

**AN ANALYSIS OF THE
CONVEYANCING
(SCOTLAND) ACT, 1874, 37
AND 38 VICTORIA, CAP. 94**

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JOHN T. MOWBRAY

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BY
JOHN T. MOWBRAY, W.S.

WITH
AN APPENDIX CONTAINING THE ACT.



EDINBURGH:
BELL & BRADFUTE, 12 BANK STREET.

1874.

PREFACE.

OF the provisions of 'The Conveyancing (Scotland) Act, 1874,' the most important are those for—

1. The abolition of the renewal of investiture.
2. The redemption or commutation of casualties in existing, and the abolition of legal casualties in future feus.
3. The vesting in every heir, by survivance, of a personal right to his ancestor's estate, so as to enable him to deal with it without having made up a title, and
4. The shortening of the period of the positive prescription as to titles to estates in land.

The enactment of the first two of these provisions may be said to have completed the carrying out of the suggestions made by the Royal Commissioners in their Report, dated 13th January 1838, for the improvement of the Scottish system of land rights and conveyancing. In the conclusion of that Report the Commissioners made the following remarks:—' In bringing these suggestions to a close, we think it not unnecessary or unimportant to remark that the improvements we have recommended, while perfectly consistent with each other, may yet be separately adopted. We have stated the improvements which we think may be safely introduced

'generally into the system. But if it should be thought that 'we are advancing too rapidly, we are not aware that any 'part may not be taken by itself.' The course thus suggested was adopted; the recommendations contained in the Report were carried out gradually, and after the various Acts that were passed during the period, from 1845 to 1868, had come into operation, there still remained two of the propositions in the Report which had not received effect, viz.,

The 9th, which recommended 'That where a party has 'granted a disposition with a double manner of holding and 'indefinite precept, or with a holding simply *a me*, or silent 'as to the manner of holding sasine by the disponent or his 'heirs or assignee duly taken hereafter and recorded, should 'be held and construed to be, and should, in all respects, 'operate as a sasine duly confirmed by the superior of the 'disponent;' and

The 1st, which recommended 'That the casualty of relief, 'and other casualties of superiority, as well as the superior's 'right to composition upon the entry of singular successors, 'should in future be discharged, and either commuted for an 'annual payment, or purchased by the vassal.'

The first quoted of these propositions differed from the others contained in the Report in this, that while, with reference to the existing forms, they were to be carried out 'by 'substituting and abridging,' this proposition involved the sweeping away of the forms to which it referred, viz., charters by progress, without putting anything in their place, and consequently rendered it necessary to provide by statutory enactment for the effects which flowed from actual entry with the superior. This may partly have been the reason why the carrying of it out was postponed, though the other changes naturally and appropriately took precedence, as preparing the

way for this one; but another cause of delay was that though for some time there has been a very general agreement of opinion in the profession that entry by charter or writ, at least so far as compulsory, should be abolished, there was not the same agreement of opinion as to the way in which it could best be done. It would be out of place here to discuss the relative merits of the two modes that were proposed, but it may be hoped that the delay which has thus been occasioned, though in itself to be regretted, may have had the effect of rendering more perfect the plan that has been adopted.

The provision for vesting in an heir a personal right to his ancestor's estate will be recognised by all as removing an admitted source of hardship, and the shortening of the period of the positive prescription will be generally approved of; but it is possible, in these days of emigration to foreign lands, that in cases of remote propinquity the true heir may be lost sight of for the shortened period, and so be deprived of his right of succession, though probably such cases will be of rare occurrence.

In regard to the alterations in the solemnities in the execution of deeds, there will probably be greater difference of opinion. It is certainly desirable that anything really superfluous in the way of solemnity should be dispensed with, but the object sought to be attained by such solemnities is an important one; and it will be admitted that the former rules operated satisfactorily for its accomplishment, while it may be doubted whether they involved any risk of error which a reasonable amount of attention was not sufficient to avoid. It is to be hoped that the relaxation in this and other respects of the old rules may not in any way tend to looseness of practice in the preparation and execution of deeds.

In preparing this Analysis, I have endeavoured to bring

together the different sections of the Act bearing on the same point or subject, so as to show in one view the several provisions connected therewith; and I trust that in this way the work may prove useful to the practitioner, by facilitating his reference to the clauses which he may wish to consult.

I am indebted to Mr John P. Wood, W.S., for the preparation of the Index.

J. T. M.

EDINBURGH, Nov. 2, 1874.

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