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MANITOBA

COMMISSION DE RÉFORME DU DROIT

REPORT

ON

SMALL PROJECTS

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Report #62

The Manitoba Law Reform Commission was established by *"The Law Reform Commission Act"* in 1970 and began functioning in 1971.

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FOREWORD

In this Report, the Commission considers three small areas of the law which require legislative reform. The first area of study is section 6 of *"The Mercantile Law Amendment Act"*, C.C.S.M. c. M120. This section was enacted in Manitoba 90 years ago to abrogate the common law which would not enforce debt settlement arrangements because of the requirement of consideration. In Part I of this Report, we review the scope of this legislation, its judicial interpretation, as well as the historical background to the legislation. Recommendations for legislative amendment are made both to improve the section's clarity and to take into account developments in the law since its statutory inception.

Parts II and III of this Report deal with two small areas of the law of property: respectively, the Rule in *Shelley's Case* and the law of waste. The former, named after a sixteenth-century English case which referred to and applied the Rule, was developed for a feudal land system. It is uncertain whether the Rule applies in Manitoba. It is an anachronism, however, which for the sake of clarity should be abolished by the Legislature. The Commission examines this Rule and the various rationales for its existence. Part II concludes with several recommendations pertaining to the Rule's abolition. In the third and final area of study, the Commission looks at two types of waste - permissive and equitable - and recommends that the legislation presently governing these categories in *"The Law of Property Act"*, C.C.S.M. c. L90, be revised to reflect properly the scope of their intended application.

A list of the Commission's recommendations of reform for each of these three areas of the law is contained in Part IV of this Report.

It is customary in a foreword to acknowledge those persons who have made a significant contribution to a study. In this case, there are several. Prof. Philip H. Osborne, LL. B. (University of Auckland), LL. M. (McGill), of the Faculty of Law, University of Manitoba prepared a background paper on

section 6 of *"The Mercantile Law Amendment Act"*, C.C.S.M. c. M120, which formed the basis for our Report in this area. We gratefully acknowledge Prof. Osborne's significant contribution. Our legal research assistants this summer, Timothy N. Taylor and Sheila J. Beatty, were responsible respectively for preparing draft Reports on the topics set forth in Parts II and III herein. We thank them for their assistance. Finally, we should like to acknowledge particularly the contribution of a member of our Commission, Prof. J. Irvine, who played an important role in the development of the property law matters contained in Parts II and III.

PART I

SECTION 6 of *"THE MERCANTILE LAW AMENDMENT ACT"*

1.01 Section 6 of *"The Mercantile Law Amendment Act"*, C.C.S.M. c. M120, reads as follows:

> **Satisfaction of obligations by part performance.**
>
> Part performance of an obligation, either before or after a breach thereof, where expressly accepted in writing, by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to have extinguished the obligation.

The section was first enacted in Manitoba in 1895.[1] It deals with a narrow but important aspect of commercial law: the enforcement of debt settlement arrangements. Section 6 is one aspect of a larger body of law concerning contract modifications. These involve mutually agreed changes in contractual terms made subsequent to the formation of the primary contract.[2]

1.02 In Part I of this report, we consider the scope of section 6 and its judicial interpretation. Recommendations for legislative amendments are made which, in our view, would make the section a more effective vehicle for commercial and private compromises and settlements. In order to understand the purpose of the section, we propose first to trace briefly the position of debt settlement arrangements at common law and the exceptions which were adopted to minimize the mischief done by it.

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[1] *"The Queen's Bench Act, 1895"* S.M. 1895 c. 6, s. 39(10).

[2] For an excellent article concerning the broader topic of contract modification, see Aivazian, Trebilcock and Penny *"The Law of Contract Modifications: The Uncertain Quest for a Bench Mark of Enforceability"* (1984) 22 O.H.L.J. 173.

A. Historical Background

1.03 The Rule in *Pinnel's Case* at common law provided that any settlement of a debt or compromise agreement which called for the payment by a debtor of a lesser sum, in discharge of a greater sum owed to a creditor, is unenforceable.[3] The creditor may repudiate the arrangement and call upon the debtor to discharge the original sum of the debt. The following illustrations involve a debtor who owes $1000.

Illustration 1

The debtor offers $800 in full settlement. The creditor accepts that sum and acknowledges that the debt is settled.

Illustration 2

The debtor and creditor agree that $800 shall be paid in eight equal monthly payments and that on completion of the eight payments the debt shall be settled. The debtor begins to perform the agreement. After four monthly payments the creditor repudiates the agreement and demands immediate payment of the balance of the total debt, i.e. $600.

Illustration 3

The debtor and creditor agree that $800 shall be paid in eight equal monthly payments and that on final payment the debt will be extinguished. The debtor pays the eight installments and the creditor sues for the balance of $200.

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[3] *Pinnel's Case* (1602), 5 Co. Rep. 117a; 77 E.R. 237. Although *Pinnel's Case* is generally credited as the source of this Rule, the Rule clearly predates this case. As early as 1584, the principle quoted above was applied to a suit in assumpsit: *Richards* v. *Bartlett* (1584) 1 Leon 19. See *Cheshire and Fifoot's Law of Contract* (10th ed.), at 79-81 for the early history of the Rule.

1.04 In each of the above illustrations the debt settlement arrangement is unenforceable at common law. The creditor may sue for the balance owing under the original $1000 debt. The position at common law was achieved by a strict application of the doctrine of consideration - an integral element of the common law of contract. The essence of the doctrine of consideration is that only bargains or agreements involving some reciprocity of economic value are enforceable. Promises which are not bought are unenforceable. In the eyes of the common law judges, creditors' promises to accept less than they were owed were not bought in any sense because the debtor was giving no more than (s)he was legally obliged to pay. The arrangement did not have the indicia of 'bargain' or a 'promise bought' because the debtor was already under a legal obligation to do what was given in exchange.

1.05 The position at common law clearly produced unsatisfactory results. If one refers to the three illustrations just given it would seem that all ought to be enforceable. Indeed, if one based the enforceability of promises on any reasonable concept other than the doctrine of consideration, there would be no problem; "intention to create a legal relationship", "reasonable expectations of the parties" or "reasonable and justifiable reliance" would all lead to enforcement in most cases. In the English case of *Foakes* v. *Beer*,[4] Lord Blackburn put forward the major argument in favour of enforceability of debt settlements:[5]

> What principally weighs with me in thinking that Lord Coke [in *Pinnel's Case*] made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so.

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[4](1884), 7 App. Cas. 605.

[5]*Id.*, at 622.

Lord Blackburn did not, however, press his views and he joined the majority in the House of Lords in following the decision in *Pinnel's Case*.

1.06 *Pinnel's Case* is still good law in England[6] and was the position in Manitoba until section 6 was passed in 1895 to relieve against its hardship. A plethora of exceptions and evasions have, however, been adopted in the common law to minimize its hardship. Accordingly, legally advised parties can easily avoid the Rule. The exceptions comprise the following:

1. Construction. Each compromise or settlement agreement will be carefully examined to determine if some consideration can be found. The debtor may have promised to do more than the letter of his/her legal obligation e.g. a promise to pay in kind, or at an early date, or a different place, or with negotiable paper. Adequacy of the consideration is of no concern provided that something in excess of duty is given at the request, express or implied, of the creditor.[7] If consideration can be found, the compromise or settlement agreement is sometimes called "an accord and satisfaction".[8]

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[6]The Rule in *Pinnel's Case* was more recently affirmed by the English Court of Appeal in *D & C Builders Ltd.* v. *Rees* [1965] 3 All E.R. 837. The British Parliament has never implemented the recommendation of the Law Revision Committee to the effect that legislation should be passed to abrogate the Rule. *See* Gt. Brit. Law Revision Committee, *Sixth Interim Report* (1937), Cmnd. 5449, at par. 35.

[7]So it was that Sir George Jessel, M.R., said in *Couldery* v. *Bartrum* (1881) 19 Ch.D. 394, at 399:

> According to English Common Law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English Common Law, he could not take nineteen shillings and sixpence in the pound; that was nudum pactum.

[8]An accord and satisfaction has been defined as follows:

> Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.

Br. Russian Gazette & Trade Outlook Ltd. v. *Associated Newspapers Ltd.*, [1933] 2 K.B. 616 at 643 (C.A.), per Scrutton, L.J.

2. Composition of Creditors. If the agreement to take less is made jointly by a number of creditors the settlement is binding.

3. Settlement with a Third Party. If the settlement agreement is made between the creditor and a third party it is binding.

4. Deed. A settlement made by way of an agreement under seal is binding.

5. Equitable Estoppel. Promises made between parties which are intended to alter an existing legal relationship between them are binding if they are intended to be acted upon, are acted upon and if it would be inequitable not to enforce them. Many debt settlement and compromise agreements are enforceable under this doctrine.

1.07 It may be argued that the development of these doctrines and devices has so thoroughly circumvented the Rule in *Pinnel's Case* that there is no longer any need for legislative intervention in the nature of s. 6 of *"The Mercantile Law Amendment Act"*. This argument is most persuasive in respect of the doctrine of equitable estoppel. However there continues to be some uncertainty as to the scope of this doctrine. In particular, there continues to be doubt if it enforces the abrogation of rights rather than their suspension and it remains unclear if the promisee must act to his/her detriment. In light of these uncertainties, we have concluded that it is advantageous to have a legislative provision for the enforcement of debt compromise and settlement arrangements. We recommend:

RECOMMENDATION 1

That there continue to be legislation in Manitoba expressly to enforce debt settlement arrangements.

B. The Scope of Section 6 and its Judicial Interpretation

1.08 Section 6 was quoted earlier in this Report (par. 1.01). The purpose and meaning of this section appear reasonably clear, at least if it is read in relationship to the common law as evidenced in *Pinnel's Case*. First, however, four general points should be made. The section does not purport to

be the exclusive source to enforce debt compromises. Accordingly, its terms need not be satisfied if an agreement is already binding at common law.[9] This is an important point where an agreement is enforceable at common law because it falls within one of the five exceptions we outlined earlier. It should also be noted that the section is a cautious and conservative one which protects very carefully the interests of the creditor. It recognizes the primacy of the creditor's right to the full performance of the obligation unless the creditor has deliberately and voluntarily granted some indulgence. Thirdly, the provision may have a wider scope than debt compromise in that it concerns partial performance of *obligations*. Nevertheless it would seem that the section is aimed primarily at debt settlement[10] and virtually all the reported cases on the section involve the settlement of debts. Finally, this section is similar in nature to provisions in the other western provinces[11] as well as Ontario[12] and the Yukon[13] and Northwest Territories.[14]

1.09 The section contains two methods of settlement or compromise. Each will be examined in turn:

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[9]This was also the position taken by the Alberta Institute of Law Research and Reform in their report on *The Uniform Sale of Goods Act* (Report No. 38; October, 1982), at 44.

[10]In particular, the use of the word "creditor" supports a narrower construction.

[11]Saskatchewan: *Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 45(7); Alberta: *Judicature Act*, R.S.A. 1970, c. 193, s. 34(8); British Columbia: *Law and Equity Act*, R.S.B.C. 1979, c. 244 s. 40.

[12]*Mercantile Law Amendment Act*, R.S.O. 1980, c. 265, s. 16.

[13]See *Judicature Ordinance*, R.O.T.Y. 1971, c.J-1 s.10(g).

[14]See *Judicature Ordinance*, R.O.N.W.T. 1974, c. J-1, s. 19(g). The provision is also found in the *California Civil Code*, s. 1524.

Method 1

Part performance of an obligation, either before or after a breach thereof, where expressly accepted in writing by the creditor . . . , though without any new consideration, shall be held to have extinguished the obligation.

> In these circumstances the creditor may, if it be in his/her interest, indicate by an express and written acceptance that partial performance will be sufficient to extinguish the debt. The most common manner in which this will be done will be by giving a written receipt marked "in full settlement" or words to that effect. This provision does not permit an oral acceptance or an implied acceptance arising out of conduct to be effective. The policy seems to be that the creditor should only be bound if (s)he has in the clearest and most explicit manner indicated a willingness to take less than is legally due.

Method 2

Part performance of an obligation, either before or after a breach thereof, . . . rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to have extinguished the obligation.

> This part of the section is clearly a specific reversal of the decision of the House of Lords in *Foakes* v. *Beer*.[15] It requires that the parties negotiate an agreement for the settlement of obligations and that the settlement be carried out in accordance with the agreement. In essence it requires an antecedent agreement and performance of that agreement. If both elements are satisfied, the arrangement is binding.

1.10 Judicial interpretation has, however, expanded the scope of section 6 beyond the foregoing interpretation. Of particular importance is the construction of the phrase "in pursuance of" contained in the *"Method 2"* form of settlement. In the Manitoba decision of *Triple C. Floorings Ltd.* v.

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[15] *Supra*, n. 4.

Wrights Carpets Ltd.,[16] these words were, in effect, generously construed. That case involved the settlement of a $919.44 debt. A debt compromise agreement was reached which called for a full settlement of 35 cents on the dollar. The money was to be paid within a reasonable time and notification was to be given that all other creditors had accepted a similar amount. Clearly if this agreement had been carried out, it would have been a binding *"Method 2"* settlement under section 6. The agreement, however, was never performed and the Court held that it was repudiated by the debtor's non-compliance and was at an end. Later a cheque was given to the creditor in the amount of 35 percent of the debt. The cheque carried the notation "account in full". The creditor cashed the cheque but continued to claim the balance. The Court held that there was a binding *"Method 2"* settlement under the Act. The Court construed the creditor's acceptance and cashing of the cheque with the knowledge that it was being tendered in full payment as a valid acceptance and, in the Court's view, a binding *"Method 2"* settlement.

1.11 The case involves a broad interpretation of the *"Method 2"* settlement for the following reasons. The tendering of the cheque by the debtor in *Triple C* was an offer of a settlement. Accordingly, the part performance (i.e. the tendering of the cheque) was not rendered "in pursuance of" an agreement but was rendered, rather, in search of or in the expectation of an agreement that had not yet been formed. The effect of the decision is to merge the two methods of settlement under section 6 into one: a debtor need only prove that his/her part performance of the obligation was accepted by the creditor. This means that the writing requirement in *"Method 1"* has been rendered nugatory by the decision. *"Method 2"*, in effect, has disappeared. In summary, the import of the decision is to interpret section 6 to read:

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[16][1980] 4 W.W.R. 440 (Man., C.C.) See also *Phillip* v. *Massey Ferguson Finance Co.*, [1973] 1 W.W.R. 443 (Sask. Q.B.) and *Bank of Nova Scotia* v. *Central Index Systems Ltd.* 10 Man. R. (2d) 384 (Man., C.C.).

> Part performance of an obligation . . . where accepted by the creditor . . . , though without any new consideration, shall be held to have extinguished the obligation.[17]

1.12 The issue arises as to whether section 6 should be amended to "bring it in line" with this judicial interpretation or whether other revisions would be more appropriate. We examine this issue under the next heading of our Report which concerns our recommendations for reform.

C. The Reform of Section 6

1. The methods of enforcement.

1.13 We think that the legislation should continue to set forth two separate methods for enforcing debt settlements. It is not enough, in our view, simply for the debtor to prove that part performance was *accepted* by the creditor when acceptance can be implied merely by conduct, i.e. the cashing of a cheque marked "in full settlement".[18] This is swinging the

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[17]It is a curious fact that the debt settlement in *Triple C* was probably enforceable on other grounds. The reasons for judgment indicate that the cheque in question was not tendered by the debtor but rather by a third party and that it was this third party's personal cheque. This would appear to indicate that the debt settlement would come within the third exception to the Rule in *Pinnel's Case* earlier summarized, i.e. settlement with a third party. Treitel states, in reference to this exception, that "[i]t is generally agreed that this rule does not depend on any contract between debtor and creditor, so that it can apply even though no promise was made to the debtor and no consideration moved from him". (Treitel, *The Law of Contract* (6th ed.), at 98). It would appear from the reasons for judgment in *Triple C* that the defendant's counsel did not raise this argument in support of the enforceability of the debt settlement but, instead, chose section 6 as his client's defence.

[18]This is not to suggest that the cashing of the cheque will always be regarded as an acceptance of the smaller sum in the terms on which it was

(Footnote continued to page 10)

pendulum too far in favour of the debtor. One effect of such a proposal is to encourage debtors to discount all debts and forward partial payment by way of cheques marked "in full settlement". A cautious creditor would then be faced with the administrative difficulty and expense of either returning the cheque because the terms of settlement were unacceptable or cashing the cheque and informing the debtor that the money is accepted in partial payment. A creditor would be forced to act to avoid the risk of having a settlement imposed.

1.14 In our view, the better approach would be to continue to require a debtor to prove that the creditor expressly accepted the part performance, as in *"Method 1"* under section 6 (see par. 1.09). However, we do not think that the acceptance need be in writing. With the repeal of both the *Statute of Frauds*[19] and section 6 of *"The Sale of Goods Act"*, C.C.S.M. c. S10,[20] it would be incongruous to retain this writing requirement as a pre-condition to the enforcement of a debt settlement under *"Method 1"*. Accordingly, we recommend:

RECOMMENDATION 2

That, subject to Recommendation 3, section 6 be amended by deleting the requirement in line 2 thereof that the creditor's express acceptance of the part performance be in writing.

(Footnote continued from page 9)
offered. In a recent New Brunswick Court of Appeal decision in *Woodlot Services* v. *Fleming*, (1977), 83 D.L.R. (3d) 201, pertaining to accord and satisfaction, the Court held that whether the creditor had accepted part payment was a question of fact. If, as in that case, the creditor had earlier and repeatedly refused partial payment in full settlement, then cashing a cheque marked in full settlement might not be taken as indicating acceptance. Nevertheless in most cases the only objective evidence will be the cashing of the cheque.

[19] *An Act to Repeal the Statute of Frauds*, S.M. 1982-83-84, c. 34.

[20] The section was repealed by *The Statute Law Amendment Act, 1983*, S.M. 1982-83-84, c. 93, s. 27.

1.15 There should, in our view, be one exception to Recommendation 2. This is where the parties have agreed in their primary contract that any modification of that contract must be in writing. The terms of the original agreement for modifying the contract should govern on this point. We therefore recommend:

RECOMMENDATION 3

That Recommendation 2 not apply where the original contract or obligation states, in effect, that any modification thereof must be in writing.

1.16 There are elements of vagueness with respect to section 6 which we think should be clarified in the reform legislation. These include the application of *"Method 2"* to executory agreements (agreements which have yet to be performed) and partially executed agreements as well as the effect of the debtor's default, if indeed these types of agreements fall or should fall within the scope of *"Method 2"*. Before proceeding to deal with these matters, however, we should like first to address the doctrine of unconscionability and its desired application to the reform legislation.

2. Unconscionability

1.17 The dissatisfaction with the Rule in *Pinnel's Case* was caused by its potential unfairness to debtors who have performed settlement agreements only to find that they are unenforceable. The creditor is seen as the one who has acted oppressively and unfairly by reneging on his/her promise and demanding more. There is, however, another side to the coin. On occasions it is the debtor who wields the economic power and who by dint of circumstances is able to force a creditor to take less than (s)he might wish. In those circumstances the result rendered by the Rule in *Pinnel's Case* may be a good one. Indeed the primary criticism of the Rule in *Pinnel's Case* is not that it always created injustice but that the rule is insensitive and unresponsive to the true determinants of justice. Section 6, though the reverse of the Rule in *Pinnel's Case*, may be criticized on the same basis. Compliance with the Act dictates enforceability and that, on occasion, may be productive of injustice.

1.18 The potential for this is pointed out by the facts of the English

decision of *D & C Builders* v. *Rees*.[21] In that case the debtor took advantage of the creditor's perilous financial situation and threatened that if the creditor did not accept partial payment in full settlement he would receive nothing. Finally, the financial predicament of the creditor forced him to accept a partial payment. A receipt marked "in full settlement" was issued. It would seem that in Manitoba, *"Method 1"* of section 6 has been complied with. A Manitoba court would have difficulty avoiding the conclusion that the debt settlement was binding. It is clearly advantageous for the legislation to deal specifically with unconscionable debt compromises and to render them unenforceable. We so recommend:

RECOMMENDATION 4

That section 6 be amended so that an obligation shall not be held to be extinguished by part performance where the court, on application, finds that it would be unconscionable to do so.

3. The enforceability of executory and partially executed agreements.

1.19 This issue relates to the *"Method 2"* form of settlement under section 6 and concerns the enforceability of settlement agreements prior to their completed execution. There is some authority[22] which suggests that,

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[21] *Supra* n.6.

[22] *Bank of Commerce* v. *Jenkins* (1888), 16 O.R. 215 (Comm. Pl.); *MacKiw* v. *Rutherford*, [1921] 2 W.W.R. 329 (Man. K.B.); *Hoolahan* v. *Hivon*, [1944] 4 D.L.R. 405 (Alta S.C.). *Contra, Udy* v. *Doan*, [1940] 2 W.W.R. 440 (Sask. K.B.). The question was left unresolved in *Rommeril* v. *Gardener* (1962), 35 D.L.R. (2d) 717 (B.C.C.A.). Rose J. in *Bank of Commerce* v. *Jenkins, supra*, would appear to go even further and hold that a totally executory agreement is irrevocable. His Lordship stated:

> . . . [I]t must be held that an agreement once entered into to accept part performance of an obligation is not revocable. Otherwise a creditor might make an agreement and at any time afterwards when the debtor rendered the

(Footnote continued to page 13)

at least once performance of the agreement has commenced, the agreement is irrevocable. Thus the agreement set out in Illustration 2 at the beginning of Part I (par. 1.03) would be irrevocable under this view. The better view is that section 6 only operates where there is completed performance of the agreement since the legislation employs the past tense on this point, i.e. "part performance of an obligation . . . *rendered* in pursuance of an agreement, etc."

1.20 Regardless of the present ambiguity of section 6 to executory and partially executed agreements, the question arises as to what the law should be on this point. We think that the legislation should provide for the enforcement of debt settlements once performance of the agreement has begun. This would be in line with modern trends within the law of contract. Performance is indicative of reliance on the arrangement and the situation is closely analogous to the revocation of offers for a unilateral contract.[23] Recent authority forbids revocation once performance has begun. However, it is submitted that purely executory agreements should remain revocable. Purely executory and gratuitious arrangements are not generally enforced and there appears to be no greater claim for the enforceability of this kind of agreement than many others. There is unlikely to be significant reliance in the absence of any steps of performance. The section is primarily designed to enforce arrangements where some benefit has been actually received by the creditor and that should continue to be its primary focus.[24] We therefore recommend:

(Footnote continued from page 12)
part performance the creditor might refuse to accept and thus the provision may be ineffectual.

[23]*Errington* v. *Errington*, [1952] 2 K.B. 290; *Daulia Ltd.* v. *Four Millbank Nominees Ltd.* [1978] 2 All E.R. 557 (C.A.).

[24]In our *Report on The Uniform Sale of Goods Act* (Report #57; November 1, 1983), we agreed with the Institute of Law Research and Reform that section 27 of that Uniform Act be deleted and substituted therefor with the following:

(Footnote continued to page 14)

RECOMMENDATION 5

That where a debtor begins part performance of an obligation rendered pursuant to an agreement and continues performance according to the terms thereof, the agreement shall be considered irrevocable.

1.21 One further point should be clarified in the reform legislation. This has to do with the effect of the debtor's default after (s)he has begun performance of the agreement. The Law Revision Committee of Great Britain recommended that if the agreement is not performed, the original obligation should revive.[25] We think that this is a reasonable solution where it is the debtor who has defaulted. The creditor should be able to cancel the agreement so that the original or primary contract would revive. We recommend:

RECOMMENDATION 6

That the legislation provide that where the debtor defaults after (s)he has begun part performance, the creditor may cancel the agreement so that the original contract would revive.

4. Mechanics of Reform.

1.22 We think the reforming legislation should only affect obligations created on or after the Act comes into effect. Although the drafting of the legislation is best left to the expertise of Legislative Counsel's Office, we have prepared a draft Bill to assist them. We recommend:

(Footnote continued from page 13)
An agreement, whether executed or not, varying or rescinding a contract of sale needs no consideration to be binding.

However, we also agree with the Institute that there is no need to harmonize section 6 with the sale of goods legislation for the reasons set forth at p. 44 of their Report, *supra* n. 9.

[25] *Supra* n. 6, at par. 35.

RECOMMENDATION 7

That the legislation to reform section 6 be similar to the following:

AN ACT TO AMEND THE MERCANTILE LAW AMENDMENT ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Sec. 6 rep. and sub.

1 Section 6 of *The Mercantile Law Amendment Act*, being chapter M120 of the Revised Statutes, is repealed and the following section is substituted therefor:

Satisfaction of obligations by part performance.

6(1) Part performance of an obligation either before or after the breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction; or
(b) when rendered pursuant to an agreement for that purpose;

though without any new consideration.

Unconscionability.

6(2) Notwithstanding subsection (1), an obligation shall not be held to be extinguished by part performance where the court, on application, finds that it would be unconscionable to do so.

The requirement of writing under clause 6(1)(a).

6(3) Subject to any agreement to the contrary, an acceptance by a creditor under clause 6(1)(a) need not be in writing.

Right of cancellation.

6(4) A creditor may cancel an agreement under clause 6(1)(b) where

(a) the debtor has not yet commenced performance thereof; or
(b) the debtor has commenced performance thereof but fails to continue performance on a date or within a time so provided and, in the circumstances, it would be unreasonable for the creditor to give the debtor more time to remedy the default.

Transition.

2 Nothing in this Act shall affect obligations which arose before the day in which this Act comes into force.

Commencement of the Act.

3 This Act comes into force on the day it receives the royal assent.

PART II

THE RULE IN *SHELLEY'S CASE*

A. Introduction

2.01 The "rule in *Shelley's case*", so called because of its definitive expression in the sixteenth-century case of *Wolfe* v. *Shelley*,[1] alters the natural meaning of particular words used to convey successive interests in land.[2] The report of the case states:

> that it is a rule in law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail; that always in such cases, "the heirs" are words of limitation of the estate, and not words of purchase.[3]

As at least two scholars recently noted, this articulation of principle does seem "alarmingly cryptic";[4] but the idea itself, in fact, is quite

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[1](1581), 1 Co. Rep. 88b, 76 E.R. 199. The rule itself, however, clearly predates its expression in *Wolfe* v. *Shelley*. Holdsworth, for example, traces it back to the middle of the 14th century; see Sir Wm. S. Holdsworth, *History of English Law* (London: Methuen and Co., Sweet & Maxwell, 1942).

[2]It is generally accepted that the rule in *Shelley's case* does not apply to personalty. *See, e.g.*, *Powell* v. *Boggis* (1966), 35 Beav. 535 at 541, 55 E.R. 1004; *Re Russell* (1885), 52 L.T. 559; *Smith* v. *Butcher* (1878), 10 Ch. D. 113; *Re Woodward*, [1945] 2 D.L.R. 497.

[3]*Supra* n. 1, at 104 [a] (Co. Rep.), 234 (E.R.). See also *Van Grutten* v. *Foxwell*, [1897] A.C. 658 at 684-5, per Davey L.J.

[4]See B. Ziff and M.M. Litman, "Shelley's Rule in A Modern Context: Clearing the 'Heir'" (1984), 34 U.T.L.J. 170 at 172.

manageable. If, for example, land was conveyed "to A for life, remainder to his heirs", under the rule A would take an immediate fee simple. This of course seems contrary to the words' apparent meaning that A should take a life estate and, at A's death, A's heir should take the fee simple. The opposite occurs because the words "remainder to his heirs" are treated as "words of limitation", defining the estate taken by A, rather than as "words of purchase" conferring any interest on the persons mentioned, namely the heirs of A.[5] The life estate taken by A under the first part of the conveyance then merges with the fee simple remainder to vest in A an immediate fee simple. Thus the estate otherwise granted to A's heirs goes to A himself.[6] Given this comparatively (and unexpectedly) straightforward explanation of the rule, it becomes apparent that it is not the meaning of "the rule" itself which requires review. Rather this inquiry must determine whether the application of the rule is justified in the context of today's laws.

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[5]The application of the rule brought the meaning of the grant "to A for life, remainder to A's heirs" very close to the grant "to A and his heirs". The latter, which evolved quite separately, was commonly construed as conferring an entire fee simple on A.

[6]A set of technical pre-conditions to the application of the rule must be satisfied:

> The interests granted to both the ancestor and the heirs must be a freehold estate in realty; these estates must be of the same quality, either both equitable or both legal, and they must be created by the same instrument. However the ancestor may receive his interest by express grant, resulting trust or use, or by implication of the law, and he may hold that interest as a co-tenant.

See Professors Ziff and Litman, *supra* n. 4 at 173.

Even more important, however, was the threshold question of construction whether "heirs" referred to the entire line of heirs from generation to generation, or simply to specific individuals alive at the ancestor's death. In the former case the rule applied; in the latter it did not.

B. Possible Reasons for the Existence of the Rule

2.02 Almost from the time it was decided,[7] judges and other legal commentators have attempted to explain the origins and purpose of the rule in *Shelley's case*.[8] From these efforts to justify the rule, at least five theories have emerged:[9]

(i) the rule prevented feudal tenants from avoiding payment of feudal incidents;

(ii) the rule prevented the granting of contingent remainders;

(iii) the rule recognized the "economic owner"[10] of the property, and restored the estate to him if his intentions were frustrated;

(iv) the rule simply recognized the constraints imposed on the law by the doctrine of primogeniture; and

(v) the rule avoided the perpetuities apparently expressed by the words of the grant.

A fuller examination of each is instructive.

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[7]The case was decided by the Court of Exchequer Chamber, comprised of the Lord Chancellor and the respective Chief Justices of the Queen's Bench, Common Pleas and the Chief Baron of the Exchequer. See *supra* note 1 at 105b (Co. Rep.), 238 (E.R.).

[8]See, for example, *id.*, at 240 (E.R.); also *Van Grutten* v. *Foxwell*, [1897] A.C. 658 at 667, per McNaughton L.J.; A.W.B. Simpson, *An Introduction to the History of the Land Law* (Oxford: Oxford University Press, 1961) at 89; *Re Rynard* (1980), 31 O.R. (2d) 257 at 261, per Wilson J.A.; *supra* n. 4 at 172-185.

[9]Professors Ziff and Litman have summarized these theories; see *supra* n. 4 at 174-185.

[10]So called by A.D. Hargreaves, "Shelley's Ghost" (1938), 54 L.Q.R. 70. See discussion *infra*.

1. Avoidance of feudal incidents

2.03 According to this theory, *Shelley's case* expressed a rule of tenure founded on feudal principles: its purpose was to prevent tenants from avoiding payment of feudal dues owed to their lords. In the thirteenth-century, transfer of land by descent upon death, unlike purchase *inter vivos*, entitled the English feudal lords to collect various feudal 'incidents' or dues[11] from their tenants. Given the apparent meaning of the words used, land conveyed by grant "to A for life, remainder to his heirs" would be transferred on the death of A, under an express *inter vivos* purchase and not by descent, and thus payment of feudal dues would be avoided very simply. The effect of the rule, however, was to transform that direct grant of a remainder to the heirs as purchasers into a direct grant of the remainder back to the ancestor 'A'; thus the heirs could receive an interest in the property only by descent directly from the ancestor, whereupon payment of feudal dues once again became necessary. Of course, however logical this explanation may have seemed in medieval England, it is not the collection of feudal incidents that justifies the continued existence of the rule in 1985.

2. Prevention of contingent remainders

2.04 'Contingent remainders' seem to have been unacceptably illogical in the extremely formal system of the early common law of property. If by definition a living person can have no heirs,[12] then any gift in remainder "to A's heirs" must necessarily remain contingent until A dies; only then could the identity of the heirs be ascertained. Such an arrangement was perceived as creating two problems: first, part of the fee simple was unaccounted for -- not "seised" by anyone -- which seems to have struck the medieval mind as an absurdity leaving "an abeyance of seisin". More

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[11]Chiefly "relief" and "*primer seisin*".

[12]From "*nemo est haeres viventis*". Thus A could have an "heir apparent" or an "heir presumptive", but no heir in his own lifetime.

seriously, perhaps, since only a fraction of the fee simple was seised, no one could be held accountable for the bulk of the feudal services and incidents to the immediate lord. The contingent remainder would have been, therefore, both illogical and impolitic. In the situations to which it applied, the rule in *Shelley's case* may have solved this problem by vesting the entire fee simple in the ancestor 'A', thereby cancelling the contingent remainder.[13] While this theory may make sense when viewed in conjunction with some of the other possible explanations (such as the one preceding, concerning feudal incidents), its inherent validity is probably suspect, for it appears that for decades prior to 1579 the courts had already accepted the paradox of the contingent remainder.[14] What was true in 1579 at the very time of *Shelley's case* is even truer in 1985, when the possibility that such a creature might cause alarm seems utterly remote and unwarranted.

3. Recognition of the economic owner

2.05 A.D. Hargreaves, the proponent of this theory,[15] suggested that the rule developed in the fourteenth century to give effect to the intentions of particular testators. The idea may be explained in this way:

> During the Middle Ages, settlements frequently took the form of the settlor conveying to himself for life with a remainder to his son in fee tail and with a further remainder to the settlor's heirs, that is, "to A for life, remainder to B [A's son] and the heirs of his body, remainder to A's heirs". On those occasions when B died in his father's lifetime without issue . . . the courts permitted the settlor, A, to claim the fee on the supposition that the purpose of the original settlement had failed and it would be consonant with the

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[13]"Through the application of *Shelley's* case, the heirs received nothing in a proprietary sense, but because their share passed to A, they did possess an expectancy in the form of a *spes successionis* - a hope of succeeding"; see *supra* n. 4 at 178.

[14]See Simpson, *supra* n. 8, at 94.

[15]See *supra* n. 10.

original intention of the settlor to permit him to reclaim the entire estate.[16]

Hargreaves suggested further that the courts eventually lost sight of the original purpose of the rule (namely, to permit the original settlor and "economic owner" to resume legal ownership in the event that his original intentions were frustrated), and came to apply it formalistically without regard for the intentions of the parties involved. If Hargreaves' theory is correct on this point, it would appear that judges for over four hundred years have applied the rule for no reason other than that it has always been applied. Ultimately, however, the very premise of this theory may be questioned: as Alberta law professors Ziff and Litman recently pointed out,[17] it is not altogether clear that the grant "to A for life, remainder to B and the heirs of his body, remainder to A's heirs" intends A to be anything more than an ordinary life tenant, nor that it would fail entirely if B died in A's lifetime without issue. It is not clear, in other words, that the grantor 'A' ever intended to resume legal ownership. Thus the premise of this explanation of the rule's origins may be doubted. As a result, the theory fails adequately to justify the rule's continued usage.

4. Continuity with the doctrine of primogeniture

2.06 Although the doctrine of primogeniture ceased long ago to have any real impact in matters of this kind, at one time it may have justified the rule in *Shelley's case*. Since primogeniture permitted only a single heir to take on the death of A, under this system a grant "to A's heirs" could only have been intended to signify the line of heirs from generation to generation. And yet the entire line of heirs could not possibly all take as purchasers on A's death. It would make sense, therefore, that the word "heirs" in any grant "to A for life, remainder to his heirs" should always be construed as a word of limitation describing A's interest, and not as a word of purchase. This analysis is problematic, however, because it has been held in the great majority of cases that the rule did not evolve as a mere rule of

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[16]See *supra* n. 4, at 176.

[17]*Ibid.*, 177-178.

construction: quite to the contrary, the rule is viewed as an unalterable rule of law having nothing to do with the parties' intentions.[18] Rather than providing any justification for the rule's continued existence, then, this theory of the rule's origins illuminates two compelling reasons for its abolition: first the modern application[19] of the rule, since it obliges the court to disregard even the parties' clearest intentions, is rarely beneficial; and second, even if the interpretation required by the rule was necessary at one time, the system it was designed to serve was irretrievably changed long ago.[20]

5. Avoidance of perpetuities

2.07 If "heirs" in the grant "to A for life, remainder to his heirs" denoted the whole line of inheritable descendants,[21] the grant would have given rise either to a perpetually contingent fee simple or to a perpetual sequence of life estates in favour of the heirs. In either case the result would have offended what was in the sixteenth century[22] the developing jurisprudence against perpetuities.[23] The rule expressed in *Shelley's case* would have remedied this problem by vesting the ancestor "A" with an alienable estate, thus stemming the perpetuity. If this theory is correct not

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[18]See, for instance, *Van Grutten* v. *Foxwell*, *supra* n. 8, at 672, per McNaughton L.J.

[19]The rule was considered as recently as in 1980: see *Re Rynard* (1980), 31 O.R. (2d) 257 (C.A.), discussed *infra*.

[20]See *"Act Abolishing Primogeniture"*, S.U.C. 1851, c. 6, which came into force on January 1, 1852.

[21]Note that this may not be the proper construction of these words; see n. 34 *infra*.

[22]See Holdworth, *supra* n. 1, at 108.

[23]See *supra* n. 4 at 183-4; see also Manitoba Law Reform Commission, *The Rules Against Perpetuities and Accumulations* (Report No. 49, 1980) at 9-28.

only the origins but, in some jurisdictions, the modern retention of the rule in *Shelley's case* might be explained. In Manitoba, however, the rule against perpetuities was itself abolished in 1983 by *"The Perpetuities and Accumulations Act"*, C.C.S.M. c. P32.5. Unless it serves some other purpose, it makes little sense to retain a rule of law when the policy justification for it has passed.

C. Criticisms of the Rule

2.08 Most discussions of the rule in *Shelley's case* customarily begin with mention of its difficulty, irrelevance and obscurity.[24] That such an apparently innocuous bit of law should attract such widespread denunciation is suggestive of its value. Of course, the mere difficulty of the rule would not justify its abolition; if the rule carried some valid policy into effect, the rule should stand regardless of its complexity. Such, unfortunately, is not the case. Thus the following analysis supports the abolition of the rule.

2.09 First, of the five theories surveyed above, none explains why the rule ought to continue to enjoy any current status whatsoever. Indeed when the explanation of its origins is attempted, the obscurity of the rule's effect is actually increased. Clearly the historical reasons for it have passed.

2.10 Second, the continued existence and application of the rule seem actually detrimental rather than beneficial. As already noted, it operates as a rule of law imposing a necessary construction regardless of the intentions of the parties involved. For no apparent policy reason, and against the dominant tenor of the law in this regard,[25] the courts are obliged to defeat even those intentions which are most clearly expressed.

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[24]See, for example, Professors Ziff and Litman, *supra* n. 4, at 171; and *Van Grutten* v. *Foxwell*, *supra* n. 8, at 667-681, per McNaughtan L.J.

[25]It is a first principle in the law governing testate succession, for example, that the law ought as much as possible to favour the intentions of the testator or testatrix.

2.11 Third, the rule has become a nuisance to conveyancing. The persons likely unexpectedly to suffer most are the less sophisticated practitioner (or, more likely, the clients of the less sophisticated practitioner), the draftsman of a holograph will, or the person who looks after the transfer of his property himself. Given the natural meaning of the words in the grant "to A for life, remainder to his heirs" (namely that A shall receive a life estate and his children the fee simple), it could hardly be surprising that these inexperienced individuals might fail to understand or to remember the significance of the sixteenth-century case. In the event, such random discrimination could still be excused if some compelling policy reason justified it -- but this is not the case with respect to the rule in *Shelley's case*. The result is needless confusion on irrelevant policy grounds denying the testator or vendor the property transfer they expect and hope for.

2.12 Fourth, curiously, the rule's status in Manitoba is uncertain. This may be, at least in part, because the other provinces in Canada have not been able to agree on whether the rule in *Shelley's case* even applies to them. The Alberta courts, for example, have held that the rule is not in force in that province. In *In re Simpson Estate*,[26] this conclusion followed from the Alberta Court of Appeal's construction of the legislation introducing the English law generally: in their view the "new colony" of Canada could not have adopted those laws pertaining exclusively to the tenure of land under the feudal system in England because that system was never introduced in Canada.[27] The Court also held, alternatively, that the rule would have been displaced by the Torrens system in any case because it was inappropriate to land under that system.[28] When asked to explain the continued application of the rule in other provinces (including Ontario), the Alberta Court suggested frankly that it must have been the first to consider the whole question -- that the other provinces had just assumed the rule was good law.

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[26][1927] 3 W.W.R. 534 (Alta. S.C., App. Div.); aff'd on other grounds, [1928] S.C.R. 329; foll'd in *Re Budd Estate* (1958), 12 D.L.R. (2d) 782 (Alta. S.C.).

[27]*Ibid.*, at 536-540.

[28]*Ibid.*, at 540-542.

2.13 Even in Ontario, however, where the rule is viewed as subsisting law, its imposition is regularly avoided by the courts. The ease with which it is avoided is derived from one of the set of formal pre-conditions to its application, namely, that the rule only applies where the word "heirs" in the grant "to A for life, remainder to his heirs" is found to denote the whole line of heirs from generation to generation.[29] If, on the other hand, the word "heirs" is found to refer more narrowly only to a limited group of specific individuals,[30] such as those heirs who are alive at the ancestor A's death, the rule cannot apply. Thus do the courts use this threshold question of construction to their advantage, interpreting the words of the grant imaginatively to give best effect to the intentions of the grantor. In *Re Rynard*,[31] for example, the Ontario Court of Appeal held that the rule did not apply to the following devise:

> . . . [M]y son, Kennedy shall continue to have the use of said lands until his death . . . and after my son Kennedy's death, my son Dr. Bernard Rynard shall be paid the sum of fifteen hundred dollars out of the said lands and the balance shall go to the heirs of my son, Kennedy.[32]

The Court in that instance found that the testatrix had used the word "heirs" in the sense only of her son Kennedy's next of kin living at his death. The opposite construction (to which the rule would have applied) was not possible because the testatrix had made it clear that Kennedy was not to take an estate in fee simple; rather in a subsequent clause of the will she had plainly

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[29]If it does not, the word is not a word of limitation, but of purchase. The word "heirs" need not actually be used; any words which advert to an indefinite line of heirs will bring the rule into effect. See, e.g., *Van Grutten* v. *Foxwell*, *supra* n. 3 at 684-5, per Davey L.J.

[30]Or "*personae designatum*".

[31](1980), 31 O.R. (2d) 257 (C.A.), per Wilson, J.A.

[32]*Ibid.*, 259.

limited his interest to a determinable life estate.[33] This decision is noteworthy for the Ontario Court of Appeal's resourceful use of a rule of construction to avoid imposing a rule of law. Specifically, as Professors Ziff and Litman point out:

> . . . [I]t is difficult to appreciate how the gift of the life estate to Kennedy, whether limited or of natural duration, assists in the threshold question of construction which concerns only the intended meaning of the term 'heirs'. In every modern decision where the rule in *Shelley's* case has been applied the ancestor was intended to receive only a life estate. This is the annoying aspect of the rule; it flouts testamentary intention by giving an unintentional windfall to the ancestor. Put another way, the gift of the life estate to Kennedy indicates what the heirs are to receive in the remainder, but it provides no guidance as to whom the word 'heirs' is meant to describe. After examining the entire Rynard will it is clear that there is only one reference to the heirs, and not a single adjectival or contextual basis which can assist in ascertaining the actual intentions of the testatrix in employing that term.[34]

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[33] *Ibid.*, 265.

[34] See *supra* n. 4, at 191. In its judgment the Ontario Court of Appeal, reversing the trial judge, held that section 31 of the Ontario *Wills Act*, R.S.O. 1927, c. 149, was not applicable in the circumstances of the case. Similar to section 29 of the Manitoba *Wills Act*, C.C.S.M. c. W150, section 31 provides that:

> 31. Where any real estate is devised by any testator, dying on or after the 5th day of March, 1880, to the heir or heirs of any testator, or of any other person, and no contrary or other intention is signified by the will, the words "heir" or "heirs" shall be construed to mean the person or persons to whom the real estate of the testator, or of such other person as the case may be, would descend under the law of Ontario in case of an intestacy.

(Footnote continued to page 28)

2.14 It is noteworthy further that *Re Rynard* is typical of attempts by the courts to avoid imposing the rule in *Shelley's case*. Constrained by a rule of law that seems inexplicably contrary to their sense of justice (as contrary to the grantor's intentions), Canadian judges have attempted generally to narrow its application. Again, even this might be acceptable if the rule itself sought to achieve some valid policy purpose, but the rule has no such pretensions.

D. Conclusion

2.15 In summary form, then, the following observations support the abolition of the rule in *Shelley's case*:

(i) the historical reasons for it have passed;

(ii) operating as a rule of law, without regard for the grantor's intentions, its continued application seems actually detrimental rather than beneficial;

(iii) the rule has become a nuisance in the drafting of wills and *inter vivos* settlements, trapping the unwary practitioner and client alike;

(iv) the rule's status in Manitoba is uncertain; and

(v) even where the rule is viewed as subsisting law its imposition is regularly avoided by the courts.

(Footnote continued from page 27)
Section 31 seems to create a rebuttable presumption that the word "heirs" shall be equivalent to the notion of "next of kin" in intestate succession laws. Professors Ziff and Litman, therefore, suggest that section 31 ought to have been applicable to the case: since, in their view, the word "heirs" was undefined and ambiguously used in the will itself, section 31 should have given the remainder to the heirs of the first generation only. They find it ironic that the Ontario Court of Appeal adopted less convincing reasons for avoiding the rule in *Shelley's case*.

With so little to commend the continued existence of the rule, the Commission therefore recommends:

RECOMMENDATION 1

That the rule in Shelley's case be abolished in Manitoba.

E. Proposals for Reform

2.16 It is ironic that the rule in *Shelley's case* continues to concern Canadians in 1985 when it was abolished 60 years ago in England, its country of origin.[35] Section 131 of the *Imperial Law of Property Act, 1925*, 15 Geo. 5, c. 20, provides as follows:

> Where by any instrument coming into operation after the commencement of this Act an interest in any property is expressed to be given to the heir or heirs or issue or any particular heir or any class of the heirs or issue of any person in words which, but for this section would, under the rule of law known as the Rule in Shelley's case, have operated to give to that person an interest in fee simple or an entailed interest, such words shall operate in equity as words of purchase and not of limitation, and shall be construed and have effect accordingly, and in the case of an interest in any property expressed to be given to an heir or heirs or any particular heir or class of heirs, the same person or persons shall take as would in the case of freehold land have answered that description under the general law in force before the commencement of this Act.

This legislation negates the effect of the rule by declaring that the words *"to A's heirs" be construed as words of purchase conferring an actual interest* on the persons mentioned, namely the heirs of A, and not merely as words of limitation defining the estate taken by A. Thus the English Parliament restored the natural meaning of the words of the grant.

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[35]The New Brunswick Law Reform Division also noted this irony. See New Brunswick Law Reform Division, *Survey of the Law of Real Property - A Working Paper* (1976) at 19-25.

2.17 We think that the most appropriate piece of legislation in Manitoba in which to abolish the rule in *Shelley's case* is *"The Law of Property Act"*, C.C.S.M. c. L90. The abolition can, for our purposes, be accomplished by an enactment more simply and briefly worded than the English provision. The following recommendation sets forth the draft legislation that we propose be adopted:

RECOMMENDATION 2

That the abolition of the rule in Shelley's case be accomplished by amending "The Law of Property Act", C.C.S.M. c. L90, to include a section similar to the following:

> *The Rule of law known as the Rule in Shelley's case is abolished insofar as it is part of the law of Manitoba.*

2.18 We have noted that the English legislation abolished the rule only with respect to those instruments which came into operation after its date of commencement. We think that in Manitoba the abolition of the rule should be given retrospective effect and we so recommend:

RECOMMENDATION 3

That, except as provided in recommendation 4, the abolition of the Rule in Shelley's case apply to all interests in real property created before, or on or after the date the abolition of the Rule comes into force.

RECOMMENDATION 4

That the legislation provide that where, prior to its commencement, any act or step was taken in reliance upon the applicability of the Rule in Shelley's case, the law as it was prior to the passing of the legislation should apply to that act or step, as the case may be, as if the legislation had not been passed.

PART III

PERMISSIVE AND EQUITABLE WASTE

3.01 Waste is a tort concerned with protecting the interests of a remainderman or reversioner of property. This is accomplished by restricting a tenant's use of that property. Accordingly, the law of waste is a tool used to balance the rights of tenant and remainderman. There are two categories of waste: commissive (voluntary) and permissive.

3.02 This report deals with two problems within the law of waste which require rectification. The first deals with whether life tenants are liable for permissive waste, and whether they should be. The second deals with a type of commissive waste, known as equitable waste. The issue with respect to equitable waste is whether the present legislation governing this topic is drafted broadly enough.

3.03 In attending to this area, the Commission recognizes that the law of waste has limited application today because the vast majority of leases and settlements have specific provisions covering a tenant's responsibilities.[1] Notwithstanding its small scope, this area of the law is problematic and that, in itself, constitutes sufficient justification for this study.

A. Permissive Waste

3.04 Permissive waste is an offence of omission or non-feasance, where the tenant allows events to occur which cause damage to the property. Examples include not repairing the roof of a building, causing storms to damage the building's interior[2] or allowing banks of a river to deteriorate, so that land is flooded.[3]

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[1]There has never been a reported case in Manitoba dealing with permissive waste.

[2]Lord Coke, Co. Litt. 53a.

[3]*Griffith's Case* (1564) Moore (K.B.) 69; 72 E.R. 446.

1. Manitoba

3.05 In Manitoba, waste is dealt with in *"The Law of Property Act"*, C.C.S.M. c. L90, s. 13:

> Lessees making or suffering waste on the demised premises without licence of the lessors are liable for full damages so occasioned.

By using the phrase "making or suffering waste", the section expressly encompasses both commissive and permissive waste. However, the words "lessees", "demised premises" and "lessors" exclude life tenants from the ambit of the legislation. Section 13 is credited as a translation of the *Statute of Marlbridge*, 1267:[4]

> Also fermors during their terms shall not make waste, sale nor exile of houses, wood and men, nor of anything belonging to the tenements they have to firm, without special licence had by writing of covenant, making mention that they may do it; which thing, if they do and thereof be convict, they shall yield full damage and shall be punish by amerciament grievously.[5]

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[4]52 Hen. 3, c. 23. The *Statute of Marlbridge* is also known by the names Marlebridge and Marlborough. Some commentators explain that Marlbridge is the old name for the present-day Marlborough. However, Prof. Irvine of the Commission is of the view that they were two separate centres; history has lost to us at which of the two the Court was then sitting.

The *Statute of Marlbridge* expanded the common law where the only classes of tenants who were liable for waste were those tenants whose interest arose from the laws of dower and curtesy, Co. Litt. 43a, 300; Co. 2 Inst. 145. There is a dispute among commentators as to which classes of landholders were liable at common law. Bracton (cited by Reeves 1 *Reeve's Hist. Eng. Law* 386) argues liability existed at common law against both life tenants and tenants for years.

[5]Bora Laskin, *Cases and Notes on Land Law* (2d ed. 1964) 420. The original text is:

> Item firmarii tempe firmaꝫ suaꝫ vastum, vendicõem, seu exiliũ nõ faciant, in domibꝫ, boscis, hõibꝫ, neq; de aliquibꝫ ad tenemta q̃ ad firmã ptent sp̃tantibꝫ, nⁱ spãlem (¹³) hũint concessionē [p sc'pturam ¹³] [sive cõvencõnis mencõem ¹⁴] (¹⁵) qđ hoc face possint. Et si fecint & sup hoc convincant' dampna plene refundent, & g̃vit p mĩam puniant'.

This was the first statutory enactment on waste and was followed eleven years later by the *Statute of Gloucester*, 1278,[6] which is as follows:

> It is provided that a man from henceforth shall have a writ of waste in chancery against him that holdeth by law of England, or otherwise for term of life, or for terms of years, or a woman in dower; and he who shall be attainted of waste shall lose the thing he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at.[7]

3.06 Like Section 13, the ancient statutes cover both permissive and commissive waste as explained by Lord Coke in his discussion of the use of the phrase "to do or make waste" in the *Statute of Marlbridge*.

> To do or make waste in legal understanding in this place (time) includes as well permissive waste, which is waste by reason of omission or not doing, as for want of reparation, as waste by reason of commission . . . and the same word hath The Statutes of Gloucester, c. 5, *que aver fait waste* and yet is understood as well of passive as active waste.[8]

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[6] 6 Edw. 1, c. 5. The writ of waste established in this statute was repealed in England by 1879 (Imp.), c. 59.

[7] Laskin, *supra* n. 5, at 420. The original text is:

> Ensement purveu est qe len eit desoremes bref de Wast en la Chauncelrie, [fet de ceo sur] home qi tient par la lei de Engleterre, ou en autre manere a terme de vie, ou a terme de annz, ou femme en doweire, e celui qi serra ateint de Wast perde la chose [qil ad] wastee e estre ceo face gre del trebble de ceo qe le Wast serra taxe.

[8] Co. 2 Inst. 145. This was approved in the extensive notes to *Greene* v. *Cole* (1799), 2 Wm. Saund. 252; 85 E.R. 1037 (C.A.); followed in *Harnett* v. *Maitland* (1847), 16 M. & W. 257; 153 E.R. 1184 (Exch.).

Holmested points out that the older Elizabethan cases substantiate Coke's interpretation.[9]

3.07 Unlike section 13, however, the ancient statutes make both tenants for years and tenants for life equally liable for waste. The *Statute of Gloucester* does so expressly, by listing the classes of tenants it covers, while the *Statute of Marlbridge* uses the term *fermor*. Manitoba has translated this to mean lessee, but Sir Edward Coke defined this term as encompassing all tenants who hold by life or years.[10] *St. Germain's Doctor and Student* (1518),[11] published even closer in time to the enactment of the Statutes, also describes both tenants for years and for life as being liable. Therefore, Manitoba, through a translation error[12] has drafted section 13 too restrictively, enacting only part of the law of waste. As a result, the liability of a life tenant for waste in Manitoba is unclear.

2. Case law divergence

3.08 This uncertainty of the status of the life tenant's liability for waste is exacerbated by the fact that there has never been a reported case in Manitoba on the subject of permissive waste in any context. Outside of Manitoba, there is conflicting case law concerning this issue. Even though the Statutes of Marlbridge and Gloucester clearly made both tenants for years and tenants for life liable for both permissive and commissive waste, the case

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[9] *Anon*, Trin. T6, Eliz. 62. *Griffith's Case*, *supra* n. 4, referred to by: Geo. S. Holmested, "Permissive Waste by Tenants for Life or Years" (1908) 44 C.L.J. 175 at 181.

[10] Coke, 2 Inst. 145. This definition is disputed by G. Kirchwey who argues that *fermors* include only tenants for years. *See* G. Kirchwey, "Liability for Waste" (1908), Col. L.R. 425 at 431.

[11] Plucknett and Barton (ed.), *St. Germain's Doctor and Student* (Second Dialogue) (1974) 177.

[12] It should be noted that Ontario also has a section identical to section 13: *Conveyancing and Law of Property Act*, R.S.O. 1980, c. 90, s. 32.

law has not uniformly given effect to this interpretation. Two lines of cases have emerged. While the courts seem to agree that the ancient statutes created the same liability for life tenants and tenants for years, there is divergence as to whether this includes liability for permissive waste. In the last century, the cases dealing with life tenants have held them unimpeachable for permissive waste, while the cases dealing with tenants for years have held them liable for permissive waste. In the process, both lines have thrown doubt upon the other. The leading case supporting liability for permissive waste for both life tenants and tenants for years is the English decision of *Yellowly* v. *Gower*,[13] followed in Ontario by *Morris* v. *Cairncross*.[14] The leading case supporting immunity is the English decision of *In re Cartwright*,[15] followed in Ontario by *Patterson* v. *The Central Canada Loan and Savings Company*.[16]

(i) immunity

The English decision supporting immunity for permissive waste for life tenants is that of *In re Cartwright*. It was decided on essentially three points. First, Mr. Justice Kay applied several earlier decisions,[17] which he held denied liability for permissive waste. Secondly, the judgment

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[13](1855), Ex. 274; 156 E.R. 833. Approved by: *Woodhouse* v. *Walker* (1880), 5 Q.B.D. 404 (C.A.); *Davies* v. *Davies* (1885), 38 Ch. D. 499.

[14](1907), 14 O.L.R. 544. Followed by: *Cherry* v. *Smith*, [1933] 1 W.W.R. 205 (Sask. C.C.); *Roberts* v. *McMannis*, [1933] 1 W.W.R. 193 (Sask. C.C.).

[15](1889), 41 Ch. D. 532. Followed by: *In re Freman*, [1898] 1 Ch. 28; *In re Parry*, [1900] 1 Ch. 160.

[16](1890), 29 O.R. 134 (Div. Ct.). Followed by: *Monro* v. *Toronto Railway Co.* (1904), 9 O.L.R. 299 (C.A.); *Currie* v. *Currie* (1910), 20 O.L.R. 375 (H. Ct.).

[17]*Gibson* v. *Wells* (1805), 1 B. & P.N.R. 290; 127 E.R. 473; *Herne* v. *Benbow* (1813) 4 Taunt. 764; 128 E.R. 531; *Jones* v. *Hill* (1817); 7 Taunt. 392, 129 E.R. 156.

refers to equity's refusal to provide remedies in cases of permissive waste. Finally, Mr. Justice Kay based his decision largely on the lack of litigation on permissive waste.[18]

The second point was expanded on by Chancellor Boyd in the *Patterson* case which applied *In re Cartwright* in Ontario. Chancellor Boyd held that the rules of equity and the common law were in conflict about permissive waste. The *Judicature Act 1873*, (36 & 37 Vict., c. 66) which combined equity and the common law, provides that where the two are in conflict, equity is to prevail. Accordingly, Chancellor Boyd found that the *Judicature Act 1873* had abrogated any action for permissive waste.[19]

(ii) liability

Morris v. *Cairncross* is a decision of Chief Justice Meredith of the Divisional Court of Ontario. Basically, he found *In re Cartwright* and *Patterson* wrongly decided. In arriving at this decision, he surveyed the statements of Lord Coke, the academic writing on topic, as well as prior case

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[18]On this point, the following is an excerpt from the decision of Mr. Justice Kay:

> Since the Statutes of Marlbridge and of Gloucester there must have been hundreds of thousands of tenants for life who have died leaving their estates in a condition of great dilapidation. Not once, so far as legal records go, have damages been recovered against the estate of a tenant for life on that ground. To ask me in that state of the authorities to hold that a tenant for life is liable for permissive waste to a remainderman is to my mind a proposition altogether startling.

In re Cartwright, *supra* n. 15, at 536.

[19]Chancellor Boyd relied on *Barnes* v. *Dowling* (1881), 44 L.T. (N.S.). 809 (Div. Ct.).

law.[20] Countries with similar laws such as Ireland,[21] the United States[22] and Scotland[23] were also referred to in his judgment.

(iii) evaluation

In re Cartwright relied on three cases in the Common Pleas -- *Gibson* v. *Wells*, *Herne* v. *Benbow* and *Jones* v. *Hill* -- as authorities for the principle that there is no liability for permissive waste against life tenants. However, as Chief Justice Meredith pointed out in the *Morris* decision, these cases are readily distinguishable.[24]

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[20] *Anon*, Trin. T. 6, Eliz. 62; *Corbet* v. *Stonehouse* 9 Car., 2 Rolle Abri. 816-7; *Sticklehorne* v. *Hartchman*, 28 Eliz., Owen 43; 74 E.R. 887 (K.B.); *Greene* v. *Cole*, *supra* n. 9; *Woodhouse* v. *Walker*, *supra* n. 13; *Davies* v. *Davies*, *supra* n. 14.

[21] *Hughes* v. *Sullivan* (1829), 2 Irish Law Recorder, O.S. 456; *White* v. *M'Cann* (1851), 1 Irish C.L.R. (N.S.) 205. Both hold that tenants of either class are liable for permissive waste.

[22] Particularly relevant cases include: *White* v. *Wagner* (1815), 4 Har. & J. (Maryland) 302; *Wilson* v. *Edmonds* (1852), 4 Foster (24 N.H.) 517; *Stevens* v. *Rose* (1888), 69 Mich. 259; *Moore* v. *Townshend* (1869), 33 N.J. Law 284. The latter case contains a scholarly judgment by Judge Depue who wrote a thorough review of English authorities and concluded that both life tenants and tenants for years are liable.

[23] Meredith looks to the civil law of *usufruct* because of its similarity to English law of waste. He refers to *Bell's Commentaries on the Laws of Scotland* (6th ed.) (Vol. 2) 892-3, which held tenants liable for events which would be classified as permissive waste.

[24] *Gibson* v. *Wells* dealt with a tenant at will, a class not covered by the statute. The next case, *Herne* v. *Benbow* relied on a case of a tenant at will for its authority that there is no liability for permissive waste, *The Countess of Shrewbury's Case*, 5 Co. 136, 77 E.R. 68 (K.B.). *Herne* was

(Footnote continued to page 38)

As well, the argument of Chancellor Boyd in *Patterson* that an action for permissive waste is not maintainable because equity conflicts with the common law is a misconceived view.[25] The Courts of Equity had concurrent jurisdiction of waste with the Courts of Law. However, Equity's remedies are ill-suited to permissive waste because it is non-feasance and therefore requires mandatory injunctions, which Equity has always been reluctant to grant.[26] Due to this, the Courts of Equity have consistently refused relief for all uses of permissive waste,[27] as they saw damages as the proper remedy.[28] But, as Chief Justice Meredith pointed out in the *Morris* decision, this refusal does not affect legal liability, nor conflict

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(Footnote continued from page 37)
also decided on procedural grounds. The final case, *Jones* v. *Hill*, did not deal with liability, but rather whether or not the actions complained of were waste. What also may have misled Mr. Justice Kay was the inaccuracy of the reports, noted by Baron Parke in *Yellowly* v. *Gower*, *supra* n. 14 at 293-4.

[25]This is supported by: *Morris* v. *Cairncross*, *supra* n. 16 at 459-61; Holmested, *supra* n. 10 at 186-9; C.B. Labatt, "Obligation of Tenant to Repair" (1901) 37 C.L.J. 521 at 536-7.

[26]*Kerr on Injunctions* (4th ed.) 31. *See also Morris* v. *Cairncross*, *supra* n. 15 at 560.

[27]*Lord Castlemain* v. *Lord Craven* (1733), 22 Vin. Abri. 523; *Wood* v. *Graynon* (1761), Ambler 1395; 27 E.R. 263; *Landsdowne* v. *Landsdowne* (1820), 1 J. & W. 522; 37 E.R. 467; *Coffin* v. *Coffin* (1821), Jac. 7;, 37 E.R. 776; *Powys* v. *Blagrave* (1854), 4 D.G., M. & G. 448; 43 E.R. 582; *Warren* v. *Rudall* (1860), 1 J. & H. 1; 70 E.R. 637.

[28]Per Hardwick, L.C. *Jesus College* v. *Bloom*, 3 Atk. 262, 26 E.R. 953. *Also see* Holmested, *supra* n. 9 at 186-9.

with it.[29] Furthermore, as legal liability is founded upon the legislation and is not a rule of common law, it is not affected by the *Judicature Act*.[30]

Finally, Mr. Justice Kay's main reason for his decision was the lack of litigation dealing with permissive waste. This was, in his view, strong evidence of an immunity. However, there are probably better explanations. First, the majority of life tenants have their estates settled upon them by instruments that would contain specific provisions governing their duties. Further, the rule *actio personalis* would not allow a remainderman to sue the life tenant's estate.[31]

Accordingly, despite the many textbooks which have unquestioningly accepted *In re Cartwright*,[32] its reasons are unpersuasive. It follows

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[29] *Morris* v. *Cairncross*, *supra* n. 15, at 561-2.

> The most that can be said as to the course of Courts of Equity in regard to claims for permissive waste is that they did not actively interfere . . . and I see in this course nothing that involves any conflict or variance between the rules of equity and the rules of common law.

[30] C.B. Labatt, *supra* n. 26 at 533-4, cited with approval by Chief Justice Meredith.

[31] *Id.*, at 535. *Also see* Notes (1889) 20 L.Q.R., 448-9, cited with approval by Meredith. It is unfortunate that Chancellor Boyd in *Patterson* v. *Central Canada Loan and Savings Company* decided "it appears unnecessary to delve into the ancient law with a view of impeaching the decision of Mr. Justice Kay in *In re Cartwright*" (*supra* n. 17 at 136). The exercise would have been more profitable than his uncritical acceptance.

[32] These writers include: Megarry and Wade, *The Law of Real Property* (4th ed. 1975); Cheshire and Burns, *Modern Law of Real Property* (13th ed. 1982); *Adkin's Landlord and Tenant* (17th ed. 1973) 147-50; Peter Butt, *Introduction to Land Law* (Aust.) (1980) 80; W.A. West, *The Law of Dilapidations* (7th ed. 1974); J.C.W. Wylie, *Irish Land Law* (1975) 213.

that the decision of Chief Justice Meredith in *Morris* that, in effect, makes both life tenants and tenants for years liable for permissive waste should be followed in Manitoba.

3. Conclusion

3.09 Both life tenants and tenants for years should be liable for permissive waste. Not only is this the more convincing historical interpretation of the law, it is also the better policy. The Commission can see no reason whatsoever for the two to be treated differently. In both situations there is a reversionary interest to be protected. As discussed, Manitoba, through a translation error has not adequately protected these interests.

4. Options of Reform

3.10 There are three options available to correct this problem. First section 13 of *"The Law of Property Act"* could simply be repealed, leaving the Statutes of Marlbridge and Gloucester to cover the field. This is the situation in most provinces.[33] It is not, in our view, an appropriate solution as it does not satisfactorily clarify the liability of tenants for permissive waste.

3.11 Secondly, Manitoba could retain section 13 and enact a further provision similar to section 29 of Ontario's *Conveyancing and Law of Property Act*, R.S.O. 1980, c. 90.[34] This section is a translation of the *Statute of Gloucester* and its presence mitigates Ontario's identical translation error. However, the section does not expressly define waste to include

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[33]Alberta, British Columbia, Newfoundland, Nova Scotia and Saskatchewan are all simply governed by the old English Statutes.

[34]The section reads as follows:

> A dowress, a tenant for life or for years, and the guardian of the estate of a minor, are impeachable for waste and liable in damages to the person injured.

permissive waste. It would also be undesirable to preserve the flawed section 13.

3.12 Finally, Manitoba could repeal section 13 and enact a broader provision which would clarify the law. This has been done in New Brunswick and Prince Edward Island, who share an identical comprehensive statutory provision dealing with waste. It reads:

> 6(1) Subject to the express terms of any lease, or of any valid and subsisting covenant, agreement or stipulation affecting the tenancy,
>
> (a) every tenant for years and every tenant for life is liable to his landlord and to every other person for the time being having a reversionary interest in the leased premises for voluntary waste and for permissive waste in respect of the premises to the extent by which the interest of the landlord and other persons, if any, having a reversionary interest in the premises is detrimentally affected thereby; and
>
> (b) every tenant at will is liable to his landlord and every other person having a reversionary interest in the leased premises for voluntary waste in respect of the premises to the extent by which the interest of the landlord and other persons, if any, having a reversionary interest in the premises is detrimentally effected thereby.
>
> 6(2) Every landlord and every person having a reversionary interest in any leased premises is entitled, in respect of any waste by a tenant in respect of the premises, in an action brought in a Court of competent jurisdiction to obtain damages or an injunction or both.[35]

3.13 These sections clearly follow Lord Coke's interpretation of the ancient statutes and make both life tenants and tenants for years liable for permissive waste. They codify very clearly the scope of the law and

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[35] *Landlord and Tenant Act*, S.N.B. c. L-1. The same provision appears in *Landlord and Tenant Act*, R.S.P.E.I. 1974, c. L-7, s. 7.

specifically address what remedies are available. Adoption of similar legislation would be the best path, in our view, for Manitoba to follow.

3.14 If Manitoba were to adopt this legislation, two adjustments should be made. First, due to *"The Perpetuities and Accumulations Act"*, C.C.S.M. c. P32.5, all successive legal interests are deemed to take effect in equity as interests behind a trust. It would be desirable, therefore, expressly to include trustees of estates for life or years as persons to whom a tenant may be liable. Secondly, the words "detrimentally affected", contained within the New Brunswick and Prince Edward Island statutes, must be viewed with caution. Potentially, they could negate the common law action of ameliorating waste. This type of waste encompasses alterations which improve the estate.[36] Although claims for ameliorating waste are only successful if the whole character of the property is changed or proposed to be changed,[37] this type of waste could be a weapon for the conservation of estates of historical or natural significance. Because the words "detrimentally affected" could be construed by the courts to abrogate such an action, we think it is advisable to exclude expressly ameliorating waste from the ambit of the legislation. The Commission therefore recomends:

RECOMMENDATION 1

That section 13 of "The Law of Property Act", C.C.S.M. c. L90, be repealed and replaced with the following:

Waste by Tenants

(1) Subject to the express terms of any lease, or of any valid and subsisting covenant, agreement or stipulation affecting the tenancy,

(a) every tenant for years and every tenant for life is liable to his landlord, to any other person for the time being having a

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[36]Megarry and Wade, *supra* n. 32 at 104.

[37]*Ibid.*

reversionary interest in the leased or settled premises, and to any trustee of any trust under which such terms of years or life estate may subsist, for voluntary waste and for permissive waste in respect of the premises to the extent by which the interest of the landlord and other persons, if any, having a reversionary interest in the premises is detrimentally affected thereby; and

(b) every tenant at will is liable to his landlord and every other person having a reversionary interest in the leased premises for voluntary waste in respect of the premises to the extent by which the interest of the landlord and other persons, if any, having a reversionary interest in the premises is detrimentally affected thereby.

(2) Every landlord, every person having a reversionary interest in any leased premises and every trustee, as the case may be, is entitled, in respect of any waste by a tenant in respect of the premises, in an action brought in a Court of competent jurisdiction to obtain damages or an injunction or both.

(3) Nothing in this section shall be construed as abrogating, diminishing or in any way affecting any jurisdiction of the Court with regard to ameliorating waste.

B. Equitable Waste

3.15 To prevent abuse by tenants who were made unimpeachable of waste, the Court of Chancery began to intervene in the seventeenth century by granting injunctions to restrain such tenants from acts of gross or malicious damage. Such acts are incongruously called equitable waste, which Megarry and Wade define as "a peculiarly flagrant breach of voluntary (commissive) waste, which the ordinary disposition from waste will not excuse".[38] This law has been used extensively. Cases include dismantling a mansion house[39] or cutting

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[38] Megarry and Wade, supra n. 32, at 105.

[39] *Vane* v. *Lord Barnard* (1716), 2 Vern. 738; 23 E.R. 1082.

down ornamental trees.[40]

3.16 In Manitoba, equitable waste is dealt with in "The Law of Property Act", C.C.S.M. c. L90, s. 12:

> An equitable interest for life without impeachment of waste does not confer upon the tenant for life any right to commit waste of the description known as equitable waste, unless an intention to confer such right expressly appears by the instrument creating the equitable interest.

3.17 This provision is copied from England's *Law of Property Act*, Imp. 1925, c. 20, s. 135. The reason the section only covers equitable life interests is because the *Settled Land Act*, Imp. 1925, c. 18, made the interest of a life tenant an equitable one. This has just recently occurred in Manitoba under *"The Perpetuities and Accumulations Act"*, C.C.S.M. c. P32.5, s. 4. Accordingly, section 12 now reflects the state of law in this province. Prior to the enactment of the perpetuities legislation, however, section 12 inadequately covered the area, due to indiscriminate borrowing from the English statute.

3.18 The Manitoba error becomes glaring when the legislation from other provinces is surveyed. Newfoundland, New Brunswick, Ontario, Saskatchewan, Alberta and British Columbia all copied the provision, properly enlarging upon it to include all life estates.[41] For example, the *Conveyancing and Law of Property Act*, of Ontario, R.S.O. 1980, c. 90, s. 30, provides:

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[40] *Turner* v. *Wright* (1860), 2 De G. F. & J. 234; 45 E.R. 612.

[41] *The Judicature Act*, R.S. Nfld. 1970, c. 187, s. 21(h); *The Judicature Act*, S.N.B. c. J-2, s. 28; *Conveyancing and Law of Property Act*, R.S.O. 1980, c. 90, s. 30; *The Queen's Bench Act*, S.S. c. Q-1, s. 45(2); *Law of Property Act*, R.S.A. 1980, c. L-8, s. 62; *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 12. Also note that New South Wales (*The Conveyancing Act*, N.S.W. 1919, no. 6, s. 9) and New Zealand (*Property Law Act, 1952*, S.N.Z., s. 29) have enacted the enlarged provision.

> An estate for life without any impeachment of waste does not confer and shall not be deemed to have conferred on the tenant for life a legal right to commit waste of the description known as equitable waste, unless an intention to confer the right expressly appears by the instrument creating the estate.

3.19 Thus, Manitoba is uncomfortably unique in failing to appreciate the narrowness of the English provision. Even though section 12 is more adequate now with the passage of the perpetuities legislation, it should be expanded by adopting the wording of the legislation of the other jurisdictions. This is advisable for two reasons. First of all, such a move would make Manitoba uniform with every other province which has legislation on equitable waste. As well, the recommended provision is more clearly worded than section 12. The Commission recommends:

RECOMMENDATION 2

That section 12 of "The Law of Property Act", C.C.S.M. c. L90, be repealed and replaced with the following section:

Equitable Waste

An estate for life without impeachment of waste does not confer and shall not be deemed to have conferred on the tenant for life a legal right to commit waste of the description known as equitable waste, unless an intention to confer the right expressly appears by the instrument creating the estate.

PART IV

LIST OF RECOMMENDATIONS

A list of the Commission's recommendations in Parts I to III of this Report is as follows:

PART I - SECTION 6 of *"THE MERCANTILE LAW AMENDMENT ACT"*

1. That there continue to be legislation in Manitoba expressly to enforce debt settlement arrangements.

2. That, subject to Recommendation 3, section 6 be amended by deleting the requirement in line 2 thereof that the creditor's express acceptance of the part performance be in writing.

3. That Recommendation 2 not apply where the original contract or obligation states, in effect, that any modification thereof must be in writing.

4. That section 6 be amended so that an obligation shall not be held to be extinguished by part performance where the court, on application, finds that it would be unconscionable to do so.

5. That where a debtor begins part performance of an obligation rendered pursuant to an agreement and continues performance according to the terms thereof, the agreement shall be considered irrevocable.

6. That the legislation provide that where the debtor defaults after (s)he has begun part performance, the creditor may cancel the agreement so that the original contract would revive.

7. That the legislation to reform section 6 be similar to that set forth on pages 15-16 of this Report.

PART II - THE RULE IN *SHELLEY'S CASE*

1. That the rule in *Shelley's case* be abolished in Manitoba.

2. That the abolition of the rule in *Shelley's case* be accomplished by amending *"The Law of Property Act"*, C.C.S.M. c. L90, to include a section similar to the following:

The Rule of law known as the Rule in *Shelley's case* is abolished insofar as it is part of the law of Manitoba.

3. That, except as provided in recommendation 4, the abolition of the Rule in *Shelley's case* apply to all interests in real property created before, or on or after the date the abolition of the Rule comes into force.

4. That the legislation provide that where, prior to its commencement, any act or step was taken in reliance upon the applicability of the Rule in *Shelley's case*, the law as it was prior to the passing of the legislation should apply to that act or step, as the case may be, as if the legislation had not been passed.

PART III - PERMISSIVE AND EQUITABLE WASTE

That sections 12 and 13 of "*The Law of Property Act*", C.C.S.M. c. L90, be repealed and replaced therefor with the following:

Waste by Tenants

12(1) Subject to the express terms of any lease, or of any valid and subsisting covenant, agreement or stipulation affecting the tenancy,

(a) every tenant for years and every tenant for life is liable to his landlord, to any other person for the time being having a reversionary interest in the leased or settled premises, and to any trustee or any trust under which such terms of years or life estate may subsist, for voluntary waste and for permissive waste in respect of the premises to the extent by which the interest of the landlord and other persons, if any, having a reversionary interest in the premises is detrimentally affected thereby; and

(b) Every tenant at will is liable to his landlord and every other person having a reversionary interest in the leased premises for voluntary waste in respect of the premises to the extent by which the interest of the landlord and other persons, if any, having a reversionary interest in the premises is detrimentally affected thereby.

(2) Every landlord, every person having a reversionary interest in any leased premises and every trustee, as the case may be, is entitled, in respect of any waste by a tenant in respect of the premises, in an action brought in a Court of competent jurisdiction to obtain damages or an injunction or both.

(3) Nothing in this section shall be construed as abrogating, diminishing or in any way affecting any jurisdiction of the Court with regard to ameliorating waste.

Equitable Waste

13 An estate for life without impeachment of waste does not confer and shall not be deemed to have conferred on the tenant for life a legal right to commit waste of the description known as equitable waste, unless an intention to confer the right expressly appears by the instrument creating the estate.

This is a Report pursuant to section 5(2) of "*The Manitoba Law Reform Commission Act*", C.C.S.M. cap. L95, signed this 7th day of October 1985.

Clifford H.C. Edwards, Chairman

Knox B. Foster, Commissioner

Lee Gibson, Commissioner

John Irvine, Commissioner

Gerald O. Jewers, Commissioner