

## PROPERTY LAW BILL. 1969.

## EXPLANATORY MEMORANDUM.

This Bill follows the broad stream of similar legislation in all the other Australian States except Queensland which, at varying intervals of time, have followed the United Kingdom Conveyancing Act 1881 and its successor in some respects, the Law of Property Act 1925.

The purpose of these Acts was to sweep away many of the archaic and technical rules relating to property, particularly to real property, and at the same time to simplify and modernise the laws of property and the practice of conveyancing generally. New Zealand and all the Australian States except Queensland and Western Australia have followed with legislation of their own on similar lines, the latest Acts being the New Zealand Property Law Act 1952-1963, the New South Wales Conveyancing Act 1919-1964, the Victorian Property Law Act 1958-1966, The South Australian Law of Property Act 1936-1966 and the Tasmanian Conveyancing and Law of Property Act 1884-1966.

It is likely that the demand for reform legislation on the lines of the United Kingdom Act would have come earlier, had it not been for the establishment of the Torrens title system of land registration in Australia and New Zealand and the growth of that system on an ever increasing scale. The Torrens system was itself intended to, and did, simplify the transfer of and dealing with land which came under the operation of the system. There is still however some land which is under what is known as general law or old system title, and in regard to this the rules of conveyancing are still as archaic as they are technical with the result that the conveyance of a general law title entails not only trouble and expense but the risk of loss by failure to observe technicalities of an historical nature which now serve no useful purpose.

Besides the necessity for reform as regards old system conveyancing it is desirable to codify and modernise the general rules of property in order to bring the property laws of the State up to date with the other States and New Zealand.

The Bill is largely based on the Property Law Act of Victoria and the Property Law Act of New Zealand with lesser contributions from the New South Wales and South Australian Acts. The broad pattern is the same in all these jurisdictions,

but in some cases the detail of part of one Act has appeared to be more suitable than another to the present needs of the State legal system. A feature of all the Property Law Acts is the inclusion as far as possible of existing legislation on subjects related to property so that the Act becomes a comprehensive measure covering the ground formerly covered by many separate Acts which will now be repealed.

As a result many parts of the Bill are only re-enactments in modern style of some older existing legislation. Other parts are new to the State and are intended to bring the legal system of the State on these matters up to date and into line with current legislation in the other Property Law jurisdictions. At the same time opportunity has been taken to include some measure of law reform where it appears necessary.

The following is a detailed analysis of the Bill.

#### PART I.—PRELIMINARY.

Clause 4 repeals certain State Acts and English Statutes which will no longer be necessary or desirable as a result of the Bill. In some cases the relevant provisions of the repealed Act will be found either in form or substance in the Bill, e.g., Partition Act, Contingent Remainders Act, Apportionment Act, Light and Air Act, Landlord and Tenant Act, Supreme Court Act, Simultaneous Deaths Act and Law Reform (Property Perpetuities and Succession) Act.

Clause 5 is a savings clause to preserve existing rights.

Clause 6 deals with the relationship between the Bill and the Transfer of Land Act, 1893 and provides that except where expressly stated the Bill so far as inconsistent with the Act is not to apply to land under the Act.

Clause 7 sets out the definitions.

#### PART II.—DEEDS AND OTHER INSTRUMENTS.

Clause 8 will simplify conveyancing by giving statutory definition to the words "month" (which otherwise can mean lunar month) and "person" (which otherwise would not include a corporation) in all deeds, wills, contracts and other instruments. In addition words in the singular are to be construed as including the plural and the masculine gender is to include the feminine and neuter genders and *vice versa*.

Clause 9 provides a simple and uniform method for execution of a deed and dispenses with necessity for sealing, indenting and formal delivery.

Clause 10 will protect persons dealing with corporations by enabling them to accept as duly executed a deed purporting to be under the common seal of the corporation and countersigned by a director and the secretary, and there are similar provisions as to attorneys for corporations and corporations acting as attorneys.

Clause 11 provides that a person may take an interest in land or other property or the benefit of any covenant although he is not named as a party in the instrument concerned. Subclause (1) is in substance a re-enactment of section 5 of the Real Property Act 1845 (8 and 9 Vict. C. 106) which is to be repealed by this Bill. That section has been held to have a very limited effect and is in practice confined to what are known as "covenants running with the land". There has been a great deal of judicial argument on the question as to whether persons who are not parties to a contract should have the right to enforce the contract when it has been made for their benefit. See *Coulls v. Bagots Executor and Trustee Co. Ltd.* 40 A.L.J.R. 471 and *Beswick v. Beswick* (1967) 3 W.L.R. 932. The result of the cases is that the Courts have refused to recognise third party rights except in limited categories of cases and not always on logical grounds. For example, in general, in the absence of any trust it can be said that a policy of insurance taken out by A and expressed to be payable to B is not enforceable by B. Similarly where two partners agree that on the death of one, the survivor will pay an annuity or other sum to the widow, such an agreement cannot be enforced by the widow. The manifest injustice caused by the rigid application of the third party rule has led to suggestions for reform. As long ago as 1937 the Law Revision Committee in England in its Sixth Interim Report stated:

"The common law of England stands alone among modern systems of law in its rigid adherence to the view that a contract should not confer any rights on a stranger to the contract, even though the sole object may be to benefit him."

The Committee recommended (at para 48) legislation to provide that:

“Where a contract by its express terms purports to confer a benefit directly on a third party, it shall be enforceable by the third party in his own name subject to any defences that would have been valid between the contracting parties. Unless the contract otherwise provides it may be cancelled by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct.”

This proposal is advocated in “Law Reform Now” published in 1964 and edited by the present Lord Chancellor and is among the subjects in Item 111 of the first programme of the English Law Commission of July 1965. It is also advocated in a leading text book, Cheshire and Fifoot’s Law of Contract 6th Ed. p. 391-2. It is therefore felt that there is ample authority to justify the inclusion of a measure of law reform in the Bill by substantially adopting the wording of the Law Revision Committee’s recommendation in subclauses (2) and (3).

Clause 12 provides that a deed may be described by various names.

Clause 13. This is substantially a re-enactment of the 1845 Real Property Act now to be repealed and negatives conditions and covenants implied by the common law.

Clause 14 provides that a receipt embodied in a deed is sufficient without being endorsed on the deed as has been necessary with general law conveyances.

Clause 15. A receipt in or endorsed on a deed is sufficient evidence of payment in favour of a subsequent purchaser.

Clause 16. A deed expressed to be supplemental to a previous deed is to be read as if it contained a full recital of the previous deed.

#### PART III.—GENERAL RULES AFFECTING PROPERTY.

Clauses 17, 18, 19, 20 and 21 are re-enactments of subsections (3), (4), (5), (7) and (8) of section 25 of the Supreme Court Act which are more appropriate in a property statute.

Clause 22. Long term leases are sometimes created in favour of trustees for mortgagees. When the mortgage money is paid the term of the lease is said to be satisfied but under the old common law rules the balance of the term did not automatically merge in the freehold. The purpose of this clause is to make the merger automatic.

Clause 23 abolishes the obsolete estate in land known as an estate tail in which land was granted to A "and the heirs of his body" and could be made to devolve strictly on a person's heirs. In such case the land could not be alienated unless the estate was "barred" by some means often fictitious. Since the passing of the Transfer of Real Property Act 1833, now to be repealed, it has been possible to bar an estate tail by deed and dispose of the fee simple. As a consequence an estate tail now serves no useful purpose and is better abolished by conversion to fee simple from the start.

Clause 24 abolishes the archaic rule of the common law that a future estate in land could not be created.

Clause 25 abolishes the old technicality associated with the descent of land to the heir at law which was thought to prevent interests in chattels real i.e., now leases being created other than by will.

Clause 26 relates to the future estate in land known as a contingent remainder and is in effect a re-enactment of part of the English Act 8 and 9 Vic. Cap. 106, which will cease to apply, and also a re-enactment in substance of the Contingent Remainders Act 1878 now to be repealed.

Clause 27 abolishes what is known as the Rule in Shelley's Case. This rule dates back many centuries and laid down that in a grant of land to A and his heirs, A took the fee simple and the heirs took nothing. In other words it was said that the words "A and his heirs" were words of limitation which marked out the estate which A was to take and were not to be construed as conferring any benefit on the heirs. By reason of clause 37 of the Bill technical words of limitation will no longer be necessary and the rule in Shelley's case is better abolished.

Clause 28. By means of an executory limitation it has been possible to prevent the alienation of land for inordinately long periods. This clause places a not unreasonable restriction on such limitations.

Clause 29 will allow corporations to hold property as joint tenants in the same way as individuals are able to do.

Clause 30 will allow valid receipts for income to be given by married minors.

Clause 31. Subclause (1) is a re-enactment of section 25 of the Law Reform (Property Perpetuities and Succession) Act, 1962 now to be repealed. Subclause (2) is a measure of reform which follows similar legislation in the United Kingdom and gives the Court power with the consent of a married woman to remove any restrictions on alienation attached to her property.

#### PART IV.—CONVEYANCES AND OTHER INSTRUMENTS.

Clauses 32, 33, 34, 35 and 36 contain a codification of the existing law including parts of the Real Property Act 1845 now to be repealed and relates to the necessity for conveyances of land to be by deed and for interests in land to be created by writing.

Clause 37 will allow old system conveyances to pass the fee simple without the technical words and references to "heirs" previously necessary. The clause also provides for a form of conveyance.

Clause 38 abolishes the necessity for technical words in a gift conveyance of old system land.

Clause 39 abolishes the necessity for technical words made necessary by the operation of the Statute of Uses which was passed in England in 1535.

Clause 40 abolishes the archaic and obscure doctrine that in some circumstances a conveyance was said to operate "by wrong".

Clauses 41 and 42 are a re-enactment in modern language of the adopted English Statute 8 and 9 Vict. Cap. 119 now to be repealed.

Clause 43 abolishes the rule that the release from rent of part of the land extinguished the whole rent.

Clause 44 abolishes the rule that old system land cannot be conveyed by a person to himself or to himself and others.

## PART V.—COVENANTS.

Clauses 45 to 52 will obviate the need in conveyances and deeds, including company charges, for many lengthy covenants and conditions to be spelt out. They will now be implied by virtue of this Part. The result will be to shorten many conveyancing documents and save expense. This will bring the State into line with the other States (except Queensland) and dispense with the need for a special form for use in Western Australia when a document is to be prepared on an "all-States" basis as often occurs with charges given by companies whose operations are nation wide.

## PART VI.—MORTGAGES.

Clause 53 is a codification of the existing law as regards the effect of a foreclosure of a mortgage.

Clauses 54 and 55 are a codification and clarification of the powers of the court as regards enforcement of old system and equitable mortgages.

Clause 56 abolishes "consolidation" i.e. the right of an old system mortgagee to insist on repayment of all mortgages owing by the same mortgagor as a condition of repaying any one and in this respect brings an old system mortgage into line with a mortgage under the Transfer of Land Act, 1893.

Clauses 57-66. These clauses are in substance a re-enactment of Part II of the English Statute 23 and 24 Vict. Cap. 145, now to be repealed, but in addition the power to appoint a receiver is made applicable to mortgages under the Transfer of Land Act, 1893 so as to dispense with the need for this having to be expressly provided for in the mortgage instrument as is commonly done now.

Clauses 67 and 68 relate to advances made on joint account which in the main means advances made by trustees. In such case a mortgagor dealing with the surviving mortgagee will have statutory protection without being affected by notice of any trust.

## PART VII.—LEASES AND TENANCIES.

Clause 69. This part is to be applicable to all leases including leases under the Transfer of Land Act, 1893.

Clause 70 is a codification of the existing law.

Clause 71 abolishes the legal implication that the payment of rent yearly, half yearly or quarterly creates a tenancy from year to year which can only be terminated by six months notice expiring at the end of a year of the tenancy.

Clause 72 is complementary to clause 71 by providing a simple and uniform method of terminating any "periodic tenancy" or tenancy of uncertain duration. "Periodic tenancy" is defined in clause 7 as meaning "a tenancy of no fixed duration and in respect of which the rent is payable weekly, monthly, yearly or for any other recurring period". Such tenancies will in future be capable of termination by one month's notice on either side and the existing technical and often troublesome rules relating to the procedure for termination will no longer be necessary.

Clause 73 is a re-enactment of section 6 of the English Statute 23 and 24 Vict. Cap. 38. A waiver of a specific breach of covenant is not to be deemed a general waiver of all breaches.

Clause 74 abolishes the doctrine of "interesse termini" under which a lessee was regarded as not having a leasehold estate before entry on the land. Now a lease will be capable of taking effect without entry being necessary, but under subclause (3) the lease must take effect within 21 years. Subclause (5) confirms the validity of concurrent leases.

Clause 75 is a re-enactment of section 9 of the English Real Property Act 1845 and provides that where a reversion on a lease is surrendered the next estate becomes the reversion for the purpose of enforcing rights against a tenant.

Clause 76 is a codification of the existing law. Where part of leased land is conveyed the covenants and conditions are apportioned and continue in force in respect of each part of the land.

Clause 77 is a codification of the existing law. The rent reserved by a lease and the benefit of the covenants are to pass with the reversion.

Clause 78 is a codification of the existing law and provides that the burden of covenants by the lessor also pass with the reversion and continue in favour of the lessee.



Clause 79 is a re-enactment of sections 1 and 2 of the English Statute, 22 and 23 Vict. Cap. 35, and provides that a licence to a lessee to breach a covenant does not prejudice the lessor's rights in respect of other covenants or other co-tenants.

Clauses 80-82 (except 81 (3)) are in substance a re-enactment of the Landlord and Tenant Act, 1912, now to be repealed, and contains provisions relating to the assignment of leases and relief against forfeiture for certain breaches of covenant. Clause 81 (3) is new and is taken from the U.K., New South Wales and Victorian Acts. Subsection (6) of section 3 of the Landlord and Tenant Act which purports to apply the relief from forfeiture provisions to "any right or option to purchase any land where the purchaser is in possession" has been omitted following the decision of the High Court in *Tropical Traders Ltd. v. Goonan* (1963) III C.L.R. 41 as to its ineffectiveness in the context of that Act.

Clause 83 is new and will allow a head lease to be replaced by a new lease without disturbing any sublease. This will not apply to a lease which is registered under the Transfer of Land Act, 1893.

#### PART VIII.—POWERS OF ATTORNEY.

Clauses 84-88 will facilitate the operation of powers of attorney and give statutory protection to third parties dealing with attorneys. A power of attorney given for valuable consideration may be made irrevocable, either indefinitely or for a specified time not exceeding two years.

#### PART IX.—VOIDABLE DISPOSITIONS.

Clauses 89 and 91 are a re-enactment in modern form of two old English Statutes passed in reign of Elizabeth I namely, 13 Eliz. Cap. 5 and 27 Eliz. Cap. 4 which avoided conveyances made in fraud of creditors and purchasers respectively.

Clause 92 protects the acquisition of reversionary interests made in good faith without fraud or unfair dealing and follows the English Sales of Reversions Act 1867, the effect of which is now expressed in the U.K. Property Law Act and has been followed in the Acts of other States.

## PART X.—POWERS OF APPOINTMENT.

Clauses 93 and 94. A person to whom a power to appoint property is given may disclaim the power. The power may then be exercised by the other persons to whom the power is given unless the contrary is expressed in the instrument.

Clause 95. A purchaser in good faith is not to be affected by an appointment which is void as a fraud on the power.

Clause 96. An appointment is not to be invalid on account of the exclusion of one or more of the objects or on the ground that only a nominal share has been appointed. This is to be found in most of the other Property Law Acts and dates back to an English Act, the Powers of Appointment Act 1867.

Clause 97. A deed executed in accordance with the Act is to be a valid execution of a power without other formality.

## PART XI.—PERPETUITIES AND ACCUMULATIONS.

Clauses 99-115 are a re-enactment of Parts I and II of the Law Reform (Property Perpetuities and Succession) Act, 1962 now to be repealed.

## PART XII.—SUCCESSION.

Clauses 116-118 are a re-enactment of sections 20-22 of the above Law Reform etc. Act.

Clauses 119-120 are a re-enactment of the Simultaneous Deaths Act, 1960 now to be repealed.

## PART XIII.—EASEMENTS, ENCROACHMENTS AND MISTAKE.

Clause 121 is in substance a re-enactment in simplified form of the Light and Air Act, 1902 now to be repealed.

Clauses 122 and 123 are new and are taken from the New Zealand Act. Where, mistakenly, a building is erected which encroaches on a neighbour's land or is built on the wrong block, the Court is to have power to adjudicate between the owners and to make such order as is fair and equitable in the circumstances.

Clauses 124-125 are re-enactments of sections 23 and 24 of the Law Reform etc. Act 1962 now to be repealed and relate to the powers of the Court in regard to payments made under mistake.

PART XIV.—PARTITION OF LAND AND DIVISION  
OF CHATTELS.

Clauses 126-127 are in substance a re-enactment of the Partition Act, 1878 now to be repealed.

Clause 129 is new and is taken from the New Zealand Act and empowers the Court to order a division of jointly owned chattels or a sale and division of the proceeds.

PART XV.—APPORTIONMENT.

Clauses 130-134 are in substance a re-enactment of the Apportionment Act, 1891 now to be repealed under which rents dividends and annuities are to be considered as accruing from day to day and are apportionable accordingly as between the persons entitled in succession.

PART XVI.—SERVICE OF NOTICES.

Clause 135 provides a statutory method of serving any notice which is required to be served under the Act or under an instrument or agreement that relates to property.

FIRST AND SECOND SCHEDULES.

These are the Acts which will be replaced by the new Act and are therefore to be repealed.

THIRD SCHEDULE.

These are the various covenants to be implied pursuant to clause 45 and follow the similar covenants in the Property Law Acts of the other jurisdictions.

FOURTH SCHEDULE.

Provides a form of Conveyance.