) grant the lessee (i.e. tenant) possession within one year after the date of the deed (or grant the lessee possession to commence at the end of an existing lease which now has not more than seven years to run)
(note: an ordinary fee simple owner can grant leases to start at any time up to 21 years in the future.)

(c) be at the best rent reasonably obtainable (taking into account any fine - i.e. any capital payment - which may be made)

(d) contain a covenant for payment of rent, and a proviso for re-entry (forfeiture) if the rent is not paid within a specified period (to be not more

than 30 days) after becoming due

(e) be prepared in duplicate - the "counterpart" (i.e. the copy) being executed by the lessee and handed over to the tenant for life; and the "original" executed by the tenant for life *(he is the lessor, i.e. landlord)* and handed over to the lessee.

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There is a great difference between the tenant for life deciding to sell some land (and maybe a cottage or two) and deciding to sell the stately home itself.

There are, covering this and other situations, five circumstances in which the tenant for life cannot sell without the *consent* of the trustees, or a court order. These are:-

1) to sell the principal mansion house (being a house whose pleasure-grounds park and lands occupied therewith are at least 25 acres) - this requires consent (or court order) under pre-1926 settlements *unless the settlement expressly says it does not*, and under post-1925 settlements *if the settlement expressly says it does*,

2) to cut and sell timber,

3) to compromise and settle disputes relating to the settled land,

4) to sell settled chattels (oil paintings, suits of armour and such like) *(Such items are often known as "heirlooms" - although if they pass with the land as a result of the Settlement they are not true heirlooms at all: true heirlooms are chattels which*

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Frame 42 *REGISTERED SYSTEM*

Your reply to the question in frame 35 is wrong; on the unregistered system this type of mortgage is not registrable, but on the registered system ALL mortgages are registrable.

INSTRUCTION: return to frame 35 on page 235 and make another choice.

pass to the heir, as if they were realty, by ancient custom etc. Formerly, in some areas, the bed was inherited with the land as an heirloom, by ancient custom.)

5) - under court order only - to carry out any proper transaction which an absolute owner could perform.

The tenant for life also has certain powers to carry out improvements, and to select investments for capital money of the Settlement. (In s.73 of SLA there is a list of 21 methods in which capital money can be used. They include paying for improvements, and investing in the deemed-to-be-safe forms of securities known as "trustee securities".)

Improvements are not the same as repairs. Every generation is expected to pay for its own repairs, but improvements can be paid for out of capital because they will benefit future generations. Thus re-thatching a roof is likely to be regarded as a repair (because thatched roofs only last a few years - they are not much more durable than modern flat roofs) but replacing a thatched roof with a tiled roof would probably be treated as an improvement.

The extensive powers given by Statute to the tenant for life cannot be restricted by any agreement, though they can be extended. No powers (except powers to appoint - or to revoke the appointment of - trustees) can be given to any person other than the tenant for life: if they are given to any other person they are treated as given not to that person but to the tenant for life - as in *Re Jefferys (1939)*.

The tenant for life cannot assign his powers, release them, contract not to exercise them, nor lose them in any way, other than in a few exceptional cases such as:

(i) by court order (e.g. upon the tenant for life's bankruptcy) or

(ii) if the tenant for life is a mental patient, or

(iii) if the tenant for life transfers his powers to the person next entitled under the Settlement - e.g. *if in our example the aged Charles hands his powers on to George*.

Frame 43 LOCAL SEARCH

Answer to question in frame 40 on page 245: the registered system.

INFORMATION: There are also Local Land Charges Registries: every District Council (and every London Borough Council) keeps one. A Search must be made (present cost £13·50 for Search plus a printed set of additional questions) in the Register of the Council in whose area the property is situated. It reveals matters such as proposed road-widening, slum clearance, planning permissions and refusals, tree preservation orders, smokeless zones etc., which are on the records of the District and/or County Council.

This Search must be made in addition to the Land Registry or Land Charges Registry Search, which will not reveal any of these matters.

QUESTION: You are buying unregistered land in Somerset. What Searches (choosing one of the following eight alternatives) would you consider it necessary to make?

(a) Local Land Charges Registry only
[turn to frame 44 on page 253]
(b) Local Land Charges Registry and the Land Registry
[turn to frame 45 on page 255]
(c) the Land Charges Registry and the Local Land Charges Registry
[turn to frame 46 on page 257]
(d) the Land Charges Registry and the Land Registry
[turn to frame 47 on page 259]
(e) Local Land Charges Registry and the Land Charges Registry and the Land Registry
[turn to frame 45 on page 255]
(f) none at all
[turn to frame 48 on page 261]
(g) the Land Registry only
[turn to frame 45 on page 255]
(h) the Land Charges Registry only
[turn to frame 49 on page 263]

B: Functions of Trustees of a Settlement

We have seen that the settled land trustees have little power. Their chief functions are:-

(1) to receive and hold capital money,

(2) to receive notice from the tenant for life of his intention to carry out certain transactions,

(3) to give consent to certain transactions,

(4) to act as "Special Personal Representatives" on the death of the tenant for life,

(5) to act as "Statutory Owner" if the tenant for life is a minor (i.e. under 18) or if there is no tenant for life,

(6) to exercise a general supervision over the well-being of the Settled Land.

There are certain rare cases outside the scope of this book where the trustees can exercise the powers of the tenant for life: one of these cases is where the tenant for life wishes to buy land from the Settlement for himself.

C: Ad Hoc and Compound Settlements

Ad hoc and compound settlements are beyond the scope of this book but let us see one example of each:-

The idea of an AD HOC SETTLEMENT is that if an owner of a fee simple is subject to an Equitable right which is not overreached, he can create a Settlement - and then the right can be overreached.

It is not much used because there are many Equitable rights which it is not possible to overreach, but here is an example where it could apply:-

Fred Smith owns (in fee simple) a piece of land which has been charged with (i.e. it is the security for) an annuity - like we saw on pages 100-101 - payable to Fred's uncle Adam until Adam dies. Fred wishes to sell the land, but the purchaser wants it to be free from

this annuity. So Fred creates a Settlement, with himself as the tenant for life, with beneficial rights (the rights mentioned at the beginning of this example) for himself and Adam, and two trustees who must be approved by the Court (or alternatively Fred can appoint a trust corporation).

Now Fred can sell the land as tenant for life, and Uncle Adam's right is overreached, so his annuity is charged on the money - whatever it is invested in.

In practice, ad hoc settlements are rare.

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A COMPOUND SETTLEMENT arises when there are two or more Trust Instruments. A typical example would be a settlement followed by a re-settlement: a settlement

to Charles for life,
then to George in tail,

and when George reaches full age he bars his entail with Charles' consent and executes a re-settlement

to George for life,
then to Gigi in tail.

We have to be careful because we have *three* Settlements here. We have the two set out above, and these two together make up a Compound Settlement (which counts as a third, quite separate, settlement)

to Charles for life,
then to George for life,
then to Gigi in tail.

This is convenient - as long as no tenant for life gets confused and tries to exercise his powers under

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Frame 44

Your answer to the question in frame 43 is wrong; a Search in the Local Land Charges Registry alone is insufficient.

INSTRUCTION: return to frame 43, page 251, and make another choice.

the wrong settlement and possibly even gives notice of his intentions to the wrong trustees! In the example above, the trustees of the compound settlement will be the same persons as the trustees of the first settlement, but the trustees of the re-settlement may well be different persons.

Compound settlements are not unusual on stately homes.

D: Termination of a Settlement

Once land has been settled it remains so until it comes into the hands of a person of full age and is free from all actual or possible rights under the Settlement, or alternatively has become subject to a Trust for Sale.

Thus, in our Horace-Charles-George-Gigi example, if the tenant for life (whichever of them it is at that moment) sells the land to Fred Smith in fee simple, the land at that moment ceases to be Settled Land - though the rights of the beneficiaries which have been overreached continue to hold good against the purchase-money, which is capital money of the Settlement.

Otherwise, the land remains settled until Gigi (or some subsequent tenant in tail) ultimately bars the entail: the land thereupon ceases to be Settled Land (as in *Re Alefounder's Will Trusts (1927)* on page 244) unless it is still affected by some provision in the Settlement (e.g. jointure - see page 231 - to provide an income for the deceased tenant for life's widow) which was a frequent occurrence before 1883, but not today.

If the Settlement ceases when the tenant for life dies - e.g. the property was granted to a widow for life and then to her son in fee simple, and the widow has now died - there is no need for the tenant for life's Personal Representatives to treat the land as settled, because the Settlement ceased at the moment of the tenant for life's death. This was decided in *Re Bridgett and Hayes' Contract (1928)*. So, on the widow's death in our example, the property will be

vested in the son by an ordinary Assent, not a Vesting Assent as is used for Settled Land.

SUMMARY

In this chapter we have seen an outline of various provisions relating to Settled Land, including rights exercisable by the tenant for life

(a) on giving notice to the trustees, and
(b) with the trustees' consent (or a court order)

and functions of settled land trustees.

TEST QUESTION on Chapter 20:-

(a) An ancestral castle belongs to Barnard for life and then to Vane. Does Barnard need the trustees' consent
   (i) to sell 250 acres of the land
   (ii) to sell the castle
   (iii) to demolish the castle
   (iv) to instal a complete new drainage system for the castle
   (v) to instal central heating in the castle?

(b) Who will pay for the installation of the drainage system and the central heating? *(See Parts I and III of Schedule III of SLA as to this.)* And who will have to pay the quarterly heating bills?

(c) Explain to Vane what a Compound Settlement is.

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Frame 45

Your answer to the question in frame 43 is incorrect. A Search in the Land Registry will be of no avail, this land being unregistered land.

INSTRUCTION: return to frame 43, page 251, and make another choice.

CHAPTER 21

TRUSTS FOR SALE

OUTLINE OF CHAPTER:-

A: The nature of trusts for sale
B: The position before 1883
C: Trusts for sale 1883-1925
1. under 1882 SLA
2. under 1884 SLA
D: Trusts for sale since 1925 - the present position (including statutory trusts for sale)
E: Ad hoc trusts for sale
F: Conversion
G: Settlements and trusts for sale compared - with some reasons for the decline of the Strict Settlement

A: THE NATURE OF TRUSTS FOR SALE

The man who entered into a Trust for Sale normally had no particular wish to keep land in his family. He was looking at land as an investment, his primary object being to produce a regular income for the beneficiaries, with preferably also some capital appreciation. Land was generally a sound investment.

Today, land must share the investment market with such creations as stocks and shares, unit trusts, premium bonds, local authority loans, life assurances, antiques, and many others; but formerly to a large extent this was not so: the wise man who wished to invest his spare money would purchase a piece of land on Trust for Sale.

This means that the legal estate, either freehold or leasehold as the case may be, is vested in (i.e. is granted to, and held by) two or more trustees, "upon trust to sell the land, with power to postpone sale; and to hold the net proceeds of sale (and net income until sale, upon trust for the beneficiaries".

Let us look at those words in a bit more detail:-

upon trust

(i) to sell ..... *(i.e. the trust deed imposes on the trustees a duty - not a mere power - to sell)*

with power to postpone *(i.e. despite their duty to sell, they can wait until the time is right - e.g. until prices are high, or until the beneficiaries are ready to receive the capital)*

and

(ii) to hold the net proceeds of sale .... *(i.e. proceeds after any expenses have been deducted)*

and the net income until sale ..... *(i.e. rent or other profits - for they will not leave the property standing empty if it is not to be sold at once)*

in trust for X, Y, and Z, the beneficiaries ..... *(these are likely to be the investor's children - or such of them as reach 21 - or such of them as fulfil other conditions)*

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Frame 46

Your answer to the question in frame 43 on page 251 is correct.

QUESTION: What Searches would be required if you were buying a registered property in Norwich?

INSTRUCTION: turn to frame 50 on page 265.

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Learn the underlined words on page 257 by heart.

And note that the trustees hold the legal estate:-
on a Settlement, it is the tenant for life who can sell;
on a Trust for Sale, it is the trustees who can sell.

B: The Position before 1883

Trusts for Sale were widely used by nineteenth century businessmen, but the origin of Trusts for Sale is far earlier. They were known as early as the fourteenth century.

Before 1883 (and indeed right up to 1925) anyone who entered into a Trust for Sale normally did so as an investment. Let us imagine Josiah Smith (Fred Smith's great-great-great-grandfather) about 1820. A "self-made man", born in a cottage. High up in a Somerset valley he built a woollen mill, driven by water-power from the fast-flowing hillside stream. (It was a mill that went out of business a few years later when the West of England woollen trade declined and the industry moved to the coal-powered mills of Yorkshire, but that's another story.)

When his mill was prosperous, Josiah decided to buy the adjacent land and build cottages there for his workers, so that (a) the workers would no longer have to make the long trudge up the valley daily to get to work, and (b) the cottages would be a profitable investment for Josiah's spare cash: a sound capital investment and one which would produce good rents.

Most of the adjacent land was Settled Land and was therefore unsaleable, and Lord Horace the local landowner was rather glad that it was so (as long as he was not too short of money) and made such remarks as, "If there must be an Industrial Revolution, at least it won't be able to happen here". But one piece of land near the mill was not Settled Land, and Josiah provided the money for two of his sons as his trustees to buy it. It was of course an investment, and there was no intention whatever of keeping it in the family if it did not remain a good investment.

They bought the fee simple absolute in possession, on trust to sell it, with power to postpone the sale for as long as they at their discretion should think proper *(without limit - there is no contingency here, so the Rule against Perpetuities does not apply)* and on

trust to hold the net proceeds of sale (and net income until sale) for the benefit of those relatives, charitable institutions and other persons that Josiah had nominated as his beneficiaries. The beneficiaries' rights might be absolute, but alternatively they could be for the benefit of A for life and then B - just like a Settlement.

C: Trusts for Sale 1883-1925

1. Under 1882 SLA

The original draft of the 1882 SLA did not include land held on Trust for Sale, but "the unprompted wisdom of Parliament" added a remarkable s.63, "drafted in a fine style of perplexed verbiage" (as the "Solicitors' Journal" said) enacting that trust-for-sale land was to be deemed to be Settled Land - and thus came within SLA - if the proceeds or income were ... for any person for life or any other limited period.

This defeated the chief purpose of the Trust for Sale (namely that sale of the land should take place as and when the trustees thought fit) - the powers of sale which the trustees were intended to have all became vested, in such cases, in the tenant for life - namely A in the above example.

2. Under 1884 SLA

One solution would have been to repeal s.63 of 1882 SLA. But instead, 1884 SLA provided that the tenant for life in these cases should be unable to exercise his powers without a court order. Unless he obtained such an order the trustees could sell

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Frame 47

Your answer to the question in frame 43 is wrong in two respects: your choice has excluded the Local Land Charges Registry Search, and has included a Land Registry Search which is of no use as the land is unregistered land.

INSTRUCTION: return to frame 43 on page 251, read it again, and make another choice.

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47.

and did not need the tenant for life's consent. The general practical result was to restore the position which had existed until the 1882 SLA.

In short:-

1) until 1882 the trustees had the powers of sale,
2) from 1882 SLA to 1884 SLA the tenant for life had these powers,
3) after 1884 SLA the tenant for life had the powers but could not exercise them; only the trustees could exercise them, unless a court order was made to the contrary.

D: Trusts for Sale since 1925 - the Present Position

The ordinary Trust for Sale is still the same today as it was before 1883 - i.e. a vesting of investment property in two or more trustees on trust to sell, with power to postpone, and to hold the net proceeds of sale and net income until sale in trust for specified beneficiaries. Since 1925 a power to postpone always exists unless it is expressly stated not to. It is to be expected that the trustees will normally want to postpone the sale until a suitable time, when the property will fetch a good price and the beneficiaries have reached full age and are ready to receive the money.

But if the trustees cannot agree on whether to sell now or to postpone the sale, their duty is to sell it (their trust is a Trust FOR SALE) even if the *majority* of them think it would be better to postpone the sale. A case on this point is *Re Mayo (1943)*.

Most important to us however is the way that the 1925 legislation took advantage of the rather convenient system of trusts for sale, and created "statutory" trusts for sale.

Three examples are worthy of note:-

(1) INTESTACY: if a person dies intestate (i.e. without leaving a valid will) his property passes to his administrators (who have the duty of paying his debts etc. and then dividing his assets among his next of kin

in accordance with the intestacy rules) upon a *trust for sale*,

(2) CO-OWNERSHIP: if two or more persons are entitled to land as co-owners (co-ownership being the subject of our next chapter) a *trust for sale* arises, and

(3) MORTGAGES: if trustees lend money on a mortgage of land, and the borrower behaves in such a way that he eventually loses his right to redeem (repay) the loan, the trustees as mortgagees hold the mortgaged land on a *trust for sale*.

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Law degree students are once again advised that insufficient detail for them is given here and they should consult other books on just what is included in the term "trust for sale" - or, to use the important 1925 LPA phrase, "an immediate binding trust for sale". Without going into detail, let us just note that a grant

"to X and Y on trust for sale, for the benefit of A for life and then B and C jointly in fee simple"

is a Trust for Sale, but

"to A for life, and then to X and Y on trust for sale for the benefit of B and C jointly in fee simple"

is Settled Land because the Trust for Sale is not immediate - it does not start until after A dies. (Therefore A as tenant for life can sell the land, and the rights of the others are overreached - they attach to the money.)

In *Re Hanson (1928)* a trust "to sell when my son

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Frame 48

Your answer to the question in frame 43 is wrong; if you buy any land without making Searches you run horrible risks of losing your money! The purchase of land is attended by numerous registrable dangers which Searches reveal.

INSTRUCTION: return to frame 43, page 251, and choose another alternative.

reaches 25" was held to be Settled Land until the son reached 25, as the Trust for Sale was not immediate.

But in *Re Herklots' Will Trusts (1964)* a house which could not be sold without the consent of certain persons was held to be on an immediate binding trust for sale, because it *could* be sold immediately by the trustees if the necessary persons gave their consent.

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The property on trust for sale is to be sold when the trustees think fit, and if they all agree to postpone (which is the normal case) they are not liable in any way - even if they postpone the sale indefinitely. If they do not unanimously agree to postpone, the property must be sold - as in *Re Mayo (1943)* above.

Since 1925, trustees who have postponed the sale have powers of leasing, mortgaging and otherwise dealing with the land - they have all the powers of a tenant for life and of SLA trustees.

To sell the property there must be at least two trustees (or a Trust Corporation - e.g. a Bank) because a single trustee other than a Trust Corporation cannot give a valid receipt to the purchaser for the purchase-money. (There is an exception: a sole personal representative acting as such - e.g. a sole administrator selling the land under the statutory trust for sale imposed on the intestacy - can give a valid receipt.) Since 1925 there cannot be more than four trustees: if more than four are appointed, the first four able and willing act.

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Do the trustees have to ask the beneficiaries their opinion before coming to a decision on whether to sell or to postpone the sale?

By s.26 of LPA, as amended by 1926 Law of Property (Amendment) Act, the trustees of statutory (and some other) Trusts for Sale must (so far as practicable) consult beneficiaries who are of full age, and must (so far as consistent with the general interest of the trust) give effect to their wishes - or the wishes of the majority of them in value.

Under the rule laid down in *Saunders v. Vautier (1841)* if all the beneficiaries are of full age and are in unanimous agreement, they can order the trustees to terminate the trust - e.g. if X and Y are holding on trust for Z in fee simple, if Z is of full age he can tell the trustees to transfer the legal estate to him.

E: Ad hoc Trusts for Sale

Ad hoc trusts for sale are a rarity, but they can be used for the same purpose as ad hoc settlements which we saw on page 252. In fact Fred in the example on that page would be better advised to appoint two trust-for-sale trustees (who, like ad hoc settlement trustees, must be approved by the court) or a trust corporation, to sell the land. Adam's right in the example would be overreached (in a broad sense: see page 266) - it would be charged on the trust fund. So the ad hoc trust for sale overreaches a right which otherwise would not be overreached.

F: Conversion

There is a maxim of Equity to the effect that Equity treats what ought to be done as done.

If land is granted to trustees on trust for sale, what ought to be done eventually is that it should be sold - i.e. converted into money - although, as we have seen, the power to postpone may delay this happening for many years.

Since converting the land into money - which is personalty - is what ought to be done, Equity treats it

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Frame 49

Your answer to the question in frame 43 is wrong; if you do not search in the Local Land Charges Registry you may fail to discover essential information as to planning and other matters.

263

INSTRUCTION: go back to frame 43, page 251, and choose another alternative.

49.

as done. It treats all trust-for-sale property as if it were already money. It treats it as personalty.

Compare this with Overreaching, in a Settlement. We have seen (pages 63-67) that, by overreaching, the beneficiaries' rights in the land become rights in a fund of money - but note that *this sum is treated as real property*: it is and has always been subject to the rules applicable to real property in that before 1926 it descended (if held in fee simple) to the heir, it could (and still can) be entailed, the entail can be barred to make it a fee simple, and so forth.

At the risk of over-complicating the point, we must consider whether overreaching exists on a Trust for Sale. Strictly it does not, but there is something very akin to it which is often referred to as overreaching. We called it overreaching on page 101. Perhaps we should call what happens on a Trust for Sale "overreaching in a broad sense" (as against, on a Settlement, "overreaching in a strict sense") - but let us look at the difference between the two:-

(i) in a settlement	**(ii) in a trust for sale**
interests in land *[realty]*	**interests in land** *[treated in Equity as personalty, by doctrine of "conversion"]*
change, on sale of the land, into rights in a trust fund,	**change, on sale of the land, into rights in a trust fund,**
which both law and Equity treat as realty.	**which is (and is treated as) personalty.**
This is "overreaching".	This is not in a strict sense "overreaching" but is often referred to as such.

What we are saying is simply this:-
in a *Settlement*, both the land and the proceeds of sale count as *realty*;
in a *Trust for Sale*, both the land and the proceeds of sale count in Equity as *personalty*.

As real and personal property all devolves to the same persons since 1925 (AEA), all this may appear to make no practical difference: but it is possible to fall into a trap. For example: two partners P and Q own land in fee simple. (They are "tenants in common in Equity" - see next chapter.) This is a Statutory

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Frame 50

Answer to the question in frame 46 on page 257:- Searches are required in the Land Registry and the Local Land Charges Registry. The Land Registry Search is needed in all Registered Land matters, and the "local search" is needed in all cases, whether the land is registered or not.

Note: some solicitors, when dealing with registered land, search in the Land Charges Registry as well as the Land Registry and the Local Land Charges Registry. They claim that even in registered land cases a Land Charges Registry Search is needed in order to show that the vendor is not bankrupt. Other solicitors maintain however that a Search in the Land Charges Registry in such cases is unnecessary.

INFORMATION: There is also a LAND REGISTER which is a register of under-used land - derelict factory sites, disused railway marshalling yards, and such like. It is quite separate from all the Registries we have seen in these frames, and is to do with Planning rather than Real Property Law.

INSTRUCTION: You have reached the final frame (congratulations!) and have learnt (i) the difference between the registered and unregistered systems, (ii) the layout of the registers of both systems, and (iii) the method of searching in respect of both systems. Before you leave the frames, compare and contrast frames 25 and 30 (both on page 217) and also frames 29 and 35 (both on page 235). Then read the rest of the book!

Further information on Registration will be found in Chapter 44.

Trust for Sale, as we saw under (2) on page 261. Q wants to leave his share of this land to his wife W, but wishes to leave his car and all his other goods and chattels to his daughter D. So he makes a will leaving his realty to W and his personalty to D. When he dies, the share in the land goes to D as personalty.

G: Settlements and Trusts for Sale compared

(some reasons for the decline of the Strict Settlement)

Five particular reasons may be noted:-

STRICT SETTLEMENT	TRUST FOR SALE
1. The strict settlement has failed in its intention of keeping land in the family; since 1882 SLA the tenant for life can sell.	1. The trust for sale can be utilised to keep land in the family for a time. (For example, grant land to trustees on trust for sale with power to postpone, subject to a condition that they must not sell without the consent of a son X. Then provide that income until sale is to be shared between the three sons X, Y and Z, but if the property is sold the proceeds shall be shared between Y and Z. Thus X finds it is against his interests to consent to any sale, so the land is likely to remain in the family as long as X lives.) *Re Inns (1947)* was a case where this happened.

STRICT SETTLEMENT	TRUST FOR SALE
2. Rights of subsequent generations can be completely nullified (even their interests in the proceeds of sale being taken away) by the tenant in tail in Equity barring his entail, unless once every generation a re-settlement (page 154) takes place. Under the post-1925 law, deeds of re-settlement have suffered a large amount of that particular form of tax known as Stamp Duty.	**2. The trustees are in control, as they have the legal estate.** **(On a Deed of Appointment of a New Trustee, the Stamp Duty payable is 50p.)**
3. The legal estate is vested in the tenant for life, so in the mid-20th. century a large amount of Estate Duty was payable on the whole property, once every generation on the death of the tenant for life. On a large estate, this could amount to many thousands of pounds. Many Settlements were therefore terminated (by barring the entail and then creating a Trust for Sale) to reduce the tax liability.	3. The legal estate is vested in the trustees, so the Estate Duty payable used to be much less than on Settled Land. Today the Capital Transfer Tax payable is the same on both Settled Land and Trust for Sale. But if the Chancellor of the Exchequer introduces new tax laws in a future Budget, Trusts for Sale have a flexibility which Settlements lack, for making changes by which the trustees can minimise the tax liability.

STRICT SETTLEMENT	TRUST FOR SALE
Under Capital Transfer tax (which replaced Estate Duty in 1975) the tax position on a life tenant's death is the same whether the land is settled or on trust for sale.	
4. Settled land is subject to all the restrictions and complexities of the 1925 SLA designed for large family estates; Trust Instrument and separate Vesting Deed are required, etc.	4. Much less restriction and formality. There need not be two documents unless desired. (in practice it is often most convenient to have two.)
5. The strict settlement is designed to set up the eldest son in life.	5. The trust for sale is primarily intended to benefit all the children equally, but can be used in other ways as the grantor wishes.

If a landowner wishes to create interests in succession, he can since 1925 carry out his wishes just as well by Trust for Sale as by Settlement, for since 1925 any property real or personal can in Equity be entailed. (Before 1925, personalty could not be entailed - which meant that leaseholds could not be held in tail: but since 1925 they can, so if Lord Horace has a property on a 999 years Lease, and grants it to Charles for life and then to George in tail, it is a Settlement. - If Horace grants it to two trustees on trust to sell it and to hold the net proceeds, and net income before sale, for the benefit of Charles for life and then George in tail, it is a Trust for Sale. - And if Horace grants it to himself for his life and then to two trustees on Trust for Sale

for the benefit of Charles for life and then George in tail, it is Settled Land because there is not an *immediate* binding Trust for Sale, and so Horace as tenant for life can later sell it, overreaching the rights of Charles and George.)

Referring back to the example of the Marriage Settlement on page 231: Lord Horace, instead of creating a Settlement, could have granted the property to trustees Tom and Dick on trust for sale, with power to postpone; and on trust to hold the net proceeds of sale (and income until sale) for Horace for life, then Charles for life, and then George and the heirs of his body. (Note that this trust for sale commences immediately, unlike the one at the end of the previous paragraph which does not begin until Horace dies.) Provisions for the payment of Jointure, etc., as on pages 231-232, could also be included.

Let us consider, with reference to the five points we have just seen above, how this compares with the Settlement:-

1. A proviso that there shall be no sale without Charles' consent, and a further proviso that Charles loses his interest if he consents to a sale, would ensure that the land is likely to stay in the family until Charles' death. And his son George may one day agree to be bound by a similar condition.

2. George can still bar his entail, but the trustees have the legal fee simple: George is not in the position of power which he held under the Settlement - where after barring his entail (after Charles' death) he had both the legal and Equitable fees simple. (Nevertheless he could perhaps then end the Trust: see *Saunders v. Vautier (1841)* on page 263.)

3. Tom dies: a new trustee Harry is appointed in his place, incurring Stamp Duty of 50p. - Horace and Charles also die, but under the Trust for Sale system they do not have the fee simple either at law or in Equity. This formerly resulted in a tax saving, though this is no longer so today.

4. The SLA formalities do not apply.

5. Trusts for Sale are more flexible generally than Settlements.

Thus we see that the Trust for Sale has achieved everything the Settlement set out to achieve, and has done it more conveniently - *and* the Trust for Sale is more effective than the Settlement for keeping the land in the family.

It would seem that if it were to be enacted that the creation of Settlements should cease, and that all grants of this nature should henceforth be created by way of Trust for Sale, the law would be simplified and nothing of value would be lost.

SUMMARY

In this chapter we have seen:-

the meaning of "Trust for Sale",
i.e. a grant to trustees, on
a trust (duty) to sell, with
a power (discretion) to postpone sale as long as they wish; and
a trust to hold the net proceeds of sale (and the net income - rent etc. - before sale) for the beneficiaries.

the position (1) before 1883
(2) 1883-1884; 1884-1925
(3) since 1925 the present position.

statutory Trusts for Sale on (1) intestacy, (2) co-ownership } since 1925
(3) mortgages }

conversion *(i.e. trust for sale property counts as personalty whether the land has been sold or not)*

contrasted with overreaching *(settled property counts as realty whether the land has been sold or not)*

Advantages of Trust for Sale over Settlement.

TEST QUESTIONS on Chapter 21:-

1(a) Explain what is meant by a trust for sale, and say what the trustees must do, and what they may do.

(b) You and your partner are the trustees of a trust for sale. Your partner has died; what action would you take regarding the trust for sale, and for what reasons?

2. Jack leaves his freehold house by will "to my wife Dottie as long as she lives, and then to my daughter Jill".
Mike leaves his freehold house by will "to my trustees on trust to sell (with power to postpone) and to hold the net proceeds of sale and net income until sale for my wife Lottie as long as she lives, and then for my daughter Lil".

Tom and Dick are the trustees in both cases.

State, in each case,
(a) whether there is a settlement or a trust for sale,
(b) who has the legal fee simple estate,
(c) who are the beneficiaries,
(d) what deeds or documents are necessary.
(e) Dick, Dottie and Lottie die: who can now sell the property, in each case?

3. What is an "immediate binding trust for sale"?

NOTE:- Our Horace-Charles-George-Gigi example of a Settlement comes to an end with the close of this chapter. Gigi refused the re-settlement which was offered to her. When George died she acquired the legal fee simple as tenant for life, and shortly afterwards she gained the Equitable fee simple by barring her entail. As soon as she had the fee simple absolute in possession both at law and in Equity, the Settlement terminated. When Gigi appears again in Chapter 26 therefore, it is as an ordinary fee simple owner.

Section D (Chapters 22 - 24)

Concurrent Ownerships

CHAPTER 22

CO-OWNERSHIP

OUTLINE OF CHAPTER:-

A: Coparcenary and Tenancy by Entireties
B: Joint Tenancy and Tenancy in Common
C: The four "unities" of joint tenants
D: Joint Tenancy and Tenancy in Common before 1926
E: Joint Tenancy and "Tenancy in Common" (Equitable Interests in Undivided Shares) since 1925
F: Termination of Joint Tenancies and Tenancies in Common
1. by union in sole tenant
2. by sale
3. by partition
4. by severance: three methods
(A) by alienation
(B) by acquisition of another estate in the land
(C) by notice in writing
G: Some advantages and disadvantages of Co-ownership

This chapter is concerned with the position when two or more persons own a particular legal estate (or Equitable interest) at the same time. A typical example is when Mr. and Mrs. Smith together buy a freehold (or leasehold) house. Such questions arise as "What happens if one of them dies?" and "What happens if one of them wants to sell the house and the other does not?"

Contrast co-ownership *(two or more persons owning one particular estate or interest, all at the same time)* with settled land *(two or more persons owning separate successive interests, one after another).*

There are four sorts of co-ownership:-

(1) coparcenary
(2) tenancy by entireties
(3) joint tenancy
(4) tenancy in common.

A: Coparcenary and Tenancy by Entireties

Before 1926, coparcenary arose if a man died intestate leaving several daughters but no sons. Coparcenary was abolished by the 1925 legislation, except in very rare cases.

Coparcenary can still exist in the cases of

(a) a person who was of unsound mind on 1st. January 1926 and is still living and of unsound mind today,

(b) an owner of an entail who dies without having barred it,

but this book does not look into these rare cases.

Similarly this book does not look at tenancies by entireties. This subject can still be relevant to a solicitor who has to look into old deeds, but no new tenancies by entireties have been created since 1882.

B: Joint Tenancy and Tenancy in Common

Joint tenancy and tenancy in common are still of great importance. (In practice, you are likely to come across joint tenancies *every day*.)

First let us be clear about this word "tenancy". More than once when I have been explaining the contents of a Deed of Conveyance (the deed for purchasing a piece of unregistered land in fee simple) to a husband and wife buying a house, we have come to this word and they have become quite distressed, saying, "But we want to be owners, not tenants..." and I have had to explain to them what this book first explained on page 8, and again on page 38: that they are tenants of the Crown - the nearest to absolute ownership of land that is possible in English law. So "tenants" here means what a layman would call "owners".

Now: what is the difference between "joint" tenants and tenants "in common"?

Briefly, the difference is this:-

If there are two joint tenants, A and B, and A dies, the whole property belongs to B.

This is the "right of survivorship" or *jus accrescendi*. On a tenancy in common this does not apply.

If there are two tenants in common, A and B, and A dies, B's share continues to belong to B; but A's share goes as he left it in his will - or goes to A's next of kin on his intestacy if he left no will.

Before 1926 this led to problems, as we shall see.

For partners in a business, a tenancy in common is usual, for if one of them dies he is likely to have wanted his share to pass to his family, not to his partners.

Husband and wife are likely to prefer joint tenancy, so that on the death of one, the property goes to the other automatically by right of survivorship.

- - - - -

There can be no joint tenancy unless all the four "unities" are present. These are unities of:-

Possession
Interest
Title
Time

- often remembered by the word PITT.

If any of these four is absent, there is no joint tenancy; there can only be tenancy in common. Tenancy in common needs only the unity of possession. (If there is no unity of possession, then there is no co-ownership at all.)

C: The four "Unities" of Joint Tenants

UNITY OF POSSESSION:- The tenants must all be in possession of the whole property. So if A has one part and B the other, separately, this is not co-ownership.

UNITY OF INTEREST:- The joint tenants must all have rights which are (i) equal and (ii) the same estate or interest. It may be a fee simple, a life interest, a leasehold term, or any other, but they must all have the same. And note that they must be equal: if the fee simple is owned by A ($\frac{2}{3}$) and B ($\frac{1}{3}$) they are not joint tenants.

UNITY OF TITLE:- The joint tenants must all have received their estate or interest by the same deed or document (or by the same statute - e.g. they may have received it by twelve years' possession as squatters under the 1980 Limitation Act; see page 580).

UNITY OF TIME:- The joint tenants must all have received their estate or interest at the same time. Usually this is a natural result of unity of title, but not always. For instance a grant "to X for life, with remainder to the heirs of Y and Z": Y and Z die at different times and so (since the status of "heir" arises at the moment of the death) Y's heir and Z's heir become heirs at different times and are therefore tenants in common.

(Note for law degree students: there developed two exceptions to the requirement of unity of time, namely, (i) conveyance to uses - thus if a bachelor conveyed land to the use of himself and any wife he might marry, when he married he held as joint tenant with his wife, and (ii) gift by will - "to A for life with remainder to the use of the children of B" gave each child of B born in A's lifetime a vested interest at birth, and their having been born at different times did not prevent them from taking as joint tenants.*)*

D: Joint Tenancy and Tenancy in Common Before 1926

Before the 1925 legislation, both joint tenancy and tenancy in common could exist either at law or in Equity.

If the deed (or will) does not say whether joint

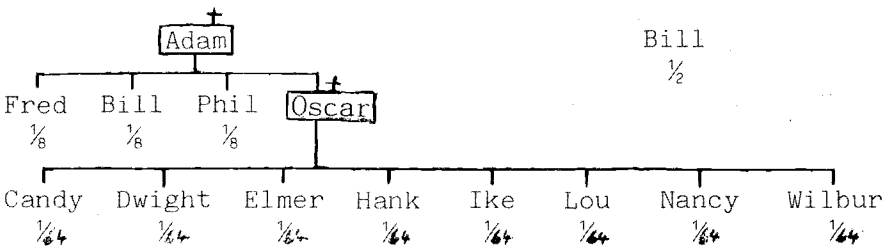
tenancy or tenancy in common is intended, Equity has always preferred tenancy in common and would assume in many cases that this was intended, but common law has always preferred joint tenancy and (in the absence of contrary evidence) would assume that this was meant unless any of the four unities were absent. This might lead to various complications - but a far greater difficulty arose (until 1925) regarding the disposal of property held in common, after one or more of the tenants in common had died.

Let us take a typical example. Adam and his nephew Bill own a house. The date of our example is pre-1926. (The number of co-owners in our example is limited to two to keep it simple, but in practice it could until the end of 1925 be any number.)

Adam dies, so Bill wishes the house to be sold.

If they were joint tenants there was no problem. Bill owned the whole fee simple by right of survivorship and could sell it.

If they were tenants in common the situation was less straightforward. Bill's half (assuming they each had half) still belonged to him. Adam happened to have left a will leaving all his property equally between his four nephews (namely Fred, Bill and Phil who are the children of his brother John, and Oscar who is the son of his brother Sam in America). So each nephew inherited a one-eighth share of the house. Shortly afterwards, Oscar died leaving all his property by will equally between his eight children. This gave the following result:-



i.e. twelve living persons - and eight of them were scattered across several States of America - with

"undivided shares" ranging in size from one half to one sixty-fourth. (There are cases on record which concerned one sixty-fourth shares and one seventieth shares.) All twelve of them had to execute the Deed of Conveyance in order that the fee simple could be sold.

Suppose (and again there are cases on record) that one of the twelve had mortgaged his share, another had created a Settlement of all his property - to himself for life and then to his son in tail - and another was a lunatic or a bankrupt: at best the sale would involve months of work, and at worst could prove impossible.

If one of them was untraceable the sale would be impossible. The only solution might be to wait until he had been missing for seven years, after which he is presumed dead, as in *Doe d. George v. Jesson (1805)*.

To end such situations as this was one of the aims of the 1925 legislation. The changes concerning co-ownership which this legislation made, which we must now examine, give the appearance of complicating the matter: but in practice they make such land more easily saleable, and at the same time reduce the difficulties which formerly faced the purchaser.

E: Joint Tenancy and "Tenancy in Common" (now known as Equitable Interests in Undivided Shares) since 1925

First, take a word of advice: *keep the law and the Equity in two strictly-separated compartments of your mind.*

AT COMMON LAW since 1925:-

three important rules:-

(1) only joint tenancy can exist: tenancy in common is abolished.

(2) the joint tenancy must take the form of a trust for sale.

(3) there cannot be more than four trustees: if more than four are appointed the first four (able and willing) act.

IN EQUITY since 1925 the position is still the same as before: there can still be both joint tenancy and tenancy in common.

(Strictly, since 1925 we should speak of "interests in undivided shares" instead of "tenancy in common" because one cannot have a "tenancy" of something which is only Equitable - but the phrase "tenancy in common" is still frequently heard, and as we have got used to it let us keep to it.)

An example will make it clear how these useful reforms take effect - but, before the example, here are two reminders:-

(i) consider the legal and Equitable positions as two separate problems, and

(ii) wherever we meet a trust we meet Equity.

EXAMPLE:- Adam and Bill *after* 1925 own a house. At law they will be joint tenants: this is so even if the purchase-deed describes them as tenants in common.

They will hold

as joint tenants
on trust to sell (with power to postpone)
and
to hold the net proceeds of sale
(and any income until sale)
in trust for themselves
either as joint tenants or as
tenants in common,
whichever they intend.

If one of them wishes the property to be sold and the other does not, it should be sold, as it is on trust for *sale*.

We note that Adam and Bill are the two trustees and also the two beneficiaries - they have the fee simple (as legal owners) in trust for themselves (the Equitable owners) and this is quite normal in a statutory trust for sale.

Now let us see what happens. *(We shall see that in effect the common law decrees who can sell the legal*

estate, but Equity decrees who shall receive the proceeds of sale.)

(1) Suppose they wish to sell in their lifetime: they can do so, thus fulfilling the trust for sale, and they can then divide the proceeds of the sale between themselves, the two beneficiaries.

(2) Suppose instead Adam dies, and the deed by which they bought the house described them as joint tenants in Equity as well as at common law. The legal fee simple belongs to Bill as surviving joint tenant. If the house is sold, the proceeds too belong to Bill as surviving joint tenant in Equity. (Since he thus has the sole right both at law and in Equity, the trust for sale is at an end and so he is an ordinary fee simple owner.)

(3) Suppose again Adam dies, but the deed by which they bought the house described them as tenants in common.

AT LAW, Adam and Bill are joint tenants - since 1925 there is no alternative. So after Adam's death Bill owns the fee simple by right of survivorship: he can sell. For a reason we shall see in a moment, it is inadvisable for a purchaser to buy from a sole trustee (unless the trustee is a trust corporation - such as a Bank) so Bill appoints a second trustee - his solicitor possibly, or perhaps his brother Fred - and the two trustees as joint tenants sell. (Trustees are *always* joint tenants at common law.)

IN EQUITY, the two trustees hold the proceeds of sale on trust for the beneficiaries, who are tenants in common: thus half the proceeds of the sale of the house go to Bill, the other half go under the provisions of Adam's will - or under the intestacy rules (page 139) if he left no will. If difficulties arise like those we saw on page 276 (one sixty-fourth shares etc.) the trustees can invest an appropriate part of the proceeds until the difficulties have been cleared up: these difficulties do not prevent or delay the sale, for the deed has only to be executed by the legal owners - i.e. the two trustees - and not, as was formerly

necessary, by the far-scattered tenants in common.

Summarising the position in this last example, therefore:- if the purchase-deed describes Adam and Bill as tenants in common, the position is:

at common law, they are joint tenants of the house,

so if Adam dies, Bill (with a second trustee) can sell as survivor;

in Equity, they are tenants in common of the proceeds,

so if Adam dies, Bill takes his half of the proceeds; and Adam's beneficiaries take Adam's half.

This would also be the position if the deed described Adam and Bill as "joint tenants upon trust to sell (with power to postpone) and to hold the net proceeds of sale and net income until sale in trust for themselves as tenants in common" - this being the normal type of wording.

Note that the beneficiaries' Equitable right is in the *proceeds of sale*, and not the land itself. But see *Williams & Glyn's Bank v. Boland (1981)* (page 314 below) in connection with this.

If one of the beneficiaries is not paid his due, can he make any claim against the purchaser? Before 1926 he well might, for it was the purchaser's duty to pay the right persons. But since 1925, as long as the purchaser has a receipt for the purchase-money, signed by *at least two* trustees, the beneficiaries' rights are only against the trustees. (That is why Bill appointed a second trustee, above: the purchaser would insist on it, knowing that if the money were paid to only one trustee, who then ran off with it, the beneficiaries would have the right to sue the purchaser.)

In example (2) (page 279) no second trustee was needed because Bill was not holding as trustee for anyone - he was entitled to all the benefit for himself.

So once again we see that the present system combines convenience with fairness: the common law makes the property easily saleable, while Equity is concerned to see that justice is done.

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Sometimes Equity recognises a tenancy in common in situations where it is not immediately apparent from the wording. Thus "to Adam and Bill as beneficial joint tenants" creates a joint tenancy, in Equity as well as at law; but any words in the grant showing that the tenants were each to take *a distinct share* in the property creates a tenancy in common. Words which have been held to have this effect include:-

"to Adam and Bill *in equal shares*",
"to Adam and Bill *equally*",
"to Adam and Bill *respectively*", etc.

Such words are known as *WORDS OF SEVERANCE*.

Equity also assumes that the parties are tenants in common if they are business partners, or if they provided unequal amounts of the purchase-money, or if their interest in the property is as mortgagees (e.g. if Bill and Fred together lent some money to Phil - whether they provided equal amounts or not - secured on a mortgage of Phil's house).

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Co-ownership of Settled Land is a subject beyond the scope of this book. Let us just note three examples:-

(1) "To A and B as beneficial joint tenants for their lives and then (after the death of the survivor of them) to X" is Settled Land, and therefore not a Trust for Sale: A and B (having identical rights - the four "unities") are regarded as a single "person"; and that person is the tenant for life of the Settlement.

(2) "To A and B as tenants in common for their lives and then to X" is a Trust for Sale: it is not Settled Land because A and B are separate persons with separate rights and cannot together be a tenant for life. (So the legal estate is held by A and B as trustees, as joint tenants on trust to sell; and the Equitable beneficial interest is for A and B as tenants in common for their lives and then to X.)

(3) "To A for life and then to X and Y" is Settled Land until A dies, and then it becomes a Trust for

Sale (provided of course that A has not already sold it as tenant for life, overreaching the rights of X and Y).

- - - - -

Students sometimes ask why the Trust for Sale is applied to the joint tenancy as well as to the tenancy in common, for it seems at first that the joint tenancy can lead to no complications - for if one joint tenant dies, the other(s) will automatically take by right of survivorship.

Consider however this sad state of affairs:-

Jack and Jilly and their daughters Lily and Millie buy a house as joint tenants (joint both at law and in Equity). Lily elopes with Walter the milkman, and to finance this escapade she has sold her quarter to a local businessman, Arthur Daley. Thus Jack ($\frac{1}{4}$) Jilly ($\frac{1}{4}$) and Millie ($\frac{1}{4}$) are still joint tenants between themselves, but Arthur ($\frac{1}{4}$) (not having all the four unities) is a tenant in common.

The shock is too much for Jilly: she dies. By right of survivorship the other two joint tenants take her share equally between them; thus Jack and Millie each have an interest worth three-eighths of the total value of the house, and Arthur continues to have his quarter. If Arthur dies, his share goes by his will between his five children, a one-twentieth share each (in the proceeds of sale of course - they cannot move in!)

Since 1925 such a transaction can only take place in Equity: the *legal* joint tenancy cannot be made into a tenancy in common. Lily cannot sell her legal joint tenancy, except she could transfer it to Jack, Jilly or Millie.

Thus in the above example Lily continues to be a legal owner: the house is held by Jack, Jilly, Lily and Millie in trust for Jack, Jilly, Millie (jointly) and Arthur (in common). After Jilly's death the property is held by Jack, Lily and Millie jointly in trust for Jack and Millie jointly (three eighths each) and Arthur (one quarter). - After Arthur's death it is still held by Jack, Lily and Millie, on trust for Jack and

Millie jointly (three eighths each) and Arthur's five children, all of whom are tenants in common (one twentieth each).

In all cases of co-ownership the land is treated as personalty, because, now that there is a statutory Trust for Sale, the Equitable doctrine of Conversion (see page 263) applies (but see also *Williams & Glyn's Bank Ltd. v. Boland (1981)* on page 314).

F: Termination of Joint Tenancies and Tenancies in Common

There are four ways we need to note:-

1. Union in sole tenant,
2. Sale,
3. Partition,
4. Severance.

1. UNION IN SOLE TENANT

If the land becomes vested in a sole person free from any liabilities under the trust, the trust for sale is at an end.

Thus we saw (example (2) on page 279) that where Adam and Bill were joint tenants both at law and in Equity, on Adam's death Bill was entitled to the whole legal estate and the whole Equitable interest so the Trust for Sale ended. Therefore Bill does not need to appoint a second trustee when he sells.

Bill must produce a Death Certificate (see page 86) to prove that Adam has died.

But the purchaser might ask, "How do I know that Adam did not sever (i.e. change his Equitable joint tenancy into a tenancy in common) before he died? If Adam did that, Bill is now holding as trustee not just for himself, but for himself *and* Adam's heirs, and so a second trustee is required."

To overcome this problem, the 1964 Law of Property (Joint Tenants) Act provides a method whereby a

purchaser can assume there is no severance, as long as there is no written "memorandum of severance" placed with the deeds. (This 1964 Act does not apply in certain cases where one party is bankrupt; and also does not apply to registered land because the method of registration used by the Land Registry is meant to prevent this problem from arising.)

2. SALE

If during his lifetime Adam had sold his half to Bill the Trust for Sale would thus have ended, whether they had been in Equity joint tenants or tenants in common.

Similarly if Adam and Bill sold the property to Charles, he will take the property (once he has paid for it and obtained a receipt from the two trustees) free from the Trust for Sale. The trust to sell has been satisfied - the property has been sold. The beneficiaries' rights under the trust attach to the money, as we have seen.

3. PARTITION

Partition is a physical dividing of the property: Adam is to take this part and Bill that part as two separate properties. They are likely to build a wall or some other barrier to separate the two. There are certain statutory controls on partition in 1925 LPA.

4. SEVERANCE

Severance means ending a joint tenancy in Equity by changing it into a tenancy in common. It can be carried out in three ways:-

(A) by Alienation

Alienation means transfer - e.g. Lily's sale to Arthur, above. Further examples of alienation are if one party goes bankrupt (so his share goes to his Trustee in Bankruptcy) or mortgages his share, or makes a contract to alienate.

Furthermore there is severance if one party does anything at all intimating that the parties mutually treated their interests as being thenceforth held in common. There need not be anything in writing. Even an informal oral discussion coming to no conclusion is enough, if in the course of their talk the parties show that they are treating their interests as separate.

An example of this is *Burgess v. Rawnsley (1975)*. In this case a Mr. Honick intended to marry Mrs. Rawnsley, and they bought a house as joint tenants. She decided not to marry him, so he tried to buy her share from her: but their negotiations failed to come to any legally-enforceable agreement. But the fact that they had discussed the matter showed that they both regarded their shares as separate, and this severed the joint tenancy in Equity. So when Mr. Honick died, the beneficial interest did not go to Mrs. Rawnsley by right of survivorship; she held the property as trustee for herself and Mr. Honick's heirs.

In *Burgess v. Rawnsley*, both of them regarded their shares as separate. If, however, one of them had *not* regarded their interests as separate, but the other one had done so and had entered into a course of dealing which made this clear (e.g. if he had attempted to mortgage his half, even if he failed to find a mortgagee willing to lend him any money) this too would have counted as a severance.

And finally under this heading, if A and B are joint tenants, and A murders B, it is a severance: a killer cannot claim his victim's property by right of survivorship. Nor can A inherit it under B's will or intestacy: in this connection A is treated as if he did not exist, except that by the 1982 Forfeiture Act the court has a power to vary this rule after manslaughter - not murder - and also A will not be prevented from making any claim he is entitled to make under the 1975 Inheritance (Provision for Family and Dependants) Act which we saw on page 87. The anonymously-named case of *Re K (1985)* is with regard to inheritance by a widow who killed her husband in circumstances which led the Crown Court to sentence her to two years on probation for manslaughter. She was allowed to have his property.

(B) by Acquisition of another estate in the land

Example: if a property is granted "to A and B jointly for life, with remainder to X in fee simple", and A acquires the fee simple remainder from X: this acquisition makes A and B into tenants in common of the life interest. (What this does to examples (1) and (2) on page 281 is a subject *completely* outside the scope of this book!)

(C) by Notice in writing

1925 LPA enables severance to be achieved by one party giving notice to the other or others, in writing, of his wish to sever. Such notice should be attached to the deed by which the parties purchased the property and it thus acts as a memorandum of severance which prevents the 1964 Law of Property (Joint Tenants) Act (see page 283) from applying.

The consent of the other co-owner(s) is not required.

In the case of *Re 88 Berkeley Rd., London N.W.9 (Rickwood v. Turnsek) (1971)* such a notice, duly sent by post by recorded delivery but never received by the addressee, was held to be valid.

G: Some Advantages and Disadvantages of Co-ownership

Specialists in taxation law have found co-ownership an exciting hunting-ground. This book cannot possibly go into such matters but let us just glance at what is involved. The most important relevant tax here is Capital Transfer Tax (CTT) which replaced Estate Duty in 1975 under the provisions of the 1975 Finance Act.

Suppose Adam buys a house (in his sole name) and lives there with his nephew Bill. When Adam dies and leaves the property to Bill in his will, CTT is payable. When Bill dies a few years later, CTT is payable again.

Suppose Adam and Bill bought the house as legal and Equitable joint tenants. (Adam provided all the money, so this is in effect a gift of half the property to Bill.) Until 1975, if Adam lived for seven years after making such a gift, the gift escaped from Estate Duty altogether; but since 1975 it no longer escapes because the value of the gift is aggregated with (i.e. is added on to) the rest of Adam's property, and CTT is charged on the total figure. But it is still financially worth while to make the gift:-

Suppose that when the property was bought it cost £16,000. As a result of inflation it is worth £60,000 when Adam dies. If it is in Adam's name alone there is CTT payable on £60,000. If it was put in joint names at the time of the purchase there is CTT payable on Adam's half: and also the gift (which was half of £16,000) must be aggregated. So CTT is payable on £38,000 (Adam's £30,000 plus the aggregated £8,000) instead of £60,000. And there is a further advantage: CTT on gifts *inter vivos* - i.e. between living persons - is payable at a lower rate than CTT on gifts by will.

CTT is not payable on property passing from husband to wife or vice versa, whether during their lifetime or on death. Gifts to their children must be aggregated (unless they are small sums below the minimum aggregable sum) - Parliament's intention is that property should be taxed in this way once per generation. (But a wealthy person can reduce the family's CTT by jumping a generation, by leaving part of his property to his grandchildren.)

Co-ownership can thus give tax advantages on death: but it can also lead to problems. In particular, breakdown of a marriage can lead to major problems regarding the matrimonial home. We shall look at these problems in Chapter 23.

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And finally in this chapter, observe the effect that co-ownership can have on intestacy:- consider Ivor and his wife Ivy and their 18 year old son Ian. Ivor dies intestate in a car accident.

(Note: for this example, ignore insurance payments, damages for Negligence, tax and all other complications: just consider the intestacy rules.)

Ivor leaves a house worth £38,000 (in his own sole name) and savings etc. worth another £42,000.

By the intestacy rules (see page 139) Ivy takes £40,000 (e.g. the house plus £2,000) and a life interest in half the rest. The other half of the rest goes to Ian: so he receives a cheque for £20,000.

If the house were in Ivor and Ivy's joint names as beneficial joint tenants, Ivy would get the house by right of survivorship, not by intestacy (so for distribution purposes the house does not come within the subject-matter of the intestacy - although for tax purposes it would have to be counted, except that there is no CTT between husband and wife). So the subject-matter of Ivor's intestacy amounts to only £42,000: and Ivy is entitled to the first £40,000 of this, by the intestacy rules. So she will take £40,000 plus a life interest in half the rest; Ian gets the other half of the rest: Ian's cheque is £1,000.

If this leaves Ian as a dependant who is inadequately provided for, the provisions of the 1975 Inheritance (Provision for Family and Dependants) Act which we saw on page 87 may be applicable.

If the house were held by Ivor and Ivy as Equitable tenants in common in equal shares, then Ivy has already a £19,000 stake in the house: so her £40,000 on Ivor's intestacy may consist of the other £19,000 half-share in the house plus £21,000 other property: leaving a residue of £21,000 of which Ian gets half, i.e. £10,500.

This would be so whether the property was originally conveyed to them as Equitable tenants in common, or whether one or other of them had severed an Equitable joint tenancy by one of the methods we saw on pages 284-6, during their lifetimes. Note that there can be no severance by will: the right of survivorship takes priority over any attempt at severance in a will, because the will does not take effect until the moment of death - at which moment the property has already

fled from the deceased to the survivor and therefore never becomes property to which the will is applicable.

Yet another possibility is that the house is in Ivor's name alone but Ivy contributed some of the purchase-money or did work to the property (see page 307) giving her (say) an £8,000 stake in the house. So she has an Equitable interest in the house to this extent before Ivor's death (in Equity they are co-owners, tenants in common, but in unequal shares) and so, on Ivor's intestacy, she can count the house as £30,000 instead of £38,000. So her £40,000 may consist of the house plus £10,000 - leaving £32,000 residue of which Ian receives £16,000. We shall see further examples of cases where the property is in one party's name but another party has made contributions, in our next chapter.

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Final Note on Co-ownership:- On any sale of the trust-for-sale property, *all* trustees must execute the deed. There must be at least two trustees - but if there are three (or four) trustees, the signatures of 2 out of 3 (or 4) will *not* be enough.

On any sale of *any* land, *all* legal owners must execute the deed.

SUMMARY

In this chapter we have seen:-

joint tenancy - with right of survivorship
tenancy in common - with no right of survivorship

Joint tenancy has unities of possession
interest
title
time ("PITT")

Tenancy in common need only have unity of possession, though it *may* have all the four unities.

At common law since 1925:-
(i) only joint tenancies can exist,
(ii) they take the form of a Trust for Sale,
(iii) there cannot be more than four trustees.

Summary continued overleaf:-

In Equity, joint tenancies and tenancies in common still exist, though since 1925 tenancies in common are correctly known as "interests in undivided shares".

Example: A and B as co-owners; A dies. (i) What would have been the position before 1926, and (ii) what is the position today?

Before 1926

if joint tenants, B takes A's share by right of survivorship, so B has the whole property.

if tenants in common, A's heirs take A's share by A's will or intestacy,
so: A's heirs have half the property;
B has half the property.

After 1925

if joint tenants, AT LAW, B takes A's share, so B can sell the whole property.
IN EQUITY, B takes A's share of proceeds by right of survivorship,
so B receives the whole net sale price.

if tenants in common, AT LAW, B takes A's share, so B* can sell the whole property.
IN EQUITY,
A's heirs take A's share of the proceeds by A's will or intestacy,
so: A's heirs receive half net sale price;
B receives half net sale price.

*Sole trustee should appoint a second trustee before selling, as a sole trustee (other than a trust corporation) cannot give a valid receipt for the purchase money.

Termination of joint tenancy by:-
(1) union in sole tenant
(2) sale
(3) partition
(4) severance

Termination of tenancy in common by:-
(1) union in sole tenant
(2) sale
(3) partition

TEST QUESTIONS on Chapter 22:-

1. Mr. and Mrs. Simple are buying a house. They say they want it in both their names, but when they are asked whether they want to be joint tenants or tenants in common in Equity, Mr. Simple replies, "I don't know: what's the difference?" Explain the position in language they will understand.

2. Mr. and Mrs. Simple have bought as joint tenants. Following a family argument Mrs. Simple severs the joint tenancy and makes a will leaving all her property to her granddaughter. A month later Mrs. Simple dies.
   (a) How does Mrs. Simple sever the joint tenancy?
   (b) Can Mr. Simple remain in the house?
   (c) When the house is sold, who is entitled to the proceeds?

3. Three partners P, Q and R buy a property for £140,000 of which P contributes £70,000 while Q provides £40,000 and R puts in £30,000. Five years later P and R have died and X offers to buy the property for £280,000. Who can sell the property and who will be entitled to the proceeds of sale? Give reasons for your answer.

4. Fred Smith says, "We own Magpie Cottage". Advise him and his wife what the true position is.

5. H and W (husband and wife) own a freehold house as joint tenants. H has left W and has gone to live in Paris. W pretends that H is dead and tries to sell the house and take all the money as the surviving joint tenant. Explain how the purchaser's solicitor will find out that W is deceiving the purchaser.

CHAPTER 23

THE MATRIMONIAL HOME

OUTLINE OF CHAPTER:-

A: The matrimonial home in the context of a divorce, nullity or judicial separation.

B: The matrimonial home other than in the context of a divorce, nullity or judicial separation:

1. Who can sell it?

1(a) Who can sell if the house is in joint names?
1(b) Who can sell if the house is in the name of one person, and that person paid for it?
1(c) Who can sell if the house is in the name of one person, but the other person substantially contributed to it?

2. Who gets the money?

2(a) Who gets the money if the house was in joint names?
2(b) Who gets the money if the house was in the name of one person?

3. Until sale, who can live there?

3(a) Who can live there if the house is in joint names?
3(b) Who can live there if the house is in the name of one person (regardless of whether or not the other person contributed to it)?
3(c) Who can live there if the house is in the name of one person but the other person contributed to it (as in the case of Williams & Glyn's Bank Ltd. v. Boland (1981))?

C: The Law Commission's Proposals.

A: The Matrimonial Home in the Context of a Divorce, Nullity or Judicial Separation

Divorce ends a marriage; nullity means that the "marriage" never was a marriage (e.g. if the wedding ceremony was not properly performed) and judicial separation - sometimes used by those whose religious beliefs will not let them divorce - means that Husband and Wife are still married but are released by the Court from their matrimonial duty of living together.

The two spouses, the Husband and the Wife, will be abbreviated to H and W throughout this chapter.

The 1973 Matrimonial Causes Act gives the Court wide powers regarding the matrimonial home if a question arises in connection with a divorce, nullity or judicial separation. By s.23 of that Act, the Court can order payments (either periodic, or lump sums) from one spouse to the other. By s.24 it can order the transfer of property from one spouse to the other.

S.25 of the 1973 Act (as amended by the 1984 Matrimonial and Family Proceedings Act) says that in exercising its powers under ss. 23 and 24 of the 1973 Act the Court must consider various factors, including each spouse's income, earning capacity, and needs; the family's standard of living, each spouse's age, the length of the marriage, any physical or mental disability, contributions (financial or otherwise) to the marriage, and so on. Looking after the home and family counts as a contribution.

In considering these factors, the interests of the family's children under 18 are to be put first.

The 1984 Act states that the Court should consider whether it is desirable to make "a clean break" (e.g. a once-for-all lump sum payment and no periodic payments) and that H and W's conduct should be taken into account if it would be inequitable to disregard it.

Provisions of the 1970 Matrimonial Proceedings and Property Act and the 1981 Matrimonial Homes and Property Act (etc.) may also be applicable.

The case of *Wachtel v. Wachtel (1973)* gives us the basis for what is sometimes called the "one third" rule - though it is not a rule; it has never been more than a guideline. H (Mr. Wachtel) was a dentist, able to earn a high income. His wife W was a dental nurse whose salary would only be about one eighth of what H earned. They had two children. The house was in H's name. Each accused the other of adultery, but it was not proved. When H and W divorced, their son went to live with H, and their daughter with W. The Court of Appeal (Lord Denning and others) granted W a lump sum payment of approximately one third of the value (at that time) of the matrimonial home, and periodic payments which in effect gave W about one third of their joint income.

The Court's attitude in dividing property on a divorce is not "Who does this belong to?" but "Who should this be given to?" with a view to seeing that both parties will still have a home and a reasonable chance of picking up the pieces of their lives. In *Martin v. Martin (1978)* the Court said, "It is important that each party should have a roof over his or her head whether or not there be children of the marriage".

In the 1970s "Mesher" orders (ordering that W should not have to leave the matrimonial home until the youngest child reaches 17 - or in other cases, until the youngest child finishes full-time education) were popular. They were first used in the case of *Mesher v. Mesher and Hall (1973)* in which W was granted such an order, enabling her to stay in the matrimonial home, because H was hoping to marry his new lady-friend who had a house, which had been awarded to her on the break-up of her marriage; whereas W was contemplating marriage to a divorced man who could *not* offer her a home because it had been awarded to his ex-wife. But "Mesher" orders now seem to have lost their former popularity.

In *Thompson v. Thompson (1985)* W was living in the matrimonial home under a "Mesher" order dated 1981, but in 1983 W wanted to sell the house and move to a new district - which required a further Court order - which she was still struggling to obtain in 1985!

B: The Matrimonial Home other than in Context of a Divorce, Nullity or Judicial Separation

For the rest of this chapter we shall be considering problems arising with regard to the matrimonial home other than within the context of a divorce, nullity or judicial separation. So we may (for example) be talking of a situation where H and W are informally separating, without going to Court (or maybe one of them has just packed a suitcase and left) or it may be a case where the conflict is between W's rights and the rights of a Building Society or other mortgagee, or a case where the parties are not married - as in *Bull v. Bull (1955 - see page 303)* in which the parties were mother and son.

We must also include here all cohabitees who are splitting up - for no-one can get a divorce, declaration of nullity or judicial separation unless they are married.

Disputes concerning the matrimonial home in the context of a divorce etc. are heard in the Family Division of the High Court; but those not in that context come in the Chancery Division (or in some circumstances the Queen's Bench Division).

When a problem regarding the matrimonial home arises other than in the context of a divorce, nullity or judicial separation, the position is complicated. There is no Statute giving the Court powers like those we have seen under heading A above, and we are thrown back onto the general law - in particular the 1925 legislation with its Trust for Sale, and the law of Trusts in general. And let's face it, the 1925 legislation is showing its age here. The LPA, by which all co-ownerships have to be on Trust for Sale, was an excellent piece of legislation, but times have changed.

In 1918, less than 10% of the eight million dewllings in England and Wales were owner-occupied. (More than seven million belonged to private landlords.) In 1978, over 55% of the seventeen million dwellings in England

and Wales were owner-occupied and the number is still growing today; the private landlords' stock of housing had dropped by 1978 to two and a half million and is today dwindling still further; and there are five million Council tenants - some of whom will become owner-occupiers under the "right to buy" provisions in the 1980 Housing Act.

So in 1918 (and the figure was not very different in 1925) there were about 800,000 owner-occupied dwellings as against more than 9,300,000 today. In other words, for every owner-occupied house that existed in 1918 there are *eleven* today.

And inside the typical owner-occupied house in 1918 or 1925, was a well-to-do couple. (Married of course; the idea of cohabitation would have shocked them.) H had a well-paid job and it would have been highly unusual to find that W went out to work. They might have told you, "Working class men's wives go out to work; but the working classes don't buy houses - they rent!" So, in our typical owner-occupied house, H was the family breadwinner. And so the house would normally be put in his name. Not co-ownership.

By the 1960s, many wives - some very affluent - were going out to work, and it had become popular to put the house in the joint names of H and W. And so, by the LPA, they had to hold it on Trust for Sale: this fiction - this pretence - that they were buying the property to sell it, as we saw in the last chapter. It is what is called "a legal fiction".

But we are seeing here a fiction upon a fiction, for H and W in most cases did *not* each contribute equal amounts towards the purchase-money. But they chose to be beneficial joint tenants (i.e. joint tenants in Equity as well as at law) because (i) they wanted the "right of survivorship" (which is very convenient for married couples if one of them dies - see page 274) but also (ii) more important to them, they wanted the tax advantage which at that time went with joint tenancy. (If H died and the house was legally in his name, the whole value of the house was included in the figure on which the tax known as Estate Duty was

calculated; but if the house belonged legally to H and W jointly they were treated as if they had provided half the money each and so only half the value of the house was counted. This advantage ended when Estate Duty was replaced with CTT - see page 286 - in 1975.)

So it was (and is) quite normal to find the house in the names of H and W as beneficial joint tenants, even though H provided the majority or even the whole of the money. It is a fiction on a fiction: a fiction that they bought it to sell it, and a fiction that they paid for it equally, when they did not.

Someone might say, "H has a greater earning power than W, and W cannot earn if she has to stay at home with the children: so treat it as a gift from H to W" - but the husband who sees no objection to this when happily married may see it very differently if they fall out.

In most cases the financial position is further complicated by the fact that part of the money was borrowed from a Building Society, or a Bank or some other lender, on a mortgage. (A mortgage is a loan made on the security of the house: if the interest on the loan is not regularly paid, the mortgagee - lender - has the right to sell the house - see Chapter 39.)

Since 1975 the tax advantage which we noted above no longer exists between H and W because there is no CTT between H and W, though the advantage can apply between other persons as we saw with Adam and Bill on page 287: but today it is usual (70% of all married - or unmarried! - couples) to put the house in joint names irrespective of who pays for it.

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That is enough background: now let us look at the law. But first let us be clear in our minds about (A) what properties we are talking about, and also (B) what question we are trying to answer.

(A) We are talking about people's *homes*. We are talking of the matrimonial home in which H and W and the children (and possibly Grandma etc.) live. And we are

talking of homes which are lived in by cohabitees or by mother and son or other relatives, or friends, or even a group of students who have pooled their finances to buy a house.

(B) Wives and husbands sometimes walk out on each other - and it happens today far more than it did in 1925. Cohabitees split up. Friends fall out. And the question we are trying to answer in the next 25 pages is: when the relationship breaks up, what are the individuals' rights concerning the property? (Assume that the parties are not at present divorcing - because if there is a divorce, Part A of this chapter - pages 293-4 - will apply instead of this Part. So the parties are splitting up without a divorce, or possibly they have split up now but the divorce - if there is one - will be in two years time, since two years desertion or separation is evidence of grounds for divorce within the 1973 Matrimonial Causes Act.)

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There are three possibilities we must consider:-

(a) house in joint names (whether they paid for it equally or not)

(b) house in H's (or W's) name alone (and that person alone paid for it)

(c) house in one of their names alone (but the other person made payment or some other substantial contribution - such as building an extension - which gives that person an Equitable interest).

And whichever of these three situations applies, we have to consider that situation from three angles:-

(1) Who can sell the house? (This is governed partly though not completely by who has the legal estate.)

(2) Who gets the money from the sale? (This is governed generally by who has the Equitable interest.)

(3) Who (until sale) can live in the house? (The right of occupation may be an Equitable interest or it may be a mere licence - see page 423 - but in plain English two important points are, "Can one party

throw the other one out?" and "Can one party insist on staying there, and thus prevent the other party from selling it?")

Combinations of the above points (a)-(c) and (1)-(3) will form our headings for the next few pages.

1. WHO CAN SELL?

1(a) Who can sell if the house is in joint names?

H has moved out and is living in a bed-sitter with his mistress.

Much has been said, written, shown on television, etc., about this type of problem. The intelligent student may well have opinions on what ought to be done in such a situation. But in these pages we are not looking at what *ought* to happen, we are looking at what *does* today happen.

The law, like a man on a desert island, can only use the machinery standing there available. For co-owners, this means the Trust for Sale - this artificial pretence dating from 1925 that they bought it to sell it.

For H and W this means that as they have the house in joint names, it is shown on the title deeds or Land Registry Title Certificate as belonging to H and W as trustees, holding on Trust for Sale for the benefit of the beneficiaries (i.e. H and W themselves).

So H (encouraged by his mistress) tells W: "I want to kick you and the family out and sell the house so that I and my love can buy a bungalow". "Oh no, no", replies W. But H and W are legally the trustees of a Trust for Sale, and if trustees cannot unanimously agree to postpone sale, they are on trust to *sell* it - as in *Re Mayo (1943)* which we saw on page 260.

Since (because of LPA) we *have* to use this legal fiction, this pretence that H and W are like commercial partners buying a house with the purpose of making a profit on re-sale, when the truth is that this is a

non-commercial matrimonial union buying the house as a home and *not* primarily for sale, at least we must interpret the legislation so as to do the least possible harm to the Equitable owners' rights. We should *not* press every detail of the fiction to its logical conclusion if this results in the sacrifice of some innocent person's rights.

Judges do indeed have this discretion to apply the rules either strictly or liberally - but they are of course bound by the rules. Any person who says, "It *ought* to be different", and therefore assumes that the Court will deal with the matter on principles of common sense and natural justice as if the LPA did not exist, is deluding himself and is misleading the people he *ought* to be helping. But, within the rules, the Court will try to help the situation.

So W would therefore be well advised to refuse to sign any sale documents. H may then apply for a Court order to force a sale, but by s.30 of LPA the Court has discretion as to whether or not to grant the order. And the Court will ask whether the property is still being used for the purpose for which it was purchased.

Therefore if the house was bought as the matrimonial home, and although H has gone, W and the children are still living there, it is still being used as the family home and the Court is unlikely to order a sale.

So H, who may well have criticised the Trust for Sale when they jointly bought the house, saying, "We don't want to sell", finds that now that he *does* want to sell, he *can't*. This situation occurred in *Bedson v. Bedson (1965)* and *Jones v. Jones (1971)*.

If the story were the other way round - W and the family have gone to live with W's sister, leaving H in the house - the Court would be much less unwilling to make the order for sale. *Jones v. Challenger (1973)*.

So H could find that the house (into which he has put his life's savings and hours of painting and decorating) is sold, and he receives *part* of the proceeds. And this will bring us to the most difficult problem of all: "Who

gets what part of the money?" - but we shall not look at this until we reach heading 2 on page 304 below.

In *First National Securities Ltd. v. Hegerty (1984)* H and W purchased a house (unregistered land) as joint tenants. They did not move in: H was about to retire from the police force, but at this moment they were still in a police house. H alone mortgaged their new house (by forging W's signature) and ran off with the money to Ireland.

The Court held: (i) this was a sufficient act of alienation to show a Severance (as on pages 284-5) of the Equitable joint tenancy: H and W were therefore Equitable tenants in common in equal shares; (ii) the mortgage was a valid mortgage of whatever H was entitled to mortgage, namely his half share in Equity; and (iii) now that H had gone and the mortgagee wished to sell and W wished not to sell *(note: the mortgagee was not a trustee but the Mortgage gave it the right of sale over H's half)* an application needed to be made under s.30 of LPA (just as we saw on page 300) and the Court would then decide whether it should order a sale.

Another 1984 case, *Thames Guaranty Ltd. v. Campbell*, again produced a situation in which the house was in the joint names of H and W, but H alone mortgaged it. But he did so, not by executing a deed of Mortgage, but by simply handing the Land Certificate to the lender as security. The Court held that H and W were trustees of the Land Certificate, just as they were trustees of the land: H alone had no authority to hand it to the lender: and so the lender had no enforceable claim at all against the house - all the lender could do was to sue H personally for debt.

So: to sum up the main point that we have seen in the last three pages:- if the property is in joint names there is a Trust for SALE, but under s.30 of LPA the Court may well refuse to force such a sale upon an unwilling person if the property is still being used for what it was bought for.

We shall see further details and cases on who can stop the sale, under headings 3(a)-(c), pages 310-322.

1(b) Who can sell if the house is in the name of one person, and that person paid for it?

If the house is in the name of H alone, and neither W nor Grandma nor anyone else in occupation has any financial interest in it, H can sell it (unless he is prevented by W's right of occupation - see page 312.) But today it is quite likely that W will have a financial interest in the property: see next paragraph.

1(c) Who can sell if the house is in the name of one person, but the other person substantially contributed towards it?

Suppose the house is in H's name, but W provided £1,000 of the purchase-money: or W provided no money but she laid a concrete drive and built a garage for the family car. These substantial contributions of money or labour can give W an Equitable interest in the property.

Though there is no expressly-stated Trust, there *ought* to have been one - and "Equity looks on what ought to be done as if it was done" (as we saw on page 61) so there is a Constructive Trust (page 91). Or it may alternatively be a Resulting Trust.

(Note: where we say, "There *ought* to be a Trust", Equity has the machinery to provide one: but where we say, "There *ought* to be a better system than the Trust for Sale" - Equity has no machinery whatever to bring that about! Only Parliament can do that.)

So H holds the property as a constructive (or resulting) trustee, on trust for H and W - though he may not realise it. As this is co-ownership (Equitable tenancy in common) there is a Trust for Sale - and so a second trustee should be appointed on a sale. The purchaser should insist on this as we saw on page 280:

otherwise if W is defrauded by H, W has a claim against the purchaser - unless the purchaser can show that he was a B.F.P., without notice of W's right.

This point arose in *Bull v. Bull (1955)*. In this case, mother and son supplied the purchase-money but the house was put in the son's name alone. Later the son married, and his wife and his mother fell out. Unable to please both of them, the son tried to put his mother out of the property, but failed. Mother and son were Equitable tenants in common. There were no valid grounds on which mother could be evicted from the property, and as mother and son were tenants in common in Equity, there was no way the son (or two trustees) could possibly sell the property, in his interests and directly against hers, without her consent - except by applying to the Court under s.30 of LPA which we noted on page 300 above.

The decision went the other way in *Caunce v. Caunce (1969)* because there the Court held that there was no notice of a wife's right. In the *Caunce* case, the deeds of the house (it was unregistered land) were in H's name alone - W did not realise this - although the purchase-money had been provided by H and W in (unequal) shares. So H was trustee for H and W, though the deeds did not show this. H mortgaged the house to a Bank, and later H went bankrupt and disappeared. The Bank wanted to evict W and sell the house. The High Court held that W's rights did not prevail against the Bank because the Bank was a B.F.P. (which phrase includes a B.F.M. - a bona fide mortgagee) without notice. W's presence in the house was not a matter which gave the Bank any constructive notice that she might have an Equitable interest in the property, for it was natural for her to be in occupation - she was H's wife!

But since the House of Lords came to the opposite decision, on a piece of registered land, in *Williams & Glyn's Bank Ltd. v. Boland (1981 - see page 314)* it is questionable whether *Caunce v. Caunce* can be relied on.

Contrast *Caunce v. Caunce* with *Hervey v. Smith* on page 122.

2. WHO GETS THE MONEY?

Consider this hypothetical problem:- A house was bought (either in H's name or joint names) in 1974 for £12,000, of which H supplied £3,000, W (whose salary was only one sixth of H's) provided £1,000, and a Building Society advanced the other £8,000. H took full responsibility for the mortgage (except one month when W paid it because H had some big car-repair bills to pay). In 1977 W built a greenhouse. They think H paid for the materials but neither of them can remember for certain. W has not earned any salary since their son was born in 1983. Now they are separating (the son is going with W) and they *agree* that the house should be sold. It will fetch £56,000.

After the repayment of the £8,000 mortgage, how should the remaining £48,000 be divided? As H put in £3,000 and W £1,000, should H receive £36,000 ($\frac{3}{4}$) and W £12,000 ($\frac{1}{4}$)? Or, as H was responsible for £3,000 *and the £8,000 mortgage* (i.e. £11,000 of the £12,000 purchase price) should H receive £44,000 ($\frac{11}{12}$) and W get £4,000 ($\frac{1}{12}$)? Or should they take half each? If the house is in H's name, should W receive *anything*? And what difference should the greenhouse make? And what difference should W's adultery make?

What should happen? I can't answer that! But what *will* happen? Lat us look at the law.

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2(a) Who gets the money if the house was in joint names?

If H and W were co-owners and the deed or Title Certificate stated that they were "legal and Equitable joint tenants" or "beneficial joint tenants", that is conclusive unless there has been fraud or mistake. Joint tenants are equal. They will be treated as being entitled equally, irrespective of what proportions each put in. If one of them severs the Equitable joint tenancy they become tenants in common in equal shares, even if the amounts they put in were unequal.

Similarly, a grant "to H and W as tenants in common in equal shares" would give them equal shares even if the contributions which they made were unequal.

But "to H and W as tenants in common" would give them shares in proportion to their contributions.

Once the house is legally in joint names, H cannot change his mind later, just because he provided all the money and now he has found out that W is unfaithful. H cannot transfer the property from joint names to his sole name without W's written agreement - for which H will probably pay dearly, because W will be advised about this by her own separate solicitor (or if she is not, H may be laying himself open to an allegation that H used "undue influence" over W - in which case W can declare the agreement void if she so wishes).

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The Land Registry exists to register legal estates and not Equitable rights. The Registrar will *exclude* references to Trusts from the Register. So it may be necessary to protect them by entering a Restriction (see page 603) onto the Register, saying that two trustees are needed on any sale of the property. This at least shows that a right different from the ordinary "right of survivorship" exists.

But what the Equitable rights are is nothing to do with the Land Registry, and as long as the purchaser pays the purchase-money to two trustees, what the trustees do with the money is no business of the purchaser or the Registrar. If beneficiaries are defrauded, their remedy is to bring an action against the trustees for Breach of Trust.

Nevertheless if a phrase such as "beneficial joint tenants" (which means they are joint in Equity as well as at law) is used, the Registrar will include this phrase in the registration of the legal title.

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If the house is in legal joint names but there is no indication of what beneficial interests the parties intended (e.g. "to H and W on trust for themselves")

they are presumed equal, regardless of what proportions they contributed.

2(b) Who gets the money if the house was in the name of one person?

Now we turn to the situation where the house was in only one of their names.

If the house was in one name alone, it is possible that there may have been an express declaration of trust (e.g. it is in H's name and he declares in the purchase-deed that he holds it as trustee for himself and his 17 year old wife, who, being under 18, cannot hold a legal estate - see page 567).

Again the Land Registry will exclude all reference to the Trust, and there should be a Restriction entered saying that two trustees are needed on a sale - for otherwise H could sell it without W's knowledge, and depart with the money; and the unfortunate purchaser would find that as he had only paid the money to one trustee, W could claim against him. In *Caunce v. Caunce* (page 303 above) which was on unregistered land, we saw that this claim failed on the grounds that the other party was a B.F.P. without notice of W's rights, but on registered land this is not so: by *Williams & Glyn's Bank Ltd. v. Boland (1981 - see page 314)* W's presence in the property is enough to make the purchaser subject to her rights. The purchaser or his solicitor must ask about this sort of thing before parting with the money - or take the consequences.

Not only will the Land Registry not register the Equitable rights, but also (as we saw on page 15) it will not normally return the Transfer Deed after it has registered the legal title. So the Trusts and the transfer of the legal estate had better be in two separate deeds, or we shall run the risk of losing track of the Trusts altogether!

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The above is written on the assumption that there are expressly-stated trusts. But it is much more

likely that there is *no* declaration of trust, simply because the parties never thought about it - as in the example at the top of page 304 - and so, if the matter comes to Court, the Court must try to decide what the parties intended - or what they would have intended if they had thought about it. The Court here has to fall back onto the principles of resulting and constructive trusts which we saw on pages 90-91.

It must be shown that the party who is not on the legal title made a contribution, and that it was intended as a contribution to the house and not merely to general living expenses. In contrast to what we saw under heading A (page 294) of this chapter, the question the Court is required to answer is not "Who should this be given to?" but "Who does this belong to?" - and the person who put nothing substantial in will get nothing at all out.

In *Pettitt v. Pettitt (1970)* the house was in W's name. H had dug the garden and done some general handyman work around the house, increasing its value. The House of Lords held that this was not sufficient to give H any Equitable interest in the property.

In *Gissing v. Gissing (1971)* H and W had been married for 35 years. The house was in H's name and he had paid for it, but W went out to work, contributed to the general living expenses, bought clothes for their son and paid his school fees, got H a job with the firm she worked for, and paid for some fittings in the house and the laying of a lawn. The House of Lords held that none of this gave her any Equitable interest in the house.

In both *Pettitt v. Pettitt* and *Gissing v. Gissing*, the Court did not regard the contributions to the house as "substantial".

But in *Eves v. Eves (1975)* the owner's mistress, Janet, had carried out a good deal of work improving the property. She broke up the concrete which a previous owner had laid over the front garden, and made flower-beds. She demolished an old shed and built a new one. The house was in the man's name alone: when

it was bought Janet was not of full age and so could not own a legal estate. Marriage was contemplated, but their association came to an end when the man met a new girl-friend. The Court of Appeal refused to order sale of the property, on the grounds that the man needed it for his new family whereas Janet already had a new home - she had married by the time the case came to Appeal - but the Court of Appeal saw the man as a constructive trustee for himself and Janet, and ordered that when the property was eventually sold, Janet should receive one quarter of whàtever proceeds of sale remained after repayment of the mortgage. (With inflation, her share could be quite a few thousand pounds.)

This precedent was not followed in *Tanner v. Tanner (1975)* in which there was no intention to marry.

But in *Hussey v. Palmer (1972)* in which an extension had been built onto the house, the Court held that there was an Equitable right to a share in the property for the mother-in-law who had paid for the extension.

Hussey v. Palmer, *Eves v. Eves* and *Tanner v. Tanner* were all Court of Appeal cases in which Lord Denning was one of the Judges.

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In trying to decide what the parties would have intended (if only they had thought about it before falling out with each other) the Court will look at whatever evidence is available. If both parties have made substantial contributions, even though the house is in one name alone, but the parties do not have any intelligible record of who paid what, the Court will probably have to assume that their rights are equal. If there is a record, the Court may consider what proportions each is entitled to.

In *Heseltine v. Heseltine (1971)* and *Eves v. Eves*, the parties received $\frac{3}{4}$ and $\frac{1}{4}$. In *Hazell v. Hazell (1972)* the apportionment was $\frac{4}{5}$ and $\frac{1}{5}$. But in both *Rimmer v. Rimmer (1953)* and *Smith v. Baker (1970)* (not to be confused with *Smith v. Baker (1891)* which is a House of Lords case on Tort of Negligence) the parties were treated as equal.

In *Gissing v. Gissing (1971 - see above)* the House of Lords ruled that the principle of equality is not appropriate unless the contributions of the parties are so inextricably mixed up that it is impossible to unravel them from each other.

The contribution may be financial, or some other matter such as work. But looking after the home and family, and doing a bit of painting and decorating, do *not* count (in contrast to what we saw under heading A - page 293) for this purpose. Work over and above that (as in *Eves v. Eves* where the lady broke up concrete with a sledgehammer) can count. Unpaid help given by W in running H's greengrocery business counted in *Re Cummins, Cummins v. Thompson (1972)* - a case which was not about a matrimonial home but a warehouse used in the family business. The warehouse was in H's name, but W helped to run the business that provided the purchase-money to buy the warehouse, and this gave her an Equitable interest in it.

This is just a small selection of precedents, concerning a subject on which there are very many cases, some of which are not easy to understand. Students reading for a law degree should know about

Binions v. Evans (1972)
Browne v. Pritchard (1975)
Cooke v. Head (1972)
Cowcher v. Cowcher (1972)
Re Densham (a bankrupt) (1975)
Errington v. Errington and Woods (1952)
Greasley v. Cooke (1980)
Hodgson v. Marks (1971)
Kowalczuk v. Kowalczuk (1973)
National Provincial Bank Ltd. v. Ainsworth (1965)
Re Buchanan-Wollaston's Conveyance (1939)
etc., etc.

For further details, see the leading Land Law textbooks, and also
Duckworth's "Matrimonial Property and Finance",
Hartley's "Matrimonial Conveyancing",
Hogett and Pearl's "The Family, Law and Society",
Murphy and Clark's "The Family Home",
etc.

3. UNTIL SALE, WHO CAN LIVE THERE?

3(a) Who can live there if the house is in joint names?

We have seen under heading 1(a) above that if the parties are legally co-owners there is a Trust for Sale but if one party refuses to sell, the Court has discretion under s.30 of LPA as to whether to enforce the sale. So W with the children is likely (and H without the children is much less likely) to be able to stay there.

But what if H gave W two black eyes last Sunday?

By the 1976 Domestic Violence and Matrimonial Proceedings Act, the Court can make orders for non-molestation, and also "ouster" orders excluding the violent person from the matrimonial home. This applies whether the house is in joint names or in the sole name of one of them. The court hearing is in chambers (i.e. in private) before a County Court Judge.

The 1978 Domestic Proceedings and Magistrates' Court Act may also be applicable.

In *Davis v. Johnson (1978)* two unmarried cohabitees were joint tenants of a Council flat. He was violent to her, so she left the flat but wanted to return. The House of Lords held that an injunction could be granted excluding the man from the flat.

But *Richards v. Richards (1983)* went the other way. In this House of Lords case, the matrimonial home was a Council house, of which H was the tenant. W left H on several occasions, but returned. In January 1982 (when they were living together in the house) W commenced divorce proceedings against H: she then continued to cook for him but moved to a separate bedroom. In June 1982 W left again, with their two children (aged 6 and 4) and went to stay with a woman friend in overcrowded conditions. A month later W (taking the children with her) went to stay with a man. In October 1982 W applied for a Court order that H should give up

the matrimonial home to her. The Court granted her the order on the grounds that it was "in the interests of the children". H appealed against the order.

The House of Lords (Lords Hailsham, Diplock, Scarman, Bridge and Brandon) held that the appeal would be allowed - so H could stay in the house - on the grounds that (i) the Judge who made the order had not taken W's conduct into account, and (ii) although the children's needs are important, they are not bound to be the first or paramount consideration. (Lord Scarman dissented from this second point.) The children in this case apparently suffered no adverse effects from being moved around.

In *Richards v. Richards* H had not been violent.

But the general principle remains that if H has used (or threatened) violence, he may find himself excluded by Court order from his home, even if the property is in his sole name - although the exclusion is likely to be for only a few months to give W time to find other accommodation, for the Courts do not like to make such an order on a permanent basis against a legal owner.

And it can even happen to a non-violent H: as in *Samson v. Samson (1982)*. Mrs. Samson's behaviour was nothing like Mrs. Richards' - but Mrs. Samson did not get on with her husband: in fact the Court found that she "could not bear to be in the same house as he" and that in trying to get H out of the house W was genuinely acting in what she believed to be the best interests of herself and the children. H was not violent, but the order was made (and the Court of Appeal upheld it) to make him leave the house, as the children would otherwise have to live in grossly overcrowded conditions (with one of them sleeping on the floor) at their grandmother's house.

In theory a violent W can be ousted, the same as a violent H: but the situation is not all that likely to arise if she is a satisfactory mother. (If either H or W is an unsatisfactory parent, the situation may also involve the Council's social worker, the N.S.P.C.C., the doctor, the headmaster, criminal proceedings by the police, and so on.)

It also appears that the decision made in *Richards v. Richards* may have an effect on Court procedure, so that certain claims which previously could be made under the 1976 Domestic Violence and Matrimonial Proceedings Act must now be brought under the 1983 Matrimonial Homes Act (which requires the parties' conduct to be considered, and treats the children's needs as only one among a number of matters for consideration: i.e. it does not treat the children's needs as paramount) - but this is not really within the scope of this book.

3(b) Who can live there if the house is in the name of one person (regardless of whether or not the other person contributed)?

If the house is in the name of one spouse alone, the other spouse can register a Right of Occupation under the 1967 and 1983 Matrimonial Homes Acts. For unregistered land, the registration of the right takes the form of a Class F Land Charge (see page 222) at the Land Charges Registry; the registered land equivalent is entry of a Notice on the Register at the Land Registry. It is sometimes known as the "deserted wife's charter" but it can be registered at any time, and I once heard of a lady solicitor who registered hers during her honeymoon. It can also be used by H if the house is in W's name alone.

It is available whether or not that spouse has made any contribution.

Its effect is that the spouse cannot be removed from the house without a Court order (and if she has left, she can be put back in by the Court) - so H may find himself in a position where the house is in his name alone and W has made no contribution, and yet H cannot sell it without first convincing a County Court Judge that it is right and proper that W should be evicted. It is not W's house, but it *is* her home, and the Judge will not be easily convinced that she should be put out of it.

In *Wroth v. Tyler (1973)* H was retiring from business and decided to move back to the district where he had been born. W did not want to go. But the house was in H's sole name, and he entered into a binding contract to sell it. Then (the following day) W registered her Right of Occupation. So H could not complete the sale. (H was therefore sued for breach of contract - the most likely outcome of this being H's bankruptcy.)

These statutory Rights of Occupation only apply between H and W - not unmarried couples, Grandma, etc. But note that if *any* person in occupation has made a contribution, they may have rights of occupation by *Williams & Glyn's Bank Ltd. v. Boland (1981 - see below)* which can hold good without registration.

If there has been violence, actual or threatened (or even if no violence, as in *Samson v. Samson* above) ouster orders can apply here, the same as in 3(a) above. So H can find himself evicted from a house of which he is sole owner, so that W and the children can live there.

What is the legal position of a chap who invited a girl to live with him ... and she came ... and made his life a misery ... and now refuses to leave? As a visitor or licensee who has outstayed her welcome, she is a trespasser and he is allowed to use reasonable force (but violence is unreasonable) to remove her and her goods. But if she made any substantial contribution the position could be very different - see *Eves v. Eves* on page 307. And if she had her own room and paid rent as a tenant, see Chapter 40. (And if, as a gift, he put the property into their beneficial joint names, he's in real trouble!)

3(c) Who can live there if the house is in the name of one person but the other person contributed to it?

We must now consider the position of someone (spouse or other person) who is not a legal owner but has made a contribution. Our leading case on this is the 1981 House of Lords case of *Williams & Glyn's Bank Ltd. v.*

Boland: let us look at this important and rather difficult case carefully.

As we do so, let us be careful to distinguish "overreaching" from "overriding". "Overreaching" is changing a right in land to a right in money; whereas "overriding" means getting in front: thus an overriding interest is one which takes priority over other later interests even though it is not protected on the Register at the Land Registry.

Let us also make sure we know an "overriding" interest from a "minor" interest on registered land. A minor interest holds good against a purchaser (or a mortgagee - the Bank in the *Boland* case) if the interest is protected by entry on the Register. An overriding interest holds good against a purchaser (or mortgagee) without being protected on the Register.

At this point, glance again at page 303 where we saw *Bull v. Bull* (in which the lady who had made a contribution was allowed to stay in the house) and *Caunce v. Caunce* (in which she was not allowed to stay) and bear those two cases in mind as we continue.

Before I set out the facts of *Williams & Glyn's Bank Ltd. v. Boland*, it will help students if I "let the cat out of the bag" by saying what the important points are. The student should look out for the following points (and may indeed like to tick them off in the right-hand margin as they appear) in the argument. They are ten points in a logical progression.

1. Mrs. Boland had no legal estate because her husband had registered the property at the Land Registry in his own name alone. ( )

2. But Mrs. Boland had contributed part of the money; therefore she had an Equitable interest as an Equitable tenant in common. ( )

3. Tenancy in common is co-ownership; therefore H held as trustee on trust for sale, and on trust to hold the net proceeds of sale (i.e. the MONEY from any sale) on trust for himself and his wife. ( )

4. But the co-ownership also gave Mrs. Boland a right to live there - a right of occupation - not just as Wife, but as contributor of part of the money. ( )

5. Such a right of occupation is not an overriding interest, it is only a minor interest - and it was not on the Register. ( )

6. Therefore it would appear that the Bank's right as mortgagee should take priority over W's right, and enable the Bank to take the house and sell it. ( )

7. But she actually lived there; and s.70(1)(g) of LRA says that rights of any person in actual occupation are overriding interests. Therefore whatever rights she has got are overriding interests. ( )

8. Therefore her *right* of occupation which would normally be a minor interest (item 5 above) is transformed into an overriding interest by the fact that she was in *actual* occupation, by the rule in item 7 above. ( )

9. Therefore the Bank was subject to her rights even though those rights were not protected on the Register. ( )

10. Therefore the Bank cannot take the house and sell it. ( )

Now let us look at the facts of the case.

H and W (Mr. and Mrs. Boland) each contributed to the purchase-money when they bought their first house, and it was registered at the Land Registry in their joint names. They sold that house and bought another one, and this was registered at the Land Registry in H's name alone, which W did not realise. H mortgaged this house to Williams & Glyn's Bank Ltd., to raise money to finance his building business. The business failed and the builder's yard was sold, but a substantial deficit (£48,223) remained outstanding, and

so the Bank claimed the house. W then claimed that her Equitable interest as a contributor gave her a right of occupation, which would prevent the Bank from selling the house.

The High Court decided in favour of the Bank, as in *Caunce v. Caunce*, but the case went to the Court of Appeal and then to the House of Lords.

If the property had been unregistered land, then the position would have been as follows:-

H would have held the property as trustee on trust for sale, for the benefit of H and W. Therefore there should have been a second trustee, as there should in *Caunce v. Caunce*. If the Bank paid money to one trustee, W would have a claim against the Bank, unless the Bank was a B.F.P. without notice. But in *Caunce v. Caunce* it was held that the Bank was indeed a B.F.P. without notice. Therefore W must lose her case.

The Boland house is registered land. Therefore a purchaser (or mortgagee) is bound by overriding interests, and overriding interests include (by s.70 of LRA) the *rights* of any person in *actual occupation*. The concept of B.F.P. without notice does not arise on registered land, as we saw on page 118.

Let me stress, because it is so important in this case, that by s.70 - or to be exact, s.70(1)(g) - of LRA, the RIGHTS of anyone in ACTUAL POSSESSION are OVERRIDING INTERESTS.

The House of Lords held that (i) W had rights in the land (i.e. her Equitable interest as a contributor) and (ii) she was in occupation - she was not just H's shadow, she was a human being living there.

- But surely (i) above is wrong? Didn't we see on pages 279-280 in the chapter on co-ownership that the *trustees* have the *land* - on Trust for Sale - and the beneficiaries' interests are in the proceeds of sale, i.e. the *money*? We referred to this as "overreaching in a broad sense" on page 264. - So would we not be right in saying that W's Equitable interest is in money (proceeds of sale) and not in the land itself, and

therefore it is not an overriding interest, but is a minor interest which can (and should) be overreached, and it is one which was not protected by any entry on the Register? - And so, surely, W's claim to the house must fail, and she may perhaps receive a share of the proceeds of sale but she will have to leave the house - isn't that so?

The House of Lords said no, it is not so, because a distinction must be drawn between W's rights in the *proceeds* of sale and her rights *pending* sale. It is true, said the Court, that her rights in the proceeds of sale were a minor interest, but her rights pending sale included *the right to live there*. That too would normally be a minor interest, but as she *was* living there in actual occupation, this was capable of being an overriding interest, because of s.70(1)(g) of LRA.

Lord Wilberforce made the comment during his judgment in the House of Lords that "to describe the interests of spouses in a house jointly bought to be lived in as a matrimonial home as merely an interest in the proceeds of sale, is just a little unreal".

Let me put it this way. The fact that W was in occupation before the Mortgage was granted, made the Bank subject to any rights W might have (other than any which could be overreached). And as a contributor of part of the purchase-money, W had two rights:-

(i) a right to part of the proceeds of sale (but that will not stop the house from being sold: it is no good against the Bank because of Overreaching) and

(ii) a right, as contributor, to live in the house not merely as wife but as owner of an Equitable interest in the house. *That* held good against the Bank as an overriding interest whether the Bank knew of it or not.

In other words (stating the same point the other way round) W has a right to *be* there because of her Equitable right resulting from her contribution, and not merely because she is wife: and this right which she has paid for (which would normally be a minor interest, and void because it was not on the Register)

is made into an overriding interest by s.70(1)(g) of LRA by the fact that she *is* there.

First, W has got the *right of occupation*, and then the *fact of actual occupation* transforms this right from a minor interest to an overriding interest.

A wife's statutory right of occupation under the 1967 and 1983 Matrimonial Homes Acts is *not* an overriding interest - even if W is in actual occupation - but it can be protected by an entry on the Register (equivalent to a Class F Land Charge on unregistered land). But a right of occupation by virtue of W having made a contribution (Mrs. Boland's situation) is good as an overriding interest without any entry on the Register, if W is in actual occupation at the relevant time.

So Mrs. Boland won her case, and the House of Lords made it clear that it did not think highly of the High Court case of *Caunce v. Caunce* in which just the opposite decision was reached in respect of a property which was unregistered land. Lord Scarman said it was "by no means certain that *Caunce v. Caunce* was rightly decided". And as Mrs. Boland was not a party to the mortgage deed, the Bank cannot of course sue *her* for the mortgage money.

The right which Mrs. Boland succeeded in claiming is applicable to any person in actual occupation, and not just wives. (A proposal to limit it to wives was put before Parliament in early 1985 but was withdrawn a few weeks later.) So it could protect the occupation of the owner's brother who lives with him ... or it could be mother-in-law, or mistress, or even a lodger who has put money or work into the property ... or perhaps a fifteen year old son who has a flair for carpentry and has built good-quality fitted wardrobes in every bedroom and a shed in the garden.

For conveyancers and mortgagees this case is a headache, as they now have to check into these things.

And remember that before this case, Banks and Building Societies (etc.) used to grant mortgages without inquiring into any rights which W etc. might

have. There must be thousands of such mortgages, and it is reasonable to suppose that in at least a few dozen of them the husband will default during the 1980s or 1990s in circumstances where his wife is in the same position as Mrs. Boland - so the student may well come across these problems in practice.

And yet there are still many difficulties for people like Mrs. Boland. For instance, if the mortgagee forces H into bankruptcy, the trustee in bankruptcy can sell the house despite W's claims.

Williams & Glyn's Bank Ltd. v. Boland seems to be part of the general trend that an innocent person should not be turned out of his home. Here are seven examples of the same trend:-

(i) an innocent tenant generally cannot be evicted, despite what his landlord wants. (1977 Rent Act: see Chapter 40.)

(ii) an innocent Council tenant is a "secure tenant". (1980 Housing Act: see Chapter 40.)

(iii) an innocent wife (or other person in occupation) who has made a contribution is protected in the circumstances of *Williams & Glyn's Bank Ltd. v. Boland*.

(iv) if co-owners differ on whether to sell, the Court may refuse to order a sale so as not to turn out innocent persons (e.g. children). S.30 of LPA.

(v) if the house is in one spouse's name alone, the other can register a Class F Land Charge to protect the Right of Occupation.

(vi) other persons may have rights to stay in their home by the doctrine of part performance (page 489) or the doctrine of estoppel (page 426).

(vii) another example of the same trend, but to do with a person being turned out of his job instead of his home, is to be found in the 1978 Employment Protection (Consolidation) Act (as amended) which says that if an employer dismisses an employee who has worked there more than two years, the employee may claim damages for unfair dismissal, unless he was incompetent, unsuitable for the job, dishonest, etc.

Because of the *Boland* case, mortgagees (and also purchasers) now normally require occupiers to sign a document agreeing that any rights they have to stay in the property shall not have priority over the mortgage (or the purchase, as the case may be). But this is not without pitfalls:-

In *Kings North Trust Ltd. v. Bell and others (February 1985)* a house was in H's name but W had made financial contribution. Kings North Trust Ltd. lent money on a mortgage of the house, and to avoid the *Boland* situation, it required that W should execute the mortgage deed, thus mortgaging her interest in the property and giving up her *Boland* rights. H took the mortgage deed home for W to execute. She executed it because H explained to her that he needed the money to finance his business. But this was untrue: he wanted the money for something else.

The mortgage payments fell into arrears, and the lender wanted to evict H and W and sell the house. W claimed the right to stay there on the grounds that she had been misled as to the purpose of the mortgage - and that if she had known the truth she would not have signed it.

The Court of Appeal held that H had exercised undue influence over W in the deceitful way he had obtained her signature - and the lender must take responsibility for this, for allowing such a situation to arise instead of ensuring that the deed was executed properly. So the Court held that Mrs. Bell had a right of occupation, just as Mrs. Boland had.

But in *National Westminster Bank Plc. v. Morgan (March 1985)* the decision went the other way. In this case the Bank lent a sum of £14,500. W was anxious about whether the mortgage deed charged the house with H's business debts as well as this figure, but H's Bank Manager reassured her and she executed the mortgage deed. She later claimed that what the Bank Manager told her amounted to undue influence.

The Court held that even if she did not understand exactly what the mortgage covered, she knew they were

in financial trouble and that if she did *not* execute the mortgage they would be unable to pay their debts and would lose their house. So, when they were later unable to keep up the mortgage payments and so the Bank wanted to sell the house, the House of Lords held that her claim that there had been undue influence must fail, and the Bank was entitled to sell the house. H and W were ordered to move out within 28 days.

Two other recent cases on these problems are *Bristol & West Building Society v. Henning and another* and *Paddington Building Society v. Mendlesohn*, both of which were decided by the Court of Appeal on the same day *(2nd. April 1985)*.

In the *Henning* case, "H" and "W" (living together as H and W, though unmarried) decided to buy a house (unregistered land) and obtained a mortgage from Bristol & West Building Society. The property was put into the name of "H" alone, but when "H" and "W" later separated, a Consent Order was made by the Court declaring that "W" had a one-half beneficial interest in the property. "W" and the children remained in the property, but the mortgage interest was not paid. Compare these facts with those of the *Mendlesohn* case:-

In the *Mendlesohn* case, a mother and her son decided to buy a leasehold flat (registered land) which was put in the son's name alone, and he obtained a mortgage from Paddington Building Society. (The Society was not told that mother had contributed £15,000 towards the purchase-price: but thought the £15,000 was provided by the son.) Later, son and his girl-friend who lived with him left the flat: mother remained there alone - and the mortgage interest was not paid.

In both cases the mortgage had been granted before 1981 (i.e. before *Boland*) so the Building Societies had not obtained the signatures of anyone except the legal purchasers.

The Court of Appeal held that "W" in the *Henning* case and mother in the *Mendlesohn* case had both been fully aware that a mortgage was being obtained - and were also fully aware that the property could not be bought

without the mortgage-money - and so their rights were subject to the Building Society rights, even though they had not signed anything expressly saying so. And therefore, in both these cases, the Building Society had the right to sell the property.

Contrast these two ladies with Mrs. Boland who *did not know* that her husband had mortgaged the house.

Note also that in the *Henning* and *Mendlesohn* cases, the mortgage money was used actually to buy the property, whereas in *Boland* (and also in *Bell* and *Morgan* above) the property was bought first and mortgaged at a later date.

By the time this book is in print, there may well be further cases on this subject.

The latest one as this book goes to print is *Midland Bank Ltd. v. Dobson and another (July 1985).* In this case, the matrimonial home was bought in 1953. It was in H's name alone and W had made no contribution except some painting, decorating and such like; but W said in her evidence, "We took it that it was ours ... marriage is a partnership", and H said, "Marriage is a joint venture".

In 1978 H mortgaged the house to the Bank to raise money for his business. The business got into financial difficulties by 1985 and the Bank wanted to sell the house to recover the money loaned.

W claimed that on the above evidence H was trustee for H and W, which would give her an Equitable interest (presumably 50%) in the house.

The Court of Appeal recognised that there genuinely *was* this common intention that H and W should share whatever beneficial interest H had in the house, but it had never been put into writing. And there was no reason why the Court should say there was a resulting, constructive or implied trust (which needs no writing: s.53(2) LPA and see pages 90-91) - because W had not made a contribution nor suffered any other detriment.

So the principle applicable is the same as in *Gissing v. Gissing* (page 307) - what you put in you

take out. So W had no grounds on which she could claim an Equitable interest in the property, and could not stop the Bank from taking the house and selling it.

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And I must leave the reader to decide where all this leaves us.

Does the woman receive a fairer deal today than fifty years ago?

Does the man receive a fair deal?

Why should we classify the parties into "man" and "woman" anyway, instead of using neutral terms such as "owner", "joint owner", "occupier"? (No reason at all - but *not one* of the cases we have studied in this chapter is a case between two men.)

Is it *right* that such persons as Mrs. Gissing (page 307) should receive nothing?

Is it *right* that Mrs. Dobson (page 322) should be put out of the house where she had lived for 32 years? Or is it *right* that Midland Bank (and its customers) should be deprived of their money because of what Mr. and Mrs. Dobson *thought* but did not put into writing?

And if W is a joint tenant who contributed nothing, and she leaves H for a younger and richer man, is it *right* if H loses his home and does not receive more than half the proceeds of sale?

Is it *right* that if Mrs. Gissing had been beneficial joint owner she should receive half, regardless of contribution or lack of contribution?

This book will not enter into a discussion of these matters, any more than a motor repair manual would enter into a discussion of the value of the motor car to society. That is not the function for which it was written. It *is* the function of other books - but a lot of this is not "Law". Look for it under "Sociology". This book is about Law.

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C: The Law Commission's Proposals

The Law Commission (that body, set up under the 1965 Law Commissions Act, which monitors the law and makes recommendations as to changes) proposes that there should be automatic statutory co-ownership of the matrimonial home by H and W as beneficial joint tenants. Thus both would have the same, regardless of contribution.

The Commission adds that if for some reason the matrimonial home is in the name of one spouse alone, the other spouse's rights should be protected by the registration at the Land Charges Registry of a new species of Land Charge, a Class G (for unregistered land) or an entry on the Register at the Land Registry (for registered land).

SUMMARY

In this chapter we have seen:-

A: matrimonial home on a divorce etc. - Court tries to be as fair as possible to both parties.
1973 Matrimonial Causes Act.
1984 Matrimonial and Family Proceedings Act

B: matrimonial home other than on a divorce etc. - *see next page.*

C: the Law Commission's proposals of automatic statutory beneficial joint tenancy for matrimonial homes.

B: matrimonial home other than on a divorce etc. -

1. SALE

(a) joint tenants: Trust for Sale: s.30 of LPA gives Court discretion on whether to enforce a sale.

(b) sole owner who paid for it can sell, subject to 3(b) below.

(c) contributor has Equitable interest: constructive or resulting Trust for Sale which requires 2 trustees.

2. MONEY - PROCEEDS OF SALE

(a) "beneficial joint tenants" / "tenants in common in equal shares" } equal, regardless of what they contributed.

"tenants in common": proportionate to contributions (but treat as equal if impossible to calculate)

(b) person not on the deeds or Title Certificate must show a substantial contribution, or gets nothing.

3. RIGHTS OF OCCUPATION

(a) joint names: s.30 of LPA - see 1(a) above.
ouster for violence.
1976 Domestic Violence and Matrimonial Proceedings Act, etc.

(b) statutory Right of Occupation (Class F Land Charge) by 1983 Matrimonial Homes Act.

(c) contributor may be entitled to to stay in occupation - *Williams & Glyn's Bank Ltd. v. Boland (1981)*

TEST QUESTION on Chapter 23:-

H and W and their small daughter D live in a house, "Happyholm", in Bristol. W is not sure if they are co-owners or whether it is in H's sole name. Advise W in each of the following alternative situations:-

1. H wants to move to Bournemouth; W does not.
2. W (with D) has left H. W wants "Happyholm" sold; H does not.
3. H has left W. H wants the house sold, W does not.
4. H and W have separated and they both want the house sold, but H says W is not entitled to any of the proceeds of sale.
5. H and W are getting divorced.
6. The Building Society has sent a letter saying, "If you do not pay your arrears (or make reasonable suggestions for payment by instalments) within seven days, Court action will be commenced with a view to selling the house". (The mortgage is dated 1980.)
7. H has beaten and sexually assaulted D.
8. W cannot stand any more of H's behaviour (he smokes, and watches nasty video films) and has left him. She and D are at present in a very damp basement bed-sitter, and W claims that for D's sake H must move out of "Happyholm" so that W and D can return.
9. H has been certified insane. (See page 568.)
10. H has moved into the spare bedroom with the au pair girl.
11. W would like to bring her 85 year old disabled aunt (recently widowed) to live at "Happyholm". Auntie would require a downstairs "granny flat" and is willing and able to provide £20,000 towards having this built onto the rear of "Happyholm".
12. H ran off to Paris with the au pair girl. W has sold the house by forging H's signature. H has found out.
13. H has died intestate.

CHAPTER 24

OWNERSHIP OF BOUNDARIES

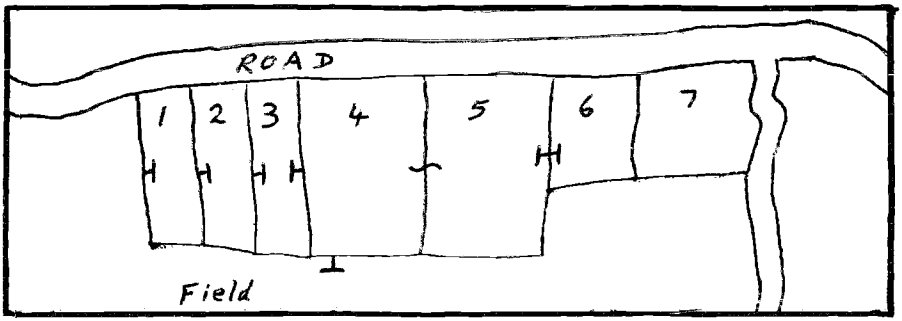
OUTLINE OF CHAPTER:-

A: Discovering the ownership
B: party walls

A: DISCOVERING THE OWNERSHIP

The garden fence has blown down in a gale. The posts are rotten and need replacing. You think the fence belongs to your neighbour, but he says it is yours. How do you find out whether a fence (or wall, or hedge etc.) is yours, or your neighbour's, or a party boundary for which both of you are jointly responsible?

First, look in the deeds. There may be a plan marked thus:-



If the "T" mark is on your side, the fence is yours. (So is the bill for maintaining it!) Thus, above, the owners of plots 1 and 2 are each responsible for one of the side boundaries; the unlucky owner of number 3 is responsible for two of them.

An "S" mark (as between plots 4 and 5) or a double "T" looking rather like a sideways "H" (as between 5 and 6) signifies a party boundary.

The front boundary of each property (fronting the road) would belong to that property; and the plan suggests in a vague sort of a way that the rear fence along the

whole length of the field belongs to the farmer.

The ownership of the fence between 6 and 7 on the plan is not indicated - as is all too often the case.

On registered land, generally, the plans are good but do not show ownership of boundaries.

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If the deeds have no plan, or if the plan does not show ownership of the boundaries, it is worth looking through the deeds (or Land Registry Title Certificate) to see if there is some such statement as: "The north fence belongs to the property and those on the south and west are party fences".

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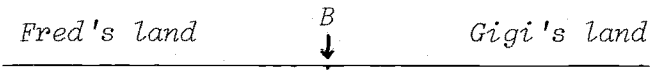
If there is no such statement, the best course may sometimes be to come to an agreement with the neighbour on a friendly basis, as the law does not offer a useful solution. But nevertheless there are guidelines: for example if two adjoining plots are occupied respectively by a Victorian red-brick villa and a 1930s concrete house, and the garden wall dividing the two plots is a Victorian red-brick wall, you do not need a solicitor to tell you that the boundary wall probably goes with the villa.

Or if there is a fence between your garden and your neighbour's, and the smooth side of the fence is on your side; while the rough side with the vertical posts and any supporting struts etc. is on your neighbour's side, there is a presumption that it is your neighbour's fence. (The presumption is rebuttable - I have known a farmer deliberately erect his fences the other way round so that when his cows leant against the horizontal rails they pushed them hard onto the vertical posts, instead of pushing them away from the posts which could cause the nails to come out.)

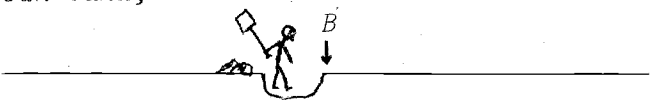
Watch out for the occasional person who puts his fence one foot back from his boundary - and marks the boundary with pegs or little stones - so that he can get to the far side of his fence to maintain it without stepping off his land.

And then there is the "hedge and ditch" rule. This says that if two properties are separated by a hedge and a ditch, the owner of the land on the "hedge" side owns the hedge and also the ditch - even though the ditch is beyond the hedge where he cannot get at it. But the principle is common sense: look at it this way:-

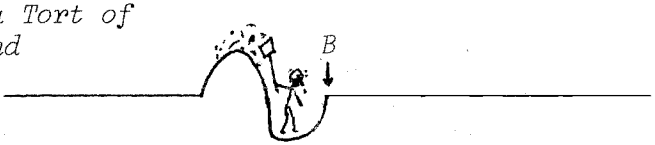
(Note: in these diagrams "B" signifies the boundary.)



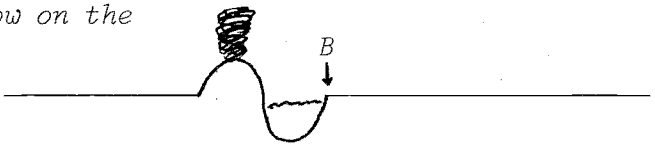
Fred begins to dig a ditch (on his own land, of course)



Fred throws the earth back onto his own land: to throw it onto Gigi's land would be a Tort of Trespass to Land

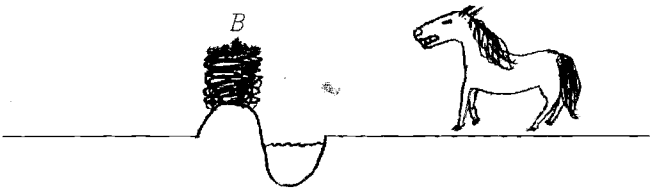


Brambles (blackberry hedge etc.) grow on the mound of earth



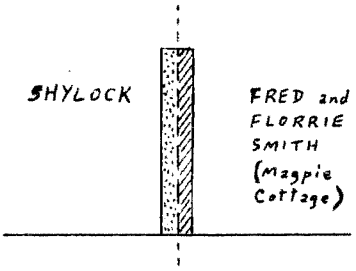
The boundary remains at "B".

But Fred, unable to gain any easy access to the ditch, abandons it; and Gigi, whose horses drink from it, maintains it: after twelve years this gives Gigi a "squatter's title" (see Chapter 43) to the ditch, and so the boundary becomes the centre of the hedge:-



The hedge is treated as the boundary on the Ordnance Survey maps: the line on the O.S. map is the centre of the existing hedge.

B: Party Walls



The wall (or hedge, fence etc.) between "Magpie Cottage" and the neighbouring property in the illustration on this page might belong either to the Smiths, or to their neighbour Shylock, or to both. If it belongs to both it is a party wall.

Before 1926, party walls could be owned (freehold or leasehold) in any one of four ways:-

(a) by the respective owners as tenants in common (Mr. and Mrs. Smith a half, and Shylock a half, of the whole wall),

(b) divided longitudinally, the hatched part owned by the Smiths and the stippled part by Shylock,

(c) as in (b) but with the Smiths having an easement of support in respect of Shylock's part and vice versa,

(d) the whole wall belonging to one, subject to the right of the other to have it maintained as a dividing wall.

Categories (b), (c) and (d) can still exist today. Category (a) presented a problem because under the 1925 legislation every such wall would have become subject to a statutory Trust for Sale - it would have been necessary to appoint trustees to deal with the wall. To avoid this the 1925 legislation provides that all party walls which would be in category (a) shall be put instead into category (c) - which is the commonest category today.

"Divided longitudinally" can include a horizontal division if the "wall" is horizontal: for example, the division between downstairs and upstairs flats. (But more commonly this would be divided so that the floorboards and the joists on which they rest would

belong to the upstairs flat; and the ceiling attached to the bottoms of those joists belongs to the downstairs flat.)

Further information on boundaries may be obtained from Powell-Smith's "The Law of Boundaries and Fences".

- And finally, remember you have no right to tell your neighbour what to do with his own property. So if the boundary fence (which happens in this case to belong to your neighbour) has blown down, and your neighbour declines to re-erect it, saying, "I don't like fences anyway", you have no power to force him to re-erect it unless (i) the deeds happen to contain an enforceable covenant for maintenance of the fence, or (ii) having no fence will allow his children to run wild over your garden in a manner which amounts to Tort of Nuisance, or (iii) the Planning Permission for the building of his house happens to contain some condition regarding the fencing of his property.

SUMMARY

In this chapter we have seen:-

ownership of boundaries:
- "T" marks and "S" marks,
- rough and smooth sides of fences,
- the "hedge and ditch" rule,
- party walls ("divided longitudinally")
  - also floor/ceiling division between upper and lower flats.

TEST QUESTIONS on Chapter 24:-

1. Explain what is meant by a party wall, hedge or fence.

2. The fence between X's and Y's property has blown down in a gale, damaging X's greenhouse. X says it is Y's fence, Y says it is not. - Advise X as to how to find out whose fence it is, and what he can do if he finds that it is Y's.

3. X's other neighbour, W (an elderly widow in poor health) never cuts the hedge which her late husband planted. It is now fifteen feet high and overshadows X's kitchen window so much that X has to keep the light on all day. Advise X - and mention "neighbourliness" as well as his legal rights!

THE END of Part 2 of this book.