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EXTENT TO WHICH THE ENGLISH COMMON LAW AND STATUTES ARE IN EFFECT

JAMES W. DAY

Section 2.01 of *Florida Statutes* 1949, which was enacted on November 6, 1829,¹ reads as follows:

"The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state."

Various meanings are attached to the term "common law," and often the sense in which it is employed in a particular instance is determinable only from the context in which it stands. It is sometimes used in American decisions and elsewhere as including English statutes that modify the English common law. Thus American statutes that adopt the English common law without mention of English statutes are construed in some jurisdictions as adopting also those statutes in force in England on the date as of which the common law was adopted by the jurisdiction in question.² Since, however, the Florida statute expressly adopts both the English common law and the English statutes as they existed on July 4, 1776, it is evident that the Legislature of Florida is here using the term "common law" as it was employed by Blackstone,³ namely, as consisting of the *lex non scripta* or that portion of the law that derives its force from custom and immemorial usage and not from statutory enactment. Cases in which the decisions are based on custom and usage are evidence of that custom and usage and constitute the chief repository of the common or non-statutory law. In American jurisdictions that have adopted the English common law as it existed on a specified date, the English cases prior to that date are usually accepted as conclusive evidence of what the common law

¹Fla. Terr. Acts 1829, p. 8.

²E.g., *Masury & Son v. Bisbee Lumber Co.*, 49 Ariz. 443, 68 P.2d 679 (1937); see *Browning v. Browning's Estate*, 3 N.M. 371, 386, 9 Pac. 677, 684 (1886). But cf., e.g., *Boardman v. Catlett*, 21 Miss. 149 (1849); *Farmers' and Merchants' Ins. Co. v. Jensen*, 58 Neb. 522, 78 N.W. 1054 (1899).

³1 BL. COMM. *63.

was at the time they were decided.⁴ A few early treatises such as those of Littleton, Coke, and Blackstone are regarded as possessing almost equal evidentiary value in this connection.⁵

PATTERNS FOLLOWED IN THE ADOPTION OF THE COMMON LAW

In most of the states of the Union, the English common law as of a particular date or the English common law and statutes of such a date have been adopted. In many of them this adoption has been by statute or constitutional provision. In others it has been made by the courts without the aid of statutory enactment, on the theory that the English law that was in effect in the colonies prior to the American Revolution continued in force thereafter. In Louisiana, however, neither the English common law nor the English statutes have been adopted.⁶

In a majority of the states, including Florida, both the statutes and common law that were in effect in England on a specified date have been adopted. In some states, however, it has been held that only the English common law of the date in question, unaffected by English statutes, is in effect. These decisions are based in some of these states on an interpretation of the English-law-adopting provision of the constitution, or the statutes of the state, as excluding the English statutes.⁷ In others the decisions are based on the theory that the courts in recognizing the English law as the basis of the jurisprudence of the state, without the aid of an adopting statute, have excluded the English statutes.⁸

In some states, including Florida, the common law or the common law and statutes that were in effect in England on July 4, 1776, have been adopted;⁹ in others the date selected in this connection is the fourth year of the reign of James the First.¹⁰ That date was chosen

⁴*E.g.*, *Ex parte Beville*, 58 Fla. 170, 50 So. 685 (1909).

⁵*Welch v. People*, 30 Ill. App. 399 (1889); *see Schick v. United States*, 195 U.S. 65, 69 (1904).

⁶*Cf.* *Noel Bros. v. Texas & P. Ry.*, 16 La. App. 622, 133 So. 830 (1931).

⁷*E.g.*, *Boardman v. Catlett*, 21 Miss. 149 (1849); *Farmers' & Merchants' Ins. Co. v. Jensen*, 58 Neb. 522, 78 N.W. 1054 (1899); *Paul v. Ball*, 31 Tex. 10 (1868); *Courand v. Vollmer*, 31 Tex. 397 (1868).

⁸*Cf.*, *e.g.*, *Lamphere's Case*, 61 Mich. 105, 27 N.W. 882 (1886).

⁹*See, e.g.*, *Evans v. Cook*, 11 Nev. 69, 74 (1876); *State v. Eastern Coal Co.*, 29 R.I. 254, 261, 70 Atl. 1, 4 (1908).

¹⁰*E.g.*, *Haggin v. International Trust Co.*, 69 Colo. 135, 169 Pac. 138 (1917); *Sopher v. State*, 169 Ind. 177, 81 N.E. 913 (1907); *Commonwealth v. Donoghue*, 250 Ky. 343, 63 S.W.2d 3 (1933); *State v. Beck*, 337 Mo. 839, 85 S.W.2d 1026

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because it corresponds roughly with the time of the establishment of the first permanent English settlement in America at Jamestown in 1607.¹¹ In a few states dates other than those mentioned have been designated concerning this matter. Thus in Georgia the common law in effect prior to May 14, 1776, has been adopted;¹² and in Tennessee the English common law as it stood in 1775 is in effect.¹³

This pattern of adopting the English common law or the English common law and statutes of a particular date, however, has not been followed in all states. In South Carolina the colonial assembly by a statute enacted on December 12, 1712, adopted 167 specific English statutes and such part of the common law as was not altered by those statutes.¹⁴ It has usually been held that an English statute omitted from that enumeration is not in effect in South Carolina. Among the omissions, for example, was the Statute De Donis.¹⁵ By the terms of that statute a limitation to a grantee and the heirs of his body, which prior to the enactment of that statute in 1285 had created a fee simple conditional, was given effect when used thereafter as an estate in fee tail. As a result of this omission, a limitation of the type in question creates in South Carolina today an estate in fee simple conditional,¹⁶ although it has been impossible to create such an estate in England since 1285.

HISTORICAL BACKGROUND IN FLORIDA

It is interesting to note, although it is indeed rare that the matter is of practical importance today, that the position of Florida as to the basic English law in effect has not always been the same as at present.

During the years of Spanish rule, the Spanish law was of course the foundation of the legal system existing in the area. This circumstance has left no imprint on the present law, however, aside from the fact that certain acts of the Territory of Florida, some of which are included in the current revision,¹⁷ preserve rights and interests obtained by

(1935); see *Cox v. Morrow*, 14 Ark. 603, 613 (1854).

¹¹See, e.g., *Penny v. Little*, 4 Ill. 301, 304 (1841).

¹²See *Harris v. Powers*, 129 Ga. 74, 79, 58 S.E. 1038, 1040 (1907).

¹³See *Porter v. State*, Mart. & Y. 226, 227 (Tenn. 1827).

¹⁴1 POWELL, REAL PROPERTY §63 (1949); see *State v. Charleston Bridge Co.*, 113 S.C. 116, 126, 101 S.E. 657, 660 (1919).

¹⁵13 Edw. I, c. 1 (1285).

¹⁶E.g., *Barksdale v. Camage*, 3 Rich. Eq. 271 (S.C. 1851).

¹⁷E.g., FLA. STAT. §2.02 (1949) (based on Proclamation of Major General Andrew Jackson on July 17, 1821, Fla. Terr. Acts 1822, p. xiv; Ordinance of Jackson of July 21, 1821, §3, Fla. Terr. Acts 1822, p. xx; Act of Sept. 2, 1822, §4,

individuals while the Spanish law was in effect.

Spain ceded Florida to the United States by a treaty dated February 22, 1819, and ratified February 19, 1821.

Governor Andrew Jackson by his proclamation dated July 17, 1821, declared that all laws and municipal regulations that were in existence when Florida was ceded to the United States should remain in effect until other provision should be made.

The Act of September 2, 1822, of the Legislative Council¹⁸ read:

" . . . the common law of England which is of a general nature, and all statutes of the British Parliament in aid of, or to supply the defects of the said common law, made prior to the fourth year of James the First, and of a general nature, and not local to the kingdom, which said common law and statutes are not inconsistent with the constitution and laws of the United States, and except as in this Act is hereby excepted, together with the system of equity recognized and practiced in the courts of chancery in the United States, shall be the rule of decision in this territory, until repealed by the Legislature thereof — Provided, however, that none of the British statutes respecting crimes and punishment shall be in force in this Territory, nor shall any person be punished by the common law, where the laws and statutes of this territory have made provision on the subject, but where the laws and statutes of the United States and of this Territory have not made provision for the punishment of offences, the several courts may proceed to punish for such offences — Provided the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed twelve months, and the fine shall not exceed five hundred dollars. . . .

" . . . this act shall have effect in West Florida, from and after its passage, and in East Florida, on the first day of October, in the year one thousand eight hundred and twenty-two."

The quoted portion of the above act remained in force until the taking effect of the Act of June 29, 1823,¹⁹ which contained the following provision:

Fla. Terr. Acts 1822, p. 50; and Act of Nov. 6, 1829, Fla. Terr. Acts 1829, p. 8); *id.*, §694.01 (based on Act of June 24, 1823, Fla. Terr. Acts 1823, p. 26); *cf. id.*, §708.01 (based on Act of Dec. 23, 1824, Fla. Terr. Acts 1824, p. 189).

¹⁸Fla. Terr. Acts 1822, p. 50.

¹⁹Fla. Terr. Acts 1823, p. 111.

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"... the common and statute law of England which is of a general and not a local nature with the exceptions hereinafter mentioned down to the fourth day of July one thousand seven hundred and seventy-six, be and the same is hereby declared to be of force in this Territory; provided, the said common and statute law be not inconsistent with the constitution and laws of the United States and the acts of the Legislative Council of this Territory — and provided also, that none of the British statutes respecting crimes and misdemeanors, shall be in force in this territory; nor shall any person be punished by the said common law, when the statutes of this territory have made provision on the subject; but where the said statutes have not made provision for the punishment of any offence, the several courts of this Territory shall proceed to punish such offence by fine and imprisonment; provided, That in no case the fine shall exceed five hundred dollars, or the imprisonment twelve months."

This Act of June 29, 1823, was repealed as of January 1, 1829, by the Act of November 23, 1828,²⁰ which was entitled "An Act to Provide for the Condensation of the Laws." The latter act listed and continued in effect eighty-two of the previously enacted territorial statutes and repealed all other public acts that had been passed in prior sessions of the Legislative Council. Neither the Act of September 2, 1822, nor that of June 29, 1823, was among those that were retained; and from January 1, 1829, to November 6, 1829, no statute with reference to the English common law and statutes was in effect.

The Act of November 6, 1829,²¹ entitled "An Act Providing for the Adoption of the Common and Statute Laws of England, and for Repealing Certain Laws and Ordinances," read as follows:

"... the common and statute laws of England, which are of a general and not of a local nature, with the exception hereinafter mentioned down to the fourth day of July, one thousand seven hundred and seventy-six, be, and the same are hereby declared to be of force in this Territory: Provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States, and the acts of the Legislative Council of this Territory; And provided also, That none of the British statutes

²⁰Fla. Terr. Acts 1828, p. 203.

²¹Fla. Terr. Acts 1829, p. 8.

respecting crimes and misdemeanors, shall be in force in this territory, except statutes declaratory of and in aid of the common law; nor shall any person be punished by the said common law, when there is an existing provision by the statutes of this Territory on the subject; but when there exists no such provision by the statute of the Territory, then the several courts of this Territory shall proceed to punish such offence by fine and imprisonment; Provided, That in no case, the fine shall exceed five hundred dollars, or the imprisonment, twelve months."

The portions of this act dealing with matters other than crimes and misdemeanors have remained in continuous operation since its enactment and are now embodied without change in substance in Section 2.01 of *Florida Statutes 1949*, which is set out at the beginning of this article. The provisions in the Act of November 6, 1829, concerning crimes and misdemeanors were amended by the Act of February 10, 1832,²² and as so modified are included in Sections 775.01 and 775.02 of the current statutes.

ENGLISH STATUTES IN EFFECT IN FLORIDA

The Legislature can of course repeal either expressly or by implication an English statute theretofore in effect in the state, just as it can repeal one of its own prior enactments.

The bar and the courts of Florida were long hampered by the relative inaccessibility of copies of the English statutes in effect in the state. Preliminary steps to remedy the situation were taken with the enactment of the Act of December 27, 1845,²³ which authorized the compilation and publication of the English statutes in force in the state. Pursuant to this authorization, Judge Leslie A. Thompson compiled in manuscript form the English statutes that in his opinion were of practical significance in Florida in 1847, the date of the completion of his project. He appended comments and notes to many of the statutes. Unfortunately the publication of his materials, although authorized by the Act of 1845, was delayed for almost a century.

Mr. Guy W. Botts, now of the Jacksonville bar, while a student in the University of Florida College of Law, completed a research project in 1937 that involved the annotating of Judge Thompson's manuscript with notes on all Florida decisions pertaining to the English statutes.

²²Fla. Terr. Acts 1832, p. 63.

²³Fla. Laws 1845, c. 46.

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At the request of the Attorney General of Florida, Mr. Botts in 1941 began a more complete annotation of the Thompson materials. In this work he retained such portions of Judge Thompson's notes as in his opinion were still of value, and added extensive comments of his own. He indicated the numerous English statutes that were in effect at the time of the original compilation but that had been repealed by the subsequent enactment of Florida statutes dealing with the same or similar subject matter. His materials were published in 1943 in Volume 3 of *Florida Statutes 1941*, pages 5 to 79.²⁴

The contributions of Judge Thompson and Mr. Botts in this connection are scholarly works that are of great value to the bar. It should be noted, however, that the question as to what English statutes are in effect is controlled by the English-law-adopting statute of Florida, and that the Thompson and Botts treatises merely represent the respective conclusions of the authors as to which English statutes continue to be within the scope of that statute. As Mr. Botts states in his preface, this determination is in the case of some English statutes a difficult one to make. It is quite possible for unusual situations to arise that are controlled by English statutes that are omitted from the lists in question.

All of the English statutes enacted prior to the American Revolution are included in Ruffhead's *Statutes at Large*, the first volume of which was published in London in 1769.²⁵

PRESENT APPLICABILITY OF ENGLISH COMMON LAW AND STATUTES

English Statutes. Section 2.01 of *Florida Statutes 1949* adopts only such portions of the English common law and statutes in effect on July 4, 1776, as are of a general nature. It expressly excludes those

²⁴The annotations to Section 2.01 in the Pocket Supplement of *Florida Statutes Annotated* list the English statutes included in the Thompson manuscript but do not set out the statutes themselves.

²⁵An English statute is most frequently designated and cited by the regnal year of the sovereign that corresponds to the date of its enactment. Thus the Statute of Tenures is referred to as the Statute of 12 Charles the Second, chapter 24. It is a simple matter to ascertain whether an English statute designated in this manner was enacted sufficiently early to render possible its being in effect in Florida. George the Third ascended the throne on October 25, 1760. No English statute enacted after July 4, 1776, which was in the fifteenth year of his reign, or bearing the name of any of the British monarchs subsequent to him — George the Fourth, William the Fourth, Victoria, Edward the Seventh, George the Fifth, Edward the Eighth, and George the Sixth — can be in effect in Florida.

portions that are local in character. Even in the absence of an express exclusion of local English common law and statutes in the English-law-adopting statute of a jurisdiction, it is held that only the English law that is of general application and not that which is local to England is in effect.²⁶ As was stated by the Justices of the Supreme Court of Pennsylvania in their report made to the legislature of the state in 1808 under statutory mandate, there are included within this exception "a multitude of English statutes, relating to the king's prerogative, the rights and privileges of the nobility and clergy, the local commerce and revenue of England, and other subjects unnecessary to enumerate."²⁷ Similarly, the so-called Black Act²⁸ for the suppression of poaching was held not to be in effect in Georgia, since it was "founded upon a tender solicitude for the amusement and property of the aristocracy of England."²⁹

Common-Law Doctrines. Principles of the common law that were developed to achieve objectives similar to those of the statutes just mentioned are frequently regarded as local to England and as therefore not of force in the United States. In *Bates v. Brown*,³⁰ for example, it was held that although the common law rule of shifting inheritances had not been rejected by statute in Illinois, it was not in effect there.³¹ By that rule one who inherits from a decedent is divested of his estate by the birth even at a time beyond the period of gestation following the death of the decedent, of an individual who would have inherited the estate if he had been in being at the death of the decedent.³² It was stated in the *Bates* case that this rule sought to promote the retention of landed property in the hands of a few in order to conserve the splendor of the nobility and the influence of the leading families, and that consequently it was local to England. The decisions of the various jurisdictions are not uniform, however, with reference to whether common law doctrines will be rejected on grounds such as these. It has been held, for example, that the rule of shifting inherit-

²⁶See, e.g., *City of Lincoln v. Rickets*, 84 F.2d 795, 798 (8th Cir. 1936).

²⁷3 Binn. 593, 596 (Pa. 1808); cf. Dale, *Adoption of the Common Law*, 21 AM. L. REC. (N.S.) 553, 567.

²⁸9 GEO. I, c. 22 (1722).

²⁹*State v. Campbell*, T.U.P. Charl't. 166, 167 (Ga. 1808).

³⁰5 Wall. 710 (U.S. 1866).

³¹*Accord*, *Drake v. Rogers*, 13 Ohio St. 21 (1861); *Cox v. Matthews*, 17 Ind. 367 (1861).

³²2 BL. COMM. ¶208, n.9.

ance is in effect in North Carolina.³³

A similar justification that is sometimes advanced for the rejection of common law doctrines of the kind under consideration is that the reason on which the rule was based had ceased to exist before the jurisdiction in question adopted the common law. Thus, although estates in joint tenancy,³⁴ and estates by the entirety,³⁵ with their accompanying right of survivorship to the longer lived of the co-owners, are recognized in most jurisdictions as existing in the absence of statutory change of the common law, it has been held that no such survivorship exists in Ohio.³⁶ The Ohio court stated in effect that survivorship was applied to these estates at common law for the convenience of the lord under whom the land was held in tenure, since the necessity for his looking both to the heir of a deceased co-owner and to the survivor for the enforcement of his tenurial rights was thereby eliminated;³⁷ that these tenurial rights of the lord were in the main abolished by the Statute of Tenures;³⁸ and that the reason for recognizing survivorship in estates in joint tenancy and estates by the entirety therefore no longer exists.³⁹

It is of course true that the reason supporting the recognition of survivorship in joint tenancies and tenancies by the entirety has ceased to exist as completely in those states that continue to accord that recognition as it has in Ohio. The divergent holdings with respect to this question exemplify the fact that the various jurisdictions are not consistent with one another in the application of the maxim that a rule of the common law passes away when the reason on which it is based ceases to exist. Furthermore, decisions of a single jurisdiction often are inconsistent in that they apply the maxim to some rules and reject it in the case of others to which it is equally relevant.⁴⁰

³³Caldwell v. Black, 5 Ired. L. 463 (N.C. 1845).

³⁴E.g., Gaunt v. Stevens, 241 Ill. 542, 89 N.E. 812 (1909); 2 TIFFANY, REAL PROPERTY §419 (3d ed. 1939).

³⁵E.g., Ohio Butterine Co. v. Hargrave, 79 Fla. 458, 84 So. 376 (1920); Palmer v. Mansfield, 222 Mass. 263, 110 N.E. 283 (1915); 2 TIFFANY, *op. cit. supra* note 34, §430.

³⁶Sergeant v. Steinberger, 2 Ohio 305 (1826).

³⁷Cf. Fisher v. Wigg, 1 Wms. 14, 21, 24 Eng. Rep. 275, 278 (K.B. 1700).

³⁸12 CAR. II, c. 24 (1660).

³⁹Cf. Gaines v. Lessee of Grant, 5 Binn. 119, 123 (Pa. 1812); Haws v. Haws, 3 Atk. 525, 26 Eng. Rep. 1102, 1103 (Ch. 1747).

⁴⁰The Supreme Court of Florida, for example, in *Farrington v. Greer*, 94 Fla. 457, 113 So. 722 (1927), and *Coogler v. Rogers*, 25 Fla. 853, 7 So. 391 (1889), recognized the common law rule that a conveyance to a grantee by one whose land

Even some portions of the common law of general application that have not been repealed by local statute may not be in effect. Thus common law doctrines are not in effect in a state when they are incompatible with its views as to liberty and sovereignty,⁴¹ are inconsistent with its customs and institutions,⁴² or are not suited to its physical and climatic conditions.⁴³ Similarly, common law doctrines that were modified in a state by custom during the time that it was a colony are of force in it only as so modified and not in their original form.⁴⁴

Stare Decisis. When it has been settled by judicial decision that a principle of law is in effect in a jurisdiction, the courts of the jurisdiction of course usually continue thereafter to recognize that principle as of force.⁴⁵ And even though the principle has not been applied there, the courts often regard it as binding upon them in an appropriate

is in the adverse possession of a third person, is void against the adverse possessor and gives the grantee no right of entry upon which he can maintain an action in his own name. This rule has been rejected by judicial decision in a number of states on the ground that the reason that supported it is no longer operative. *Cf.* 5 TIFFANY, REAL PROPERTY §1331 (3d.ed. 1939). But in *Richardson v. Holman*, 160 Fla. 65, 33 So.2d 641 (1948), the Court rejected the allied doctrine of the common law that a possibility of reverter is inalienable and apparently based its holding on the ground, among others, that the conditions that gave rise to the doctrine no longer exist.

⁴¹See *State v. Verage*, 177 Wis. 295, 187 N.W. 830, 841 (1922).

⁴²*Simpson v. State*, 59 Ala. 1 (1877) (holding use of spring guns to protect property from trespass, even if sanctioned at common law, to be inconsistent with customs of Alabama); *cf.* *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (holding common law rule restricting freedom of the press, to immunity from censorship before publication to be inconsistent with American customs).

⁴³*San Joaquin & K. R. C. & I. Co. v. Fresno F. & I. Co.*, 158 Cal. 626, 112 Pac. 182 (1910) (holding common law rules as to use of water in streams, not applicable to California); *Reno S. M. & R. Works v. Stevenson*, 20 Nev. 269, 21 Pac. 317 (1889) (holding common law doctrine of riparian rights not to be suited to physical conditions in Nevada); *Champlain & St. L. R.R. v. Valentine*, 19 Barb. 484 (N.Y. 1853) (holding common law doctrine of riparian rights as developed in England where no large lakes exist, to be inapplicable to large lakes in New York); *Fulmer v. Williams*, 122 Pa. 191, 15 Atl. 726 (1888) (holding common law concept that the term "navigable rivers" includes only tidal streams, to be inapplicable in Pennsylvania, where, contrary to the situation prevailing in England, most important rivers are chiefly above tidal waters).

⁴⁴*Storer v. Freeman*, 6 Mass. 435 (1810); see *Commonwealth v. Rowe*, 257 Mass. 172, 179, 153 N.E. 537, 540 (1926).

⁴⁵*E.g.*, *In re Seaton's Estate*, 154 Fla. 446, 18 So.2d 20 (1944); *Stinson v. Meegan*, 318 Mass. 459, 62 N.E.2d 113 (1945).

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situation if the rule is established in the common law of England and is recognized by other American jurisdictions.⁴⁶ Thus the High Court of Errors and Appeals of Mississippi in holding that the Rule in Shelley's Case was then in effect in that state, made the following statement:⁴⁷

"The argument has frequently been urged by those who assign a feudal origin to the rule that inasmuch as the . . . system has been abolished the reason for the rule has ceased, and therefore the rule itself should be abrogated. However cogent this argument may be when addressed to the legislature, yet courts of justice cannot so far recognize its policy as to make it the basis of their decisions. Whenever a principle of the common law has been once clearly . . . established, the courts of this country must enforce it until repealed by the legislature, as long as there is a subject matter for the principle to operate on, and although the reason in the opinion of the court which induced its original establishment may have ceased to exist. . . . Were it otherwise the rules of law would be as fluctuating and unsettled as the opinions of the different judges administering them might happen to differ in relation to the existence of sufficient and valid reasons for maintaining and upholding them."

Illustrative of an opposing view that is often taken is the following language used by the Supreme Court of the United States with reference to the applicability in the federal courts of the rule of the common law that one spouse is incompetent to testify in behalf of the other in a criminal prosecution:⁴⁸

"It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but if Congress fails to act, . . . is it not the duty of the court, if it possesses the power, to decide it in accordance with the present day standards of wisdom and justice rather than

⁴⁶*E.g.*, *Kreitz v. Behrensmeyer*, 149 Ill. 496, 36 N.E. 983 (1894).

⁴⁷*Powell v. Brandon*, 24 Miss. 343, 363 (1852).

⁴⁸*Funk v. United States*, 290 U.S. 371, 381 (1933).

in accordance with some outworn and antiquated rule of the past? . . . That this court . . . may decline to enforce the ancient rule of the common law under conditions as they now exist we think is not fairly open to doubt. . . .

"The final question to which we are thus brought is not that of the power of the federal courts to amend or repeal any given rule or principle of the common law, for they neither have nor claim that power, but it is the question of the power of these courts, in the complete absence of congressional legislation on the subject, to declare and effectuate, upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced. It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."

Stare Decisis in Connection with Principles on the Basis of Which Transactions May Have Been Conducted. When a rule of law that has been applied in the decisions of a jurisdiction is one upon which individuals may have relied in their subsequent attempts to acquire property rights or to provide for the devolution of such rights or in their commercial transactions, the courts are more reluctant to abrogate it thereafter than in situations in which no proper activities can have been conducted in reliance upon the law as theretofore recognized.⁴⁹ Decisions that establish rules of this type serve not only to adjudicate the rights of the parties to the immediate controversy but also to establish principles on the basis of which other individuals conduct their affairs thereafter. Alterations of such rules can, when deemed desirable, be made by the legislature, since statutes affect only subsequent transactions; but when a court vacillates and overrules its own decisions in these fields, its decision is retrospective and may impair or destroy interests and titles that have been purchased in reliance on the supposed stability of the law as previously announced.⁵⁰

For the same reason a court is usually hesitant with reference to rejecting recognized doctrines of the common law in these fields even

⁴⁹*E.g.*, *Liberty Nat. Bank & Trust Co. v. Loomis*, 275 Ky. 445, 121 S.W.2d 947 (1938).

⁵⁰*See Minnesota Co. v. National Co.*, 3 Wall. 332, 334 (U.S. 1865).

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when it has not previously had occasion to apply them⁵¹ and although conditions have so changed since the doctrines had their origin that if the situation called for their consideration in connection with transactions of a different type, it would hold that they had ceased to exist.

The rule that the courts will continue to apply the law as theretofore recognized applies with particular force when the title to real property is involved,⁵² since in most instances of this sort it is especially probable that interests or estates have been purchased on the faith of that law.

ATTITUDE OF THE FLORIDA COURT TOWARD THE COMMON LAW

The Supreme Court of Florida has, when changed social or economic conditions suggest that such action is desirable, manifested a readiness to deviate from principles of the common law other than those upon which individuals may have relied in entering into proper transactions. In *Banfield v. Addington*,⁵³ for example, a married woman was held to be liable to a customer of her beauty shop for the alleged negligence of her employee. The Court stated that her exemption at common law from liability for torts arising out of her attempts to contract was based on the control over her person, property, services, and earnings that then was vested in her husband. The Court reasoned that since social change and modern provisions in the statutes of Florida have emancipated the wife with respect to her earnings, both the spirit and soul of the former rule have disappeared and the rule itself has ceased to exist.

The Florida Court has in the main followed its prior decisions involving principles on the basis of which individuals may subsequent to the decisions have acquired title to property⁵⁴ or have entered into commercial transactions.⁵⁵ Similarly, it has usually applied to such situations the common law rules on which individuals may have relied in acquiring property, even when it has not previously had occasion to pronounce them. In *Ivey v. Peacock*,⁵⁶ for example, the common

⁵¹Cf. *Kreitz v. Behrensmeyer*, 149 Ill. 496, 36 N.E. 983 (1894).

⁵²E.g., *United States v. Title & Trust Co.*, 265 U.S. 472 (1924).

⁵³104 Fla. 661, 140 So. 893 (1932).

⁵⁴Cf., e.g., *State ex rel. Molter v. Johnson*, 107 Fla. 47, 144 So. 299 (1932).

⁵⁵E.g., *Kissimmee v. State ex rel. Ben Hur Life Ass'n*, 121 Fla. 151, 163 So. 473 (1935); *Alta-Cliff Co. v. Spurway*, 113 Fla. 633, 152 So. 731 (1933).

⁵⁶56 Fla. 440, 47 So. 481 (1908).

law rule that a conveyance can pass no more than a life estate unless the word "heirs" is used in the granting clause or in the habendum was applied in 1908 to a conveyance executed in 1887 to a grantee "to have and to hold . . . in fee simple forever." It was held that the grantee obtained only a life estate, in spite of the fact that no prior Florida decision on the point could be found, and although a statute⁵⁷ had been enacted in 1903 dispensing with the necessity of using the word "heirs" in passing a fee simple estate.⁵⁸

The Florida Court, however, like those of other jurisdictions, does not hesitate in a proper situation to overrule its prior decisions or to abrogate principles of the common law even with reference to the law of real property, when the rules of law thus repudiated cannot have been the basis upon which existing estates or interests have been acquired. Thus the Court in holding in *Richardson v. Holman*⁵⁹ that a possibility of reverter is now alienable in Florida even if such was not the case at common law, manifested a willingness to disregard doctrines of the common law. The decision was based on a statute⁶⁰ that in reality was inapplicable to the facts at hand;⁶¹ but the Court endeavored further to sustain its conclusion by a pattern of reasoning that would perhaps have led to the same result even in the absence of the specific statute upon which it relied, and that would require but little extension to support the rejection of the common law doctrines with reference to the inalienability of other contingent interests in real property. The problem as to whether such interests as contingent remainders and rights of entry for condition broken are alienable in Florida is consequently unsettled at present.

It is to be observed that no titles or interests in existence at the time of the decision in question could have come into being through purchase in reliance upon the common law rule that possibilities of reverter are inalienable. In instances in which the rejection by the Court of a common law rule may result in the destruction of such titles or interests, the rule should not be abrogated otherwise than by statute.

⁵⁷Fla. Laws 1903, c. 5145.

⁵⁸*Accord*, *Jordan v. Landis*, 128 Fla. 604, 175 So. 241 (1937); *Tyler v. Triesback*, 69 Fla. 595, 69 So. 49 (1915); *cf.* *Reid v. Barry*, 93 Fla. 849, 112 So. 346 (1927).

⁵⁹160 Fla. 65, 33 So.2d 641 (1948).

⁶⁰FLA. STAT. §689.01 (1941).

⁶¹See 1 U. OF FLA. L. REV. 309 (1948).

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PECULIAR SIGNIFICANCE OF THE COMMON LAW IN THE FIELD
OF REAL PROPERTY

The present legal system is a structure erected upon the foundation of the common law. The portion of the edifice that pertains to real property has been even more closely conformed in coloring and lines to those of this base than has the remainder of the pile, since the need for stability is relatively greater there and because it is viewed traditionally in a more conservative perspective. While this wing has been altered occasionally to adapt it to conditions existing at the time, these modifications have been effected chiefly by renovation and vertical extension rather than by demolition and replacement. It continues to manifest, therefore, most of its original form and many of the characteristics of the successive modifications to which it has been subjected.

Consequently, one who would understand the present law of real property must familiarize himself with the social system introduced into England at the time of the Norman Conquest and with the rules of property law to which it gave rise. He must also acquire a knowledge of the various intervening modifications that have been made in those rules and consider the changing social and economic conditions in which the modifications had their origin. Some of the old law is still in effect; and the new law that has been devised consists largely of additions to and alterations of the old law, that are construed in the light of the old law.

Although stability and definiteness exist to a greater degree in the law of real property than in other types of law, it is true nevertheless that in every jurisdiction many questions as to that law are not settled by local precedent. The result reached when such questions are litigated is often controlled by whether the court feels on the one hand that the situation calls for an adherence to the common law or on the other regards it as one in which it is desirable to deviate from the old law because of changed conditions or other considerations.

The attorney for a litigant in these instances must understand the relevant principles of the common law and the reasons upon which they rest, if he is to contend intelligently for the approach that will further the interests of his client. The court, also, must relate its decision to the historical background, regardless of whether the decision is an application or a modification of the original common law, if it is to avoid a precedent that will introduce confusion into the law of the jurisdiction. It often first selects the result it deems desirable

and then applies or rejects on stated grounds the common law, whichever is appropriate, to sustain that result. This practice is satisfactory when the court considers all of the implications of its holding and assures itself that it is not achieving justice in the case at hand at the expense of creating a troublesome precedent that exemplifies the saying that hard cases make bad law.

Before one uses a decision of one American jurisdiction in another as an exposition of the common law relevant to a matter in controversy, he must ascertain that neither the concepts of the two jurisdictions as to what constitutes the common law adopted by them nor their attitudes toward modifying the common law differ to such an extent as to render the decision inapplicable as a precedent.

For these reasons, the historical development of the law of real property bulks large in any treatise devoted to that subject.