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Words of Limitation and Section 60 of the Law of Property Act 1925

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INTRODUCTION

Section 60(1) of the Law of Property Act 1925 ("LPA") was intended to abolish the technical rules in relation to the passing of a fee simple in *inter vivos* conveyances. The subsection is generally regarded as having achieved its purpose in a straightforward manner and, not surprisingly, it has not received close scrutiny in modern times. Recently, the Irish legislature has embarked on an ambitious reform programme in respect of its antiquated system of land law[1] and has adopted section 60(1) as a model for reform in relation to words of limitation in respect of unregistered land.[2] But does section 60(1) provide an appropriate model for other jurisdictions to follow and, indeed, does it provide a satisfactory framework in English law? This article will argue that the drafting of the subsection is flawed, casting some doubt on its effectiveness to achieve its purpose. It seems that the problem in English law can, for the most part, be addressed. However, this requires the adoption of an artificial interpretation of the subsection's wording and reliance on section 60(4) to do more work than it was intended to do. The Irish proposal, which mirrors section 60(1) but does not include an equivalent of section 60(4), would not appear to be adequate to achieve its purpose. It must be acknowledged that, given the practical importance of ensuring that a conveyance will pass a fee simple when it is intended to do so, a court interpreting a reforming provision on words of limitation would be likely to ignore any shortcomings in terms of statutory drafting. However, even if the high stakes involved would ensure this outcome, it is submitted that the

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* Law Faculty, University College Cork. I would like to thank Professor Peter Sparkes for his comments on an earlier draft of this article. Any errors are solely the responsibility of the author.

1 See generally (Irish) Law Reform Commission *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP34-2004) (October 2004); *Report on the Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005) (July 2005).

2 The relevant provision is contained in the Land and Conveyancing Law Reform Bill, 2006 which was passed by the upper house (the Seanad) but fell due to a general election in May 2007. The Bill, which is not seen as controversial, has now been revived.

fundamental nature of the legislative provisions under discussion makes it worthwhile to explore the issues of interpretation which arise.

THE PROBLEM

At common law, in order to pass a fee simple estate, it was necessary to use the word "heirs", as in a conveyance to X "and his (or her) heirs". Section 51 of the Conveyancing Act 1881 permitted use of the alternative wording to X "in fee simple". However, unless the magic words were used, only a life estate passed. This was the result of a conveyance "to X" or "to X for ever" or "to X in fee"[3] or even "to X in simple fee".[4] With the intention of reforming this position, section 60(1) provides that:

> A conveyance of freehold land to any person without words of limitation, or any equivalent expression, shall pass to the grantee the fee simple or other the whole interest which the grantor had power to convey in such land, unless a contrary intention appears in the conveyance.[5]

On first inspection, it is not obvious why the provision is expressed to apply only to a conveyance "without words of limitation, or any equivalent expression". The sub-section would appear to make more sense without those words and, indeed, is explained in *Megarry and Wade* without any reference to them.[6]

However, the words are there and must be reckoned with. Section 60(1) does not provide that a fee simple will pass "without the need for" words of limitation. Rather, it creates a presumption that a fee simple will pass but applies this presumption only to conveyances "without words of limitation, or any equivalent expression". One question that arises, therefore, is whether the subsection applies where words are included which are intended to pass a particular estate but which would have been ineffective to do so under the rules which applied prior to the

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3 See *In re Ethel and Mitchell's and Butler's Contract* [1901] 1 Ch. 945.

4 See A. Underhill "The Report of the Land Transfer Commissioners" (1911) 27 L.Q.R. 173, 179, referring to the mischief done by a misguided solicitor who preferred "in simple fee" to "in fee simple" on the grounds that the former was "better English".

5 The phrase "or other the whole interest" involves an order of words which would not be used today but is not a typographical error and also occurs in Wills Act 1837, s. 28, on which (as will be discussed further) the wording of section 60(1) was based.

6 C. Harpum *Megarry and Wade: The Law of Real Property*, 6th ed., (London 2000), p. 50.

enactment of (the 1922 precursor of) section 60(1).[7] It will be convenient to consider two examples of such a conveyance, "to X in fee" or "to X for ever". In order for section 60(1) to function satisfactorily, the words "in fee" or "for ever" must be deemed to constitute neither "words of limitation" nor "any equivalent expression". If not, then this type of conveyance would not be covered by the subsection and, being governed by the previously existing rule, would pass only a life estate.

A related issue is that section 60(1) appears to have no application to a conveyance "to X in fee simple", the standard formula employed in a modern conveyance of unregistered land.[8] This is because the words "in fee simple" seem clearly to constitute "words of limitation, or any equivalent expression". Since the LPA repealed section 51 of the Conveyancing Act 1881,[9] which allowed this formula to create a fee simple, there needs to be an alternative explanation of why this standard formula is effective. As will be discussed later in this article, the required explanation in this instance may be provided by section 60(4).

THE PROVENANCE OF SECTION 60(1)

In order to address the issues raised above, it is necessary to understand the origins of section 60(1). Two influences can be identified. First, there is section 28 of the Wills Act 1837 from which the phrase "without words of limitation" in section 60(1) ultimately derives. It will be argued that these words make perfect sense in the succession law context but create difficulties in the *inter vivos* context to which they were extended by section 60(1). The second major influence is a recommendation of the Commissioners on the Land Transfer Acts, made in 1911,[10] which seems to be the origin of the words "or any equivalent expression" in section 60(1). These two influences, and the light they shed on the appropriate interpretation of section 60(1), will now be considered in turn.

I. SECTION 28 OF THE WILLS ACT 1837

Section 28 of the Wills Act 1837 deals with the question of words of limitation in wills and provides as follows:

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7 Law of Property Act 1922, s. 72(1) was identical to section 60(1).

8 *Cf A.J. Dunning & Sons (Shopfitters) Ltd* v. *Sykes & Son (Poole) Ltd* [1987] Ch. 287, 302 *per* Dillon L.J..

9 See LPA, s. 207 and Seventh Schedule.

10 *Report of the Commissioners on the Land Transfer Acts*, Cd. 5483, (1911), p. 53.

> [W]here any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

It is obvious that the drafters of section 60(1) "follow[ed] the lines of" the above provision.[11] Underhill described the precursor of section 60(1) as "in effect extending the provisions of the Wills Act to conveyances inter vivos".[12]

What is interesting is that section 28 addressed a different, and more limited, problem than section 60(1). Prior to the 1837 Act, a fee simple could be conveyed in a will by using the word "heirs". In addition, the courts would also accept, as sufficient to pass a fee simple, informal words indicating an intention to do so. Thus, a devise to "X in fee" or "to X for ever" would pass a fee simple, even though it would only have passed a life estate under the strict rules applicable to *inter vivos* conveyances. The position in relation to words of limitation in wills was unsatisfactory in essentially one respect only. Where a devise was made simply "to X", this would pass only a life estate to X unless an intention to pass a fee simple could be found elsewhere in the will. The most obvious interpretation of section 28 is that, as its wording explicitly states, it applies only to devises "without words of limitation", setting up a presumption that they will pass a fee simple unless a contrary intention appears in the will. Cases where non-technical words of limitation were used presented no difficulties and so did not have to be covered by the legislation.

This chimes with the explanation of the relevant provision by Lord Langdale on the second reading of the legislation in the House of Lords. He referred to the difficulties which arose when a person drew up a will without competent legal advice and made a gift of land "without adding any word of limitation or inheritance".[13] The aim of the legislation was to put an end to the

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11 B.L. Cherry, D. Hughes Parry and J.R.P. Maxwell *Wolstenholme & Cherry's Conveyancing Statutes*, 12th ed., (London, 1932), vol. 2, p. 325.

12 *A Concise Explanation of Lord Birkenhead's Act* (London, 1922), p. 68, referring to Law of Property Act 1922, s. 72(1).

13 HL Deb. (3rd series) vol. 36 col. 980 (23 February 1837).

problem whereby such "a general devise is reduced to an estate for life".[14] The relevant discussion in the first edition of *Jarman on Wills*, published in 1844, supports the view that this was the contemporary understanding of section 28. Jarman explained the effect of section 28 as "the enlargement of the operation of an indefinite devise".[15] Thus, it is submitted that, in the context of section 28 of the Wills Act 1837, the phrase "words of limitation" encompasses far more than the magic formulae which were crucial in the context of *inter vivos* conveyancing.

The conclusion that terms such as "in fee" or "for ever" qualify as "words of limitation" in the succession context might suggest that they would also qualify as such in the context of *inter vivos* unregistered conveyancing, with the result that section 60(1) would fail to achieve its purpose. However, this does not necessarily follow. Words of limitation are said to be words which "measure out the quantity of estate" to be passed by the conveyance.[16] It could be argued that true words of limitation are those which are not only intended to indicate the estate to be passed but also are effective to pass the estate in question. On this view, phrases like "in fee" or "for ever" would qualify as words of limitation in the succession context, where they have long been regarded as effective to pass a fee simple. In the *inter vivos* context, however, such expressions were never effective to pass a fee simple and so they do not qualify as "words of limitation". This view would suggest that, although in the *inter vivos* context one might loosely refer to "proper" words of limitation,[17] the definition of words of limitation invariably requires that the words in question be proper and formal and excludes informal words describing the estate intended to be passed.[18] The assumption is that only

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14 *Ibid*.

15 T. Jarman *A Treatise on Wills*, 1st ed., (London: 1844) vol. 2, p. 195. A reading of Chapter 33, on "Estates in Fee, Without Words of Limitation", makes clear that Jarman regarded "expressions, however informal, which denote the intention [to create a fee simple]" (*ibid*., pp. 179-180) as constituting words of limitation.

16 *Goodright* v. *Wright* (1717) 1 P. Wms 397, 397 *per* Parker C.J..

17 See e.g. C. Sweet *Challis's Law of Real Property*, 3rd ed., (London 1911), p. 172.

18 This would involve rejecting as imprecise a definition such as "words by which the estate or interest *intended to be conveyed* is limited" (W.D. Edwards *A Compendium of the Law of Property in Land and of Conveyancing*, (4th ed.), (London 1904) p. 327, emphasis supplied).

words which are effective to alter the common law presumption in favour of a life estate constitute words of limitation.[19]

This is a satisfying explanation of the meaning of “words of limitation” in section 60(1), provided that this phrase is considered in isolation. However, a problem is created by the fact that the subsection refers to “words of limitation, *or any equivalent expression*”. If “words of limitation” does indeed mean “words effective to pass a fee simple or a fee tail”, it would not make sense to interpret “any equivalent expression” to mean “any other expression which is effective to pass a fee simple or a fee tail” – such other expression would automatically fall into the category of “words of limitation” itself and could not logically belong to an alternative set of “equivalent expressions”. This logical difficulty, coupled with the fact that the two phrases are separated by the disjunctive “or”,[20] makes it seem necessary to interpret “any equivalent expression” to mean something other than what is meant by “words of limitation”.

The most obvious interpretation would be to regard “any equivalent expression” as including expressions which are intended to indicate the estate to be passed, e.g. “in fee” or “for ever”. This would, as has been discussed previously, have very unfortunate results for the effectiveness of section 60(1). Alternatively, the need to find a meaning for the phrase “any equivalent expression” might lead one to reconsider the interpretation of “words of limitation” which was advanced above. “Words of limitation” could instead be regarded as referring to any phrase which directly indicates the estate which was intended to be passed, thus allowing “any equivalent expression” to be interpreted to refer to any indirect indication in the relevant document of an intention to pass a particular estate. This interpretation would have the same adverse consequences for the interpretation of section 60(1).

There does appear to be a way around the difficulty, although it is not completely satisfactory. To understand the possible solution, and the

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19 On this interpretation, the phrase “words of limitation” in section 60(1) effectively means “words of inheritance”. Interestingly, the marginal note to the Real Property Bill 1913, s. 43 (from which LPA, s. 60 ultimately evolved) refers to the disposal of the fee simple “without words of inheritance”, even though the provision itself, like section 60(1), uses the phrase “words of limitation”.

20 Compare *Chichester Diocesan Fund v. Simpson* [1944] A.C. 341.

interpretation of "any equivalent expression" which it involves, one must consider a second aspect of the provenance of the section 60(1).

II. THE RECOMMENDATION OF THE COMMISSIONERS ON THE LAND TRANSFER ACTS

The remit of the Commissioners on the Land Transfer Acts was to advise on the land registration system but they felt it necessary to make certain recommendations in relation to the reform of the general law of property. One of the recommendations in their Report of 1911 was that:

> [I]t should be enacted that where real estate is conveyed by deed without any words of limitation, or the equivalent words, "in fee simple" introduced by the Conveyancing Act 1881, such conveyance should pass the fee simple or other the whole estate or interest which the conveying party has power to dispose of, unless a contrary intention appears by the deed.[21]

This proposal was taken up in section 43(1) of the Real Property Bill 1913.[22] The proposal survived into later Bills, being enacted as section 72(1) of the Law of Property Act 1922 and finally being re-enacted as section 60(1) of the LPA 1925.

One can see in the wording of the recommendation of the Commissioners the probable derivation of the phrase "without words of limitation, or any equivalent expression" in section 60(1). The Commissioners clearly understood "words of limitation" to mean the formal words of limitation which were recognised at common law as sufficient to pass a fee simple – i.e. essentially the phrase "and his/her heirs". This was to be distinguished from "the equivalent words, 'in fee simple' introduced by the Conveyancing Act 1881". When the drafters of the Real Property Bill 1913 sought to implement the Commissioners' recommendation in section 43(1), it seems that the reference to "the equivalent words … introduced by the

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21 *Report of the Commissioners on the Land Transfer Acts*, Cd. 5483, (1911), p. 53.

22 See generally, A. Underhill "Lord Haldane's Real Property and Conveyancing Bills" (1914) 30 L.Q.R. 35.

Conveyancing Act 1881" became simply the phrase "or any equivalent expression".

Thus, in order to reach the interpretation of section 60(1) which appears to have been intended by its drafters, it is necessary to interpret the phrase "without words of limitation, or any equivalent expression" in an artificial manner. The phrase "words of limitation" must be taken to mean those formal words of limitation which were recognised prior to the 1881 Act, thus allowing the words "any equivalent expression" to be interpreted (despite the absence of any explicit reference to the 1881 Act) to refer to the alternative formal words of limitation which were introduced in the Conveyancing Act 1881. This would allow phrases such as "for ever" or "in fee" to fall outside the definition of "words of limitation, or any equivalent expression", leading to a presumption that a fee simple is passed by a conveyance including these terms.

CONVEYANCES "IN FEE SIMPLE"

One consequence of the interpretation discussed in the previous section is that the words "in fee simple" – commonly described as "words of limitation"[23] – would not qualify as such but would merely be an "equivalent expression". A more significant consequence is that section 60(1) would not apply to standard conveyances of unregistered land "to X in fee simple" because such conveyances are not "without words of limitation, or any equivalent expression". Since the LPA repealed section 51 of the Conveyancing Act 1881,[24] which had formerly ensured that such conveyances were effective to pass a fee simple, it seems that one must rely on section 60(4), which is in the following terms:

> The foregoing provisions of this section apply only to conveyances and deeds executed after the commencement of this Act:

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23 See e.g. *Megarry and Wade* note 6 above, p. 47, using the example of this phrase to demonstrate the concept of words of limitation.

24 See LPA, s. 207 and Seventh Schedule.

> Provided that in a deed executed after the thirty-first day of December, eighteen hundred and eighty-one, it is sufficient-
>
> (a) In the limitation of an estate in fee simple, to use the words “in fee simple”, without the word “heirs”;
>
> ….

At first sight, a conveyance “to X in fee simple” made after 1926 satisfies the requirement of having been made after the end of 1881 and therefore, under section 60(4), would pass a fee simple.

There are two difficulties with this solution. First, the proviso in section 60(4) which confirms the effectiveness of conveyances “in fee simple” after the end of 1881 comes after a statement that the foregoing provisions of section 60 would only affect future transactions. The proviso is presented as qualifying the initial statement. This suggests that the proviso is intended to deal only with past transactions and to clarify that, while the reform contained in section 60(1) does not apply to past transactions, the limited aspect of this reform which was originally achieved by section 51 of the Conveyancing Act 1881 does apply to such transactions. Interestingly, in a textbook discussion of section 60(4) to which Sir Benjamin Cherry (primary draftsman of the 1925 legislation) himself contributed, there is a comment that “[t]he law in force after 1881 till 1926 as respects the use of the words ‘in fee simple’ will still be material in regard to titles made between those dates”.[25] Although obviously not decisive, this comment does seem to suggest that the proviso was intended to apply only to past transactions and would not, in fact, be “in force” after 1926 (it being assumed by the drafters that section 60(1) would be sufficient to deal with future transactions).

A second point reinforces the conclusion that the drafters of section 60 did not see the proviso in section 60(4) as being the crucial element which would ensure the validity of standard conveyances “in fee simple”. This is the fact that the proviso in section 60(4) is expressed to apply only to “deeds” (as was section 51 of the Conveyancing Act 1881), while section 60(1) applies to

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[25] See *Wolstenholme and Cherry’s Conveyancing Statutes* note 11 above, p. 326.

the broader category of "conveyances".[26] Under the definition in section 205(ii) of the LPA, a deed is no longer an essential element of a "conveyance".[27] Thus, while the proviso in section 60(4) could conceivably address the question of future conveyances by deed "in fee simple", it could have no application to future conveyances other than by deed (e.g. merely in writing) in the same terms. Under section 52 of the LPA, a legal estate in land cannot generally be conveyed without a deed. However, this is subject to certain exceptions, including assents by a personal representative.[28] Also, an equitable estate in land may be conveyed without the use of a deed.[29] If the proviso in section 60(4) had been intended to perform a vital function in ensuring the effectiveness of post-1926 conveyances using the phrase "in fee simple", the drafters would surely have ensured that section 60(4), like section 60(1), would apply to conveyances other than by deed.

Thus, in the end, it seems clear that the drafters of section 60 missed the difficulty which is raised in this article. This means that it is essentially fortuitous that there is an argument that the proviso in section 60(4) can be interpreted in a manner which ensures the effectiveness of conveyances by deed "in fee simple". What is necessary is to regard the proviso as applicable to conveyances after 1926, as well as to those between 1882 and 1926. In the case of a conveyance not involving a deed, the courts would have to find another means to escape the conclusion that the use of the words "in fee simple" would take the conveyance outside section 60(1), with the result that only a life estate would pass. Thus, to that extent at least, there appears to be an outstanding problem with the wording of section 60.[30] It is certainly conceivable that a court would take a more robust approach, which could e.g.

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[26] Note that section 60(4) explicitly distinguishes between "conveyances and deeds" to which the initial statement applies and "deeds" to which the proviso applies.

[27] Compare the definition in the Conveyancing Act 1881, s. 2(v).

[28] See LPA, s. 52(2). See also Administration of Estates Act 1925, s. 36.

[29] Under LPA, s. 53(1)(c), an existing equitable interest in land can (and must) be conveyed in writing. Also, on the basis that equity treats as done that which ought to be done, it appears that an attempt to pass a legal interest in land without a deed will pass an equitable interest provided that there is consideration and writing: see e.g. Smith *Property Law*, 5th ed., (Harlow 2006), p. 100.

[30] The exercise of some ingenuity might reduce the proportions of the theoretical problem. For example, in relation to assents, one could base an argument on the fact that Forms 8 and 9 in the Fifth Schedule to the LPA include the phrase "in fee simple" and LPA, s. 206(1) states that instruments in the form prescribed in the Fifth Schedule "shall, in regard to form and expression be sufficient".

involve interpreting “words of limitation” to mean “words effective to create a fee simple or a fee tail” and simply ignoring the phrase “or any equivalent expression”. It is perhaps arguable, however, that it would not be justifiable effectively to excise words from an Act of Parliament when there is an alternative interpretation which would deliver satisfactory results in all but very unusual cases.

To return to the Irish provision referred to at the beginning of this article, it appears that the problems there are greater than with section 60.[31] This is because the relevant Irish provision does not include an equivalent of section 60(4), no doubt because the drafters assumed that this aspect of the section 60 related only to past transactions (as, it has been argued above, was assumed also by the drafters of the LPA). However, as has just been discussed in detail, it appears that the most plausible way of making section 60 function successfully is to interpret the proviso in section 60(4) as ensuring the effectiveness of conveyances (by deed) “in fee simple”. Unfortunately, since the Irish Bill abolishes section 51 of the Conveyancing Act 1881,[32] and does not include any equivalent of section 60(4), it would appear to render a conveyance “to X in fee simple” ineffective to pass a fee simple. It is not, of course, denied that a court would almost certainly find some means of avoiding this disastrous result, for example by interpreting “words of limitation” narrowly and then dismissing the phrase “or any equivalent expression” as meaningless. Nonetheless, it is hoped that the drafting of the relevant Irish provision will be improved before the Bill is ultimately passed, taking into account the problem which has just been discussed.[33]

CONCLUSION

This article has considered the difficulties arising from the attempt in section 60(1) of the LPA to transplant the approach of section 28 of the Wills Act 1837 to the different

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31 The relevant provision is Land and Conveyancing Law Reform Bill 2006, s. 65(1) which reads as follows: “A conveyance of unregistered land without words of limitation, or any equivalent expression, passes the fee simple or the other entire estate or interest which the grantor had power to create or convey, unless a contrary intention appears in the conveyance.”

32 See Land and Conveyancing Law Reform Bill 2006, s. 8(3); Sch. 2, Pt. 4.

33 See also J. Mee “Words of Limitation Revisited” (2007) 12 (Irish) Conveyancing and Property Law Journal 55, where some of the arguments in this article are rehearsed from an Irish perspective.

context of *inter vivos* conveyancing. The focus of the discussion was the statement in section 60(1) that it applies only to conveyances “without words of limitation, or any equivalent expression”. At first inspection, this phrase suggests that the subsection will not apply to conveyances which do include some (informal) words of limitation, such as “to X in fee” or “to X for ever”. The effect of this would be that such conveyances would be governed by the common law rules and would pass only a life estate. This would, of course, be an inconvenient result and not one which the drafters of the subsection intended. By looking back to the origins of the subsection, the article has identified the somewhat artificial interpretation of the relevant words which has to be adopted in order to avoid the unpalatable conclusion that section 60(1) does not fully achieve its purpose. This still leaves questions surrounding a standard conveyance “to X in fee simple”. It is possible, however, to interpret section 60(4) as ensuring that such a conveyance, provided it is by deed, will pass a fee simple. This solution would not, however, apply in relation to the limited category of conveyances other than by deed, which are not covered by section 60(4).

No striking claims are being made concerning the practical impact of the arguments which have been presented in this article, since in the end the purpose of section 60(1) is clear and the courts would understandably be very reluctant to frustrate the achievement of that purpose in any context. However, it is hoped that the article at least succeeds in shedding some light on the curious wording of 60(1), as well as demonstrating that other jurisdictions should take care in adopting it as a model for reform.