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THE LAND LAW OF GREAT BRITAIN WITH ESPECIAL  
REFERENCE TO THE RIGHTS OF ALIENS.

THE English land law may not appear at first sight to present many attractions to an American reader, although the ancient tenures and the rules that formerly governed real estate continue to form an important subject in all legal studies. This, however, is rather as a matter of history than of practical utility to the American student, although many of the principles involved have survived exploded theories, and still, to some extent, govern existing institutions, even under an altered state of circumstances. But when in addition we consider the intimate relations existing between the two countries, cemented by upwards of sixty years of uninterrupted peace, and when further, it is remembered that within the last seven years, the English law excluding an alien from the inheritance and even the possession of land in that country has been relaxed even to the extent of placing all foreigners upon the same footing as natural-born British subjects, the question at once assumes a practical form and emerges from the shadowy region of previous inquiry into the real and substantial shape of interested investigation.

By the 2d section of stat. 33. & 34 Vict. c. 14, it is enacted that "real and personal property of every description may be taken, acquired, held and disposed of by an *alien*, in the same manner, in all respects, as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from or in succession to an *alien*, in the same manner, in all respects, as through, from or in succession to a natural-born British subject."

The only limitation to the full effect and operation of this section is, that it "shall not affect any estate or interest in real or personal estate to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this act, or in pursuance of any devolution by law on the death of any person dying before the passing of this act."

It will thus be seen that any American citizen may, without forfeiting his allegiance to his own country, and without the necessity of naturalization in Great Britain—nay, even without setting foot on British soil, find himself, perhaps unexpectedly, heir to a considerable estate in the latter country, and of which nothing but indifference to or ignorance of his rights, could interfere with the actual possession.

When we consider how many American citizens are removed by but two or three generations, perhaps only by one or even less, from the original family stock on the other side of the Atlantic, and that at any moment the hand of death may open a way to their succession, it is obvious that some acquaintance with the laws that regulate such rights is not only desirable, but, we might add, essential, at least to those who may be consulted under such a state of circumstances. It is believed therefore that a brief exposition may not be wholly devoid of interest, nor yet unacceptable to the profession at large.

I. And first: with respect to the English law of primogeniture, *pure and simple*. The law of PRIMOGENITURE, or the right of the eldest son to inherit to the entire exclusion of all his brothers and sisters, attaches, for the most part, to freehold property alone; or rather to lands held in free and common *socage*. It has no relation to leasehold property, that large and ever-increasing valuable accretion to real estate, and which passes according to the Statute of Distributions, which regulates the descent of personal property by much the same rules which affect all property in the United States.

In the case of copyhold or manorial lands, the law of descent, among the tenants of the manor, varies according to the customs of the respective manors. In some manors undoubtedly the law of primogeniture prevails. In others the land descends to the youngest son. In some to all the sons alike. And perhaps in a few instances the daughters inherit equally, to the exclusion of sons

But yet the lordship of the manor descends according to the law of primogeniture, the lord being in theory a tenant *in capite* of the king, or holding direct from a tenant *in capite*, in which latter case he is termed a *mesne* lord and the manor a *mesne* manor, the word *mesne*, as is well known, signifying *middle*. It may here be mentioned incidentally that great facilities exist at the present day for converting copyhold property into freehold, the lord, of course, being properly compensated for the rights and privileges which he cedes.

It will be seen, therefore, that though the law of primogeniture prevails over the greater portion of the land of England, and, indeed, of the United Kingdom generally, it does not embrace the whole of it.

Leasehold property, which forms no portion of real estate, and is not, therefore, governed by its laws, though, as arising out of it, is termed "chattels real," passes like personal property to all the children equally, without regard to age or sex, although the freehold, out of which the leasehold is carved, descends, according to the law of primogeniture, with the exceptions before mentioned.

In the case of all kinds of property the absolute owner can dispose of the same by testamentary disposition, and thus, by a stroke of his pen, defeat the law of primogeniture, or any of the customary laws before alluded to. It is only in the absence of a will, or any other disposition *inter vivos* to the contrary, that an eldest son succeeds to the freehold, to the total exclusion of his brothers and sisters; in which case it may well be supposed that such was the wish of the former possessor; but such a case seldom occurs without some other provision having been made for younger children, or without the intestate leaving in addition personalty which would be distributed as before-mentioned. Such an event, therefore, forms not only no national grievance, but scarcely even a serious private one, which could not have been readily obviated by ordinary prudence and forethought by any one careful of the interests of his children.

II. As to dower. A widow is entitled to a life-interest to the extent of one-third in all freehold estate of which her husband dies possessed, unless such right of dower is barred, as is now usually done, with a view to the facility of transfer and conveyance.

In all cases where the marriage has taken place since the 1st of

January 1834, it is enacted, by statute 3 & 4 Wm. 4, c. 105, that dower may be barred either by the husband disposing of the land in his lifetime, or by will, or by a simple declaration in any deed executed by the husband, that all partial dispositions, debts, encumbrances, contracts and engagements to which his land shall be subject shall be good against his wife's dower; that it may be subjected to any restrictions by his will, and unless a contrary intention is declared by the will, a devise of any estate or interest in land, out of which the widow would be entitled to dower, to or for the benefit of the widow, shall bar her dower.

In cases where the marriage has taken place prior to the 1st of January 1834, the ancient modes of barring dower must have been resorted to in order to effect the object, viz.: By a jointure deed executed before marriage: 4 Rep. 1, 2. But if executed after marriage, the widow had her election to accept or refuse it, and betake herself to her dower at common law: 3 Myl. & Cr. 171; 1 Scott 82; Harg. Co. Litt. 36-7. But the usual mode upon purchasing an estate was to convey it to a trustee in bar of dower: the courts of equity refusing to acknowledge the right of dower as attaching to an equitable estate, dower being a right at common law only, and the legal estate being thus vested in the trustee. The celebrated Mr. Fearne contrived also a method by which the inheritance was limited to the husband during life, with a vested remainder in a trustee, in trust for the husband, to take effect in the event of the particular estate being terminated by forfeiture, or otherwise: 18 Viner 413; the husband, in the meantime, taking a life-interest only, but never having an estate of inheritance in possession during his life, so that the widow's title to dower could never exist: 3 Lev. 437. And further effect was given to this contrivance by investing the purchaser with power, under the Statute of Uses, of appointing the fee-simple in any manner he should please. Thus the wife's dower was effectually barred, or rather defeated: 5 B. & Ald. 561. As but forty-four years have elapsed since the passing of 3 & 4 Wm. 4, c. 105, it is still desirable and, indeed, essential to be acquainted with the old forms in use prior to that act, especially as sometimes the marriage of deceased persons can only be proved by repute, in the absence of a system of public registration which, prior to the date in question, did not exist in England. Thus the exact date of the marriage becomes unimportant. In Gavelkind, according to the custom of the county

of Kent, the wife's dower consists of a moiety: Wright's Tenures 118; Rob. Gavelk. 292.

In copyhold estate, the right to dower, or as it is termed, free-bench, depends upon the custom of the manor. In the absence of any special custom, the widow is entitled to free-bench out of *copyholds* only of which her husband died seised—her title being barred by her husband's simple alienation of the lands: Wood v. English, 5 Jurist 741; 2 Ves. Sr. 633; 1 Gale & Dav. 180.

No dower attaches to leasehold estate, the widow's share of such property being regulated, as before mentioned, by the Statute of Distributions, as forming part of the personal estate of a deceased intestate.

It will be seen from the foregoing that the facilities for barring dower in England amount almost to a destruction of that ancient right, and afford a marked contrast to the state of the law on that subject in the United States.

Although, as before mentioned, no dower attaches to leasehold estate, the widow is nevertheless entitled to one-third absolutely of the value of all personal property (including leasehold) not otherwise disposed of, if there is more than one child left by her deceased husband, whether of her or a prior marriage. If there is no child, or only one, she takes one-half of such undisposed property. Of course, the issue of a deceased child or children would inherit their parents' share.

III. Much misapprehension appears to prevail upon the subject of the English law of entail. It is generally assumed by the public that estates may be entailed in perpetuity, and this is perfectly true in theory, but the practice does not support the theory. There are perhaps not more than half a dozen estates throughout Great Britain held under a perpetual inalienable entail, and these are either such as have been granted by the nation to illustrious men, such as the Dukes of Marlborough and Wellington and their heirs, or such as from peculiar circumstances of tenure in support of and attached to hereditary dignities, have been thus specially entailed by express Acts of Parliament. For instance, the possession of the castle and demesne of Arundel, in the county of Surrey, confers by tenure the earldom of Arundel and Surrey, but yet such castle and demesne can be held only by the Dukes of Norfolk as Earls of Arundel and Surrey, under a special parliamentary entail.

Attempts to create perpetual entails, rendering lands inalienable,

were undoubtedly made at very early periods of English history, notably, by the statute *De donis conditionalibus* (Westminster II.), but the judges steadily set their faces against such encroachments, as being contrary to public policy, or rather, as public policy was understood in those times, against the interest of the king as lord paramount; and by resorting to a fiction of law, known as *levying a fine, and suffering a common recovery* (temp. Edw. 4), enabled the tenant in tail, under certain circumstances, to bar the entail and acquire the fee-simple. About two hundred years elapsed between the passing of the statute *De donis* and the application of common recoveries, although so early as the time of Edward 3, the courts had intimated an opinion that a bar might thus be effected. For this fiction of law is now substituted a simple disentailing deed. To give a brief illustration: A man, either by deed or will, settles his estate upon his son for life, and upon such son's first and other sons in tail, with various remainders over in the event of his son dying without male issue—in fact, creating a web of limitations both to heirs male and heirs female, with an ultimate remainder to his own right heirs, to provide against every contingency. The whole scheme so cleverly contrived, and the web so carefully woven, is, after all, little more than an ingenious specimen of the theory of conveyancing; for upon the tenant in tail coming of age, he can, under a modern statute, 3 & 4 Wm. 4, c. 105, s. 14, effectually bar the entail. The enacting clause of the statute is as follows: “Every actual tenant in tail, whether in *possession, remainder, contingency* or *otherwise*, shall have full power to dispose of, for an estate in fee-simple in possession, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which, but for some previous act, would have been vested in or might have been claimed by the person making the disposition at the time of his making the same; and also, against all persons (including his majesty, his heirs and successors) whose estates are to take effect *after the determination, or in defeasance* of any such estate tail; saving also the rights of all persons in respect of estates prior to the estate tail, in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.”

And by ss. 8, 56 and 67, &c., creditors have the same benefit from the estate tail which a bankrupt could have had before his bank-

ruptcy under the 6 Geo. 4, c. 16, s. 65. The 3 & 4 Wm. 4, c. 105, is extended to Ireland by 4 & 5 Wm. 4, c. 92.

Of course, in addition, the tenant for life, by joining with the tenant in tail, may effectually surrender his life-interest, and the fee-simple of the estate with immediate possession may thus be brought into the market, the entail being for ever barred and all the remainders over scattered to the winds.

Prior to the passing of 3 & 4 Wm. 4, c. 74 (Act for the abolition of Fines and Recoveries, &c.), which Mr. Wendell eulogizes as a "model of legislative draughtsmanship" (see Wendell's Blackstone, vol. 2, p. 364, note), the tenant to the *præcipe* must have been actually seised of the freehold (Burr. 60; 3 B. & Cr. 388); hence a tenant in tail could not have suffered a recovery if the legal estate of the freehold was outstanding in a third person as tenant for life or for a greater estate, without concurrence of the tenant to the *præcipe* or writ of entry: Wendell, p. 314. But now, says the same authority, "Under this act, the tenant in tail's disposition is effectual against all persons whose estates are to take effect after determination, or in *defeasance* of the estate tail." And further, he says: "It expressly enables tenants in tail to alien in fee, in case of a tenancy in tail in remainder, expectant upon a particular estate or estates of a given description; it institutes a functionary, styled Protector of the Settlement; it restrains tenant in tail, there being a protector, from aliening as against posterior takers, without the consent of the protector." But this is only in the case of a tenancy in tail in remainder expectant upon a particular estate or estates of a particular description. But perhaps it will be as well to give a brief analysis of the principal clauses of the act itself. *Estate* is, by the act, defined to mean any interest, lien, or encumbrance, either at law or in equity, in, upon or affecting lands, or money, subject to be invested in the purchase of lands. *Base fee* is to mean exclusively the estate in fee-simple, into which an estate tail is converted, when the issue in tail are barred, but subsequent remainder-men are not. *Estate tail*, in addition to its usual meaning, is to include a *base fee*. *Actual tenant in tail* is one whose estate has not been barred, although it may have been divested or turned to a right. *Tenant in tail* is either an actual tenant in tail, or one who would have been such if the estate had not been converted into a base fee." Id. Wendell. By sect. 19 (after 31st December 1833). "In every case in which

an estate in any lands shall have been barred and converted into a *base fee* (either before, or on or after that day), the person who, if such estate tail had not been barred, would have been actual tenant in tail of such lands, shall have full power to dispose of such lands against all persons (including the king's majesty, his his heirs and successors) whose estates are to take effect after the determination or in defeasance of the base fee into which the estate tail shall have been converted, so as to *enlarge the base fee* into a fee-simple absolute, saving the rights of persons in respect of *estates prior* to the *estate tail* which shall have been converted into a *base fee*, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made." In relation to this clause, Mr. Wendell says, "Under this act the tenant in tail's disposition is effectual against all persons whose estates are to take effect after the determination or in *defeasance* of the estate tail." By § 22 and following: "If at the time when there shall be a tenant in tail of lands under a settlement, there shall be subsisting in the same lands *under the same settlement* any estate for years, determinable on the dropping of a life or lives, or any greater estate, not being an estate for years (including an estate tail, and including estates merely restored or confirmed by the settlement), *prior to the estate tail*, the person who shall be owner of such prior estate, or the first of such prior estates, if more than one, then subsisting under the settlement, or *who would have been such owner if no absolute disposition thereof had been made*, shall be protector of the settlement of the lands included in such prior estate, notwithstanding any charges upon or alienation of such prior estate," &c. And, "If there be several owners of such estate under the settlement, each owner is to be a protector in respect of the undivided share over which the settlement gave him power. If a married woman be protector, her husband shall be joined with her, unless the estate is settled to her separate use."

By sects. 19 and 29, the tenant of an estate tail not barred, and although turned to a right, whether in possession, &c., has power over the fee absolute, subject only to the estates prior to the estate tail: *Doe v. Lord Scarborough*, 3 Adol. & Ell. 43, 897. Tenant in tail in remainder may bar the estate tail without the consent of protector: sec. 34; *Slater v. Dangerfield*, 15 M. & W. 263.

The concurrence of protector is required in barring estates tail in remainder, in order to preserve, *under certain circumstances*, the

control of the tenant for life over the remainder-man. See Sugden's Vendors and Purchasers 404-474, ed. 14.

By sect. 15, a tenant in tail in contingency is authorized to bar estate tail and remainder over: Sugden's Property Statutes 192; Hayes's Convey., 5th ed., 197, n.

It should be observed that the statute *De donis* is not repealed by the act, and the word "tenements," therein used, is defined by Sir EDWARD COKE to mean all corporeal hereditaments whatever.

By sect. 35 of the act we have been considering, "when the estate tail shall have been converted into a base fee, the consent of the protector, if any, shall be requisite to enable the person who would have been tenant in tail, if the same had not been barred, to exercise the power of disposition under this act."

The powers given by this act are not to extend to *expectant* heirs in tail or to tenants in tail after possibility of issue extinct, or to tenants in tail who by the 34 & 35 Hen. 8, c. 20 (an act to unbar feigned recovery of lands of which the king is the reversioner), or by any other act, are restrained from barring their estates tail.

The usual plan adopted is for an eldest son, when about to marry, to join his father as before described; or if his father be deceased, then by his sole act to bar the entail and resettle the estate upon the trusts of his marriage settlement. He is thus enabled to sell portions or effect mortgages to meet family exigencies, and by constituting himself simply a tenant for life in his turn, with remainder to his first and other sons in tail, to preserve the estate for at least another generation. If mortgages are created, of course a power of sale is introduced in favor of the mortgagees, but as transfers are readily made when necessary, such a power is seldom put in force. In the case of the father living at the time of such arrangements, the son's consideration for complying takes the form of an annuity during his father's life, to which otherwise he would not be entitled. The father, on the other hand, is thus enabled to raise a loan for his younger children or for other purposes. In fact, it is only by an arrangement in the nature of bargain and sale, that the entail is carried on, or by the forbearance of the son to disentail without having effected a fresh settlement of the estate.

By 1 & 2 Vict. c. 110, s. 13, a judgment or decree of a court of law or equity, establishing a creditor's rights, has the effect of charging the amount to which he is entitled upon all estates tail

belonging to the debtor, as against the issue and remainder-men, so far as the debtor himself could by the proper means have barred such issue or remainder-men.

Copyholds cannot be entailed except by special custom. In some manors there is an express custom prohibiting entails.

Chattels, real or personal (including leaseholds), cannot, strictly speaking, be entailed, but may by deed of trust be as effectually settled as an estate of inheritance, if it be not attempted to render them inalienable beyond the period allowed by law, *i. e.*, for a life or lives in being and twenty-one years afterwards with, in addition, in the case of a posthumous child, the period of gestation. See *Gilb. on Uses*, by Sugden, 121, n. (4).

It will be seen, from the foregoing, that estates are, necessarily, constantly in the market, notwithstanding the law of entail, and that landed estates from a few rods to 100,000 acres are daily submitted to sale by public auction, or become the subject of private contract.

As any foreigner may now acquire real estate, either by purchase or devolution of law, it is at least satisfactory to know that there is no lack of such investment. Not that the investment itself, with its low rate of interest, arising from the great competition for the possession of land in so limited an area as Great Britain, offers many attractions to an absentee proprietor, but there may be many occasions, in connection with manufacturing and mining interests or co-operative undertakings, where it might be desirable to possess a real estate interest, which until recently a foreigner could not acquire except through the medium of a trustee, and even then, in case of litigation, it is at least questionable whether the courts would have given effect to such a trust, as being in contravention of the common law of the realm, and an evasion which at least a court of equity could not sanction.

Such a difficulty, however, no longer exists, and although purchases by aliens under the rights conferred by 33 & 34 Vict. c. 14, would, probably, for the most part, be effected through the intervention of English lawyers, it is not the less interesting to Americans to know that they can thus acquire whatever they may desire, whether they are resident at home or abroad.

The discovery of an heir in America to a considerable estate in England, would, on the other hand, afford scope to American law-

yers for no inconsiderable knowledge of the real property law of England, and some acquaintance with its principles, its tenures and its rules of inheritance, may not, therefore, in the present day, be deemed superfluous. Such a general historical knowledge is probably required in all *bona fide* legal examinations, and eminent American jurists are well versed in such lore; but it is the practical application of such knowledge to the changes and circumstances of the present day, to which we desire to direct the attention of the profession.

It is hardly necessary to add, that the land law in England is the same for all classes. The smallest and humblest proprietor holds his estate by the same tenure and rule of inheritance as the highest nobleman. The law of *primogeniture* and entail are alike open to all, either to accept and adopt or to repudiate and defeat, as we have essayed to describe.

In Ireland, the facilities of sale and transfer of land are even greater than in England; the Encumbered Estates Act, passed shortly after the Irish famine, making short work of the whole fabric of entails and settlements, whether upon the petition of the proprietor or any judgment-creditor.

Of the land law of Scotland, we are scarcely prepared to speak; the law of Scotland, on almost every subject having but little affinity to the law of England; but at all events the power given by the 33 & 34 Vict. c. 14, to aliens, both to acquire and inherit real estate, applies to the whole of the United Kingdom of England, Scotland and Ireland. The laws of inheritance may be said to be the same in both England and Ireland, but as by the law of Scotland *ante nati* children are legitimated by the subsequent marriage of their parents, whether in that country or in any other country where the law of *subsequens matrimonium* prevails (although such law obtains no recognition for the purpose of inheritance in England or Ireland), the law of marriage and legitimacy might form an important ingredient in the investigation of a Scotch inheritance. See Weightman's Law of Marriage and Legitimacy, published by Henry Sweet of London.

A few references to the state of the law on this subject in the former American colonies of Great Britain, both before and after the Revolution and Independence of the United States, may not be without interest.

Prior to the Revolution the law of *primogeniture* and entail was introduced into the American colonies as part of the common and