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CHAPTER 3

ENGLISH LAND LAW AND REGISTRATION

1 Prefatory

1.1 By English land law is meant the land law of England and Wales, two of the four parts of the United Kingdom of Great Britain and Northern Ireland, the other two parts being Scotland and Northern Ireland. England and Wales use the same land law, and Northern Ireland (like the Irish Republic) also uses English land law, but subject to the legislation of its own Parliament.[*] The land law of Scotland, however, is quite different, and is similar in concept to the Roman-Dutch law of Holland and South Africa. There is, therefore, no such thing as British land law.

1.2 "The English law of Real Property...can only be explained by an elaborate historical analysis. It takes a lifetime to master and when mastered is but lean, wasteful and barren learning."[1] So said Sir Arthur Underhill who, as Senior Conveyancing Counsel of the Court, presented "an easy but effective method of simplifying the Law of Real Property" to the Departmental Committee set up in 1919 to consider the transfer of land in England and Wales.[2] He called this *The Line of Least Resistance,* and it contains a particularly lucid exposition of English land law. It is to a treatise of that sort, or to one of the numerous textbooks on the subject, that those who wish to study English land law must turn. In this book we can only try to present as much as is useful to the student of land registration in a modern setting. He will need some knowledge of English land law in order to understand words and expressions still in common use not only in England but wherever English is spoken.

1.3 Even the expression 'real property' may puzzle anybody who is not familiar with the subject, for 'real' clearly must have a particular meaning if it is to distinguish land from other forms of property which are equally 'real' in the ordinary sense of 'actually existing'. Owing to the special characteristics of land which distinguish it from all other commodities[3] we should expect the law to make a distinction between 'immovable' and 'movable' property, but English law does not use such simple and self-defining terminology; for reasons stemming from Norman times some eight hundred years ago, it distinguishes between 'realty' and 'personalty'. 'Realty' or 'real property' is that sort of property in respect of which a 'real action' could be brought in court, as distinct from a 'personal

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[*] For an examination of the substantive law of Northern Ireland and proposals for its reform, see *Survey of the Land Law of Northern Ireland* (HMSO Belfast 1971) by a working party of the Faculty of Law, The Queen's University, Belfast

[1] Stewart Wallace is our authority for this pungent remark by Sir Arthur Underhill (Land Registration 2)

[2] Acquisition and Valuation of Land Committee Fourth Report (1919) Appendix 1

[3] See 1.4

action'. The word 'real' is derived from the Latin *res* meaning 'thing' and was applied to actions concerning land because, if an owner had been wrongfully deprived of land, the remedy was the restoration of the land (i.e. the thing) itself, whereas in a 'personal action' (which was all that could be brought in respect of movable goods often referred to as 'chattels') the court would allow payment of their value instead of compelling their return. However, as with so much of English land law, the distinction is by no means logical and consistent; leasehold interests (which are particularly important in English land law) are not 'realty' because at first only a personal action could be brought in respect of them, and it was not until the end of the fifteenth century that a dispossessed leaseholder could recover the land itself. Leaseholds are therefore known to lawyers as 'chattels real', a sort of hybrid which enabled numerous subtle distinctions to be made between freehold and leasehold.

1.4 Such odd snippets of information will scarcely appear pertinent to our study of land registration, but the fact that even its name requires special explanation serves to underline the complex and illogical nature of the English law of real property. This law has been very widely exported, though it was evolved down the centuries from feudal origins in conditions totally different from those found in the lands into which it has been introduced. In England a land-owning aristocracy had an intense desire to rule posterity from the grave. They strove to keep their large estates tied up in their families forever, and their families, with equal vigour, strove to free themselves. This gave tremendous scope for legal ingenuity and counter ingenuity, and the lawyers naturally prospered exceedingly, producing a maze of law which Francis Bacon, Lord Chancellor in 1618, called "manifold, intricate, tedious and uncertain" at just about the time it started to go overseas. It was in 1620 that the Pilgrim Fathers took it with them when they sailed in the Mayflower to found an English colony in the New World. The United States of America (excluding Louisiana), Canada (excluding Quebec) and most of the West Indies base their land law on English land law and use its terminology. It was 'transported' to Australia at the end of the eighteenth century and it is still used there, as also in New Zealand.

1.5 During the time English land law was spreading in Africa, the leading text-book on it for English students was *Williams on Real Property* by Joshua Williams, QC, first published in 1844. Lecturing on the English land law in 1878, he said: "Some of the most remarkable of these laws, viewed by themselves, apart from their history, and judged only by the benefits which now result from them, appear to me to be absolutely worthless. Others are more than worthless, they are absurd and injurious."[1] His son, Thomas Cyprian Williams, giving evidence in 1909 to a Royal Commission on the Land Transfer Acts, said that he had been editing his father's work for over twenty-seven years and had himself prepared seven new editions. He described how piecemeal legislation had for six centuries been patching up defects in the law and how the jurisdiction of the courts of common law and equity had been united in one new court (as we shall presently explain). He went on to say: "The result is that in substance the English law of

[1] Williarns *The Seisin of the Freehold* 1 (these words were actually quoted by Megarry and Wade in the opening paragraph of their classic book The Law of Real Property)

real property has been adapted to the exigencies of the life of the present day. But this change has been so accomplished that, in point of form, the English law of real property is a disgrace to a country which aspires to be numbered amongst civilized nations."[1] These are strong words, but by that time father and son had between them spent more than sixty-five years in the close study and presentation of that law, and nobody was better qualified to express such opinions.

1.6 It may be thought unnecessary to repeat these strictures here. Our purpose is to explain land registration, not to attack English land law. But if land registration is to be studied in the context of English law, and if the need for legal reform is to be realized in many countries which now use that law, it is imperative to make clear how unsuitable English land law was for export at the time that it was spread abroad. There is no better way of emphasizing this than by citing the opinions, not of laymen it should be noted, but of eminent English lawyers who knew that law so well and should have been the very persons to revere it. The layman has very little knowledge of it, and few Englishmen will engage in a land transaction of any sort, however simple, without the assistance of a legal adviser.

1.7 Eighty years ago Sir Frederick Pollock pointed out that it was often said that in no country were landowners so ignorant of their legal position and so dependent on legal advice as in England.[2] This is probably still true today despite the vast simplification in land law which was effected in England in 1922-25, and which could with advantage have been taken even further. Countries which are handicapped by complex land laws, whether derived from English or other sources, should appreciate not only that this sort of simplification is imperative, but also (more encouraging) that it is feasible. In this book we seek to dispel the aura of reverential mysticism which has clouded the whole subject for so long, and we hope to show that registration of title can play a vital part in producing a rational land law readily intelligible to landowners.

2 Ownership of land in England

2.1 In English legal theory only the Sovereign can own land, but as Professor Cheshire put it:

> "In the eyes of the law, of course, a private person can be nothing more than a tenant of land, a fact which was of great moment to him when his right to undisturbed possession depended upon his observance of the tenurial services and incidents. With the disappearance of these, however, tenure can now be regarded only as an academic conception ... we may safely brave the wrath of the purists and describe a fee simple tenant as an absolute owner of the land. It is an affectation to dispute the fact."[3]

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[1] *Report of Royal Commission on the Land Transfer Acts* (1911) 52 para 101
[2] See Pollock *The Land Laws* 4
[3] Cheshire 7th ed (1954) 114

This passage does not appear in editions following the seventh, possibly because it was no longer safe to brave the wrath of purists but, much more probably, because there was no longer any wrath to brave.

2.2 It is clear, however, that Cheshire was using the word ‘tenure’ in a different sense from that in which we used it when we discussed ‘security of tenure’ in Chapter 1, and here again is an example of confusing terminology. ‘Tenure’ is derived from the Latin *tenere* meaning ‘to hold’, and a ‘tenant’ is simply ‘one who holds’. In the feudal system, which the Norman Kings extended and developed in England after the Conquest in 1066, all land was considered to be ‘held’ either directly or indirectly from the King. No land was ‘allodial’ (i.e. owned absolutely without acknowledging any overlord) because it was never granted outright but only in return for military or other services. These services were rendered to the King if the land was held directly (in which case the holder was called a ‘tenant-in-chief’) or to a ‘mesne’ (i.e. intermediate) lord, if the tenant-in-chief in his turn had granted part of his land in return for services to be rendered to him. This process was called ‘subinfeudation’ and could continue for several rungs down the ladder, though in England in practice it stopped at the ‘manor’, which was the basic feudal unit. “The Manor may be said to have been the political unit of landlordship. Each Manor was a kind of petty kingdom within itself, with its own ‘Court Baron’ for civil disputes between Lord and tenant or between the tenants themselves.”[1] It usually consisted of

(i) the lord's demesne, comprising the manor house and the cultivable land which the lord himself occupied;
(ii) the land held by tenants, in either free or unfree tenure; and
(iii) the waste, on which the tenants could pasture their beasts".[2]

2.3 Thus in the context of feudalism, the word ‘tenure’ is used in antithesis to ‘ownership’ and the expression ‘allodial tenure’ is a contradiction in terms; but this gives ‘tenure’ a special, indeed artificial, meaning for ‘tenure’ in ordinary speech is the general name for the holding of land, whether allodially or otherwise. ‘Absolute ownership’ is just as much ‘tenure’ in this, its ordinary sense, as is ‘freehold’ (which we explain in the next section). The word ‘tenant’, however, appears strange to the layman when used in the context of ownership, for he invariably associates it with the relationship of landlord and tenant arising out of a lease. In fact the ordinary English house owner (the commonest sort of ‘landowner’) will be surprised to hear that legally he is a ‘tenant in fee simple’ though, such is the oddity of English usage, he is himself quite likely to describe the nature of his ownership as being ‘freehold tenure’ without any realization at all of its feudal origin or that it was so called to distinguish it from ‘unfree tenure’. He will be even more surprised to find that ‘leasehold’ (the ‘tenure’ from which he is accustomed to distinguish ‘freehold’) had no place as a tenure in the feudal plan of society, for the relationship of lessor and lessee was then regarded simply as a person contract.

[1] Underhill *The Line of Least Resistance* 216
[2] M & W 24

3 Free tenure or freehold

3.1 'Freehold' is a word which has survived from feudal days and is still in common use. In the feudal system it was the nature of the services which determined the tenure. The principal distinction was between those services which were considered to be of a free and honourable nature, like military duty, and those which were deemed unfree or servile, like working on the land at the will of the overlord. 'Freehold' therefore originally meant that the land was held by services of a free nature and not that it was free from all rent and conditions, as its name seems to imply. This indeed is what it has come to mean, for it can now be regarded as synonymous with absolute ownership.

3.2 But military service was not the only free service by which land could be held, for "feudalism in England tended of itself to settle into a kind of compromise between the rules appropriate to military tenancies, and such as would allow some tolerable convenience of agricultural occupation and peaceful commerce".[1] Thus the rather subtle distinction came to be made that agricultural service which was fixed both as to nature and extent (for example, so many days' ploughing) denoted a free tenure, known as 'socage', while variable periods of undetermined labour made the tenure 'unfree' or 'villein'.

3.3 By the end of the fifteenth century most of the feudal services had been commuted for regular money payments, often known as 'quit rents' (a term still in use), for the tenant thereby went 'quit' or free from his services.[2] With the fall in the value of money these rents ceased to be worth collecting and so the relationship with the overlord was gradually lost.

3.4 The Tenures Abolition Act 1660 converted all free tenures (with the exception of frankalmoign or 'free alms', a spiritual tenure involving no services except praying for the soul of the grantor) into ''ree and common socage' and abolished nearly all the burdensome incidents of tenure. We must now describe how unfree tenure came to be called 'copyhold' and lasted until it was abolished by the 1925 legislation, which left 'free and common socage' as the sole survivor of the feudal tenures.

4 Unfree or villein tenure, later called copyhold

4.1 After the Norman conquest much of England was held in 'villeinage', as the unfree or servile tenure was named. Villein status (i.e. serfdom) disappeared in the fourteenth century when the Black Death so reduced the number of labourers that scarcity gave the survivors bargaining power, and the villein tenant then came to hold not merely at the will of the lord, but 'according to the custom of the manor'.

4.2 Each manor had its own court, and these courts eventually recognized that a tenant, even if his tenure was unfree, should not lose his land without just cause; they also recognized his customary heirs. Tenure in villeinage became 'tenure by copy of the court roll' or 'copyhold', for it was in the manorial court rolls that the

[1] Pollock *The Land Laws* 65
[2] M & W 20

tenant's name was inscribed. Transfer of copyhold was effected by 'surrender and admittance'; the transferor 'surrendered' his lands to the lord who then 'admitted' as tenant the person nominated by the transferor; in other words a conveyance was effected by entry in a 'register'.

4.3 Thus the manorial court rolls of copyhold had the essential element of a register of title, in that a transfer could only be effected by registration, whereas freehold titles had to be proved by investigating past events and transactions evidenced only by deeds, with all the consequential difficulties of proof that we have already mentioned.[1] It is not surprising that Torrens (the author of the Australian system of registration of title described in Chapter 5) should have remarked: "It is difficult of belief, but nevertheless a fact, that the most recent attempts to assimilate tenures [i.e. the Copyhold Act 1852] instead of relieving the copyhold tenure from the oppressive and inconvenient conditions of a past age, and applying its simple, cheap, and secure method of dealing to all the lands of England, proceeds on the opposite principle of abolishing copyholds, and subjecting all lands to the grievous exactions of the conveyancers."[2]

4.4 But there was a reason for this: even when copyhold had long become an inheritable interest, it remained subject not only to customary incidents, which might vary from manor to manor (one of the drawbacks of a local instead of a national approach to land matters), but also to the overlord's right to minerals and timber, a real enough disadvantage for there to be a common proverb, "The oak scorns to grow except on free land", and it was said to be possible to trace the boundary of copyhold by the absence of trees on one side of a line, and their luxuriant growth on the other.[3] Thus from about the beginning of the seventeenth century copyhold was regarded as an outdated survival from the feudal system, and, far from its conveyancing system being thought a useful model, it was considered to be an exceedingly irritating inconvenience. The solution seemed to be to promote its status to freehold by 'enfranchising' it, that is by 'freeing' it from the disabilities to which it was subject.

4.5 However, as with so much of English land law, remedial action took a very long time, and copyhold tenure did not finally disappear until the reforming legislation of 1922-25 put an end to it. Copyhold, originating from villein or serf tenure which had vanished centuries before colonial expansion started, was never taken overseas by English settlers, and it is now merely of historical interest, as indeed is the whole theory of feudal tenure. As we have already pointed out, leasehold was not regarded as a tenure in feudal times, and the only 'tenure' - in its original feudal sense - which now survives is 'free and common socage'. Few English (or, for that matter, Australian and New Zealand) landowners realize that to this day technically they do not own their land but hold it from the Queen in the tenure of free and common socage for an estate in fee simple. The old terms persist. For example, grants of land in Sierra Leone are still in 'free and common socage'.

[1] See 2.2.3
[2] Torrens *South Australian Registration of Title* 11
[3] See *Real Property Commissioners - Third Report* (1832) 15

4.6 This now brings us to the doctrine of estates, a peculiar feature of English land law which can be infinitely confusing, though it has been described by a distinguished writer "as one of the most brilliant feats of the English mind".[1] This is a truly astounding conceit, but one which English lawyers are prepared to defend on the ground that it gave "an elasticity to the English law of land that is not found in countries outside the area of the common law",[2] notwithstanding that it is that very elasticity which has been the root-cause of many of our difficulties.

5 The doctrine of estates

5.1 "The English lawyer...first detaches the ownership from the land itself, and then attaches it to an imaginary thing which he calls an estate."[3] The estate indicates the period of time for which the particular tenure is to be enjoyed. As Megarry and Wade express it: "The tenure answers the question 'upon what terms is it held?' the estate the question 'for how long?'"[4] But the matter is not quite so clear-cut and simple as this makes it appear. We have distinguished 'free tenure' (freehold) from 'unfree tenure' (copyhold) but rather oddly, or at least without any very obvious reason, uncertainty of duration came to be regarded as an essential attribute of freehold and, in due course, this was considered to be its distinguishing characteristic. Thus the word 'freehold' came to express not only the quality of the tenure but also the quantity of the estate.

5.2 Originally freehold was not synonymous with absolute ownership. In fact, since uncertainty of duration was the criterion, there were three kinds of freehold:

(1) The fee simple, which was an 'estate of inheritance' (i.e. a fee) which descended to the general heirs (i.e. simply), as distinct from

(2) the fee tail[*] which was an 'estate of inheritance' restricted (*taillie*, i.e. 'cut down' in Norman French) to a particular class of heirs; and

(3) the life estate, which only lasted for the life of a particular person, usually the tenant. Where the measuring life was the life of another, it was known as an estate *pur autre vie* (i.e. 'for another life' in Norman French).

5.3 These three estates could exist at the same time over the same piece of land. For example, if A, the fee simple owner, made a grant to B for life and then to C in tail, B received a life estate in possession, since he had the immediate right to enjoy the land, but C merely took an estate in remainder, for he was only entitled to enjoy the land when B died. A, however, had not exhausted his whole interest, because a fee simple is of longer duration than a fee tail, and so A still

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[1] Lawson *The Rational Strength of English Law* 97

[2] Cheshire 36

[3] Markby *Elements of Law* 166 para 330

[4] M & W 15

[*] The 'fee tail' was created in 1285 by a statute known as *De Donis Conditionalibus* (Concerning conditional gifts). Pollock tells us that the great landowners obtained the enactment of that measure - against the feeling of the country- and how "that feeling was taken up and made effectual by the lawyers". We cannot here describe "the methods by which the bonds of the statute were first relaxed and then slipped of" (*The Land Laws* 69). The story is long and involved, and it is only marginally relevant to our theme as emphasizing the need to make land readily negotiable, an important objective of registration of title.

had a fee simple in reversion, since the land would revert (i.e. come back) to him or his descendants if C's specified class of descendants died out. It should be noted that all these estates were 'vested', i.e. they were the subject of present ownership. Thus we have the confusing possibility that there could be three separate freeholders of the same piece of land at the same time.

5.4 Once again, however, these are snippets of knowledge which, happily, are no longer of real concern in our context, for the Law of Property Act 1925[1] reduced the legal estates in land to two: (1) the fee simple absolute in possession (commonly called 'freehold') and (2) the term of years absolute (commonly called 'leasehold').

5. 5 It appears, therefore, that it is as correct to speak of a 'freehold estate' to distinguish it from a 'leasehold estate' as it is to speak of 'freehold tenure' to distinguish it from 'leasehold tenure', and 'estate' and 'tenure' have become interchangeable terms in this context. It seems that we have now come to the point where we can relegate the doctrines of tenures and estates to history. The only real distinction is between 'freehold', which is the equivalent of absolute ownership, and 'leasehold', which must now be explained, and which, as we have already mentioned,[2] was not regarded as a 'tenure' in feudal times but simply as a personal contract.

6 The term of years or leasehold

6.1 A lease may be defined as a contract granting the exclusive right to possession of land for a fixed or determinable period shorter in duration than the interest of the person making the grant. The interest created by the grant is formally called a 'term of years' but is more usually referred to as a 'lease' or a 'leasehold interest'. The grantor is called the 'lessor' or 'landlord' and the grantee the 'lessee' or 'tenant'.

6.2 All leases are necessarily derived directly or indirectly from the freehold. Thus A, the freeholder, may grant a lease to B for any period of years he thinks fit. B may then grant a lease to C for any period ending before the expiration of his own term. B's lease is then known as the 'head lease', and C's as an 'underlease' or 'sublease', C in his turn may grant a 'subunderlease' to D for a period less than his own term, and so on without limit, provided that the term of each lease is always shorter than the term out of which it is granted. The interest which remains vested in the landlord after a lease has been granted is termed a 'freehold reversion' if the landlord is the freeholder, and a 'leasehold reversion' if he is himself a lessee.

6.3 Perpetual leases, after the fashion of the *emphyteusis* of Roman law, are unknown to strict English law (though they are allowed, for example, in Australia), but there is no legal limit to the term of years for which a lease may be granted, and therefore no technical difficulty in making it virtually perpetual. Obviously a very wide variation is possible in the duration and importance of leasehold interests. Leases for 999 years are common. In Northern Ireland some

[1] 51(1)

[2] See para 2.3 above

prospective tenant thought 999 years not long enough and that it would be safer to make it 10,000 years, so leases for 10,000 years are to be found duly registered in Belfast. In England any lease which gave the tenant an absolute right of renewal at the expiry of each successive term, and so was perpetually renewable, was converted into a lease for 2,000 years by the Law of Property Act 1922, whereas a mortgage made by conveyance of the fee simple[1] was automatically converted into a term of 3,000 years. (The reason for this nice distinction in length escapes us.) At the other end of the scale is, say, a weekly tenancy of a furnished flat.

6.4 Since leases were at first regarded as personal contracts they did not fall within the system of freehold tenures and estates. Though a lease for, say, a thousand years free of rent was for all practical purposes indistinguishable from a freehold, it was widely different in its legal incidents. Classed as personal rather than real property, it avoided feudal burdens; also it could be left by will. Leases therefore became popular and lessees began to press for a better remedy than a mere action for damages should they be dispossessed. By about 1235 the tenant was allowed to recover his land, but only as against the lessor and his successors, and (as already mentioned) it was not until the second half of the fifteenth century that the lessee could recover his land specifically from any wrongful claimant. It could then be no longer denied that he held his land in ‘tenure’. At this point, therefore, leases became a branch of the land law, though retaining their anomalous classification as personalty.[2]

6.5 There are two expressions, in particular, with which anyone who is concerned with leases in the context of English land law should be familiar: the ‘occupation lease’ and the ‘building lease’.

6.6 The most usual sort of lease is what is known as an occupation lease because the tenant goes into occupation of the leased premises. The consideration for it is normally a ‘rack-rent’, which is rent fixed by reference to the full annual value of the site and the premises on it; it no longer means an excessive or ‘stretched’ rent, which is how it originally got its name. In some cases leases are granted for a capital payment or fine (nowadays usually called a premium) payable at the beginning of the lease in addition to the rent, which is reduced accordingly. It is impossible to generalize as to the length of terms for which occupation leases are granted. The “bulk of occupation tenancies are probably either granted for fixed terms of seven years or less or else take the form of periodic (i.e. yearly, quarterly, monthly, or weekly) tenancies, terminable by the appropriate notice”,[3] but statute has frequently intervened to protect the tenant. In England only leases for over twenty-one years require registration, and in any case the right of a person in actual occupation of land is an overriding interest.[4] Often, therefore, only inspection of the site will reveal the existence of an occupation lease; it will seldom be apparent from the register.

6.7 We should also understand the meaning of a building lease, whereby the lessee takes vacant land for which he pays a ground rent, fixed by reference to the

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[1] 22.2 V(3)
[2] M & W 1134
[3] Leasehold Committee *Final Report* (1950) 14
[4] See 2.5

value of the site at the date the lease is granted, and in addition he undertakes to erect a specified building on the site and to deliver it up to the landlord in good repair at the end of the term (though here again, in England, statute has intervened to enable the leaseholder to compel the landlord to sell the reversion to him). A typical building lease is for ninety-nine years, though shorter periods are common. Obviously the building lease is as likely to be the subject of a dealing as is the reversion (sometimes called a 'ground rent'), and so here is a clear illustration of why a separate register is required in respect of a leasehold interest which itself is capable of being sold, sublet, or charged just like a freehold.

7 Law and Equity

7.1 Having reduced the legal estates in land to two, the Law of Property Act 1925 went on to provide that "all other estates, interests and charges in or over land take effect as *equitable* interests",[1] and therefore it is now necessary to try to explain the distinction between law and equity at a length and in terms appropriate to this book. This is no easy task, but an explanation is needed, for it is inevitable that sooner or later some expression like 'legal owner' or 'equitable owner' will occur and will confuse the uninformed reader.

7.2 'Common law' is that part of the law of England which was formulated, developed and administered by the King's Courts, as distinguished from (1) *Custom*, which was the body of rules administered by the manorial courts, (2) *Statute*, the law enacted by Parliament, (3) *Special law*, such as ecclesiastical law and the law merchant which were administered by special courts, (4) *Civil law*, the law of Rome (in Latin *corpus juris civilis*) and in particular (5) *Equity*.[2] It is Equity that we shall now consider.

7.3 We may like to think of equity as "the spirit of justice which enables us to interpret laws rightly"[3] but in truth, so far as land law was concerned, it became a device whereby medieval lawyers circumvented the desires and intentions of the legislators of the day. As Sir Frederick Pollock said, "The history of our land laws, it cannot be too often repeated, is a history of legal fictions and evasions, with which the Legislature vainly endeavoured to keep pace until their results (and with them the crooked ways by which they were attained) were perforce acquiesced in as a settled part of the law itself."[4] It thus seems strangely inconsistent with the rule of law, but the 'reputable' purpose of equity was to escape the rigidity and lack of remedies of the common law which, to modern ways of thinking, was astonishingly inflexible.

7.4 Nowadays Parliament makes the laws and the courts interpret them, but in the England of the early Middle Ages the law seems to have been regarded as immutable. Instead of trying to get it changed when it appeared harsh or inadequate, those aggrieved developed the practice of seeking redress by petitioning the King, as the fountain of justice. The Lord Chancellor, in his

[1] s1(3) (our italics)
[2] See *Osborn Law Dictionary* 77
[3] Chambers
[4] Pollock *The Land Laws* 64

capacity of ‘Keeper of the King's Conscience’ heard these petitions, and thus there grew up a court (the Court of Chancery) with a body of rules (termed ‘equity’) quite distinct from and indeed in conflict with the ‘law’ administered by the King's Courts.

7.5 Rigid or literal interpretation of law is not in keeping with the doctrines of equity. These doctrines were epitomized in a number of maxims[1] beginning with “Equity will not suffer a wrong to be without a remedy”, which expressed its basic principle. All these maxims were brief and pithy, and some were highly salutary, such as “He who seeks equity must do equity” and “He who comes into equity must come with clean hands.” One of the maxims was “Equity looks on that as done which ought to be done”, and it will at once be perceived how such a principle, admirable though it seems, must conflict with a statutory provision that registration is essential to the enforceability, or even the validity, of a transaction. We discuss this in Chapter 6, when we consider registration of deeds and also briefly explain the important ‘equitable doctrine of notice’, for this is a major complication in English conveyancing, and one which registration can effectively resolve.[2]

7.6 The separate courts of Law and Equity continued until 1873 when the Judicature Act[3] fused them into one court, the High Court of Justice. Thereafter even Maitland could only define Equity as “that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity”. He added that “if we were to inquire what it is that all these rules have in common and what it is that marks them off from all other rules administered by our courts, we should by way of answer find nothing but this, that these rules were until lately administered, and administered only, by our courts of equity”.[4] If Maitland was thus defeated it is evident that we can offer no neat and tidy definition of the meaning of equity in the English context. Though Equity and Law have been fused in England, it is interesting to note that separate courts of Common Law and of Equity long survived, as for example until 1972 in New South Wales in Australia.

7.7 What English legal writers call ‘duality of ownership’[5] arose out of the ‘use’ or ‘trust’ which was an invention of the Court of Chancery. This is said to have originated in the second quarter of the thirteenth century when the Franciscan friars first came to England. Absolute poverty was prescribed by the rules of their order and they were not allowed, even collectively, to own any sort of property. However they had to have somewhere to live, and benefactors adopted the device of conveying land to suitable people in their neighbourhood to

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[1] For a list of maxims of equity see Osborn Law Dictionary 124

[2] See 6.12-3

[3] The Act came into force on 1 November 1875. The 1873 Act and the Judicature Act 1875, which completed the process of bringing Common Law and Equity together in a single system of court administration, have now been replaced by the Judicature Act l925

[4] Maitland *Equity* 1-2

[5] See Cheshire 47

hold to 'the use' of the friars.[1] The Chancellor, if need be, would enforce the use, though usually spiritual fear alone was sufficient sanction.

7.8 During the fourteenth century landowners began to discover that this sort of arrangement could be turned to their advantage. The landowner could convey his land to a group of his friends for 'his own use'; they jointly became the legal owner whilst he retained the profits and enjoyment of the land. If one of them died he could be replaced and so, in effect, the legal owner never died, thus avoiding the oppressive feudal burdens of wardship and marriage which gave the overlord valuable rights on the death of a landowner leaving an infant heir. (It is easy enough to appreciate the advantage of avoiding 'death duties'.) Creditors could also be defeated in this way, for the 'friends' did not owe the debt and the debtor did not own the land. Similarly it was possible to avoid forfeiture for treason, and escheat for felony (i.e. the return of the land to the overlord when the owner was convicted of a serious crime of the sort known until 1969 as 'felony'). Thus it will be seen that, in effect, a dual ownership was created, and indeed the success of the stratagem rested on the fact that the 'legal' ownership was vested in trustees whilst the beneficiaries enjoyed the 'equitable' ownership, though it is not really clear why the latter should have been called ownership, the whole point being that, though the beneficiaries had a right fully enforceable against the owner, it was not itself ownership.

7.9 This 'duality of landownership' is infinitely bewildering to those whose acquaintance with English law is only slight. The concept of the trust is easy enough to understand. Most systems of law provide means whereby some trustworthy person is made responsible for the management of property for the benefit of a person who requires protection, but it is the English terminology which is so perplexing. The fact that one person may be the 'legal owner' whilst another is the 'equitable owner' of the same parcel of land at the same time is difficult to explain in English and almost impossible to explain in any other language; the terms themselves are quite incapable of straightforward translation and cannot sensibly be used when English is not the language of statute; even then they will only have meaning to the lawyer. It would be a happy day if all title to land rested on the fact of registration and only on that fact, and no longer could there be any owner other than a registered owner. Those baffling terms 'legal ownership' and 'equitable ownership' could then disappear, if indeed it was ever really necessary to use them in the first place.[2]

7.10 We must not leave equity without explaining 'equitable mortgage', for this is a phrase which is frequently encountered when considering the effect of registration of title. Essentially an equitable mortgage is a contract which equity will enforce to create a legal mortgage. Either a sufficient memorandum of agreement or a sufficient act of part performance is necessary. Thus an equitable mortgage may consist of either (a) an agreement in writing stating at least the

[1] The term 'use' is not derived from the Latin *usus*, but from *opus*, *ad opus* meaning 'on behalf of'. If A held land *ad opus* B, it meant that A held it on behalf of B. In old French *ad opus* became *at oes* or *ues*, and "in English mouths, this became confused with use" (Maithmd Equity 24).

[2] It is of interest that section 161 of the Israel Land Law 1969 under the caption 'No equitable rights' provides:- From the coming into force of this Law, there shall be no right in immovable property save under an enacted Law."

parties, the property, and the amount of the advance or other material terms, or (b) the deposit with the lender of the title deeds of the borrower's land with intent to secure the loan, the deposit of the deeds being regarded as a sufficient act of part performance of an agreement to create a legal mortgage to enable equity to enforce it even in the absence of writing.[1] In Book 2 we discuss equitable mortgages in the context of registered title.

8 Transfer of land held in free tenure

8.1 But we have anticipated the right to transfer land. In modern times we tend to regard freedom of alienation[2] as a natural incident of ownership; but there was no place for it in the doctrine of feudal tenure. “Feudalism was really a co-operative association for the mutual defence of the members”[3] and the tenant by military service was no more entitled of his own motion to put a newcomer in his place than a soldier to assign his post to another. Disposal by will was still more repugnant to feudal theory.[4] The land held by the tenant was bound to remain his and on his death pass to his heir. It should be noted that the process of subinfeudation did riot affect the obligation of tenant to lord; the lord was still entitled to the services due from the tenant even if the tenant had granted his land to another. The grant merely added a lower rung to the feudal ladder without disturbing the rungs above it.

8.2 In 1290, however, subinfeudation was abolished by a statute known as *Quia Emptores* (from the first two words of its Latin text, meaning ‘Whereas purchasers’). A free tenant was henceforth forbidden to subinfeudate but was permitted to alienate the whole or part of his land by substitution, that is, the new tenant took the place of the former tenant, who departed from the scene. Thus in England “the feudal pyramid began to crumble”.[5] The number of mesne (i.e. intermediate) lordships could not be increased because of the ban on subinfeudation, evidence of existing mesne lordships gradually disappeared with the passing of time, and so most land came to be held directly from the Crown. Scotland, however, did not have the benefit of *Quia Emptores* and to this day the land-owning Scot is accustomed to being a ‘superior’ or a ‘vassal’ as the case may be, with resultant complication when it comes to registration of title and one superiority is found to overlie another which overlies a third and so on.[6]

8.3 When the alienation of feudal holdings came to be allowed, it was made conditional on publicity being assured by the delivery of possession before witnesses on the land itself. In England this process was called 'feoffment with livery of seisin'. A charter, later called a deed, was generally added, both as a

[1] Russet v. Russet (1783) 1 Bro. C.C. 269
[2] Alienation merely means the transfer of land to another person (Latin *allenus*) and has nothing to do with 'foreigners' or 'aliens' as has sometimes been supposed by those unfamiliar with English legal terminology.
[3] Pollock *The Land Laws* 54
[4] See *ibid* 56
[5] M & W 33
[6] See 6.5.12

permanent record and to ensure that the interest intended to be conveyed was clearly defined.

9 The Statute of Uses and the Statute of Enrolments 1535

9.1 The principle that a conveyance should be publicized could, however, be easily evaded by means of the 'use',[1] for the creation of the use (which the Court of Chancery would enforce) required neither formality nor publicity. Uses, in fact, introduced into conveyancing a secrecy which was popular enough with landowners and their legal advisers but was clearly undesirable on general principles. In any case, Henry VIII was not the sort of king to tolerate the avoidance of feudal dues by such a device, and in 1535 (just when the dissolution of the monasteries was greatly increasing the estates at his disposition) he procured the passing of the Statute of Uses. "The Statute of Uses was forced upon an extremely unwilling parliament by an extremely strong-willed king ... The king was the one person who had all to gain and nothing to lose by the abolition of uses."[2]

9.2 The Statute of Uses attempted to put an end to uses by a simple expedient. When land was conveyed to A to the use of B, the statute 'executed the use' (in the curious technical phrase coined for the process) and converted B's equitable interest into full legal ownership, with all its responsibilities and liabilities, whilst A took nothing. The real owner was no longer screened behind the use because the statute "by one masterful stroke...turned the possessor in use into a legal possessor".[3]

9.3 But uses were not only created by formal conveyance; they could arise in other ways. Where equity considered that land vested in one person by the common law should, as a matter of conscience, be vested in another, the person entitled to it in law was required to use it for the benefit of the person entitled in conscience, though the legal right was not transferred. The effect of the Statute of Uses was to transfer this legal right. For example, if A agreed to sell land to B and B paid the agreed price, the Court of Chancery considered that B had thereby acquired the use of the land 'by bargain and sale' (as the expression was). The statute, without more ado, converted this use into full legal ownership which thus could be obtained without livery of seisin and by an act which might be strictly private, need not be recorded in writing, and might be incapable of legal proof because at that time parties to a suit could not be witnesses in a court of common law.

9.4 The legislators did not overlook this manifest danger. In the same year as the Statute of Uses, the Statute of Enrolments enacted that no freehold estate should be conveyed by bargain and sale unless the sale was made by deed 'enrolled' either in one of the courts at Westminster or in the county where the land lay. Thus the idea of enrolment or registration of the deed of grant in some

[1] See para 7.7 above
[2] Maitland *Equity* 35
[3] Pollock *The Land Laws* 104

public place came to birth, and the Statute of Enrolments can be regarded as the parent Registration Act in England.[1]

9.5 "But the invention of lawyers was at length too much for the precautions of Parliament."[2] The Statute of Enrolments said nothing of estates less than freehold, such as a term of years, and so a 'bargain and sale' by a freeholder to grant a leasehold interest of, say, a term of one year did not have to be enrolled. By the Statute of Uses, however, the lessee was deemed to be in lawful possession. A lessee in possession could acquire the freehold from the owner of the reversion by a simple deed (called a 'release') and, since there could be no livery of seisin to one already in possession, the lessee became the owner in fee simple without any public ceremony. In this way the Statute of Enrolments was evaded and the secrecy of English conveyancing was established. In fact the Statute of Uses had the wholly unintended result of making it even easier than it had been before to transfer land without publicity. "A measure intended to compel notoriety and simplicity became the chief instrument of secrecy and complication."[3] It "introduced into the law of real property more pedantic quibbles and absurd distinctions and rules than any other English Statute."[4]

9.6 In due course the tortuous device of 'lease and release' became the common method of conveying freehold lands, and it was not abolished until more than three hundred years after the Statute of Uses. In 1841, the Conveyance by Release Act made a release sufficient by itself without first requiring a lease. This curious method of the release of a reversion upon a non-existent lease lasted until the Real Property Act 1845 put matters on a more rational basis, and a simple deed of grant then became the usual form of conveyance, as it is today.[5]

9.7 The Statute of Uses did not even succeed in its objective of putting an end to the use. Before the statute, it had been held that where there was a conveyance to A to the use of B to the use of C, the second use was ruled out as being repugnant to the first. "The use is only a liberty to take the profits, but two cannot severally take the profits of the same land, therefore there cannot be an use upon an use."[6] After the statute, it was at first still held that there could be 'no use upon a use' and consequently there was no second use for the statute to execute when it had executed the first. However, after about a hundred years or so, when land was conveyed to A to the use of B to the use of C in the knowledge that the Statute of Uses 'executed' the first use and vested the legal estate in B, the Court of Chancery began to enforce the second use for the same reason as it had enforced uses in the first instance, namely that it was against conscience for B to retain what was clearly intended for C.

9.8 "The practice ultimately adopted was to leave A out altogether and to create the equitable estate by conveying the land *unto and to the use of* B and his

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[1] See Stewart-Wallace *Land Registration* 24
[2] Pollock *The Land Laws* 106
[3] *Ibid* 3
[4] Underhill *Line of Least Resistance* 28
[5] See M & W 174
[6] Daw v. Newborough (1716)

heirs in trust for C and his heirs."[1] Hence in the final analysis it could be said that the only result of the Statute of Uses was to add a few words to a conveyance.

9.9 The Statute of Uses was repealed by the 1922-25 legislation in England, but it is still operative in many other jurisdictions. For instance, in the Bahamas it appears as Chapter 200 of the 1957 revision of the laws. Moreover it is printed in its original spelling. Its "dyverse and sundry ymaginacions, subtile invencions, and practises" (whereby land is conveyed by assurances "craftely made to secrete uses, intentes and trustes") are amusing, but do not make it any easier to read and understand, though there is certainly a fascination in the old words. Land was not only conveyed by "fraudulent foeffements", but "also by wylles and testamentes sumtyme made by nude polx and wordes sumtyrne by signes and tokens and sumtyme by wrytyng, and for the moste parte made by such psones as be visited with sykenes, in theyr extreme agoryes and peynes or at such tyme as they have hadde scantlye eny good memorie or remembrance; at whiche tymes they beyng pvokid by gredye covetous psones lycng in a wayte about them do many tymes dyspose indiscretely and unadvisidly theyr landes and inheritances". Was there ever a more graphic description of vultures gathered round the death-bed?

10 Attempts to establish registration of deeds

10.1 During the three centuries following the Statute of Enrolments in 1535 there were more than twenty occasions on which land registration bills came before Parliament.[2] Though between 1703 and 1735 four statutes did succeed in setting up local deeds registries – of questionable value – in Yorkshire and Middlesex, it is an astonishing reflection on English lawyers, and English lawmakers, that all these efforts failed to establish a general register or any effective system to cure the evils of concealed dealing. Instead, in the words of Pollock, "in the course of the seventeenth and eighteenth centuries conveyancers worked out a system of private investigation of titles which is still in use and which, though exceedingly cumbrous and expensive, is fairly effectual."[3] Pollock added that he would have said 'intolerably' instead of 'exceedingly' but for the fact that landowners had so long tolerated it. Nearly a century later landowners are still tolerating the same system in the unregistered areas of England and Wales.

10.2 In 1830 Commissioners, who had been appointed "to enquire into the Law of England respecting Real Property", declared that it was universally acknowledged that its greatest evils were "the great difficulties which occur in selling estates and obtaining money on real security, the time which usually elapses before the completion of such transactions, and the harassing expenses and disappointments which attend them".[4]

10.3 This was utter condemnation of the English system of private conveyancing, and by Commissioners who evidently were not inclined to be over-

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[1] Cheshire 57

[2] See *First Report of Registration and Conveyancing Commission* (1850) Appendix V1 for 'An historical account of the progress of registration in England so far as respects assurances of land'

[3] Pollock *The Land Laws* 107

[4] *Real Property Cornmissioners - Second Report* (1830) at 17

critical, for at the beginning of their voluminous report they had remarked that the law of property seemed to require very few alterations and "the Law of England, except in a few comparatively unimportant particulars, appears to come almost as near to perfection as can be expected in any human institutions."[1] This is a surprising comment, the more so as no improvement of any kind had been effected since Blackstone, one of the most eminent of English jurists, had seen fit (some seventy years previously) to describe the law of real property as "frittered into logical distinctions and drawn out into metaphysical subtleties with a skill most amazingly artificial but which serves no other purpose than to show the vast powers of the human intellect, however vainly and preposterously employed".[2]

10.4 The Commissioners recommended that a registry should be established in London for the registration of all deeds affecting land in England and Wales; but this was merely the same old remedy that had already been unsuccessfully proposed so many times since the Statute of Enrolments had failed in its purpose. Though three or four different bills were drafted and introduced into the House of Commons or the House of Lords, interested opposition was much more than a match for public apathy and nothing came of the recommendation.

11 Origin of registration of title

11.1 However, though its recommendation for a general register was as unsuccessful as it was unimaginative, the 1830 Report may be cited as containing the first reference to registration of title as distinct from registration of deeds.[3] A London solicitor named Thomas George Fonnereau, in a written submission to the Commission, described the Registries of Middlesex and Yorkshire as worse than useless and later, in answer to a question, stated "Although...my opinion is against a registry of instruments relating to landed property, I entertain little doubt that a registry of the property – a registry which should in itself be evidence, not of a deed, but of a title – would be highly beneficial by accomplishing facility and cheapness of transfer as well as security of title."[4]

11.2 Fonnereau was not the only one. Thomas Jefferson Hogg, a barrister, began his answer to the Commission's Circular on Registration by contrasting "the rapidity and facility of the transaction" when stock is bought with "the enormous expense and tedious delays" in dealing with landed property. He then proposed "a general registry of the titles to real property" and went on to say, "As to the effect to be attributed to registration: the entries in the registry must constitute the title, the entire and only title; otherwise you will merely impose an additional burden on the back of an animal that is already sinking beneath his load."[5]

11.3 Nevertheless, twenty years went by without any official progress on the registration front, though there were some notable statutes in the field of real

[1] *Real Property Commissioners - First Report* (1829) at 6
[2] See Torrens *South Australian Registration of Title*
[3] See C & R 4
[4] *Real Property Commissioners - Second Report* (1830) Appendix, 97
[5] *Ibid* 54

property and, of course, the idea of registration of title was canvassed in professional circles. In 1846 a select committee of the House of Lords was "convinced that the marketable value of Real Property is seriously diminished by the tedious and expensive process attending its transfer".[1] Loss in value was indeed a serious matter and so a Royal Commission was appointed "for making a full and diligent inquiry whether the burdens of land can be diminished by the establishment of an effective system for the registration of deeds and the simplification of the forms of conveyance, and by what means the same can be effected".[2]

11.4 Undeterred by the repeated failures since the Statute of Enrolments had first conceived the idea 315 years previously, the Commissioners once again recommended the establishment of a General Register. This recommendation was neither very original nor very promising but nevertheless the Report is of particular interest because it contained a detailed proposal for the establishment of a register of title instead of a register of deeds. This proposal had been submitted by another London solicitor, Robert Wilson. He is worth quoting at some length because he described very clearly the essential feature of registration of title which distinguishes it from registration of deeds. He asked: "Why is it so difficult to transfer the interest called a freehold, when it is so easy to transfer the equally real and permanent interest called a share in a Railway Company? Or rather, for this is the substantial question: – How does it happen that the law keeps an authentic list of the owners of railway shares, when it keeps no account at all of the owners of land, informing the purchaser of the one kind of property, as a certain fact, that the seller is entitled to sell, while it leaves the purchaser of the other kind of property to work back to that conclusion, as he best may, by a laborious retrospective investigation?"

11.5 He went on to point out that "the purchaser of a railway share finds the title to it already posted up to the day, and not left sixty years in arrear as the title to land is. The law does not refer him to a tedious and uncertain list of by-gone transactions and events in which he has no concern or interest, but to an authentic statement of a present fact, which alone he wishes to know, namely the fact that the person from whom he is buying is entitled to sell.

11.6 "And this absence of retrospectiveness – this reference of the title to the present time – is the result of a Register, so contrived as to record not merely the transactions and events by which changes of ownership are produced, but these very changes of ownership themselves; not merely the fact, for example, that A has executed a deed purporting to transfer a given share to B, but also the further fact, that the share is thereby taken out of A and vested in B."[3]

11.7 The reason given for not considering this proposal was that "it is not within the limits of our Commission to suggest the extensive alterations of the law which would be required to effect such a plan".[4] The Commissioners were right in thinking that the introduction of registration of title was dependent on extensive

[1] *Report of Select Committee of the House of Lords on Real Property* (1846) viii
[2] *First Report of Registration and Conveyancing Commissioners* (1850) 1
[3] Ibid Appendix V11 244
[4] Ibid 36

alteration of the law, but the fundamental truth of this basic fact did not come to be recognized until much later.

12 Introduction of registration of title and failure of 1862 Act

12.1 This time the suggestion for registration of title, though rejected, was not entirely vain, for when a bill for the registration of assurances (i.e. deeds) was submitted to the House of Commons in 1853, the Select Committee, to which it was referred, recommended instead "the immediate appointment of a commission for the purpose of considering the subject of registration of title with reference to the sale and transfer of land". The new Commission produced the celebrated Report of 1857 which has been called "the classic on which the system of registration which obtains in England today is founded".[1] It is significant, however, that the Robert Wilson who had suggested registration of title in 1850 and who was a member of the Commission dissented from the Report because it did not appear to him "to contain a satisfactory solution of the important and difficult problem" referred to their consideration.[2] The proposal in his dissent is of particular interest to any advocate of systematic adjudication[3] but hitherto it does not appear to have received much attention from writers on the English system.

12.2 Wilson's plan was in essence very simple though it took thirty-four closely printed foolscap pages to present it in detail. The land itself was to be registered on the basis of a public map. He explained, "Here at least we have something tangible to deal with...it is not at all difficult to make a map of the land. We have maps for tithes, for parish rates, for inclosures, for public works. There is to be a new Government Survey, it is said, on an enlarged scale, with a direct view to the registration of landed property."[4] (It is remarkable that the 25-inch Ordnance Survey map, started in 1853, is not mentioned in the body of the Report.) Registration of the land would be followed by registration of the present actually existing ownership and interests in the land. "The practice of the General Inclosure Act[5] – the result of an extensive and long continued experience – might be followed almost without alteration." Against the individual fields as numbered on the map (i.e. against each 'unit of use') was to be registered the name of the 'freeholder', i.e. the person 'in possession', and he explained that it would be necessary to adhere to the ancient maxim:– The possession[6] of a tenant for years is the possession of the freeholder." Provision was to be made for registration of qualifications of the freehold; the period of limitation (then forty years) for making claims against the registered owner was to be shortened to twenty or perhaps twenty-five years. Registration would of itself work out a parliamentary title by degrees, and any attempt to expedite the process must be beset with

[1] Stewart-Wallace *Land Registration* 27
[2] *Registration of Title Commission Report* (1857) Appendix Part A 83
[3] See 11.8.1
[4] See 7.5.5
[5] 1845
[6] In English law 'possession' includes receipt of rents and profits or the right to receive the same, if any. This can be confusing since it distorts the ordinary meaning of possession ' e.g. if A hires his car to B, A, the owner, is obviously not in possession of it when B, the hirer, has taken it over.

difficulties."[1] In fact Wilson made a strong case for provisional title in the first instance.[2]

12.3 It would be foolish for us to go further into the might-have-beens of well over a century ago, but here were all the ingredients of a systematic process already fully proven in the field, which Wilson suggested should be applied parish by parish on the request of a certain proportion of the landowners. It would have produced a provisional but complete register which would have become absolute in due course.

12.4 The Commission, however, rejected this imaginative proposal, remarking: "One serious objection is the necessity of sending a commission into every district to ascertain who are to be put on the register of lands in that district, – an objection not merely or mainly on the score of expense, but to the principle of such an enquiry. It would, in fact, involve a compulsory registration of title; for a landowner could not venture to remain passive, lest someone else should procure registration to his prejudice."[3] In the event, any form of compulsion was delayed for forty years, and even then was introduced only in a limited form, as we presently describe.

12.5 The recommendation of the 1857 Commission that registration of title should be introduced was accepted by Parliament, and in 1862 an Act (later named the Land Registry Act) was enacted "to give certainty to the title to real estates and to facilitate the proof thereof and also to render the dealing in land more simple and economical".

12.6 It was soon evident that this Act was not going to be successful. In a little over six years (15 October 1862 – 23 January 1869) only 547 applications were received and only 349 widely scattered properties were registered under it, 144 applications (26%) having been withdrawn or rejected and 54 being still under consideration.[4] So glaring a failure required investigation, and another Royal Commission was appointed to enquire into the reasons. These Commissioners reported in 1870, and, having expressly rejected the suggestion that it was the hostility of solicitors which had prevented registration and also the suggestion that it had been impeded by shortcomings in the working of the office[5] they attributed the failure to the fact that the 1862 Act departed from the recommendations of the 1857 Report in three fundamental particulars by imposing the necessity of:

"A. showing a marketable title;

"B. defining boundaries;

"C. registering partial interests"[6]

(A marketable title to land is one which the court will force on an unwilling purchaser)

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[1] Regi*stration of Title Commission Report* (1857) Appendix Part A 91
[2] See 11.11.6
[3] *Registration of Title Commission Report* (1857) 19
[4] See D & S 39
[5] See *Land Transfer Commission Report* (1870) xvi, xvii paras 20, 24
[6] Ibid xxiv para 58

13 The Land Transfer Act 1875

13.1 The 1870 Report led to the enactment of the Land Transfer Act 1875, which superseded the 1862 Act and established the system of registration originally recommended in 1857. The new Act remedied the three defects which had been particularized. First, the Registrar was himself empowered to hear and determine objections instead of having to refer everything to the court and was given wide discretion to ignore unimportant blemishes when examining titles for registration; secondly, it was no longer required that boundaries should be ascertained to the last inch[1]; and finally, registration was confined to the ownership of the full legal freehold or leasehold estate in the land, all partial and equitable interests (and dealings in them) being excluded from the register.

13.2 Though this new Act set up the system which today operates with such success, it was at the time even less successful than its predecessor, and by December 1885 only 113 titles had been registered under it. To some extent its failure could be attributed to the bad name which had been acquired for the whole system by the unfortunate 1862 Act, but it is questionable if the 1875 Act would have had any more success if it had been the first Act on the scene. Apart from the appalling complexity of English law – itself an almost insuperable obstacle – the plain fact was that so long as registration of title was purely voluntary it stood no chance of success.

13.3 Enthusiasts may argue that any right-thinking landowner will so welcome the security and convenience of a State-guaranteed title that he will rush to register, but in sober truth initial registration confers no obvious practical benefit on anybody who has already acquired a sound title by methods of private conveyancing, for which he has had to pay in any case. A private conveyance conducted by a competent lawyer, slow and expensive though it may be, does in the majority of cases confer a sound title, and in such cases initial registration merely imposes additional expense to confirm what is already perfectly good. Registration is only immediately beneficial where it resolves some special doubt or difficulty, but no system can operate economically if only the doubtful and difficult titles come in. Compulsion is plainly necessary if State registration is to command enough work in an area of suitable size to enable it to be administered efficiently at reasonable cost. The easy straightforward titles must help to pay for the more difficult ones.

14 Introduction of selective compulsion

14.1 These considerations eventually prevailed and a new Land Transfer Act in 1897 introduced a measure of selective compulsion, under which at the request of a county council registration of title could by Order in Council be made compulsory on sale (and on the grant or assignment of a lease for forty years or more) in defined areas. By 1902 this measure had been applied to the County of London, but registration remained purely voluntary in the rest of England and Wales.

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[1] See 8.4.8

14.2 Even this amount of compulsion, though modest enough, naturally provoked the opponents of registration of title, for no longer could they avoid it if they did not like it. For example, papers read by a London solicitor to meetings of the Law Society in 1903 and 1904 were entitled ‘The Blight of Officialdom’ and ‘How to Set a House in Disorder’, and contained a blistering indictment of the operation of the Land Transfer Act 1897. Indeed there was so much opposition to registration and so much difficulty in operating it that yet another Royal Commission was appointed in 1908 to consider the defects in the 1897 Act.

15 Reform of the land law

15.1 This Commission reported in 1911 that registration of title was greatly impeded by the state of the law and by the difference between the rules of real and personal property. As a title to land had to be properly proved to the Registrar before he could accept it for registration, there was clearly need to make the task of proving it as simple as possible. As early as 1879 it had been pointed out that “to legislate for the registration of titles, without, as a preliminary step, simplifying the titles to be registered is to begin at the wrong end”[1] and this at last had come to be generally accepted.[2]

15.2 Accordingly work was begun on a general overhaul of the law, but it was not until after the 1914-18 war, when Lord Birkenhead had become Lord Chancellor, that real progress was made. A committee set up in 1919 “agreed unanimously that the existing law of Real Property is archaic and unnecessarily complicated” and “that no great improvement in the existing systems of transfer of land, whether registered or unregistered, can be effected until the law of Real Property has been radically simplified”.[3] This makes an interesting contrast with the views of the Commissioners expressed in 1830, which we have already quoted.[4]

15.3 Sweeping new legislation was prepared covering the whole field of real properly law (including land registration, of course). The Law of Property Act 1922 was enacted “to assimilate and amend the Law of Real and Personal Estate, to abolish copyhold and other special tenures, to amend the law relating to commonable lands and of intestacy, and to amend the Wills Act 1837, the Settled Land Acts 1882 to 1890, the Conveyancing Acts 1881 to 1911, the Trustee Act 1893, and the Land Transfer Acts 1875 to 1897”. But before this Act came into force it was itself amended and subdivided into the seven Acts of 1925 which are named (1) Law of Property Act, (2) Settled Land Act, (3) Trustee Act, (4) Land Charges Act, (5) Administration of Estates Act, (6) Land Registration Act, and (7) Universities and College Estates Act.

15.4 These details have been set out in order to show the enormous scope of the 1925 legislation and also to indicate something of the extent and complexity of

[1] *Osborne Morgan's Committee Report* (1879) vi
[2] See M & W 1121
[3] *Acquisition and Valuation of Land Committee Fourth Report* (1919) 10 para 23
[4] Para 10.3 above

the problems which faced those who sought to introduce registration of title into England. Megarry and Wade sum up the effect of this legislation:

> "These Acts have simplified both practice and study in a multitude of ways. Obsolete and incongruous rules have been cleared away; new and beneficent principles have been invented. In a great many matters it is now unnecessary to go behind these Acts. But they are not a code: as was said in 1925, they represent evolution rather than revolution. They proceed by patchwork, often adapting old ideas to new problems in much the same manner as led the old law into some of its tangles. But, on the whole, they have done much to infuse simplicity and reason."[1]

15.5 Thus the legislation of 1925 did much to improve the English land law, but it must not be assumed that it is suitable for adoption out of hand in other countries which use a version of that law. It was something on the lines of an operation for cancer. It removed an ugly and dangerous growth and substantially improved the condition of the patient suffering from it, but nobody would suggest that such an operation would benefit a person not suffering from cancer or, for that matter, that one cancer operation is exactly like another. Countries into which English law had been introduced did not necessarily suffer from all its complexities. For example, settlement of estates in the English manner might be quite unknown. It seems unnecessary, and confusing, to abolish abstruse technical rules and doctrines in a country which has never had occasion to use them. This may sound very obvious, but some countries have been tempted to think that as the Law of Property Act 1925 was so successful in England it will solve their own difficulties. In Western Nigeria, for instance, in 1959 a law was enacted which is, almost word for word, a transcript of the Law of Property Act 1925. We believe that all that was required could have been included in a law which provides for registration of title, and we shall present this proposition more fully in Book 2.

15.6 The Land Registration Act 1925 repealed the Land Transfer Acts of 1875 and 1897 and gave effect to the recommendations which the Royal Commission had made in 1911. "But the all-important change for the future of land registration was that the Central Government was given the power to initiate extensions of the compulsory system instead of the county councils."[2]

16 Two schools: conveyancing reform versus registration of title

16.1 The victory of registration of title was, however, by no means yet assured. There were two schools of thought, and indeed had been for the better part of a century if we count as a school the ideas of Mr Fonnereau and Mr Hogg in 1830.[3] One school supported registration of title which had such evident merits in theory though in practice it had proved so difficult to establish, whilst the other school preferred the system of private conveyancing and believed that reform of that system would do all that was needed. In any event reform was essential

[1] M & W 1
[2] C & R 7
[3] See paras 11.1-2 above

because it would not be possible for registration of title, even if successful, wholly to replace private conveyancing for many years, and so the Conveyancing Act 1881 (which Megarry and Wade say might have been called "The Solicitors (Drudgery Relief) Act")[1] had begun the series of reforms which culminated in the 1925 legislation. It could be fairly argued that such legislation would so simplify and improve private conveyancing that registration of title would no longer be needed.

16.2 The Land Registration Act 1925 recognized that expert opinion was still sharply divided on the merits of registration of title, and postponed for ten years the new power of the Privy Council to declare compulsory areas otherwise than at the instance of a county council.[2] This was to enable the system of registration of title to be tried out side by side with the improved system of private conveyancing, which it would be misleading to call 'unregistered conveyancing' because it, too, required reference to a public register. There are, in fact, three different registers.

17 The three types of land registration in England

(1) REGISTRATION OF INCUMBRANCES (OR CHARGES)

17.1 In Chapter 1 we distinguished registration of title from registration of deeds, but we did not mention registration of incumbrances, and this must now be explained. It fills a gap in a system of registration of deeds, since there are many liabilities affecting land which may not appear in the title deeds and so even the best deeds register will not reveal them. The greatest danger in land dealing is that something of importance may not be discovered just at the time when it specially matters. Thus in the context of English land law a *legal interest* will bind the purchaser even if he did not know of it at the time of purchase, but he will be affected by an *equitable interest* only if he has notice of it, and so the owner of an equitable interest might lose it if notice is not given.

17.2 Registration of the interest offers an obvious safeguard against such eventualities. If failure to register makes an interest void against a purchaser whether he knows of it from other sources or not, and if registration is deemed to constitute actual notice to all persons for all purposes concerning the land, a legal interest cannot be overlooked by a prospective purchaser, nor need the owner of an equitable interest do more than register it to make notice of it certain.

17.3 This system of registration was introduced in England and Wales in 1839 for pending actions (which of course would not be revealed by title deeds), but though extended to certain annuities and rentcharges in 1855 and further extended in 1888 and 1900, the registrable interests remained comparatively few until 1925 when the Land Charges Act made many important interests registrable, "and for the first time registration became a fundamental part of the general system of conveyancing".[3]

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[1] M & W 1120
[2] s120(2)
[3] M & W 148

17.4 Under the Land Charges Act 1925[1] the Chief Land Registrar keeps, at HM Land Registry, registers in which certain incumbrances must be registered to be binding on a purchaser, though there is no investigation in the Registry and no guarantee that the incumbrance is valid. Moreover, the Land Charges Registers are not indexed by the land parcel affected but merely by the name of its owner at the time of the claim. Thus a prospective purchaser may be unable to discover a subsisting incumbrance duly registered under the Act if he is ignorant of the name of the owner, as he will be of the names of owners before the date of the 'root of title' (which we explain in Chapter 4). Under the Law of Property Act 1925 the root of title need be only thirty years old (this has now been reduced to fifteen years),[2] and from this it can be inferred that in 1925 it was expected that registration of title (which will supersede these registers) would be completed by 1955. Until registration of title is complete, England and Wales remain saddled with a defective register. "The rule that all persons have notice of registrations which they are sometimes unable to discover is fundamentally unsound."[3] It is a very clear example of the unwisdom of registration by name of proprietor instead of by parcels. It should be noted that the Local Land Charges Registers maintained by local authorities are kept by parcels and not by names.[4]

(2) REGISTRATION OF DEEDS

17.5 We have already described registration of deeds.[5] It is similar to registration of incumbrances in that the document registered is not investigated, nor is it guaranteed by registration, which is effected by 'enrolling' a copy of the document or a memorial giving full details of it. We discuss registration of deeds in Chapter 6. In England it now affects only land in Yorkshire where it was applied in the West Riding in 1703, in the East Riding in 1707, and in the North Riding in 1735. It has been superseded in the North and West Ridings by registration of title.

17.6 A register of deeds was also established in Middlesex in 1708. It received short shrift from the Royal Commissioners on Land Transfer in 1870. They reported that they entirely concurred with the opinion of the very experienced witnesses who had all agreed in saying that "the registry causes a great increase of trouble and expense, affords no additional security or other special advantage and ought riot to be continued",[6] but nothing was done on the strength of their brief and clear recommendation that the Middlesex Registry should be closed from as early a date as possible, and it lasted for a further seventy years. On 1 January 1936 registration of title was made compulsory on sale in the County of Middlesex, as the first area to be declared after the end of the ten-year period allowing registration of title to be tried out alongside the improvements in

[1] s1
[2] Law of Property Act 1969 s23
[3] M & W 1129
[4] Land Charges Act 1925 s15
[5] See 2.3
[6] *Land Transfer Commission Report* (1870) xxxvii para 112

conveyancing effected by the Law of Property Act 1925, and the Middlesex Registry was finally closed by the Middlesex Deeds Act 1940.

(3) REGISTRATION OF TITLE

17.7 In 1942 Lord Justice Scott's Committee on Land Utilization in Rural Areas made the startling (and obviously quite impracticable) recommendation that registration of title should be made compulsory throughout England and Wales and completed within five years.[1] The following year a committee under Lord Rushcliffe was invited to consider this recommendation and, if immediate universal registration was impossible, to say in what localities and by what stages compulsory registration should be introduced. This committee advised that compulsion should be applied by stages, starting with areas of post-war development having dense populations, through the medium of district Offices.[2]

17.8 Since the end of the war in 1945 many Orders in Council have been made extending the compulsory system, all at the instance of local authorities, and the tide of public opinion appears to have turned decisively in its favour. The problem now is how to regulate its progress so as to prevent the registry from being swamped by work.[3] A plan to extend compulsory registration to the whole country by 1973, announced in August 1964, was thwarted by the economic situation which precluded (or at least made politically undesirable) an increase in the number of civil servants – even though HM Land Registry provides an essential service which is self-supporting.

18 Secrecy of the English system

18.1 There is a puzzling feature of the English system which requires special mention. Overseas visitors to HM Land Registry are surprised to find that the land register is secret, or ‘private’ (which is the less pointed word preferred by those who defend the practice). This feature will also astonish those who have read how, after the Statute of Enrolments 1535 had failed in its purpose, repeated attempts were made, for more than three hundred years, to restore publicity to land dealing. They would scarcely expect to find that secrecy was actually a feature of the measure which, at long last, was enacted to cure the evil of ‘secret conveyancing’ (as it was unequivocally called at the time).

18.2 Indeed, the celebrated 1857 Report itself began by pointing out that “in the earlier periods of our history publicity was considered essential in almost all dealings with landed property”, and it went on to explain how by the Statutes of Uses and Enrolments “the Legislature sought to abolish that secret transfer of land which had begun to prevail by means of private confidences, enforced by the jurisdiction of the Courts of Equity”, but the provisions of these statutes were soon evaded by a subtle construction and contrivance; and instead of giving publicity and notoriety to equitable transfers, the Statute of Uses was so

[1] See *Lord Justice Scott's Committee Report* (1942) 88 para 238
[2] See *Lord Rushcliffe's Committee Report* (1943)
[3] See C & R 9

interpreted as to make even legal conveyances, what they never were before, secret".[1] The Report then referred to the repeated but unsuccessful efforts to establish "public registration" which had been "constantly recommended by the ablest lawyers and statesmen", and "upwards of twenty bills have within the course of the last twenty years been brought into Parliament for the purpose of establishing systems of registration".[2]

18.3 However, in examining the objections to a register of deeds ("or, as it has been termed of late years a Register of Assurances") the Commissioners considered (as the fourth objection out of seven) "the fear of unnecessary and uncalled for disclosures. No man likes to make his private affairs public; and one man has no right to pry into the affairs of another, except for some object, in which the latter has given him an interest." They called this objection "striking" and concluded: "Nor do we think that there is any inconsistency in attributing weight to this objection, and at the same time regarding as an evil the disuse or loss of that system of public transfer of land which in a previous part of this report we have adverted to as having prevailed in the earlier periods of our history."[3] This was a statement of remarkable ambivalence, and some further amplification might have been expected.

18.4 The Commissioners, however, did not go on to say that this objection would justify the loss of publicity which had been roundly condemned ever since the grotesque subterfuge of 'lease and release'[4] had enabled those who profited from secrecy to defeat the clearly expressed intention of the legislature to restore publicity to land dealing. In fact, the question of publicity was not again referred to in the Report, not even in the detailed recommendations; but one of the Commissioners, in a memorandum setting out "a concise Summary of the Report", clearly held no such view, for he said, "Though I do not agree that a 'mere dread of disclosures' ought to constitute a valid objection to a general registry of assurances, I am, for other reasons, entirely averse to any such registry, even in the modified form of the 'Subordinate Registry' suggested in various passages of the Report."

18.5 It is regrettable that the secrecy question was not canvassed more completely in the Report since, whatever the arguments, the Land Registry Act 1862[5] actually contained the provision that no person other than the owners of estates and interests should be permitted to inspect the registers, and to this day "any person registered as proprietor of any land or charge, and any person

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[1] Lord Westbury, Lord Chancellor in 1862, in introducing the Land Transfer Bill into Parliament did not mince his words: "it was supposed that the Statute [of Uses] would annihilate the evil. 1 am sorry to say that the object which Parliament had in view was defeated here, as in many other cases, by what 1 may be permitted to call the pedantic and narrow-minded interpretation of the Judges of the land. You will find that in English law nothing has been more fertile of results to be regretted than the attachment of our lawyers to the mediaeval logic - the pedantrics and puerile metaphysical disquisitions which distinguished what was called the learning of the time" (CLXV Hansard (1862) 354).

[2] *Registration of Title Commission Report* (1857) 2 and 3. This is what the Report actually said, but presumably it really meant 'last two hundred years'.

[3] *lbid* 13 para XX

[4] See para 9.5 above

[5] s15

authorised by any such proprietor, or by an order of the court, or by general rule, *but no other person*, may inspect and make copies of and extracts from any register or document in the custody of the registrar relating to such land or charge."[1]

18.6 The matter has recently been under examination by the Law Commission (which keeps English law under constant review). In their first Working Paper on Land Registration, they said: "Perhaps the most controversial topic in regard to land registration is the extent to which the register of any particular title should be open, if at all, to inspection by the general public", and they pointed out that "in almost every other country in the world registers of title or of land are fully open to public inspection. Lawyers in these countries find it hard to understand why we retain a private register in this country since the advantages of an open one are to them so obvious."[2] The Commission then noted that in Scotland a deeds register (the Register of Sasines) had been open to public inspection since early in the seventeenth century, and that both the Reid[3] and the Henry[4] Committees on Registration of Title to Land in Scotland had thought that, if registration of title were introduced in Scotland, the register should be open to public inspection. They also noted that in Northern Ireland the register of title has always been open to unrestricted public access, and a majority of the Lowry Committee on Registration of Title to Land in Northern Ireland considered that the register should remain fully public when compulsory registration was extended.[5] The position is similar in the Irish Republic.

18.7 However, HM Land Registry issues through the Stationery Office a pamphlet which categorically states that there is no publicity in the register of title and it is absolutely private. For this reason, and because "it is in the light of this statement that the extension of the compulsory areas has taken place and in addition many proprietors have applied voluntarily for registration", the Commissioners considered that many persons whose titles have already been registered might feel aggrieved if, by retrospective legislation, their titles were rendered open to full public inspection, and that this would not be acceptable. Accordingly the Commissioners were "not inclined to support such an innovation at present",[6] and they clearly felt that there was no need for them to state the case for secrecy and argue it in the light of world experience and practice.

18.8 England and Wales are the one exception out of all those jurisdictions – fifty in the United States alone – which use English land law and have derived their conveyancing practice from English origins but have nevertheless established publicity in dealings. The foregoing will at least show how the vital principle of publicity came to be surrendered - after over three hundred years of struggle though it still does not explain why the English must be different from the Scots and Irish in this regard.

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[1] Land Registration Act 1925 s112 (our italics)
[2] *Law Commission Working Paper on Land Registration No 32* (1971) 43
[3] *Reid Committee Report* (1963) para 64(1)
[4] *Henry Committee Report* (1969) 20
[5] *Lowry Committee Report* (1967) para 138
[6] *Law Commission Working Paper on Land Registration No 32* (1971) 44

19 Slowness of compilation

19.1 Finally it should be noted that the so-called compulsory system, which merely induces registration when there is a sale, is a very slow form of sporadic compilation.[1] It is depressing to record that in 1956 the Committee on Land Charges,[2] which despaired of finding any solution to the problem of the Land Charges Register except the registration of title throughout the country, remarked that at the present rate of progress this would take about a century to complete. We find it difficult to believe that such delay is really necessary. We repeat what Dowson and Sheppard wrote nearly twenty years ago – which, unhappily, remains as true today as it was then:

> "It is not suggested that a systematic and accelerated completion of the Land Register of England and Wales could be readily arranged or could, under any circumstances, be anything but a formidable undertaking to initiate. But we believe that there is ample evidence available now to satisfy any objective enquiry: (i) that continued reliance upon the combination of option and selective compulsion resorted to in 1897 will leave the completion of the Register to an uncertain and remote future, no matter how widely such selective compulsion may be extended; (ii) that the success which has attended the systematic compilation of Land Registers (even if of a less perfect character) in extensive territories overseas, has not been due to any more facile conditions, but simply to concerted and methodical territorial attack, which (iii) this country is more favourably situated and better equipped to undertake than they were."[3]

19.2 Yet, after well over a hundred years of striving towards registration of title in England and Wales, there is still not a single district in which it can be claimed that all title is registered. The creeping registration of the English system stands in stark contrast to the universal registration of title achieved in Germany at the turn of the century by a systematic process combined with a period of eighteen months for objection.[4] One may regret the rejection of a systematic approach of the kind so ably expounded by Robert Wilson in 1857, but should not be blind to the great political difficulty likely to be involved in any such process today. If, with the machinery of the Inclosure Acts, unpopular perhaps but at least available and understood, systematic compilation was politically unacceptable in the 1860s, it is hardly likely to be more acceptable now when even the increase of staff required to complete the eight-year programme could not be obtained.[5]

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[1] We define 'sporadic compilation' in 112
[2] *Report of the Committee on Land Charges* (1956)
[3] D & S 46
[4] See Appendix B
[5] See para 17.8 above