

Unsettled Estates: Manitoba's Forgotten Statute and the *Chupryk* Case

J O H N I R V I N E *

I. INTRODUCTION

This short note is intended as the first of three interconnected pieces of varying lengths, two of which appear in this issue. They will cover significant and supposedly discrete areas of the law of real property, from the rules governing settled land and successive estates to those governing the partition and sale of concurrently shared interests; from the statutory rules conferring powers upon trustees to facilitate dealings with trust property, to the implications of Manitoba's unique *Perpetuities and Accumulations Act*. Given the wide-ranging nature of this ramshackle enterprise, I hope the reader will understand why I have divided it into three parts; and forgive me, at the same time, for the measure of repetition which is inescapably required by such an exercise.

It is quite permissible to regard at least the first two of these pieces as an analysis or critique of the Manitoba Court of Appeal's well-known judgment in *Chupryk v Haykowski*,¹ decided in 1980 and nowadays featured, uncritically and apparently with equanimity, in leading Canadian texts on real property law.² In consequence, *Chupryk* is likely to have strong influence on the developing Canadian jurisprudence in various contexts and upon the thinking of law students. It is my conviction that the Court's reasoning in *Chupryk* is profoundly defective, and in some degree based upon a false perception of the law, that has prompted me to offer these rather protracted reflections. In this first essay, I consider the Canadian law of "settled estates", with particular reference to Manitoba.

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¹ (1980), 110 DLR (3d) 108, 3 Man R (2d) 216, [1980] 4 WWR 534; leave to appeal further to MBCA denied, (1980) 110 DLR (3d) 108n [Freedman CJM]; leave to appeal to SCC granted (1980) 33 NR 622 (SCC).

² See, for example, Albert H Oosterhoff and Wesley B Rayner, eds, *Anger & Honsberger Law of Real Property*, 2d ed (Aurora, Ont: Canada Law Book, 1985) p 701-702 or Derek Mendes da Costa, Richard J Balfour & Eileen E Gillese, *Property Law – Cases, Text and Materials*, 2d ed (Toronto, Ont: Emond Montgomery Publications, 1990), s 14:8 and 18:63-64.

My modest aim in this first essay is principally to set straight a flaw in Manitoba's historical record. In doing so, I am aware that I am addressing legal issues which are on the point of fading into history and near-oblivion, as newer methods are adopted for making provision for the successive enjoyment of family real estate. The old "strict settlement", if not yet dead, is now a rare survival, and the settled estate and settled land legislation of the nineteenth century is of vestigial importance compared with the trust-based arrangements that have supplanted them, and which have attracted their own patina of statutory mechanisms. But the very obsolescence of old-fashioned strict settlements means that few if any opportunities will present themselves for the judiciary to correct misconceptions which it has created, and that is particularly so in Manitoba, where the passing of the *Perpetuities and Accumulations Act* in 1982 makes it impossible to imagine any future circumstance in which successive estates may exist otherwise than under the aegis of a trust. The short note which follows, then, is designed to show how the Manitoba Court of Appeal, in the case of *Chupryk v Haykowski*, misrepresented the Manitoba law of settled estates by ignoring or suppressing the existence of the English *Settled Estates Act* of 1856 as part of this province's law; and how, in so doing, they obliquely sought to justify a unique, and I believe a misguided interpretation of another provincial statute – the partition-and-sale provisions of the *Law of Property Act* – to achieve the Court's preferred outcome in the *Chupryk* case.

II. THE *CHUPRYK* CASE

The facts in *Chupryk* may be briefly stated. On the death of his wife, Michael Chupryk found himself (or so the Court determined) the life tenant of a dilapidated and deteriorating property; he was also the holder of a one-third share in the remainder interest, the other two-thirds being vested in Sophie Haykowski, Mr. Chupryk's god-daughter and relative by marriage. Initially, this arrangement subsisted under a trust, but the trustee (Mrs. Haykowski's son) improperly extinguished the trust by transferring the legal title into the names of Mr. Chupryk and Mrs. Haykowski. Both were elderly and in poor health. Yet despite this, old Michael Chupryk, who lived in a small cottage at the rear of the property, saw potential for improving the value of the entire inheritance. He felt that if he could raise a modest amount of capital – four or five thousand dollars, he thought, should do the job – he would be able to restore the decrepit rooming-houses which fronted the property (and were currently unfit for habitation), and thereby arrest the process of deterioration while securing a small income from the land. Mrs. Haykowski, the principal remainderperson, was of another mind. She wanted the entire freehold to be sold as quickly as possible, so that she could secure her share of the proceeds.

The parties' ambitions, therefore, were flatly contradictory, and when Michael Chupryk sought a court order authorizing him, as life tenant, to mortgage the fee simple, Sophie Haykowski countered by seeking an order for its sale. All would have been relatively straightforward, and this contest of wills might have been directly adjudicated on its merits, had the trust still been in existence, and the property still "vested in trustees," for s 58(1) of the *Trustee Act* unequivocally authorized the Court of Queen's Bench in such circumstances to confer on the trustees the power necessary to effect the transaction, "whether a sale, lease, mortgage... or other disposition," provided only that it was deemed "expedient" by the Court.

The problem was that the trust was no longer in existence, and although Kroft J at first instance³ showed great ingenuity and determination in asserting that it could and should be resurrected and reconstituted, the Court of Appeal took the contrary view. The trust, they said, was destroyed beyond recall, and access to the powers under s 58 accordingly barred. Nor, said the Court of Appeal, did it have any "inherent jurisdiction" as a court of equity to grant to either litigant the orders they respectively sought.

Truth to tell, the Court of Appeal in *Chupryk* made no effort to conceal its own agenda. It had concluded that after six years of litigation, the dispute between these two elderly people should be brought to an end, and the long deterioration of the property checked, by the prompt sale of the land, even though this meant the ouster of Mr. Chupryk, now 87 years old, from the cottage which had for decades been his and his late wife's home. The Court found little difficulty in rejecting any plausible argument which might enable them to order the mortgage which Mr. Chupryk wanted. Without expressly saying so, they clearly regarded his restoration plans as impractical and unrealistic, but preferred to stress in their reasons the absence of any statutory mechanism (once the trust was extinguished) to enable the authorization of a mortgage. There was, they said, no Settled Land Act in Manitoba. That assertion will be critically examined below.

Why, at that stage, the Court did not simply dismiss both actions, is a good question. The argument that it was confronted by a wasting asset seems plausible, until one considers that the property had been valued seven years previously at about \$13 000, and could hardly be thought to have increased in value since that time. It might, indeed be thought to have depreciated to an irreducible minimum, at which "wasting" would scarcely be an issue. It was asserted by the Court that the parties were now mutually prepared to acquiesce in a sale, but one wonders how genuine this consensus could be on the part of Mr. Chupryk, who faced, at his advanced age, the loss of his home.⁴ If the alleged *rapprochement* were genuine,

³ *Chupryk v Haykowski*, (1979) 3 Man R (2d) 238 (QB).

⁴ It may be noted that Mr. Chupryk did not surrender passively to the Court of Appeal's order, but twice sought leave to appeal further, unsuccessfully to the Court of Appeal itself (*supra* note 1, 110 DLR (3d) 108n), then again (successfully this time) to a panel of the Supreme Court of

surely the sale could have been arrived at by mutual agreement without a court order. As it transpired, the Court was determined to end the dispute by a formal order for sale, and showed itself capable of paying a high price, in terms of disrupting the law of concurrent ownership as long understood,⁵ to bring about that result. In hindsight, some would suggest that the Court might more humanely have refused both combatants the orders they sought, and left it to Death to bring an end to their quarrels.

All the foregoing, though not I hope without interest, is straightforward enough. It is when we come to examine how the Court of Appeal, having declined to authorize a mortgage for Mr. Chupryk, justified the order for sale, sought by Mrs. Haykowski, that the real anfractuosités of the Court's reasoning come to the fore.

III. THE SEEDS OF CONFUSION

In concluding that the powers conferred by the *Trustee Act*⁶ were no longer available to it in the circumstances, the Court had denied to itself not only the ability to authorize Mr. Chupryk's mortgage, which in truth it had no desire to do; but also the most obvious and direct basis for granting Mrs. Haykowski's order of sale. Casting about for some juridical basis for making such an order, and avowedly renouncing⁷ any temptation to administer "palm tree justice", their eyes turned to the possibility that use might be made of what they termed the "*Settled Lands Acts*". In the end, they determined that they could not do so, but their efforts in this context were to my mind unfortunate, and have generated misconceptions which still persist.

Towards the close of his concurring judgment in *Chupryk*, O'Sullivan JA wrote these words:

There is no doubt that the inability of a tenant for life to raise money for improvements may work a hardship, not only on the tenant for life, but also on the remainderman and, in some cases, others. No one can benefit from a situation where property is allowed to deteriorate and run down. In England, this problem has been dealt with in a series of statutes. The *Settled Lands Acts* recognize land held in succession as settled land and authorize the tenant in possession to raise money for improvements, sometimes on his own authority and sometimes with the approval of the court. Ontario and British Columbia have enacted *Settled Lands Acts* to achieve the same purpose, but Manitoba has no *Settled*

Canada (*supra* note 1, (1980) 33 NR 622 (Martland, Ritchie and Estey JJ) and see Supreme Court of Canada, *Bulletin of Proceedings of the Supreme Court of Canada*, Oct 10 1980 (Ottawa: SCC, 1980), p 31). This proved to be the end of the saga, for after this final but hollow victory for Michael Chupryk, which seems largely to have escaped notice in the textbooks, his litigation career goes "off the radar".

⁵ See the article "A House Divided, etc", presented later in this volume of the journal.

⁶ *The Trustee Act*, CCSM c T160, s 58 (1) [then s 60 (1)].

⁷ *Supra* note 1 at para 58.

Lands Act. This does not mean that in Manitoba there is no relief for a tenant who cannot economically sustain a life interest. I agree with my brother Matas that the *Law of Property Act*, CCSM, c L90, covers successive interests, as well as concurrent interests, in land.⁸

There are mysteries here, and arguably misapprehensions too. Why, one wonders, is O'Sullivan JA (and Matas JA too) so preoccupied with the English *Settled Lands* (sic) *Acts*? Was it merely a gesture of respect to the argument of Mr. Green, counsel for Mr. Chupryk, who had somehow incorporated in his argument reasoning founded on the English *Settled Land Act* of 1882?⁹ Perhaps counsel intended, by adverting to this imaginative and bold piece of English legislation, to incite the Court of Appeal to craft (as Kroft J had done in the Court below) an equally progressive solution in Manitoba, by judicial fiat? If so, he was to be disappointed as I have already explained. What in fact the Court of Appeal did was to turn the absence of the 1882 legislation in Manitoba into a more sweeping assertion – that “Manitoba has no *Settled Lands*¹⁰ *Act*” – and present that assertion in such a way as to imply that Manitoba was in some way uniquely disadvantaged by this lacuna in its statute-book. It is my position in this paper that any such assertions are demonstrably wrong.

IV. SETTLED ESTATES AND SETTLED LAND

When O'Sullivan JA states, in the above-quoted passage, that “Manitoba has no *Settled Lands Act*,” his words are literally true. Manitoba has never had a statute of that name. Nor has any other Canadian province, so far as I am aware. The English statutes bearing that title – both the *Settled Land Act* of 1882, and the climactic *Settled Land Act* of 1925¹¹ – have been the object of sometimes wistful academic commentary in Canada, but have never been fully adopted in any Canadian jurisdiction. As Professor Waters put it, “The *Settled Land Acts* of 1882 and 1925 in England never came to Canada.”¹² So Manitoba is hardly unique in not having a statute by that name. However, O'Sullivan JA's assertion, in the same sentence, that Ontario and British Columbia “have enacted *Settled Lands Acts*” throws some light on what he is really trying to say. So do his perceptions, expressed in that same paragraph, as to what a proper “*Settled Land Act*” does, what its functions are. It seems that when O'Sullivan JA refers to “*Settled Land*” legislation, he is using the expression in a loose or generic sense, rather than as a more meticulously historic (or more pedantic) commentator might do. He is, it seems, using the “*Settled Land Act*” label to embrace a whole procession of

⁸ *Ibid* at para 60.

⁹ *Settled Land Act*, 1882 (UK), 45 & 46 Vict, c 38.

¹⁰ More properly termed a “*Settled Land Act*”.

¹¹ *Settled Land Act*, 1925 (UK), 15 & 16 Geo V, c 18.

¹² Donovan Waters, Mark Gillen and Lionel Smith, *Waters' Law of Trusts in Canada*, 3d ed (Toronto, Ont: Thomson Carswell, 2005) at p 1087.

enactments, including not only the statutes which from 1882 onwards bore that name in England, but the procession of more modest enactments which proceeded and heralded them, and bore the name “Settled Estates Acts.”

If that is indeed O’Sullivan JA’s position – that for practical purposes, the English legislation can be regarded as an unevenly-paced but consistent progression, gradually extending the powers of disposal affecting settled land – it is a perfectly coherent and tenable perspective upon the law. But if, taking this inclusive view of what “Settled Land Acts” means, he still says that Manitoba has none, he is simply wrong, as I shall show presently.

A different, but less disturbing criticism that might be leveled at his analysis is simply that in its “lumping together” of Settled Estates Acts and Settled Land Acts, it conceals more than it reveals. For purists, as they might term themselves, would certainly insist that despite their superficial similarities of name and function, there is a gulf between them in terms of the social and political theory which underlies them. This is not the place to examine the political struggle which attended the introduction of the first *Settled Land Act* in 1882, but it was regarded at the time as little short of revolutionary. Sir Arthur Underhill, writing in 1909 and reminiscing about the evolution of the land law over the previous hundred years, called it “This great Act, the greatest Real Property Act, I think, of the Century.”¹³ I propose in my third and last article in this series, in a forthcoming volume of the journal, to revive and re-examine the social exigencies which gave rise to the debate, and its influence on the law’s entire conception of what “ownership” of land means, and should mean, in the context of limited estate-holding. It seems to me that the arguments then in play may be of interest again in light of the new era of real property law quietly, almost covertly ushered in by s 4 of Manitoba’s *Perpetuities and Accumulations Act* in 1982.¹⁴ But that, as I say, is a task for another day. For present purposes, it is enough to know in a general way how the underlying philosophy of the *Settled Land Acts*, beginning in 1882, differed from that of the *Settled Estates Acts* which preceded them. That may be achieved by considering the observations of two great Victorian judges. First, there is the judgment of Chitty LJ and of Lindley MR, commenting on the 1882 legislation, in *Re Mundy and Roper’s Contract* in 1899:

The object is to render land a marketable article, notwithstanding the settlement. Its main purpose is the welfare of the land itself, and of all interested therein, including the tenants, and not merely of the persons taking under the settlement. The Act of 1882 had a much wider scope than the *Settled Estates Acts*. The scheme adopted is to facilitate the striking off from the land of the fetters imposed by settlement; and this is accomplished by conferring

¹³ Sir Arthur Underhill, “Changes in the English Law of Real Property During the Nineteenth Century” reprinted in Committee of the Association of American Law Schools, ed, *Select Essays in Anglo-American Legal History*, vol 3 (Boston, Mass: Little, Brown and Company, 1909) 673 at 681.

¹⁴ SM 1982-3-4, c 43, RSM 1987, c P-325.

on tenants for life in possession, and others considered to stand in a like relation to the land, large powers of dealing with the land by way of sale, exchange, lease, and otherwise, and by jealously guarding those powers from attempts to defeat them or to hamper their exercise. At the same time the rights of persons claiming under the settlement are carefully preserved in the case of a sale by shifting the settlement from the land to the purchase-money which has to be paid into court or into the hands of trustees. The Act of 1882 and the subsequent Acts ought, then, to be construed by the Court with regard to these broad principles and in a spirit of wise and reasonable liberality.¹⁵

To the same effect, and inferred, one may fancy, with a sly hint of triumphalism in the aftermath of a hard-fought struggle, are the words of Lord Macnaghten in *Lord Henry Bruce v Marquis of Ailesbury* in 1892:

The Act of 1882 differs from all previous legislation in regard to settled land. It proceeds on different lines, and it has a different object in view. The *Settled Estates Acts* did not confer or enable the Court to confer on a limited owner powers beyond those ordinarily inserted in a well-drawn settlement. They were no doubt very useful Acts in their way. An application to the Court at a moderate cost was made to serve the purposes of a private estate Act. But the *Settled Land Act* was founded upon a broader policy and has a larger scope. A period of agricultural depression, which shewed no sign of abatement, had given rise to a popular outcry against settlements. The problem was how to relieve settled land from the mischief which strict settlements undoubtedly did in some cases produce, without doing away altogether with the power of bringing land into settlement. That was something very different from the task to which Parliament addressed itself in framing the *Settled Estates Acts*. In those Acts the Legislature did not look beyond the interests of the persons entitled under the settlement. In the *Settled Land Act* the paramount object of the Legislature was the well-being of settled land. The interests of the persons entitled under the settlement are protected by the Act as far as it was possible to protect them. They must be duly considered by the trustees or by the Court whenever the trustees or the Court may be called upon to act. But it is evident I think that the Legislature did not intend that the main purpose of the Act should be frustrated by too nice a regard for those interests.¹⁶

No Canadian jurisdiction has adopted a “Settled Land Act” as here understood, though some may have effected changes in the parallel universe of trusts law which have in practice brought about many of the same effects. Manitoba is not singularly bereft, then, in lacking a Settled Land Act in this technical sense. But in his assertion that Manitoba has no Settled Land Act in the broad, loose or inclusionary sense apparently used by O’Sullivan JA in *Chupryk*, his Lordship falls into error: for Manitoba has had, since the date of its enactment; still had in 1980 when *Chupryk* was decided, and I believe has still (for what it is worth), the *Settled Estates Act, 1856*.¹⁷ We shall consider it presently.

For present purposes, we should note that in the passage quoted earlier¹⁸ from his judgment, O’Sullivan JA obviously conflates the *Settled Estates Acts* and the *Settled Land Acts*; and confirms this impression by noting that “both Ontario

¹⁵ *Re Mundy and Roper’s Contract* (1898), [1899] 1 Ch 275 UKCA at 288.

¹⁶ *Lord Henry Bruce (A Child) v Marquis of Ailesbury* ([1892] AC 356 HL (Eng) at 364-5.

¹⁷ *Settled Estates Act, 1856*, (UK) 19 & 20 Vict c 120.

¹⁸ *Supra* note 8.

and British Columbia have enacted *Settled Lands Acts*,” without alluding to the fact that the two statutes in question bore the respective titles of “the *Settled Estates Act*¹⁹ and “the *Land (Settled Estate) Act*”.²⁰ In the same breath, O’Sullivan JA then muses “But Manitoba has no *Settled Lands Act*.” Not only is this wrong, if we accord to that label the inclusive meaning which the learned judge himself accords to it; but it created a false impression by inference,²¹ that unlike other, happier and more progressive jurisdictions, that there is (or was) in Manitoba a total void, just where a Manitoba *Settled Lands Act* ought to be.

In truth, the Court’s rather strange fixation with the supposedly more “advanced” legislation of other jurisdictions becomes all the more puzzling when one reflects that few if any of them²² would have been of the slightest use to either of the litigants in the *Chupryk* case itself. The great English *Settled Land Act*²³ of 1882, in particular, on which Matas JA lavished considerable attention, contained nothing which might have advanced the claims of Mr. Chupryk, for while it did confer powers upon life tenants to mortgage the fee simple without judicial approval,²⁴ those powers could only be used for a specific range of purposes, in no way germane to Mr. Chupryk’s improvement plans. And no powers of disposition whatever, with or without the Court’s approval, were conferred on remainderpersons like Mrs. Haykowski.

An effort will now be made to give a more accurate picture of the statute law governing settled estates in Manitoba, as it stood at the time of the *Chupryk* case. Let me begin by introducing that most neglected of statutes, the *Settled Estates Act* of 1856.

¹⁹ RSO 1980, c 468.

²⁰ RSBC 1979, c 215.

²¹ And this is precisely the inference drawn from *Re Chupryk* in the textbooks. Thus *Anger & Honsberger*, *supra* note 2 at 701, declares flatly that “In Manitoba there is no settled estates legislation”; *Waters’ Law of Trusts in Canada*, *supra* note 12, at 1088 n 25 explains *Chupryk* as a case where “The absence of settled land legislation in other provinces occasionally causes difficulty”, and repeats this inference of a complete legislative void later, at 1306 n 86.

²² Except perhaps Ontario’s *Settled Estates Act*, had it been adopted in Manitoba – see s 13(1)(a) of that statute (*supra* note 19), which was first adopted as long ago as 1895 (*Settled Estates Act*, SO 1895, c 20, s 15) and does authorize mortgages, if the Court consents, to effect improvements or repairs.

²³ *Supra* note 9.

²⁴ *Ibid* at s 18. The mortgaging power was slightly expanded by the *Settled Land Act* of 1890, but would still not afford any relief to a life tenant who merely wished to raise money for improvements. No such powers as that sought by Mr. Chupryk can be found in any of the *Settled Estates/Settled Land* legislation until the advent of s 71 of the great *Settled Land Act*, 1925, *supra* note 11. Except, that is, in Ontario, as mentioned *supra* note 22.

V. THE SETTLED ESTATES ACT, 1856²⁵

The history of the English *Settled Estates* and *Settled Land Acts*, from early Victorian times down to the present day, has often been told, and told well, in the English textbooks, so only a brief précis will be presented here.²⁶ A long line of statutes can be traced in the English statute-book, each dealing in some measure with the very dilemma succinctly stated by O'Sullivan JA in the passage of his *Chupryk* judgment which I have already quoted.²⁷ A life tenant in possession of settled land might perceive that the time was ripe for capital improvements to be made, or urgent repairs effected, in the interests of everyone concerned – not just his own, but those of the remainderman, too, not to mention mortgagees and “posterity.” But even if he had the necessary financial means to effect the improvements out of his own pocket, there would often be little incentive to do so, if he reflected on the transience of his own estate. The obvious solution, if the remainderman could be persuaded to cooperate, would be to raise money upon a mortgage of the title. But in the absence of such concurrence, the only precarious and unattractive security that the life tenant could offer was his own life estate. So the practice developed, at an early date, of incorporating into settlements express special powers, conferred by the settlor upon the life tenant, to mortgage the whole fee simple estate – even over the objections of the remainderperson, who would be bound by that mortgage.

Unfortunately, whether by lack of foresight, poor advice, or even by design, settlors sometimes omitted to provide such powers: yet in such cases the desire or need to raise capital to improve the property might be every bit as pressing, and the public interest clearly favoured the encouragement of capital improvements and responsible land-maintenance.

That is how the development of Settled Lands legislation began. At the start, there were instances of private or local Acts of Parliament being engaged as desperate and expensive solutions to these problems.²⁸ Legislative intervention

²⁵ *Supra* note 17.

²⁶ In my third article in this series, I shall hope to return to this phase of legal history, and to the arguments of policy which animated it: arguments which still have resonance in the present day, especially, I shall argue, in the aftermath of Manitoba's *Perpetuities and Accumulations Act* of 1983.

²⁷ *Supra* note 8.

²⁸ See Underhill, *supra* note 13. It should not be supposed that such private statutes were rare. In the masterly account offered by William Cornish et al in the new *The Oxford History of the Laws of England*, vol 12 (Oxford, England: Oxford University Press, 2010) at 83. We learn that for decades, such applications to Parliament “usually numbered about a dozen a year” from 1830 onwards, but “spiked” in 1853-4. The 1856 Act was introduced expressly to obviate the need for such extreme expedients, and can be regarded as “essentially a transfer of jurisdiction” from Parliament to Chancery.

became a matter of urgency. At first, we find statutes of specific or determinate purpose, namely the so-called Drainage Acts²⁹ of 1840 and 1845.

It was in 1856 that the first English *Settled Estates Act* was passed;³⁰ the first of a series of statutes³¹ which culminated in the great *Settled Land Act* of 1925.³² The 1856 act is of great importance to this paper in a way in which its more elaborate and ambitious successors are not. It requires our attention precisely because it was at all times since its enactment, at all times material to our present inquiry – notably when *Chupryk* was before the courts – and in my view still is, part of the law of Manitoba, as well as that of some other provinces.³³ Let me now justify these assertions.

I would contend first that the 1856 Act is part of Manitoba law by reason of the fundamental rules governing the reception of English statutes in the settled colonies. Those rules as laid out by Blackstone, were explained and applied by the Manitoba Court of Appeal itself in *Meanwell v Meanwell* in 1941,³⁴ but the fullest and clearest analysis of the doctrine of reception, both as to statute and judge-made law is surely that of Mr. Jean Côté, as he then was, in his justly-famous articles in the *Alberta Law Review*, in 1964 and 1977 respectively.³⁵ It would be pointless to summarize or paraphrase those principles here, beyond observing that in the Saskatchewan case of *Re Moffatt Estate*³⁶ in 1955, McKercher J of that province's Court of Queen's Bench found that since it was "reasonably applicable to the situation existing in Saskatchewan," the English *Settled Estates Act* of 1856 should be considered to be part of that province's laws – perhaps since it received the Royal Assent in England, but at the very latest since 15th July 1870, the date

²⁹ Respectively, *An Act to Enable the Owners of Settled Estates to Defray the Expence of Draining the Same, by Way of Mortgage*, (UK) 3 & 4 Vict c 55; and *An Act to Alter and Amend 3 & 4 Vict c 55*, (UK) 8 & 9 Vict c 56. The more ambitious *Improvement of Land Act*, 1864 (UK) 27 & 28 Vict c 114 advanced the same course by authorizing limited owners to raise money upon mortgages of the fee simple for other agrarian purposes including the enclosure of fields, the building of farm buildings and labourers' cottages, shelter planting, and land clearance, but being dependent upon the consent of the Enclosure Commissioners (and an attendant bureaucracy) these reforms were clearly unsuited for reception in jurisdictions outside the United Kingdom: and this Act can therefore be disregarded for our present purposes. It may, however, help to explain why neither the *Settled Estates Acts* nor the *Settled Land Acts* conferred any general or plenary privilege on life tenants to mortgage the fee simple.

³⁰ *Supra* note 17.

³¹ The others were the *Settled Estates Act* 1858 (UK), 21 & 22 Vict c 77; the *Settled Estates Act* 1864 (UK), 27 & 28 Vict c 45; the *Leases & Sales of Settled Estates Act*, 1874 (UK), 37 & 38 Vict c 33; the *Settled Estates Act*, 1877 (UK), 40 & 41 Vict c 18; and the *Settled Land Act*, 1882, *supra* note 9.

³² *Supra* note 11.

³³ Specifically, Saskatchewan and Alberta. See Bruce H Ziff, *Principles of Property Law*, 5th ed (Toronto, Ontario: Carswell, 2010) at 185, esp n 103-4.

³⁴ [1941] 1 WWR 474, 49 Man R 26.

³⁵ "The Introduction of English Law into Alberta", (1964) 3:2 Alta LR 262, and "The Reception of English Law" (1977) 15 Alta LR 29.

³⁶ (1955) 16 WWR (2d) 314.

fixed officially as the “cut-off” date for the reception of English law by the *North-West Territories Act* of the Dominion, in 1886. Since the history of Manitoba is so closely similar to that of Saskatchewan, the conditions of society in each province at any conceivable relevant date³⁷ so closely similar, and the legislated “cut-off” date for reception identical in both provinces,³⁸ it would be hard to deny that the ordinary processes of reception made the England *Settled Estates Act* of 1856 part of Manitoba Law.³⁹

The opening provisions of s 1 of Manitoba’s first *Queen’s Bench Act*, in 1874, surely fortify this conclusion, confirming that:

The Court of Queen’s Bench in Manitoba shall decide and determine all matters of controversy relative to property and civil rights, according to the laws existing, or established and being in England, as such were, existed and stood, on the fifteenth day of July, one thousand eight hundred and seventy, so far as the same can be made applicable to matters relating to property and civil rights in this Province.

These provisions, only lightly pruned and still compassed about by extraneous verbiage of no relevance for our present purposes, are still on the Manitoba statute-book, as s 33(1) of the present *Queen’s Bench Act*.⁴⁰ They were of course there in 1980, too,⁴¹ when the Court of Appeal decided *Chupryk*. Indeed, O’Sullivan JA expressly noted this very section,⁴² and correctly reflected that the English law of 1870 conferred no mechanism allowing a common law life tenant to grant a mortgage of the fee simple. Had his Lordship allowed his eye to wander to the opposite page, however, he would have seen this provision, which would surely have given him food for thought on the other aspects of the case:

Leases and sales of settled estates, etc.

55(1) The court has the same jurisdiction as the Court of Chancery had in England, on the fifteenth day of July in the year 1870, in regard to leases and sales of settled estates, and in regard to enabling infants, with the approbation of the court, to make binding settlements of their real and personal estate on marriage, and in regard to questions submitted for the opinion of the court in the form of special cases on the part of such persons as may by themselves, their committees or guardians, or otherwise, concur therein.⁴³

This section had been on the Manitoba statute-book since its enactment as s 33 of the *Queen’s Bench Act*, 1895.⁴⁴ It was an avowed “borrowing” from the

³⁷ See Côté, (1977), *supra* note 35 at 79.

³⁸ In Manitoba, set by the *Queen’s Bench Act*, SM 1874, c 12, s 1.

³⁹ Or at least those parts of it which were applicable.

⁴⁰ CCSM c C280, s 33(1).

⁴¹ At that time, the provisions were in s 51(3) of the *Queen’s Bench Act*, RSM 1970, c C280.

⁴² *Supra* note 1 at para 58.

⁴³ *Supra* note 41 at s 55 (1).

⁴⁴ SM 1895, c 6. When the Statutes of Manitoba, newly translated into French, and rigorously overhauled and purged of anachronisms and perceived anomalies, re-appeared as the *Re-Enacted Statutes of Manitoba*, 1987, it was still there as s 51(1) of RSM 1987, c 280. But when the *Queen’s Bench Act* underwent yet another revision in the following year, and was essentially replaced by

Ontario *Judicature Acts*, which had themselves carried it forward from Ontario's old *Court of Chancery Acts*. Whether or not any of the enactments in this formidable lineage ever received judicial attention either in Ontario or Manitoba, I do not know. I doubt it, for its terms – at least those relevant to our present inquiry – are quite unequivocal. The superior courts of both provinces were endowed – since 1865 in Ontario, since 1895 in Manitoba – with the same powers, in regard to leases and sales of settled estates as the Court of Chancery in England had enjoyed on specified dates (18th March 1865 in Ontario; 15th July, 1870 in Manitoba).

The law governing the leases and sales of settled estates in the English Court of Chancery, on both those dates, was of course encapsulated in the English *Settled Estates Act, 1856*.

I have perhaps laboured too ponderously to convince the reader that this 1856 Act long ago became part of Manitoba law. The general rules of reception are fortified by the general statutory provisions which, as we have seen, fix an “official” cut-off-date for statutory reception; and if that is not considered sufficiently conclusive, the 1895 amendment of the *Queen's Bench Act* confirms the obvious with focus and precision.

Noting that the 1856 Act has nonetheless never been welcomed into the limelight in Manitoba by any judicial utterance, favourable or otherwise, should we be dismayed or surprised that it has survived so long in the shade? Professor Bruce Ziff, in his valuable textbook,⁴⁵ seems to find it an embarrassing survival, referring to it as “this cumbersome and prolix statute” and caustically noting the “emaciated” and “almost worthless” nature of the powers of disposition it confers. For what my opinion is worth, I think Professor Ziff is rather too severe as to the style of the statute. No writer, even a statutory draftsman, can entirely shuffle off the stylistic conventions of his time, and if the 1856 statute is a trifle over-decorated in its language, repetitive, embroidered and “Gothick” in its presentation, what should we expect from the days of the Pre-Raphaelites and the Neo-Gothic? While its wordiness may be annoying to some, it is in large measure designed to produce a set of instructions sufficiently worked out to avert needless litigation. I for one find no offence in the imagery of “Water, Water Mills, Wayleaves and Waterleaves,”⁴⁶ and confess to finding its “prolixity” quite as pleasing as the austerities of modern legislative draftsmanship.

As for the content of the 1856 Act, Professor Ziff's criticisms could be appropriately directed not at those who conceived and drafted the statute, but at the generations of legislatures who totally failed in the ensuing century or more to

the *Court of Queen's Bench Act*, SM 1988-9, c4-C280, this provision was deleted, evidently being considered redundant and duplicative of s 33 (1), *supra* note 40.

⁴⁵ *Supra* note 33 at 185.

⁴⁶ *Settled Estates Act 1856*, *supra* note 17, s 2.

update and expand the range of transactions which it enabled. The embattled life tenant of 1856, denied powers of sale or leasing by his unimaginative or spiteful settlor, would not have regarded the conferral of such powers by statute, and the removal of the need to seek a private Act of Parliament,⁴⁷ as “emaciated” or “worthless” reforms. If they have become so – and they have – it is because the 1856 Act has been long since overtaken by events, which have made it redundant. For better or worse, I would merely assert again that it is still there, as part of the law of Manitoba,⁴⁸ of Saskatchewan and of Alberta too.

But redundant it undoubtedly is. Until 1983 when, as explained below, all life tenants were made willy-nilly the beneficiaries (and usually also the trustees) of a legislatively imposed trust,⁴⁹ the 1856 Act might be of use when a life tenant under a common law settlement felt the need to make a sale or lease of the fee simple. That would not be often, since express settlements are not commonly created these days, and when they do occur, are usually effected under a trust; which brings into play the extensive facilities for Court-approved dispositions of all kinds, afforded in Manitoba by the *Trustee Act*, s 58(1).⁵⁰

Before 1983, arrangements analogous to settlements might arise in Manitoba by reason of the (then) *Dower Act*, which would create life estates having priority over the dispositions in a homeowner’s will. The result would be a succession of estates, and it might well be debated whether the property was “vested in trustees” unequivocally enough to attract the operation or make available the facilities afforded by s 58(1) of the *Trustee Act*.⁵¹ If such doubts could not be overborne, the powers secured to the life tenant by the 1856 Act might still be convenient. In such special cases a perceived need on the part of a life tenant to sell the fee simple or grant leases binding on the remainderperson, might be met only by recourse to the 1856 Act. Further, the power under s 32 of the 1856 Act to grant, unilaterally and without judicial consent, leases not exceeding 21 years (and not including the principal Mansion House and Demesnes thereof) may even now be

⁴⁷ See note 28.

⁴⁸ In 1995, by its Report No. 89, “The Trust Provisions in the Perpetuities and Accumulations Act,” the Manitoba Law Reform Commission explicitly recommended that the 1856 Act should be repealed, as being redundant and creating a potential embarrassing concurrency of powers vested simultaneously in a trustee of the settlement (by the *Trustee Act*) and in the life tenant (by the *Settled Estates Act*). The powers are not contradictory, so the *Trustee Act* does not in itself impliedly repeal the older statute. Nothing has been done to implement the Law Reform Commission recommendation.

⁴⁹ By the *Perpetuities and Accumulations Act*, *supra* note 14.

⁵⁰ This provision, subject to occasional amendments, has been part of the Manitoba statute-book since the *Trustee Act* of 1931, SM 1931, c 52, s 53 (1). It is also a feature of the laws of Alberta, New Brunswick, Nova Scotia, Yukon and the NWT.

⁵¹ The better view is surely that the executor of the will would be deemed to be a trustee in a sufficiently plenary sense to enable recourse to s 58(1), especially in light of the amplitude of the definition of “trust” in s 1 of the *Trustee Act*.

of use to the life tenant (whether under a trust or not)⁵² who prefers not to avail himself of s 58 of the *Trustee Act*.

That said, Professor Ziff is right – the 1856 Act, which never once received mention in a single reported case in Manitoba,⁵³ and suffered, as we have seen, the added indignity of being ignored in *Chupryk* as supposedly non-existent, is an anachronism overdue for repeal. This is more true in Manitoba than in its other last strongholds, Saskatchewan and Alberta, because in Manitoba, s 4(1) of the *Perpetuities and Accumulations Act* decreed as follows in 1983:

Effect of successive legal interests

4(1) Successive legal interests, whether valid or invalid at common law or as executory interests, take effect in equity behind a trust, except that any successive legal interest which would not be valid as an equitable interest behind a trust is invalid for all purposes.⁵⁴

That provision inescapably means that whenever a life estate is followed by a remainder interest, howsoever that situation comes about, a trust is imposed by law and the plenary powers of disposition available under s 58(1) of the *Trustee Act* are available. This will surely be so even in cases like *Chupryk v Haykowski*, where the initial trustee has wrongfully divested himself of his trusteeship and purported to vest common law title in the erstwhile beneficiaries: for they will still hold “successive legal interest,” s 4(1) will still insist on imposing a trust, and no trust will fail merely for want of available trustees. Relevance and utility, at that point, have surely passed the 1856 Act by.

On that valedictory note, I would end, but for one observation. Readers of *Chupryk v Haykowski* will I think note that in its curiously dogged and ultimately fruitless search for statutory powers which would avail either Michael Chupryk or Sophie Haykowski, the Court seemed, in a manner hard to articulate, to use the supposed absence of any Manitoba “Settled Land legislation” as an excuse for what it was about to do. An excuse, that is, for showing “resourcefulness” in scouring the statute-book to find (and if need be, stretch) some juridical basis on which to give one litigant (Mrs. Haykowski) the order she sought. In that spirit, the Court of Appeal set its sights on the “partition” provisions of the *Law of Property Act* of Manitoba, and invested them with functions which may by some be thought both novel and questionable. But that is a question for another day, and will be dealt with in another article, later in this volume.

⁵² Since 1983 the better view is that there will always be a trustee in such circumstances in Manitoba, though that will not necessarily be the case in Saskatchewan and Alberta, where the 1856 Act still clings to life.

⁵³ Though it did, of course, feature prominently in the Saskatchewan case of *Re Moffatt Estate*, *supra* note 36.

⁵⁴ *Supra* note 14.