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Report on the Passing of Risk in Contracts for the Sale of Heritable Property, , Scottish Law Commission, Stationery Office, 1990, 0102628904, 9780102628906, . .

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Commercial aspects of trusts and fiduciary obligations , Ewan MacKendrick, 1992, Law, 297 pages. The origins of this book lie in the first Oxford Law Colloquium held in St. John's College, Oxford on 12-13 September 1991. The subject of the Colloquium, "Commercial Aspects

The Law of Restitution , Robert Goff Baron Goff of Chieveley, Gareth Hywel Jones, 2002, Law, 912 pages. The second edition of this text examines such topics as the right to restitution and defences..

Parker and Mellows the modern law of trusts, David Berkeley Parker, A. J. Oakley, Anthony R. Mellows, 1998, Law, 799 pages. .

Equity and contemporary legal developments papers presented at the first International Conference on Equity, the Faculty of Law, the Hebrew University of Jerusalem, June 1990, Israel B. Greene and Sara Mann Greene Fund for Equity Studies, 1992, Law, 923 pages. .

Irish Conveyancing Law 3rd Edition, John C W. Wylie, Una Woods, Dec 1, 2005, , 943 pages. An essential guide to conveyancing law and practice. This user-friendly and highly practical guide contains the information, advice and guidance that will ensure your

The Court of King's Bench, 1450-1550 a study in self-help, Marjorie Blatcher, Nov 27, 1978, Law, 181 pages. .

Doctor and student or, Dialogues between a doctor of divinity and a student in the laws of England: containing the grounds of those laws, together with questions and cases concerning the equity thereof; also comparing the civil, canon, common and statute laws, and shewing wherein they vary from one another. To which is now added on account of the author, and a general table of the principal matters; never before printed, Christopher Saint German, 1721, Law, 366 pages. .

The Frontiers of Liability, Volume 1 , Peter Birks, 1994, Law, 216 pages. The 'Frontiers of Liability' is the title of a series of high-level seminars held in All Souls College, Oxford during 1993 and 1994. Drawing together top academics

Constructive trusts , A. J. Oakley, Nov 9, 1978, Law, 142 pages. .

The constructive trust the case for a new approach in English law, D. W. M. Waters, 1964, Law, 353 pages. .

Equity, fiduciaries and trusts, 1993 , D. W. M. Waters, Maryla Waters, Mark Bridge, University of Victoria (B.C.). Faculty of Law, International Academy of Estate and Trust Law, 1993, Law, 463

pages. .

Irish Land Law Fourth Edition, J. C. W. Wylie, Sep 30, 2010, , 1247 pages. Comprehensive and clear, this book not only covers the subject of Irish land law with depth and detail, it also offers invaluable information on equity, trusts and succession

The Road to Oxiana , Robert Byron, 1982, Architecture, 292 pages. In 1933 the delightfully eccentric Robert Byron set out on a journey through the Middle East via Beirut, Jerusalem, Baghdad and Teheran to Oxiana -the country of the Oxus, the

Equity A Course of Lectures, F. W. Maitland, Mar 3, 2011, Law, 368 pages. The lectures given in Cambridge between 1888 and 1906 by the Downing Professor of the Laws of England, F. W. Maitland..

Explaining Constructive Trusts , Gbolahan Elias, 1990, Law, 177 pages. Concerned with "rationalizing the rules" (Preface p. v) of constructive trusts, this reappraisal of the English law of trusts discounts two major existing theses regarding the

Contract and conveyance , J. T. Farrand, 1980, Business & Economics, 340 pages. .

Town and Country Planning (Scotland) Bill; Planning (Listed Buildings and Conservation Areas) (Scotland) Bill; Planning (Hazardous Substances)(Scotland) Bill; Planning (Consequential Provisions)(Scotland) Bill: Report on the Consolidation of Certain Enactments relating to Town and Country Planning in Scotland (157)

Chapter 6 deals with "Scotland in Parliament" and in the context of parliamentary procedures, there is mention of a number of criticisms, for example, that "there is insufficient time in its [Westminster's] crowded schedule for Scottish affairs to be fully and properly discussed . . . It is often argued that there should be more scope for Scottish legislation to keep up with development south of the Border, to implement measures of Scottish law reform more promptly and to provide greater opportunities to make changes, unique to Scotland, which require legislation."

There is a variety of sources of law reform proposals, but the most significant one is the Scottish Law Commission which was set up in 1965. It is created by and answerable to Parliament and its function is to report on areas of Scots law which may require reform. If reform is required, an Act of Parliament will usually be necessary.

It is a matter of great concern to lawyers and ought to be of equal concern to the Scottish public that, at present, 10 of the commission's reports have not been implemented and many of these have not even been allocated time for debate in Parliament. Scotland in the Union is an attempt to persuade us that things may change.

The commission has programmes for law reform which are agreed upon by the Government. The commission then identifies an area of law which it investigates by considering the current position and often also how other countries deal with the issue. A discussion paper is issued for comment by anyone interested.

Once the commission has considered the comments, it produces a report which it presents to the relevant minister, usually the Lord Advocate. The report contains the commission's proposals for change and it incorporates a draft Bill which makes life easier in that the work which the Parliamentary draftsman would otherwise have to do is already done. At that point, the commission's work on that particular item is complete.

It is a matter of regret that many of these reports on important matters such as succession, divorce, the passing of risk, have not even been discussed in Parliament. It is for Parliament to decide on what laws should be changed and how, but it is not acceptable to have these reports lying

somewhere without even being debated.

Many of the law commission's proposals are controversial, but some are not, and many non-controversial proposals for legislative change are submitted not only by the commission, but also by the Law Society of Scotland and other bodies. It is both disturbing and annoying that not even these can be implemented quickly.

Some non-controversial measures are incorporated into Law Reform (Miscellaneous Provisions) Acts, the last one being in 1990. That Act was actually highly controversial in that it contained far-reaching proposals on the provision of legal services. The Government is probably still licking its wounds from the battle which it had with the legal profession over what many regarded as ill-considered proposals.

At present, the law provides that when a contract for the sale of heritable property (the commonest example being a house) is completed, the risk of destruction of the property passes immediately to the buyer who must therefore insure the property against that risk, even although he will not take over possession of the property for some time, frequently at least six weeks.

Since that decision, lawyers invariably provide in their contracts that the risk will not pass to the buyer until the date of entry, i.e. when the buyer moves in. This is sensible, because in most cases the seller remains in the property until that date, or very close to it, and so is in a better position than the buyer to look after it properly.

The reason given by the Government for not implementing this report is not that it is controversial, nor is it because there is a lack of parliamentary time. The Government's reason is apparently that, because lawyers provide in their contracts that risk will pass at entry, there is no need to change the law at all.

This is not satisfactory. Following upon the decision in the Glasgow Corporation case, lawyers altered their practice and the Government could have easily ascertained what the practice was. That being so, one has to ask why it allowed the Scottish Law Commission to embark on the project on risk if it knew that it had no intention of implementing the recommendations.

"The principal purpose of a legal system must be to provide effective and efficient administration of justice . . . Clearly, that purpose can be achieved only if the legal system can adapt and develop in keeping with changing social circumstances . . . [The] changing pace of social circumstances makes it necessary to keep the law up-to-date. This suggests the need to look critically at current parliamentary procedures to see whether ways can be found of expediting them and thus facilitate essential law reform."

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The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both House of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General thirty-eight Reports containing proposals for the reform of the law. It has also published eleven Working Papers, five Consultation Papers and Annual Reports. Details will be found on pp 28–31.

This Report was submitted on 20th December 1991 to the Attorney General, Mr. Harold A. Whelehan, S.C., under section 4(2)(c) of the Law Reform Commission Act, 1975. It embodies the results of an examination of and research in relation to the law relating to The Passing of Risk from Vendor to Purchaser which was carried out by the Commission at the request of the former Attorney General, Mr John Rogers, S.C., together with the proposals for reform which the Commission were

requested to formulate.

While these proposals are being considered in the relevant Government Departments the Attorney General has requested the Commission to make them available to the public, in the form of this Report, at this stage so as to enable informed comments or suggestions to be made by persons or bodies with special knowledge of the subject.

The Commission recognised that a comprehensive review of land law and conveyancing law was not feasible within the limited resources available to them at the time, and accordingly established a Working Group which was asked to identify a number of areas in which reform of land law or conveyancing law could be brought about more easily. The Working Group was asked to concentrate on areas where it could recommend changes in the law which would remove anomalies or redundant provisions.

The members of the Working Group appointed were Mr John F. Buckley, Commissioner (Convener), Miss Justice Mella Carroll, Professor J.C. Brady, Mr George Brady, SC, Ms Mary Laffoy, SC, Mr Ernest B. Farrell, Mr Rory McEntee, Solicitors. Miss Justice Carroll resigned from the Working Group in November 1988 following her appointment as a judge of the Court of the International Labour Organisation.

The Commission would like to record its deep appreciation of the contribution which the members of the Working Group have made to the Commission's examination of this difficult and technical area of the law. Their knowledge and experience were invaluable in enabling the Commission to formulate practical proposals for alterations in the law. As usual, however, the Commission emphasises that it alone is responsible for the contents of this Report.

The position of parties in the intermediate stage in the conveyancing process between contract and completion has given rise to considerable controversy in Ireland. This controversy not only manifests itself in the area of the passing of risk between contract and completion, but also, for example, in that of the registration of judgment mortgages against the vendor's estate during this period.

There is a general equitable principle that where there is a contract for the sale of land, the vendor is usually regarded as holding the property on trust for the purchaser.¹ The trust has sometimes been called a constructive trust, as it arises without any intention on the part of the parties.² The exact nature of the trust is, however, as yet unclear – both in this jurisdiction and in Britain.³ The issue which causes the greatest disagreement would appear to be the question of when the beneficial interest in the land is to be regarded as passing to the purchaser and from the vendor. One view is that the vendor becomes a trustee of the legal estate and the purchaser becomes the owner of the beneficial interest as soon as the contract for sale is entered into.⁴ This view is subject to the qualification that the contract must be one of which a court would grant specific performance.⁵ There is, however, also authority for the opinion that the crucial fact is not the signing of the contract, but rather the payment of the purchase money by the purchaser.⁶ Under the latter theory, the purchaser does not acquire the entire beneficial interest in the land until he has paid the whole of the purchase money to the vendor, and accordingly, the vendor is a trustee for him only to the extent to which he has paid part.

purchaser who benefits. The corollary of this rule is that he also suffers the losses,⁸ subject to the vendor's duty to maintain the property so long as he retains possession.⁹ It is the purchaser, therefore, who bears the loss or damage caused to the property by such things as fire, flood or storm and other elements which are beyond his control.

Standard Conditions of Sale attempt to ameliorate the purchaser's position. Condition 43 of the Incorporated Law Society's General Conditions of Sale (1988 Ed.) provides that the vendor shall be liable for any loss or damage howsoever occasioned to the subject property between the date of sale and the actual completion of the sale. The condition limits the amount of such liability to the sale price. Condition 44 introduces qualifications to the general principle, namely that the liability shall not apply to inconsequential damage from reasonable wear and tear in the course of normal

occupation and use or to damage occasioned by operations reasonably undertaken by the vendor in vacating the property (provided the same are undertaken with reasonable care).¹⁰

Condition 45 provides that nothing in Conditions 43 and 44 shall affect, inter alia, the purchaser's right to specific performance, the operation of the doctrine of conversion, the rights and liabilities of parties other than the vendor and the purchaser, the rights and liabilities of the purchaser on foot of any lease subsisting at the date of sale, the purchaser's right to effect, on or after the date of sale, his own insurance in respect of the property, or the purchaser's right to gains accruing to the subject property after the date of sale.¹¹

It is beyond doubt, therefore, that at common law the purchaser bears the loss or damage caused to the property from the date of the contract by such things as fire, flood, storm and tempest. Various commentators have suggested ways of getting around this doctrine¹² and a recent English decision suggests that the doctrine of frustration may apply to contracts for the sale of land, albeit in very limited circumstances.¹³ Frustration is where an act occurs which is the fault of neither party to a contract and the effect of that act is to deprive one of the parties of substantially the whole benefit which it was the intention of the parties that he should derive from the contract.

By analogy with a lease –National Carriers Ltd v Panalpina (Northern) Ltd., [1981] AC 675 and in Scotland, Cantors Properties (Scotland) Ltd v Swears and Wells Ltd 1978 SC 310. The Ontario Court of Appeal has held that the doctrine does apply to contracts for the sale of land; Cahan v Frazer (1951) 4 DLR 112. See also Capital Quality Homes Ltd v Colwyn Construction Ltd (1975) DLR (3d) 385.

It would appear, however, that the principle that the purchaser bears the loss or damage still applies with undiluted force in Ireland.¹⁴ The result of this principle is that a purchaser must take out insurance to cover the property from the date of the contract,¹⁵ and must be advised to do so by his solicitor.¹⁶ Even when the purchaser does take out his own policy this is not free from problems; generally a purchaser can succeed in obtaining fire cover only for the premises.¹⁷

The vendor is under no duty to keep up his insurance¹⁸ with the result that the cover may have lapsed between contract and completion. A wise vendor would, of course, maintain his insurance lest the sale should not be completed. It is clear that as long as the vendor has not been paid he has an insurable interest.¹⁹

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