QUIA EMPTORES AND THE ENTAIL

Subinfeudation and the Family Settlement in Thirteenth Century England

by

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I. - Introduction

1990 was the seven-hundredth anniversary of the passing of the statute Quia Emptores. The statute is accorded a fundamental place in the development of English land law in that it provided that alienations of the fee simple in freehold land should be by substitution rather than subinfeudation. This meant that the alinee would hold the alienated land from the alienor's lord rather than from the alienor, thus safeguarding the valuable interests of the lord in the services and incidents arising from the tenement. Freedom to alienate by substitution was also recognized, so that, for the future, lords would have to accept as tenants the assigns of their original grantees. Subinfeudation of the freehold was still permissible if the estate being granted was less than the fee simple, for instance if it was a life estate or a fee tail, although the distinction between and definition of the fee tail and the fee simple as estates were in large measure results of the statute. It is the purpose of this article to suggest that, in addition to the above achievements, Quia Emptores deserves to be accorded an important role in the development of the entail in English land law, albeit that its role in this regard was probably not one intended by its framers, and was to cause embarrassment and confusion for some considerable time.

The development of the entail as a freehold estate in land is one of the most mysterious episodes in the history of English law. It is usually traced to the needs of thirteenth-century fathers who wished to provide grants of land for their daughters and younger sons, coupled with an unwillingness to allow such offspring freedom to alienate to strangers so as to destroy the chance of the land reverting to the main family line if the younger son or daughter died without issue. Fathers found such schemes thwarted by the courts interpreting the gifts as being conditional upon the birth of issue, so that, once issue was born, the condition was fulfilled and the grantee free to alienate. If such issue later died, the
chance of the land reverting to the father or his heir had gone. It was to protect the legitimate expectations and wishes of such donors that the statute *De Donis Conditionalibus* was enacted in 1285. This allowed the heirs of the body of such donees, as well as those with a right to the reversion in the absence of such heirs, to recover land alienated in such circumstances by means of the remedies of 'for-medon', so-called because they enforced the *forma doni*, the form of the gift. Although on its face, the statute appeared to protect the form of the gift only until the land descended to the first heir or such heir failed, it was gradually interpreted to mean initially that the entailed land could not be alienated for three generations and finally that it could not be alienated at all. Having created an inalienable interest in land, the courts almost immediately, if not concurrently, set about discovering methods by which such land could be effectively alienated so as to defeat the restriction. Thus were developed the methods of barring entails by warranty, fine and common recovery. In effect, English law devised an unbarrable entail and means by which to bar it in quick succession, thus performing perhaps the most remarkable *volte face* in legal history. The about-turn was so remarkable and so sudden that it raises serious doubts as to whether what occurred has been properly appreciated. This article will argue that a much more consistent and coherent story can be told if it is recognized that *Quia Emptores* and the circumstances of its enactment played a key role in the process by which the entail developed.

II. - The Relief and Inheritance

A full understanding of this development requires an examination of several related concepts in mediaeval land law, and it is best to begin with that of the 'relief'. The relief was the sum of money paid by the heir of a deceased tenant to the tenant's lord on the occasion of taking up his inheritance. Much has been made by writers on the history of English land law of this payment, suggesting that it indicates the feudal origins of such grants to a tenant in return for his services, with no right that any heir should expect to inherit the land upon the original tenant's death. In such circumstances, the heir, should he wish to inherit, would have to buy back the land from the lord, in effect compensating him for his not being able to choose a new tenant freely. There is evidence that, at the close of the eleventh century, William Rufus had extracted large sums from the heirs of tenants in such circumstances. However, this was at a time when heritability of land held by military tenure was far from accepted, and even then it met with complaints which in themselves indicate that there was already in existence an idea of a just amount that was payable in such circumstances. In his Coronation Charter, Henry I provided that such reliefs should be just and lawful, and in the thirteenth century, the actual sums amounting to just and lawful