INTRODUCTION TO THE LAW OF REAL PROPERTY

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INTRODUCTION

TO THE

LAW OF REAL PROPERTY

An Historical Background of The
Common Law of Real Property
And Its Modern Application

By

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PREFACE

This book is basically a revised edition of A Preliminary Survey of the Law of Real Property. In the twenty-two years that have elapsed since the publication of the Preliminary Survey, there have been many important changes and developments in real property law. This new edition reflects such changes.

A substantial portion of the text has been re-written and the treatment of such topics as estates and future interests is more extensive than in the earlier edition. The possibility of reverter, the power of termination, the contingent remainder, and the doctrine of worthier title, for example, are discussed more fully. But the scope of the two books is the same and the general arrangement of the subject matter in the earlier work has been retained. And there has been no change in the objective stated in the preface to the Preliminary Survey of providing the beginning student with "a simple, concise text setting forth in outline form the older and the modern law" in selected areas of real property law.

The past few years have witnessed the publication of three great treatises on the law of property—the American Law of Property (Casner ed.), Powell on Real Property, and Simes and Smith on Future Interests. Anyone writing in this field is necessarily indebted to the authors of these works. My frequent citations to these treatises are not only for the purpose of indicating supporting authority for textual statements; they are also used to encourage students to turn to these books for a more comprehensive treatment of the topics under discussion.

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Boston, Massachusetts
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INTRODUCTION TO THE LAW OF REAL PROPERTY

Chapter 1

THE BACKGROUND

INTRODUCTION

It would be economical in terms of time and effort if we could begin the study of the law of real property by proceeding directly to a consideration of that law as it is in our own day and place. Unfortunately, such a short cut is not practical. A thorough understanding of the modern land law is impossible without a knowledge of its historical background. That law has been a millenium in the making. During this long period great changes have been effected by means of legislation and decisions, as well as by the development of new social systems and customs, but the process of change has been one of evolution, not revolution. The imprint of the past is still discernible in the present. In this branch of the law more than any other we can time and again invoke the often quoted statement of Mr. Justice Holmes: "Upon this point a page of history is worth a volume of logic." [1] And if the aridity of legal history tends to be irksome we might

[1] New York Trust Co. v. Eisner, 256 U.S. 345 at 349, 41 S.Ct. 506 at 507, 65 L.Ed. 963 at 983 (1921).

recall Mr. Justice Cardozo's statement that this is a field "where there can be no progress without history." [2]

SECTION 1. THE NORMAN SETTLEMENT

And so we begin with the England of the Norman Conquest (1066). The Norman arrow, shot perhaps at random, that pierced the eye socket of Harold, the Saxon king, decided not only the Battle of Hastings but deflected the course of development of English law for centuries to come. The Conquest, while preserving the frame-work of the Old English state, gave to England a new dynasty, a new ruling class and a new system of land holding.

The Conqueror operated on the principle of political legitimacy. Tenuous as his claim to the English throne may have been, his successes in battle put beyond dispute his assertion that he was the legitimate successor of Edward the Confessor and, therefore, entitled to the rights and prerogatives of an English king.[1] Consequently, those who had opposed him at Hastings and in the later risings forfeited their lands.[2] The Saxon nobility, who had formed the backbone of the opposition, were for the most part wiped out or driven into exile. Their lands became available for distribution to William's men as a reward for services and the distribution itself served as a means of establishing on a solid foundation a new Norman aristocracy.

It is a tribute to the extraordinary administrative ability of William that this vast redistribution of English lands was carried

[2] Cardozo, Nature of the Judicial Process 54 (1921). And see Wyzanski, History and Law, 26 U. of Chi.L.Rev. 236 (1959).

[1] The struggle between Harold and William for the English Crown is vividly and authentically portrayed in Hope Muntz's magnificent historical novel, The Golden Warrior (1949).

[2] See the writ of William I to the Abbot of Bury St. Edmunds ordering the abbot to turn over to the king the lands of the abbey tenants "who stood in battle against me and were slain" at Hastings. The writ is set out in Douglas and Greenaway, 2 English Historical Documents 918 (Oxford Univ. Press, 1953).

out in an orderly manner. The whole process was controlled by the firm hand of the king. Immense holdings were granted, as might be expected, to his kinsmen and to his closest associates in the great project of the Conquest. To ten of his principal followers he gave almost one-fourth of England.[3] To lesser barons he made grants of the smaller fiefs or holdings of English earls and thegns. Normally, the grants were not of a compact territorial unit but consisted of manors scattered through several counties.

The properties granted consisted in part of land for use and occupancy, and in part of a congeries of rights and privileges correlative to customary services and duties owed by the humbler tenants living within the manorial extent. The peasant occupants of village lands were probably left undisturbed for the most part in their little holdings but they acquired new lords to whom they must render the ancient dues. Continuity with the past was preserved through the principle applied by the Conqueror that every earl, bishop, abbot and baron to whom he gave land held it with the same rights and privileges as his English predecessor in title had on the day when King Edward the Confessor "was alive and dead." [4]

The larger baronial estates, or honours as they came to be called, were normally created out of the holdings of numerous Englishmen. As many as eighty English estates, situated in different regions, might be combined to compose a single lord's honour. In the course of the Norman settlement several thousand smaller estates were compressed into fewer than two hundred major honours. The lords of these honours were the men who, with William, established the new English state.

[3] See Douglas and Greenaway, 2 English Historical Documents 22 (Oxford Univ. Press, 1953).

[4] This curious expression comes from Domesday Book, the record of the great survey of England made by William's order in 1086. See infra, § 4.

SECTION 2. THE INTRODUCTION OF FEUDAL TENURE

From the legal standpoint one of the significant aspects of the Norman plantation was the introduction into England of the most highly organized type of feudal tenure—military tenure. Feudalism is a generic term that may be used to describe the social structure of Western Europe in the Middle Ages. It had for its central core the relationship of lord and vassal (not then a word of opprobrium) bound together by a bond of personal loyalty and owing mutual aid and assistance. The relation was usually evidenced by the solemn ceremony of homage wherein the vassal knelt before the lord, acknowledged himself to be his man, and swore fealty to him. It was frequently accompanied by a grant of land from the lord to the vassal, the land to be held of the lord by the vassal as tenant.[1] Normally, by the terms of the grant specific services were imposed on the tenant and these services (*servitia debita*) were considered to be a burden on the land itself.

Military tenure was known in Normandy and the Conqueror used it to build in England a military organization adequate to maintain the Crown against rebellion from within and invasion from without. Most of the lords and barons to whom he granted English lands held them under an obligation to supply a specified quota of knights for the royal host whenever they should be required. The number of knights to be furnished was in each case fixed by the terms of the charter evidencing the grant and, therefore, initially depended on the will and necessities of the king. This number bore no constant relation to the size or value of the honour granted. The lay lords who received grants of the

[1] Land was not the only subject matter of a feudal grant. It was customary throughout Western Europe in the Middle Ages for great and petty lords to obtain vassals bound to render military service by granting to such vassals a monetary annuity. The feudal bond was created by the rendition of homage by the grantee to the grantor. These grants numbered in the thousands. In the medieval period status performed the function that contract does in the modern law. For a detailed study of feudal annuities see Lyon, From Fief to Indenture (1957).

king [2] were, of course, accustomed in their own countries to the institution of tenure, or land holding, in return for military service to a lord. Not so were the bishops and abbots to whom William gave lands, or confirmed older grants, on condition of knight service. On these ecclesiastical tenants in chief he also imposed the duty of finding a stipulated number of knights for service in the feudal host.[3] This innovation of the Conqueror, induced by the military necessities of the times, yielded an additional 800 knights, in round numbers, for the king's service. In all, the quota of knights demanded of the lay and ecclesiastical baronage amounted to approximately 5000 men.

SECTION 3. THE CREATION OF SUB-TENURES

The expense to the tenants in chief of maintaining as part of their households the prescribed quota of knights must have been considerable. Moreover, the constant presence in the household of a number of armed men, inclined to be disorderly at times, was a matter of concern particularly to the ecclesiastical tenants. Slowly at first but with increasing frequency the tenants in chief made allotments of lands to their knights who thereupon became tenants of their lords. The amount of land given in return for the obligation to supply the service of one knight (the knight's fee of feudal records) varied. It depended on the bargain made by the lord and his prospective tenant. A particular tract might be made up of a number of knight's fees and, in later times, might be subdivided into fractional parts of a knight's fee. In

[2] A person holding land directly under the king was called a tenant in chief (in Latin, tenant *in capite)*

[3] The Constitutions of Clarendon (1164), purporting to embody established feudal customs, provided in Cl. XI: "Archbishops, bishops and all beneficed clergy of the realm, who hold of the king in chief, have their possessions from the lord king by barony and are answerable for them to the king's justices and officers; they observe and perform all royal rights and customs and, like other barons, ought to be present at the judgments of the king's court together with the barons, until a case shall arise of judgment concerning mutilation or death." Douglas & Greenaway, 2 English Historical Documents 721 (Oxford Univ.Press, 1953).

some cases the number of knights enfeoffed, that is, given land, by the tenant in chief exceeded the quota owed for the king's service and in other cases the number was less.[1] This was a matter of the development of the individual honour.

All tenure implied service due from the tenant but the service fixed at the creation of the tenure might be and often was non-military in nature. The king made provision in land for his important administrative and household officials and to such tenures was attached the duty of rendering specific services necessary to the functioning of the royal household. The service prescribed required the performance of such duties as those of marshal, steward, butler or chamberlain. These were tenants of dignity and rank but this type of tenure also embraced tenants who served the king in his chamber, his pantry and his kitchen. The Conqueror, for example, gave half a hide of land (about 60 acres) in Gloucestershire to his cook. The greater tenants in chief, whose households were often royal establishments in miniature, also gave lands to some of their retainers subject to the obligation to render a prescribed personal service to the lord. Such tenures, whether held of the king or of an intermediate lord, became known as serjeanty tenures.[2]

Moreover, many a small landholder found it advisable in an unruly age to place himself under the protection of some powerful earl or abbot by becoming his man. He hoped thereby to

[1] In 1166 Henry II ordered each of his tenants in chief to answer what amounted to a questionnaire on the number of knights enfeoffed on the tenant's estate and the number required by his *servitium debitum*. The purpose of this survey may have been to provide a basis for an increase in the feudal assessment which in most cases had been fixed in the Conqueror's reign. The returns of the tenants in chief (*Cartae Baronum*) show in many cases the enfeoffment of more knights than required for the king's service. The return of the Archbishop of York explains how this came about: "For our predecessors enfeoffed more knights than they owed to the king, and they did this, not for the necessities of the royal service, but because they wished to provide for their relatives and servants." Douglas and Greenaway, 2 English Historical Documents 907 (Oxford Univ.Press, 1953); 3 Holdsworth, History of English Law 42–43 (3rd ed. 1927).

[2] Serjeanty tenure is further described in § 6, infra.