THE LAW OF REAL PROPERTY OF NEW BRUNSWICK: SOME PROPOSALS

Alan M. Sinclair†

All Canadian lawyers know that we inherited our Common Law rules of real property from England and know equally that radical changes and reforms were made in this branch of the law in England about half a century ago.[1] No such sweeping changes have taken place here and indeed it is correct to conclude that we have a veritable museum of rules which as nowhere else reflects the great historical background of the English feudal system. Almost any Canadian law student can talk with some comprehension of the niceties of primer seisin and other assorted oddments. It is still of some importance, in this province at least, to know where we get the apparently ridiculous rules. An Australian or New Zealander, and even the odd American, while silently chuckling over our system, longs to come and be immersed for a while in our doctrines, for nowhere else can they be found extant. Such stalwarts as the Rule in Shelley's Case, the Doctrine of Worthier Title or the Rule in *Whitby v. Mitchell*, to mention only a few, stand proudly forth in our jurisprudence along with the almost never-questioned giants of the Statutes of Uses and Enrollments. It is almost as though we have a panorama of the past that is nourished, cherished and indeed revered; there is also the possibility that there is a degree of apathy. Grand reform of certain facets of our legal lives is no doubt possible and indeed has been accomplished. However, apart from occasional substantial and enlightened excursions into the exotic areas of perpetuities and trusts, the fact of life is simple: reform by statute of the rules of real property law is not politically viable; nobody much cares.

With this background therefore, it could seem that a discussion of possible reform is a waste of time. At this juncture it probably is. That is, it is on a grand scale. There is no question but that sweeping reform is necessary and one would find few to quarrel with this conclusion. One would find the same number sufficiently

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† Alan M. Sinclair, LL.B. (Dalhousie), LL.M. (Southern Methodist and Michigan), S.J.D. (Michigan), of the Faculty of Law, University of New Brunswick.

1 In the sweeping Law of Property Act (1925), 15 & 16 Geo. 5, c. 20 (Imp.), begun with the Law of Property Act (1922), 12 & 13 Geo. 5, c. 16 (Imp.), eventually coming into force on January 1st, 1926 and encompassing some six hundred pages of printed Bills.

interested to undertake the monumental task it is. The burden of this article then is two-fold:

The first is to remind those interested in the law of real property of this province of some of the problems inherent in our statutes as they now exist and the second is to suggest a half-dozen changes in our common law that might be considered as desirable to be effected on a statutory base. The number of possibilities in both of these topics is legion. The reader will be able to dredge from his own mind many others. The writer wishes only to mention and discuss a few. The purpose is clearly to highlight and perhaps thereby to serve as an example of the larger work that needs to be done on a more serious base. If this article has only a catalytic effect it will have done more than the writer dares hope.

The obvious place of beginning for a look at present statutory law on real property is the Property Act itself.[2] Remembering that in this first phase we are looking for errors in the existing legislation, there is no question that the most often questioned section is section 18.[3] Don't be immediately disdainful because the first two words of that section are "Estates tail". Please don't leave now with the thought that here is another professor on the loose with nothing more to do than pick bones. It is, of course, true that those words are followed by others which purport to sound the death knell of the fee tail. It is submitted that there are two problems here which still need close scrutiny and one of them, it is further submitted, makes the use of the fee tail in New Brunswick today very much a possible tool. To dispose first of the constructional problem. Most former students of real property will remember that the fee tail grew from the fee simple conditional and served as a very useful vehicle for land transfer and holding for a very long time. The free alienability of land eventually won out of course, and provided the *raison d'être* for this section. As with so many legislative enactments, pressure of time and the persuasion of convenience led the draftsmen to lift the section rather than draft it. The hazards of this are always present however, and in this case proved to lead to a very odd situation. The fact that the draftsman's brother in Nova Scotia made the same error (or perhaps the route was more circuitous) is no longer a salve as Nova Scotia has at least altered its section.[4] In short, when the time came to do away with the fee

2 R.S.N.B., 1952, c. 177.

3 Estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall be adjudged a fee simple; and if no valid remainder is limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple.

4 See *infra*.

tail, the State of New York had already made the move. What easier method of law reform is there than to benefit from another's efforts? So New Brunswick took the New York section and it still stands in our legislation. The problem of course is that the lifter didn't read the rest of the New York statute. Cast a glance back for a moment at section 18. In essence, it says that the fee tail is abolished and if a fee tail is attempted it automatically is changed to a fee simple. Then it concludes that this is to be a fee simple absolute where no valid remainder is limited on the fee tail. Two problems immediately arise. What happens if a valid remainder is limited on the fee tail and what difference does it make anyway because the common law of real property in all its precision has declared unequivocally that there can never be a remainder of any kind after any kind of fee simple—absolute or otherwise. New York had solved these problems by a further provision of its Act whereby ". . . such remainder shall be valid as a contingent limitation on a fee . . .". There is no question that the New Brunswick provision in its present form makes no sense and whether one is prepared to deny the efficacy of the fee tail today or not it obviously needs to be changed. It should be remembered that the words of the section have been litigated with the result that the Supreme Court of Canada (in considering the Nova Scotia version[5]) was content to accept the earlier Nova Scotia decision[6] that the words qualifying the change from fee tail to fee simple were meaningless.

If, however, as will probably be the case, the section is left as it is, an interesting and perhaps practical use of the fee tail as disposed of by this provision can be made when it is considered along with section 31 of the Wills Act.[7]

This section, like the following one, deals with the problem of lapse and if one considers for a moment section 32 it will be noticed that there where a child, brother or sister of a testator to whom real property had been devised, dies prior to the testator and has left issue living at the date of death of the latter then no lapse takes place. It is clear that this saving only takes effect in the restrictive circumstances set forth of relationship to the testator within fairly narrow bounds. When one shifts to a dissection of section 31 however a different set of circumstances is present. There, where a testator has devised real property to X in fee tail and X has predeceased the testator (but leaves issue) and such issue are in turn still alive at the date of death of the testator, then again no lapse takes place. Two restricting and interconnecting results flow

5 *Ernst v. Zwicker* (1897), 27 S.C.R. 594.

6 *Re Simpson* (1863), 5 N.S.R. 317.

7 (1959), 8 Eliz. II, c. 15 (N.B.).

from this section. The first is that lapse is defeated here regardless of degree of relationship to the testator and second it becomes obvious that such a result can only be imagined if fee tail has a *scintilla juris*.

To put it as succinctly as possible then, a solicitor drawing a will and wishing to prevent any possibility of lapse (as far as is humanly possible, that is) could so plan the desires of his client as to make a devise to a person not fitting within section 32 and do so by the addition only of the words "in fee tail". Considering the effects of this under both section 31 of the Wills Act and section 18 of the Property Act the result apparently is this: under the former section there is no question that a devise to A in fee tail (or to A and the heirs of his body) is a devise that "would have been, under the law of England, an estate tail". Section 31 then performs its service of preventing lapse and the devisee's estate for some degree of time at least has a fee tail. It would appear that immediately section 18 of the Property Act fastens on this and the estate tail is to be "adjudged a fee simple". The combination of course is clear. It may not be too far-fetched then to suggest to solicitors involved in will-drafting that this anomaly of our law does offer a vehicle which in certain cases may be useful to effect the desires of some clients. The conclusion can be stated shortly. If any change is proposed in the way of reformation of the Property Act, section 18 might well be a proper place to begin. Such an amendment would not, of course, alter the possible usefulness of the combination of the Wills Act and the Property Act as discussed above.

The second suggested change in the existing provisions of the Property Act concerns section 11 and in particular subsection (3) thereof which provides that "In a conveyance, it is not necessary in the limitation of an estate in fee simple to use the word 'heirs', but it is sufficient if the words 'in fee simple' are used". The original, common law, requirement, of course, was that any *inter vivos* conveyance of the fee simple in order to be valid had to contain the "magic words": "and his heirs". Failure to do so resulted at most in the creation of a life tenancy in the grantee. This subsection then does have the merit of enlarging this stricture by making it possible to convey the fee simple in an alternative manner. The fact remains, however, that outside these two methods, to which strict adherence is required, no creation of a fee simple in a grantee is possible. A great many jurisdictions have altered this to align the method of conveying *inter vivos* with testamentary transactions. It will be remembered that in the latter case failure to include any words of limitation in the devise of real property is not a fatal error on the part of the testator and unless a contrary intention is evidenced in the will the fee simple will pass to the devisee if the testator

himself was possessed of that estate when he died. It is submitted that no reasonable case can now be made for a different requirement in the law of conveyancing and that a section similar to that in use in other Canadian provinces[8] should be enacted in subsitution for section 11 (3) of the Property Act.

The third possible change to be considered lies in section 8. This section, designed to remove the rigors of a failing interest in the nature of a contingent remainder, does not do all that it should or could. The history of the contingent remainder is shortly told and all we need remind ourselves of here is that at the common law a contingent remainder in freehold is subject to destruction where the preceding estate of freehold (on which it must be hinged) has come to an end and can no longer support it. Under this rule then where an estate is limited to a wife for her life and the remainder is to go to such children of the testator as reach 21 years of age (the testator dying before any children reach that age) the contingent remainder in the children is open to destruction if at the time their mother dies they have not fulfilled the condition; the reversion (attached to all contingent remainders) then works and the title reverts to the estate of the testator. A similar result flows at the common law if for any reasons other than death the estate of the

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8 E. G. The Ontario provision (R.S.O., 1960, c. 66) reads as follows:

5(1) In a conveyance, it is not necessary, in the limitation of an estate in fee simple, to use the word "heirs".

(2) For the purpose of such limitation it is sufficient in a conveyance to use the words "in fee simple" or any other words sufficiently indicating the limitation intended.

(3) Where no words of limitation are used, the conveyance passes all the estate, right, title, interest, claim and demand that the conveying parties have in, to, or on the property conveyed, or expressed or intended so to be, or that they have power to convey in, to or on the same.

(4) Subsection 3 applies only if and as far as a contrary intention does not appear from the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

(5) This section applies only to conveyance made after the 1st day of July, 1886.

Nova Scotia has an even simpler formula

Section 2 (2) provides:

2 (2) A conveyance does not require a habendum or any special form of words, terms of art or words of limitation.

and in Section 5

(5) Except where a contrary intention appears by the conveyance,

(a) where words of limitation are not used, the conveyance conveys the whole property right that the party conveying had power to dispose of by the conveyance, including, in the case of real property, the fee simple;

R.S.N.S., 1967, c. 56.

preceding life tenant comes to an end, as by merger, forfeiture, etc. The rule was harsh; the contingent remainder in freehold could not exist as such without the preceding freehold interest remaining intact; seisin was the reason. Section 8 of the Property Act was designed to substantially alter this position in providing that even if the preceding life estate determined before the remainder vested, no destruction would take place but only if that life estate came to an end through "forfeiture, surrender or merger". Forfeiture won't bother us much any more, surrender or merger may. This leaves, it is submitted, two areas in which destruction is still possible: natural termination of the preceding life estate (through death of the life tenant) and disclaimer. As to the latter it can only be assumed that omission of this category from section 8 was an error. The section is patterned on the English Real Property Act of 1845,[9] which resulted a few years later in the Contingent Remainder Act of 1877.[10] The latter Act apparently cured the defect by adding disclaimer to the list extant now in section 8 of the New Brunswick Act.[11]

Unfortunately, destruction of contingent remainders by removal of the preceding freehold by natural termination (*e.g.*, death of the life tenant), is a more tortuous tale. The passage of the Statute of Uses should have cured this defect, or at least made it possible to be cured, provided the right process of raising a use (or using an executory devise) was invoked. In other words, once it became possible to have springing executory limitations, the death of the life tenant prior to vesting of the contingent remainder should have moved the fee into the estate of the grantor (or testator) until the condition happened (say, coming of age of the remainderman) and then it should have sprung out of the former into the latter. This was one of the great and far reaching results of the Statute of Uses. Such a result was not to be however because of the strict rule put forward in *Purefoy v. Rogers*.[12] In establishing this now famous rule the court was all too clear in pointing out that where a limitation could be construed to be either an executory interest or a contingent remainder it must fall into the latter class. Shortly then, natural termination still (as long as *Purefoy v. Rogers* remains with us) destroys unvested contingent remainders. While subtle devices can be employed to circumvent the rule (mainly by so wording the conveyance that no possibility exists of classification as a contingent remainder, as a limitation to the wife for life and one day later to those children attaining 21 years of age—a contingent remainder

9 Real Property Act (1845), 8 & 9 Vict., c. 106, s. 8 (Imp.).

10 Contingent Remainders Act (1877), 40 & 41 Vict., c. 33 (Imp.).

11 See Laskin, *Cases and Notes on Land Law* (Toronto, 1958), p. 348.

12 (1671), 2 Wms. Saund. 380; 85 E.R. 1181.

in the children here being impossible as the rule that a contingent remainder must vest at or before the termination of the preceding life estate is run afoul of) it should be possible by more modern, legislative means to cure this defect. The second English statute mentioned earlier[13] had this effect. Only one Canadian province, Prince Edward Island, has followed suit.[14] It is now submitted that along with a few of the other old gems of the history of real property law to be looked at shortly, *Purefoy v. Rogers* has got to go and the Property Act of this Province should be amended accordingly. It would be appropriate if a new subsection (2) were added to section 8 to contain the same basic provision as that now in existence in Prince Edward Island.

A minor change in subsection (1) of section 10 is suggested as well. The opening words of the section state that "A feoffment made after the first day of July, 1904, is void at law unless evidenced by deed; . . .". The writer heard a distinguished lawyer of this Province once argue (without specifically referring to this section) that conveyance of real property by feoffment had been abolished. This misconstruction of the provision of this section is easily assumed. There is no question that a deed is a prerequisite to a valid *inter vivos* conveyance today. This is not to say however, that this has short-circuited one of the former major methods of alienation of land. It is still possible to convey by feoffment, so long as this procedure is followed by a deed. It is submitted, of course, that as the deed does the job by itself (basically by the provisions of the previous section wherein it is categorically stated that a conveyance of the immediate freehold lies "in grant as well as in livery"[15]), no person would ever consider adding the burden of a livery. We must be careful however, not to go too far. The English Law of Property Act of 1925, in section 51, abolished conveyances "by livery or livery and seisin, or by feoffment or by bargain and sale". There is a valid argument, in New Brunswick, for abolishing feoffment, and it is submitted that this should be done by amending section 10, but let us not go too far and abolish the conveyance by bargain and sale; at least not yet. So long as we have the Statute of Uses in effect, the results, mainly in conveyancing, future interests and trusts, achieved by application of that Statute can only be invoked in such a circumstance as where a use has been raised and a bargain and sale transaction is one of the major methods of raising a use. A complete new Property Act is necessary to dispense with the

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13 Note 10, *supra*.

14 R.S.P.E.I., 1951, c. 138.

15 9(2) All corporal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery.

Statute of Uses and no one would recommend arbitrary repeal of it without complete study and overhaul of all our property legislation. Until that happy day arrives we must be extremely careful in our patchwork.

One very small point remains in this first part of this article on proposed changes in the existing legislation. This concerns section 43. In subsection (1), a mortgagee is required, when exercising the power of sale granted in the preceding section, to abide by certain rules calculated to advise the mortgagor of his impending move. Three clauses follow the admonition to the mortgagee, *viz.* he must do "(a); or (b); and (c)." It may be picayune to question what is apparently straight forward but the writer wishes to know if it would be satisfactory to do just "(a)" or must he do "(a)" and "(c)"? To put it in simpler, more dramatic form, if I am invited to a party and asked to bring (a) a bottle of scotch; or (b) a bottle of rum; and (c) a bottle of brandy, do I satisfy my host by bringing the Scotch (or the rum and brandy) or must I bring the Scotch or rum, and the brandy? Do I therefore, as a mortgagee, fulfill my obligations by advising the mortgagor under clause (a) and then relax, or may I do otherwise and adopt, as an alternative, advertisement under clause (b) and (c), or must I abide by either (a) or (b) and then do (c) as well? It is submitted that an argument could be made (perhaps not all that seriously) for any of these. If this is correct, a mortgagee can satisfy the statute by doing (a) alone, of course. It is suggested therefore, that any heavy amendment to this Act should include a restatement of this section so as to make this more clear; a tabular form of construction may perhaps provide the easiest solution.

Turning now to the second area for discussion outlined above, namely, that of suggested changes in our common law that might be made on a statutory base for the first time in this Province, one of the most "popular" reforms brought up from time to time concerns the Rule in Shelley's Case. A commonly accepted statement of the Rule would proceed like this: Where an estate of freehold is given to a person and in the same will or deed an estate is given either mediately or immediately to his heirs (or the heirs of his body) and both are legal or both equitable, it is a rule of law that the word "heirs" (or "heirs of his body") is a word of limitation and not of purchase. Accordingly, in a conveyance to A for life and remainder to A's heirs, instead of A and A's heirs each taking an estate, as one would have thought, A receives, under the Rule, a life estate and the remainder in fee and then the doctrine of merger works to give A a fee simple absolute. (It is perhaps worthwhile to remind ourselves here that, unlike many have assumed, the Rule, by itself, did not give A the fee simple absolute but only the limita-

tion to A's heirs and gave that interest to A so that any intervening freehold—say a life estate in B –would prevent immediate merger.) Leaving aside the reasons for the Rule (none of which really pertains anymore) it should be noticed that the application of it does not depend on any intent of grantor or testator, it is truly a rule of law. This is one of the harsher components of the Rule for while intention may be looked at to determine who the grantor or testator had in mind, once the determination was made that the conditions fitted the Rule no statement, however categorical, of intent, could vary the result.

While one can escape the limitations on conveyancing presented by the Rule, as by ensuring that the life interest and the remainder differ in that one is legal and the other equitable, or by giving A (in the example above) a leasehold interest, say for 99 years, there are obvious inhibitions to such moves. There is no question that this is one of the relics of the past which no longer has any reason for remaining and should be done away with. Legislation is the only really effective way to do this. Courts have been trying to do it on their own at least since 1769 when Lord Mansfield attempted it in *Perrin v. Blake*.[16] No Canadian Province has as yet done away with it although there is at least a possibility that Alberta has succeeded by the ruling in *Re Simpson*.[17]) England, in its reform legislation referred to earlier, abolished it for all instruments coming into operation after 1925. The provision to accomplish this can be very simple, a statement that what was the effect of the Rule, that the word "heirs" was a word of limitation, now is to be considered as a word of purchase.

A situation in conveyancing often confused with the Rule in Shelley's Case, the so-called Doctrine of Worthier Title, should be mentioned here as well. This is another relic of the past which, it is submitted, should be done away with. Under the Doctrine,[18] when a conveyance (or testamentary disposition) consisted of a limitation by O to A for life with a remainder to O's heirs, then the remainder in the heirs was transformed into a reversion in O. Today, this situation would more probably arise in that case where a grantor, A, sets up a trust whereby the trustee is required to pay the income therefrom to A for life and upon A's death to convey the property to A's heirs. The attempted remainder (contingent and equitable, of course) in A's heirs is again changed under the Doctrine to a reversion in A. The interests under the Doctrine of Worthier

16 (1769), 1 Wm. Bl. 672; 96 E.R. 392.

17 [1927] 4 D.L.R. 817.

18 The name of this doctrine arose because of its application to a situation which can no longer exist as well as to the situation outlined hereunder which does remain.

Title then are always taken away from the heirs and given to the ancestor. The combination of these two, the Rule in Shelley's case and the Doctrine of Worthier Title, have, because they obviously encompass such a wide spectrum of possible limitations to remaindermen, held sway for a period and manner totally inconsistent with their initial stature. There is no question but that they are traps for the unwary; even the wary stumble. Intent is obviously defeated; a grantor who has entered into a conveyance by which he assumes that he has effectively divested himself of all but a life interest will find that he possesses the reversion as well and, most important, this is open to attachment by his creditors. He can, of course, (if he realizes during his lifetime what he has done) leave the reversion to his heirs in his will and accomplish what he originally set out to do; the problem arises because this realization almost never comes while he is alive. Failure to recognize the trap will result in most cases therefore on the interest falling into the grantor's residuary estate. Like the suggested legislative approach to Shelley, the solution is simple: the Doctrine can be dispensed with by a short, succinct statement (in the Property Act) to the effect that a remainder to the heirs of a grantor is to remain as that and not to result in a reversion in the grantor.

Thirdly, another of the old ghosts still haunting is the Rule in *Whitby v. Mitchell*.[19] In its simplest form, where a life estate was given to A, remainder for life to his eldest son and remainder in fee to his sons and their heirs and A had no son at the date of the conveyance, then the remainder in fee was void. A was alright as he was alive and could take the present interest, his son was alright, possessing a valid (contingent, of course) life estate but the further unborn remaindermen were thought to be just too far away. While mitigated by the courts to some extent by the Cy-Pres Doctrine,[20] this was not of much help and the Rule was done away with in England in the 1925 sweep. It forms one of the trilogy, with the two above-discussed relics, of traps which still wander aimlessly through our reports. No greater need for it exists than for the others and it is submitted again that it can be legislated out in short order. Failure to move here is not of such pressing importance however as the Rule against Perpetuities apparently will handle most of the problems arising here in any event.

Many people (including many courts) over a very long period of time have tended to confuse two classes of future interests: possibilities of reverter and reversions (particularly, in the latter

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19 (1890), 44 Ch.D. 85.

20 See Megarry, *A Manual of the Law of Real Property* (2nd ed., 1955), pp. 144-145.

case, with reversions attached to contingent remainders). It is with the possibility of reverter that we must concern ourselves here for a few moments. This is the interest remaining in a grantor of a fee simple determinable. In the conveyance by O to A and heirs so long as the property is used for school purposes, A has a fee simple determinable, and to take care of the event happening of non-user, O has the possibility of reverter. Whether this is a contingent or vested interest in O has also been the subject of debate for a considerable period. It has been the opinion of the writer that it is a vested interest (the condition precedent to O's getting the use of the interest again is only so attached and not to the estate itself; or, to put it another way, O had a fee simple absolute, he has given away a fee simple determinable and he therefore must have something left; this slice of the orange is the possibility of reverter; there are no strings attached to retention only to enjoyment). The question of alienability of the possibility of reverter, *inter vivos*, was settled in New Brunswick some years ago. Section 14 of the Property Act provides that such an interest may be "disposed of by deed". As well, the interest is devisable under section 2 of the Wills Act. This leaves only the case of devolution upon intestacy and here lies the potential problem. If the writer's thesis above that the possibility of reverter is a vested interest is not accepted then the problem becomes more acute for section 3 of the Devolution of Estates Act[21] provides only for devolution of estates "*vested* in any person". Perhaps a reference to a recent Canadian case will shed some light. In *Re Tilbury West Public School Board and Hastie*,[22] the Ontario High Court held that a grant to certain persons "as long as the land shall be used and needed for school purposes" created a fee simple determinable in the grantees and left a possibility of reverter in the grantor. For our purposes this fairly common form of conveyance is important for the Court was asked to decide, once the categorization had been done, on the effect of the Rule against Perpetuities on these estates. In holding that the possibility of reverter did not violate the Rule against Perpetuities, the Court relied on the interest in the grantor being vested.[23] A succession of English cases had held the opposite[24] and the matter had been in some doubt in Canada.[25] Getting back to our immediate problem then, of whether under our Devolution of Estates Act, a possibility of reverter descends under section 3, it would appear that if this

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21 R.S.N.S., 1952, c. 62, s. 3.

22 (1966), 55 D.L.R. (2d) 407.

23 ". . . the right of reverter existed in the grantor and was vested in him from and after the date of execution of the deed". *Ibid.*, at p. 416.

24 These are pretty well all cited in the above case.

25 Laskin, *supra*, note 11, at p. 52.

Ontario case has persuasive value—as, it is submitted, it should—then all three possible areas of transmission of this interest have been covered. The only probable question remains as to whether this should be the case. In this connection, it is interesting to note that while agreeing with the thesis that a possibility of reverter is a vested interest and would not therefore fall under the Rule against Perpetuities, the Ontario Law Reform Commission has recommended that the interest should be subject to the Rule and they further recommend legislation to ensure that this is done. It is hard to imagine this being accomplished without destroying the significance of the possibility of reverter being a vested interest and it would have to be concluded, therefore, that once accomplished the vesting would have to go. This type of legislative step would then have repercussions on the case of devolution upon intestacy under the Devolution of Estates Act. Aside from this rather tangential investigation pointing out a possible path for us to follow, it also clearly illustrates the latent danger in patching one area of the fabric of this highly integrated system of rules without first closely looking at the others. It is recommended therefore that at the moment no change need be considered in our statutory rules regarding this class of future interest but that future recommendations need be watched very carefully.

Switching now from the Property Act itself, but still remaining within the area of real property and the legislation presently extant appertaining thereto, it might be worthwhile to glance shortly at two other New Brunswick statutes that will bear some dissection.

The New Brunswick Dower Act[26] still partially controls the law of conveyancing to a considerable extent and what hazards of this nature are not placed on a conveyance by the Act are done so by the rules of dower at common law.[27] While it may not be politically healthy to repeal the Dower Act and also abolish the common law of dower, there is no question but that dower is today an anachronism. The combination of testator's family maintenance Acts, intestacy legislation, wills Acts and almost complete bar of dower provisions has swept past and obviated this ancient protection. We have made the move on curtesy[28] and it is submitted that dower should follow. It served a much earlier era; it no longer serves today. Rather it hinders free conveyancing and its supposed protection can be fairly easily circumvented in the somewhat rare case of potential use. The use of the power of appointment, a conveyance

26 R.S.N.B., 1952, c. 64.

27 The Common Law rules of dower still having considerable vitality; see section 3 of the Dower Act. The Act really only enlarges the application by extending the concept to equitable interests and rights of entry.

28 Married Women's Property Act, R.S.N.B., 1952, c. 140, s. 8.

to uses, a conveyance of the equity of redemption by the husband alone are only a few of the accepted devices.

Be all that as it may however, we will presumably keep dower in our armoury for some time yet. If this is so, perhaps one or two questions about it as it now exists may be asked. First of all, the problem might arise of interpretation of a provision of section 5. The provision here is that "when a wife has been divorced by her husband . . . by reason of adultery by her committed, she shall not be entitled to dower out of any lands of her husband . . .". This is no doubt straightforward but raises the obvious question of what happens if the divorce is obtained by the wife? Presumably, the common law will apply. And the common law was clear: ". . . divorce barred all marital rights of both parties without regard to the location of fault"[29]. The trouble lies in the spelling out of the loss of rights by the wife in section 5 of the Dower Act and thus by implication in effect saying that if the divorce was obtained by the wife then her dower will be preserved. If this is not the result then it would appear that the provision of section 5 is redundant. It could be suggested then that, if thought desirable, section 5 should be amended so as to cover both sides of the coin. The reference in the opening words of section 5 to section 10 of an Act of George III and to section 37 of the Divorce Court Act is extremely interesting in this regard and if one refers to section 10 as mentioned becomes more so.

It should also be pointed out that it might be worth considering a provision regarding dower and conveyancing from the Province of Ontario. The Dower Act of Ontario[30] provides that when a husband who is living apart from his wife seeks to sell property and encounters bar of dower difficulties he may apply to a judge of the Supreme or County Court for an order dispensing with her concurrence in the deed. Once this is accomplished, the judge ascertains the amount of the wife's dower and orders it paid into court. It would appear that such a provision would close what appears to be the only gap remaining in this aspect of conveyancing; the submission is still advanced however, that dower should altogether disappear.

Finally, one of the most vexing problems facing solicitors today, and which has been so for a very long time, is that of title searching and certification of title. There is no doubt that a land titles system is, while perhaps not a panacea for all these legal ills, the most efficacious approach known today. Apathy and expense are its obstacles but presumably it will come into being someday. Consideration has no doubt been given to such a system and its many

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29 *Powell on Real Property* (1950), Vol. 2, s. 216.

30 R.S.O., 1960, s. 13.

variants for New Brunswick and it is really not the burden of this article to push the case any further other than to recognize the need, not only from a theoretical point of view, but from the practical side as well. Space is at a premium and time more so. The introduction of a survey system based on a grid coupled with a land bank makes a new registry of title system not only easier but almost mandatory. It is time we gave serious thought to it; until we do it might not be amiss to provide an intermediate palliative. We are all aware of the process of title search under our present set-up: taking the chain back to a good root (how far this is varies considerably from office to office and location to location) based on crown grant or some other more recent episode. It is the practice in Nova Scotia to go back at least forty years to a good root and it is from this that it is submitted we might take our key. Any selection of minimum time is necessarily based on some provision of a statute of limitations, and a glance at the English solution will perhaps add a measure of assistance. It had been held in England, at least since the beginning of the nineteenth century,[31] that on searching title all one needed to do was go back in time to a good root at least sixty years before. This sprang from the judicial ruling that possession by a grantor for this period prior to a contract to sell was sufficient for all practical purposes to provide *prima facie* evidence of the right to convey.[32] This assumption was reduced to forty years in 1874[33] and to thirty years in 1925,[34] both by statute. As the majority of our limitation periods, as established by statute, have as their base either a twenty or a forty year period then forty years is an appropriate figure to settle on at this juncture. If one were to do this then it might be practicable to establish, by statute, a system whereby it is stated that any registered conveyance of the fee simple by way of grant or legal mortgage at least forty years before the date of the search is a good root of title and that once that is found, a bringing forward of the search to the present time is all that is required so far as certifying title is concerned from the evidence provided by the registry office and other public records. A view will of course have to be taken as well to displace any fear of title by adverse possession or prescription.

This kind of first aid is not really healthy of course and it bears repeating that we can not really afford to continue on our present course. It would be satisfying to all (eventually, at least) to have a land titles system whether it be as sophisticated as to provide for a central registry or not. This kind of cure can be done on a basis

31 *Barnwell v. Harris* (1809), 1 Taunt. 430.

32 See Cheshire, *Modern Law of Real Property* (10th ed., 1967), p. 659.

33 Vendor and Purchaser Act (1874), 37 & 38 Vict., c. 78, s. 1 (Imp.).

34 Law of Property Act (1925), 15 & 16 Geo. 5, c. 20, s. 44 (1) (Imp.).

whereby no great expense is involved all at once as is the case with an overnight creation of a Torrens system. Rather, it is possible, once the survey work (already under way in New Brunswick) is complete, to gradually wend our way into it by a system whereby as each piece of surveyed property comes up for lease, sale or mortgage it is investigated, surveyed, classified and certified. There is really no need for doing that piece of property any earlier and the gradual manner of proceeding removes the sting of expense and time. This is another of those areas of law reform which needs a great deal of prior working out and if a few forward looking practitioners were prepared to advise the government on its implementation then the job could be done in its most effective manner. It is the practicing solicitor who needs the help in this area; he is the most knowledgable from having done and indeed doing the work of title searching; and it is he who will ultimately be able not only to improve his own position but materially aid his client as well.

It will be obvious to anyone who has lasted this long that I have omitted to mention one of the most necessary reforms we have facing us today and that is the problem of what is to be done with the Rule against Perpetuities. Such a topic is however really beyond the scope of a simple article as this and is such a pervasive and difficult topic that it requires intense study on its own. The Province of Ontario has concluded such a study and reference to their report is thought sufficient for anyone interested in this area to begin with. It is a highly specialized field and obviously one of extreme importance not limited necessarily to the real property sphere. We in this province need reform in the application of the Rule as badly as anyone else; without a law reform commission or similar body it is a formidable and unenviable task.

In conclusion therefore may the writer respectfully suggest that the changes in our legislation mentioned in this article are long overdue; there are many others in this field as of course in others. I don't seriously suggest that a great many people are really all that much interested in this facet of law; a large number are in the many areas of law, particularly on the legislative side, that need reconstruction. We are long overdue for a revision of the New Brunswick statutes; perhaps consideration could be given to reflection in a new revision of what should be done to modernize the laws of real property along with the necessary reforms in the other parts of our legal system.