A TREATISE

ON

THE LAW OF REAL PROPERTY,

FOUNDED ON

LEITH & SMITH'S EDITION OF BLACKSTONE'S COMMENTARIES

ON

THE RIGHTS OF THINGS.

BY

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OF OSGOODE HALL, BARRISTER-AT-LAW

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PREFACE TO THE SECOND EDITION.

THE present Edition has been long delayed, awaiting the revision and consolidation of the Statutes.

The original scheme has been retained, namely, a work based on Messrs. Leith and Smith's edition of the second volume of Blackstone's Commentaries. The chapters on the Origin of Property and the Ancient and Modern English Tenures have been dropped out to make room for more practical matter; but where the Commentaries on the early law are necessary or useful to elucidate the modern law they have been retained.

The chapter on Incorporeal Hereditaments has been enlarged by the addition of a section on Profits à Prendre, including therein public and private rights of fishing, and a section as to rights of killing game; and, under the head of Franchises, a section on Ferries.

A new chapter on Perpetuity and Remoteness has been added; and, while it is impossible to treat fully of such a profound subject in one chapter, it is hoped that the outline of the principles involved which has been attempted will be a guide to the student who desires to make deeper researches.

In conclusion—the whole book has been thoroughly revised, and in great part re-written. The author desires to express his appreciation of the manner in which the previous edition was received by the profession, and trusts that the present one will be of some assistance to the student of Property Law.

The Index has been prepared by W. K. FRASER, ESQ., Barrister-at-law.

E. D. A.

TORONTO, March, 1916.

CORRIGENDA.

Page 21, note (*kk*). For "Jones" read "James."
Page 28, line 25. For "as" read "or."
Page 28, sec. 12, line 6. For "heirs" read "heir."
Page 83, note (*j*), line 3. For "rests" read "vests."
Page 104. Strike out note (*g*).
Page 128, line 8 from bottom. For "present form" read "following form."
Page 296, line 12. For "administration" read "administrator."
Page 346, note (*q*). For "000" read "67."
Page 355, line 1. For "tender" read "render."
Page 366, s. 4, line 6. Before "was" insert "it."
Page 373, line 18. For "condition" read "consideration."
Page 383, line 7. For "covenantor" read "covenantee."
Page 449, line 1. After "alteration" insert "is."

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CHAPTER I.

OF THE ENGLISH LAWS IN FORCE IN ONTARIO.

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1. *General Remarks.*

BEFORE entering on the consideration of the rights appertaining to real property in Ontario, it may be proper to enquire what laws affect those rights in this, a British possession, and by what authority such laws apply.

The subject may be examined with reference, first, to the mode in which colonies are established or acquired; second, to the system of laws which is to prevail or may be enacted after such establishment or acquisition, and how and by what authority introduced; and lastly, to the position in which Canada as a colony, and more especially the Province of Ontario, stands in regard to those two subjects of consideration.

2. *Mode of acquiring Colonies.*

Colonies may be acquired by *occupancy*, *conquest*, or by *treaty or cession*.

A colony is acquired by occupancy when British subjects take possession of and settle in an uninhabited, or uncivilized country; in which case the right is not only founded on the law of nature, but may be upheld as spreading throughout the world the growth of Christianity and civilization. Of such colonies New South Wales is an instance (*a*), for although not originally uninhabited, the assent or dissent of the uncivilized aborigines, so sparsely scattered in an immense continent,

(*a*) *Cooper* v. *Stuart*, 14 App. Cas. at p. 291.

cannot be considered, or deemed of sufficient account to class that colony among those acquired by conquest; and the same may be said of the earliest French possessions in this country.

So also Newfoundland was a settled, not a conquered colony. But India, in early days, stood in a peculiar position. The factories were established for trading purposes under the protection of Great Britain, in the midst of a populous and highly civilized nation, under a ruler with whose sovereignty England did not attempt to interfere for some centuries. The English, and those who were under their protection at the factories, stood in a peculiar position with regard to their laws which will presently be referred to.

Acquisition by *conquest* need not be defined. Conquest, if not founded on the law of nature, is certainly founded on that of nations.

The acquisition of a colony by *treaty or cession* is a right founded on the law of nations.

On the acquisition of a new colony by the Crown in any of the above modes, the question immediately arises as to what system of laws is to be considered in force among the inhabitants, and by what authority new laws are to be introduced; and this brings us to the second subject of consideration.

3. *Laws in Force in Colonies—Occupancy.*

As regards colonies acquired by *occupancy*, Blackstone says (*b*): "It hath been held that if an uninhabited country be discovered and planted by British subjects, all the English laws then in being, which are the birthright of every subject, are immediately in force there; but this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situations and the condition of an infant colony; such, for instance, as the general rules of inheritance and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people; the laws of police and revenue (such especially as are enforced by penalties); the mode of maintenance for the established clergy; the jurisdiction of spiritual courts; and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times and under

(*b*) 1 Comm. 107; see also 2 P. Wms. 75.

what restrictions, must in case of dispute be decided in the first instance by their own provincial judicature, subject to the revision and control of the King in council; the whole of their constitution being also liable to be new modelled and reformed by the general superintending power of the legislature in the mother country."

These rules apply not only to an uninhabited, but also to an uncivilized country settled by British subjects, at least when in such uncivilized country the acquisition is not attended with circumstances of such magnitude and importance as that it may be deemed a conquest. Thus it is said, "Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only their own laws, but the sovereignty of their own State, and those who live amongst them, and become members of their community, become also partakers of and subject to the same laws" (*c*). Such portions, of the common and statute law as are applicable to the new situation are at once in force upon settlement of the colony, and the settlers are also entitled to all the rights and immunities of British subjects. They and their descendants have the same rights, and the Crown possesses the same prerogative and the same powers of government that it does over its other subjects. The sovereign has the right of appointing such magistrates, and establishing such corporations and courts of justice as he might do by the common law at home, and also the right of establishing a local legislature, with authority subordinate to that of parliament, but supreme within the limits of the colony for the government of its inhabitants. Such an instance is that of Newfoundland (*d*).

But when the sovereign has once established a legislature in the colony his prerogative right to exercise any legislative authority in the colony thereafter is gone (*e*).

The power to enact laws in colonies acquired by occupancy before the establishment therein of local legislation, resided formerly in the sovereign, but might have been exercised by the King in council. But by the Act 23 & 24 V. c. 121, which recites that divers of Her Majesty's subjects had occupied, or

(*c*) *Adv.-Gen. of Bengal* v. *Ranee Surnomoye Dossee*, 2 Moo. P.C.N.S. 59; *Mayor of Lyons* v. *E. I. Co.*, 1 Moo. P.C. at p. 272; *Blankard* v. *Galdy*, Salk. 411; Memo., 2 P. Wms. 75.

(*d*) *Keilly* v. *Carson*, 4 Moo. P.C. at p. 84.

(*e*) *Hall* v. *Campbell*, Cowp. 204; *Atty.-Gen.* v. *Stewart*, 2 Mer. at p. 158; *Re Lord Bishop of Natal*, 3 Moo. P.C. N.S. 148.

might thereafter occupy, places being possessions of Her Majesty, but in which she had established no government, it was enacted that the provisions of 6 & 7 V. c. 13, by which the Crown was empowered to establish, by Order in Council, laws, institutions and ordinances for the government of her settlements in Africa should extend to all her possessions not acquired by cession or conquest, nor "except in virtue of this Act" being within the jurisdiction of the legislature of any of her possessions abroad. At the settlement of a colony, as before remarked, those laws which are in force in England and are applicable to the new situation are in force; but such laws as are thereafter made by the British Parliament do not apply to the colony unless expressly mentioned, or unless they are of such general import that it can clearly be inferred that they are intended to apply to all British subjects (*f*).

India stands in a peculiar position. The settlement was made by a few foreigners for the purpose of trade in a very populous and highly civilized country, with the sovereignty of whose ruler England did not pretend to interfere for some centuries. If the settlement had been made in a Christian country the settlers would have become subject to the laws of the country in which they settled (*g*). In India they retained their own laws for their own government within the factories which they were permitted by the ruling powers of India to establish. This was in consequence of the state of society which did not permit the reception and mixing of foreigners with the Indian population, and the acquisition of the national character. Hence, the factories which were carried on under the protection of Great Britain took and retained their national character from her (*h*).

4. *Conquest.*

In conquered colonies, the laws existing at the time of the conquest, except, says Blackstone, "those contrary to the law of God," remain in force till altered by the Sovereign, who, as conqueror, can impose on the conquered such laws, British or otherwise, as he or any legislative council appointed by him may please (*i*). And this power may be exercised either by

(*f*) *Brook* v. *Brook*, 9 H.L.C. at p. 214; 2 P. Wms. 75.

(*g*) *Adv.-Gen. of Bengal* v. *Rance, etc.*, 2 Moo. P.C. N.S. at p. 260.

(*h*) *The Indian Chief*, 3 Rob. Adm. Rep. at p. 28.

(*i*) *Whicker* v. *Hume*, 14 Beav. at p. 526; 7 H.L.C. 150; *Blankard* v. *Galdy*, Salk. 411; *Mayor of Lyons* v. *E. I. Co.*, 1 Moo. P.C. at p. 272; Memo., 2 P. Wms. 75.

proclamation, letters patent or Order in Council (*j*). But this is subject to the exceptions stated by Lord Mansfield in *Hall* v. *Campbell*, Cowp. 209, viz., that the power of the King "is subordinate to his own authority in parliament; he cannot make any new change contrary to fundamental principles; he cannot exempt an inhabitant from that particular dominion, as, for instance, from the laws of trade, or from the power of parliament, or give him privileges exclusive of other subjects"; nor can he establish a court to proceed otherwise than by the Common Law (*k*), nor act in many other cases that might be put. It will be borne in mind, however, that after the constitution of a local legislative assembly and a grant to it of authority to make laws, the same consequences follow as above named in the case of such a grant in a colony acquired by occupancy, and the prerogative rights of the Crown to make laws cease (*l*); and it would seem that, even though a constitution has not been given, still, if the laws of England have been granted by the Crown, its power to change them is gone (*m*). The inhabitants, at and after the time of conquest, are not to be deemed aliens, but British subjects.

5. *Treaty or Cession.*

In colonies acquired by treaty or cession the rule is the same as in conquered colonies, except in so far as the power of the Crown may be modified by treaty on cession which is to be deemed "sacred and inviolable" (*n*).

Although the power of the sovereign to impose such laws as he might deem proper upon a conquered or ceded colony has been well established, and although in the case of this very proclamation, it was held to have introduced the English law into the newly acquired territory (*o*), this view was not received in the Province of Canada without opposition.

The French-speaking historians and jurisconsults of Canada

(*j*) *Hall* v. *Campbell*, Cowp. 204; *Whicker* v. *Hume*, 14 Beav. at p. 526; *Jephson* v. *Riera*, 3 Knapp at p. 149; *Cameron* v. *Kyle*, 3 Knapp at p. 346; *Beaumont* v. *Barrett*, 1 Moo. P.C. 75.

(*k*) *Re Bishop of Natal*, 3 Moo. P.C.N.S. 152; Com. Dig., Prerogative D. 28; 2 Knapp 78.

(*l*) *Hall* v. *Campbell*, Cowp. 204.

(*m*) *Calvin's Case*, 7 Rep. 14. See *Re the Island of Cape Breton*, 5 Moo. P.C. 259.

(*n*) *Hall* v. *Campbell*, Cowp. 208; *Re Adam*, 1 Moo. P.C. 470.

(*o*) *Hall* v. *Campbell*, Cowp. 204.

have generally urged that the late Province of Canada is to be classed among those colonies which were acquired by treaty or cession, and not among those which were acquired by conquest. Such a question is not always easily determined, for a colony may be conquered and under the control of an enemy, and yet the Parent State be unsubdued (*p*); and there may remain to it the possibility of re-conquest. Such was actually the case as regards the late Province of Canada on the French King's ceding it to the English King in 1763. If, in such a case, the conquered territory is ultimately ceded by a definitive treaty of peace, it is contended that the ultimate acquisition is to be referred to the treaty rather than the conquest. Great Britain, it has been said (*q*), has not adopted this as a principle of international law, but has considered that by the conquest of a territory it becomes *ipso facto* part of the dominions of the Sovereign, and that subsequent cession on the treaty of peace is to be regarded merely as a ratification of title. It must be borne in mind also that the fact that a colony is ultimately ceded is by no means conclusive that it had not, theretofore, been conquered, for conquests are almost universally followed and confirmed, or abandoned, by treaty when a peace is agreed on. Neither is the fact that a colony has been ceded conclusive that the right to it does not rest on other title prior and paramount to, or other than, the cession; thus, the colony of Newfoundland having been first acquired by settlement, it has been held (*r*) that it is to continue to be deemed as so acquired, and not by treaty or conquest, notwithstanding its abandonment by France by the Treaty of Utrecht in 1713, and that in the wars which preceded that treaty, it had, from time to time, passed under the control of the French and English alternately. Jamaica was acquired by conquest from the Spaniards; but as they were all driven out of the island, and it was afterwards settled by the English, it is to be classed as a colony acquired by settlement, so far as respects the introduction of the English laws (*s*).

Whether the late Province of Canada was acquired by conquest or by cession would appear to be of little practical

(*p*) See the remark of Cockburn, C.J., in a note to his published charge to the Grand Jury in *R.* v. *Eyre*, in 1866, p. 19.

(*q*) *Le Droit Civil Canadien*, Vol. 1, p. 336; *Wildman International Law*, Vol. 1, p. 162.

(*r*) *Keilly* v. *Carson*, 4 Moo. P.C. 85.

(*s*) *Hall* v. *Campbell*, Cowp. 204.

importance, in so far at least as the matters are concerned to which this chapter is especially devoted. For, as we have already seen, the rule as to the power of imposing laws is the same in each case. And this was the rule which, in fact, was acted on, or supposed to have been acted on after the treaty.

Admitting the rule, however, it was argued with great ability that the Sovereign had no prerogative right to impose new laws upon the inhabitants, as the government of Great Britain was not absolutely Monarchical but Parliamentary, the power of the Sovereign being capable of exercise only in conjunction with, or as an integral part of the Parliament; and secondly, that the proclamation did not in fact profess to introduce the laws, but contained a promise to introduce them only (*t*). As to the first contention, it seems clear that this was a matter purely between the Sovereign and Parliament. If the proclamation had not been satisfactory to Parliament, objection might have been, and no doubt would have been, made to it by a body so jealous of the exercise of prerogative rights by the Sovereign. But no objection having been made, and the Parliament being the only source from which objection might arise, its acquiescence must be attributed to its agreement with a well established constitutional principle. Indeed, Parliament afterwards affirmed the proclamation by the Act of 1774 (*u*), which recited that the inhabitants had enjoyed an "Established form of constitution and system of laws by which their persons and property had been protected, governed and ordered for a long series of years, from the first establishment of the said Province of Canada," thus recognizing its full and complete operation. The Act then revoked the proclamation as to civil matters, excepting the tenure of land, restored the French-Canadian law relating to property and civil rights, and continued in force the criminal law of England, the benefits and advantages of which had been so sensibly felt by the inhabitants, as the Act relates, from an experience of more than nine years(*v*).

As to the second contention, based upon the phraseology of the proclamation, it may be said that, if the Sovereign had no prerogative right to impose the laws of England upon the new colony, the proclamation would have merely amounted to an assurance that they would eventually be established by the

(*t*) *Wilcox* v. *Wilcox*, 2 L.C. Jur. App., pp. i., *et seq.*
(*u*) 14 Geo. III. c. 83; Houst. Const. Doc. 90.
(*v*) See 2 L.C. Jur. App. at pp. xiii. and xxxix.

proper legislative authority. But if the legislative power of the Sovereign be admitted, then, although the proclamation might declare what would be done in the future, it would in that respect differ in no respect from other prospective legislation. And, assuming the validity of the local legislative authority of the Governor and council to pass ordinances which was granted by the proclamation, it was followed on 17th September, 1764, by an ordinance which, as far as its phraseology is concerned, left no doubt that the laws of England were henceforth to be the laws of the Province.

6. *Introduction of English Law into Canada.*

Having shown the authority of the Crown to impose on the late Province of Canada such laws as it pleased, except so far as restricted by the treaty of cession, and that, in the absence of interference by the Crown, the laws existing at the time of cession would have continued in force, we have now to consider what laws were allowed to exist, what were imposed by the Crown, what the Crown could not interfere with or impose by reason of the treaty, and how it comes that the Crown has lost its rights, and we enjoy the right to legislate for ourselves, subject only to the power of the Crown to withhold its assent to a proposed measure becoming law, and of the British Parliament to impose laws on us, except so far as restrained in regard to taxation by the statute 18 Geo. III. c. 12.

On the surrender of Quebec in 1759, it was provided in the Articles of Capitulation that the inhabitants should be maintained in possession of their goods, houses, privileges, and in the exercise of their religion (*w*).

Montreal subsequently surrendered to the British, and by the terms of the capitulation, the inhabitants were guaranteed the free exercise of their religion, but the guarantee did not extend to their laws, usages, or customs (*x*).

In 1763, by the treaty of Paris (*y*), the French possessions were ceded by that government to the King of Great Britain, "in the most ample manner and form, without restriction." The King of Great Britain agreeing, however, "to grant the liberty of the Catholic religion to the inhabitants of Canada," and to give orders "that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of

(*w*) Houst. Const. Doc. 27.
(*x*) Ibid. 45.
(*y*) Ibid. 61.

the Romish Church, *as far as the laws of Great Britain permit*" (*z*). Afterwards, in the same year, the King, in the exercise of his prerogative right, issued a Proclamation introducing the law of England, civil and criminal, in general terms (*a*), into the ceded territory, then formed into the Province of Quebec; but by some inadvertence, the territory was so described as to exclude the greater part, in regard to which no provision was made for its civil government. The Proclamation declared that powers had been given by Letters Patent to the Governors of the newly acquired territories (which had been erected into four distinct Governments—of Quebec, East and West, Florida, and Grenada) with the advice and consent of the Members of Council to call General Assemblies, and with such consent and that of the representatives of the people to make laws, etc., and in the meantime all persons might confide in the King's protection for the enjoyment of the benefit of the laws of England, for which purpose, it was declared, power had been given to the Governors with the advice of the Councils to constitute Courts for hearing and determining causes, civil and criminal, according to Law and Equity, and as near as might be "*agreeable to the laws of England*," with right of appeal in civil cases to the Privy Council.

Under this Proclamation and the King's Commission and instructions to the Governor, civil government in lieu of the then existing military tribunals was established in the Province of Quebec. The legislative power was exercised by the Governor and Council, and in September, 1764, a Provincial Ordinance was passed, establishing a Superior Court of King's Bench, with power to hear and determine all civil and criminal cases "*agreeable to the laws of England*," and the Ordinances of the Province.

7. *Re-Introduction of French Law.*

The French-Canadian people were dissatisfied with the introduction of the British law, and in 1766, the Attorney and Solicitor-General, to whom the Imperial Government had referred, reported in favour of re-establishing the French law in civil matters; in 1772 and 1773, the Advocate-General, the

(*z*) It is frequently, though erroneously, stated by French-Canadians that "the Treaty accorded to them their religion, language and laws." It has been already shown that their laws remained in force till English law was introduced by the Proclamation. As to the official use of the French language, see Houst. Const. Doc. 162, 183, and see *Re Marriage Laws*, 46 S.C.R. at pp. 346, 366, 414.

(*a*) Houst. Const. Doc. 67.

Solicitor-General (afterwards Lord Chancellor Loughborough), and the Attorney-General (afterwards Lord Chancellor Thurlow), to whom the question had again been referred, reported to the same effect; England became involved in difficulties with the other North American Colonies; and in 1774, the British Statute 14 Geo. III. c. 83 (*b*) was passed, which, after reciting the defect in the proclamation of 1763, enlarged the limits assigned by it to the Province of Quebec, and defined those limits (*c*), which included, apparently, with other territory, the whole of what was formerly Upper Canada. By the same Act, after reciting therein that the provisions made by the Proclamation for the Civil Government had, on experience, been found to be inapplicable to the state and circumstances of the Province, the inhabitants whereof, it was further recited, amounted at the conquest to 65,000, professing the religion of the Church of Rome, and enjoying an established form of constitution and system of laws, by which their persons and property had been protected and governed for a long series of years, it was provided that the Proclamation should be revoked, that in all matters relating to civil rights and the enjoyment of property, and customs and usages, resort should be had to the laws of Canada (meaning the French laws in force before the Proclamation), until varied by such Ordinances as might from time to time be passed by the Governor and Legislative Council, to be appointed as set forth in the Act, and the Roman Catholic inhabitants were guaranteed in the free exercise of their religion. It was, however, provided that the Act should not extend to lands granted or to be granted by the Crown in free and common socage; and that the owner of lands, goods or credits might devise or bequeath the same, notwithstanding any law or custom prevalent in the Province to the contrary; and the criminal law of England was retained as introduced by the Proclamation of 1763. The Act took effect on 1st May, 1775.

Thus it was that, with the exceptions above-named, the old French law was again in force. As applied to lands, it partook in its nature, in some respects, more of the feudal system than did the then existing British law, and perhaps, until recent changes, there were few parts of the world where some of the relics of the feudal system were preserved as intact as in Lower Canada (*d*).

(*b*) Houst. Const. Doc. 90.

(*c*) These limits have been abridged and defined by various Treaties with the United States.

(*d*) For instances of rendering homage, see Parkman, *The Old Regime in Canada* (Ed. 1885) chap. xviii., p. 246. Feudal rights and duties were abolished in Lower Canada by 18 Vict. cap. 3.

8. *Upper and Lower Canada.*

The French law, with the above exception, remained in force, modified from time to time by Ordinances passed by the Governor and Council under the authority of the Quebec Act of 1774, until the Provincial Act of Upper Canada was passed after the separation of the Province into Upper and Lower Canada by the Act 31 Geo. III. c. 31 (*e*).

By that Act the powers given by 14 Geo. III. c. 83, to the Governor and Council, to legislate, were abrogated, and the former Province of Quebec was divided into the two Provinces of Upper and Lower Canada; a separate constitution and representative form of government were granted to each, and the power of legislation was vested in the Legislative Council and Legislative Assembly of each Province, to be appointed as set forth in the Act, the assent of the Crown, which might be expressed through the Governor, being always required to any measure becoming law. It was also provided that all lands to be granted in Upper Canada should be in free and common socage, and that if the grantees desired it, grants should be on the same tenure in Lower Canada. This Act, however, still left the former French Canadian law and Ordinances of the Governor and Council in force in Upper Canada.

9. *English Law in Upper Canada.*

The first Act of the Parliament of Upper Canada, passed under the authority of the Imperial Act of 1791, recited that Upper Canada had been principally settled by British subjects unaccustomed to the law of Canada (meaning the French law), and repealed the provision made by the Act 14 Geo. III. c. 83, that in matters of controversy relating to property and civil rights resort should be had to the laws of Canada, and it was declared that in such matters "resort should be had to the laws of England as the rule for decision of the same;" and the same with regard to evidence, legal proof and investigation of matters of fact. The English poor and bankrupt laws were expressly excepted. The Ordinances theretofore made by the Governor and Council were to remain in force, however, except so far as necessarily repealed by the above provisions (*f*). The English Statutes of jeofails, of limitations, and for the amend-

(*e*) Houst. Const. Doc. 112.

(*f*) See the effect of the Act of 32 Geo. III. c. 1, fully expressed in the preamble to R.S.O. c. 101, which is practically a re-enactment of the original statute.

ment of the law, and the equitable jurisdiction and powers of the Court of Chancery in England, were not introduced till subsequently.

Although the Chancellor had previously refused to apply the common law as to waste(*ff*), yet the effect of this enactment is thus plainly stated by Moss, C.J.O., in *The Keewatin Power Co.* v. *Kenora*(*g*): "I feel great difficulty in acceding to the suggestion that has been made that no wider rule of interpretation is to be applied to it than is to be given where the question is as to the scope of the laws introduced into a colony acquired by settlement. With much deference, I cannot but think that, under a statute framed as ours, a much larger body of the law, especially of the broad and well-understood doctrines and principles of the common law with regard to property and civil rights, is introduced than is to be deemed to be carried with them by the settlers or colonists of a new uninhabited country. Until the latter have established a system of laws for themselves, it is reasonable and consistent that the administration of the system which they carry with them should be modified and even restricted by considerations applicable to their situation and condition in the new land. But when, in the establishment of a system of laws, it is distinctly and unequivocally declared that, in controversies relating to certain subjects, such as property and civil rights, resort should be had to the common law of England as it existed on a certain day, what warrant is there for saying that the rules of property prevailing at that time are not to be administered? Certainly none, unless it can be seen that to do so would lead to manifest absurdity. And in such case the remedy can easily be applied by the legislature. To what extent such an enactment introduces local Acts of Parliament or local customs or usages not forming part of the common law, or how far they are to be deemed modified by circumstances, is another question."

In former editions of this work the question of what English laws are in force in the Province was treated at some length. But as these laws range over a variety of subjects foreign to the scope of this work, the subject is not further pursued. Suffice it to say that questions relating to property, as they arise, are determined by the English law in force at the time of the Provincial Act of 1792, as modified by Provincial enactments.

(*ff*) *Hixen* v. *Reaveley*, 9 O.L.R. 6.
(*g*) 16 O.L.R. at p. 189.

CHAPTER II.

OF CORPOREAL HEREDITAMENTS.

(1). *Lands, Tenements, and Hereditaments. p. 13.*
(2). *Land, what it Includes, p. 14.*

THE objects of dominion or property are *things*, as contra-distinguished from *persons*; and things are by the law of England distributed into two kinds; things *real* and things *personal*. Things real are such as are permanent, fixed, and immoveable, which cannot be carried out of their place; as lands and *tenements*. Things personal are goods, money, and all other moveables; which may attend the owner's person wherever he thinks proper to go. And to this we must add shares in the capital stock of corporations, and other species of property, which being intangible (though the evidence of their existence and ownership is tangible) are immoveable, and which are yet denominated personal property, and by fiction of law are supposed to follow the person.

In treating of things real, let us consider, first, their several sorts or kinds; secondly, the estates which may be had in them; and, thirdly, the title to them, and the manner of acquiring and losing it.

1. *Lands, Tenements, and Hereditaments.*

First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. *Land* comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large (*a*). *Tenement* is a word of still greater extent, and though in its vulgar acceptation it is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies every thing that may be *holden*, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial, ideal kind. Thus *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, com-

(*a*) For interpretation of the term *land* for the specific purposes of the various statutes following, see R.S.O. c. 103, s. 2 (*c*); c. 109, s. 2 (*b*); c. 112, s. 2 (*c*); c. 113, s. 2 (*e*); c. 114, s. 2; c. 115, s. 2 (*a*); c. 117, s. 2 (*a*); c. 120, s. 2 (*a*); c. 121, s. 2 (*f*); c. 124, s. 2 (*e*).

mons, and the like; and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are, all of them, legally speaking, tenements. But an *hereditament*, says Sir Edward Coke, is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal, or incorporeal, real, personal or mixed. Thus, an heir-loom, or implement of furniture, which by custom, in England, descends to the heir with an house, is neither land nor tenement, but a mere moveable; yet, being inheritable, is comprised under the general word hereditament; and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament.

There are also certain other things which, though primarily personalty, descend to the heir, and may therefore be included in the term hereditaments, such as fish in a fish-pond, deer in a park, doves in a dove-cot (*b*).

Hereditaments then, to use the largest expression, are of two kinds, corporeal, and incorporeal. *Corporeal* consist of such as affect the senses; such as may be seen and handled by the body; *incorporeal* are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

2. *Land, what it Includes.*

Corporeal hereditaments consist wholly of substantial and permanent objects; all of which may be comprehended under the general denomination of land only. For *land*, says Sir Edward Coke, comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable meadows, pastures, woods, moors, *waters*, marshes, furzes, and heath. It legally includeth also all castles, houses and other buildings; for they consist, sayeth he, of two things; *land*, which is the foundation, and the *structure* thereupon; so that, if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law. And therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only; either by calculating its capacity, as, for so many cubical yards; or,

(*b*) *Parlet* v. *Cray*, Cro. Eliz. 372; Crabb on Real Prop. 21.

by superficial measure, for twenty acres of water; or by general description, as for a pond, a watercourse or a rivulet; but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*. For water is a moveable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable; and therefore in this I may have a certain substantial property; of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cœlum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land; and downward, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs in general to the owner of the surface; so that the word land includes not only the face of the earth, but everything under it, or over it. And therefore if a man grants all his lands, he grants thereby, unless excepted, all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water—by a grant of which nothing passes but a right of fishing, or perhaps the right of user of the water, as for mill purposes—but the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum*, everything terrestrial will pass (*c*).

But the maxim will give way to the intention of the parties, and the interpretation of the conveyance will govern what passes thereby. Thus, C owned two contiguous houses, and one of the first-floor rooms in one house protruded over and

(*c*) For the purpose of conveyance in Ontario see definition of *land* in R.S.O. c. 109, ss. 2, 15; c. 115, s. 2; c. 117, s. 2. In *Winfield* v. *Fowlie*, 14 Ont. R. 102, a building floating in the waters of Georgian Bay, and approached by a sort of tramway leading from a piece of land to which the parties had a title, and commonly used therewith, was held to pass under a conveyance of the land made in the statutory short form, on account of the very wide signification given to the conveyance by the statute. But see *Hill* v. *Broadbent*, 25 App. R. 159; *Fraser* v. *Mutchmoor*, 8 O.L.R. 613.

was supported by the other house. He conveyed the latter house to H by a conveyance containing a plan which delineated the ground site of the house; and it was held that by the conveyance there passed to H the column of air above the protruding room of the house retained by C (*d*). In an almost exactly similar state of circumstances, a conveyance of the supporting house was followed by a conveyance of the house with the protruding room, each was delineated on a plan which showed the respective ground sites only, and the latter house was described or bounded on one side by the former, and it was held that the protruding room passed by the conveyance of the house by which it was supported (*e*).

(*d*) *Corbet* v. *Hill*, L.R. 9 Eq. 671.
(*e*) *Laybourn* v. *Gridley*, (1892) 2 Ch. 53.

CHAPTER III.

OF INCORPOREAL HEREDITAMENTS.

(1). *General Remarks, p. 17.*
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1. *General Remarks.*

An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal), or concerning, or annexed to, or exercisable within, the same. It is not the thing corporate itself, which may consist in lands, houses, jewels or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled; incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstract contemplation; though their effects and profits may be frequently objects of our bodily senses. And, indeed, if we would fix a clear notion of an incorporeal hereditament, we must be

careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, to a man and his heirs, is an incorporeal hereditament; for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the produce of them, as the tenth sheaf or the tenth lamb, seem to be completely corporeal; yet they are indeed incorporeal hereditaments; for they being merely a contingent springing right, collateral to or issuing out of lands, can never be the object of sense; that casual share of the annual increase is not, till severed, capable of being shown to the eye, nor being delivered into bodily possession.

Incorporeal hereditaments are principally advowsons, tithes, commons, ways, offices, dignities, franchises, annuities, profits à prendre, rents, and reversions and remainders dependent on freehold estates.

2. *Advowsons.*

Advowson is the right of presentation to a church or ecclesiastical benefice. Advowson, *advocatio*, signifies *in clientelam recipere*, the taking into protection; and, therefore, is synonymous with patronage, *patronatus*; and he who has the right of advowson is called the patron of the church. For, when lords of manors first built churches on their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common, the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church, of which he was the founder, endower, maintainer, or, in one word, the patron (*a*).

(*a*) By the Church Temporalities Act, 3 V. c. 74, s. 17, it is enacted "That in the event of any person or persons, bodies politic or corporate, desiring to erect and form a church or churches, and to endow the same with a sufficiency for the maintenance of such church, and of Divine service therein, according to the rites of the said Church of England and Ireland, it shall and may be lawful for him or them to do so, upon procuring the licence of the Bishop under his hand and seal for that purpose; and thereupon, after the erection of a suitable church, and the appropriation by the founder thereof of such church so erected, and of lands and hereditaments, or other property adequate to the maintenance thereof, and of an incumbent, and adequate to the usual and ordinary charges attendant upon such church, such provision being made to the satisfaction of the

The instance of an advowson will completely illustrate the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages, but it is a right to give some other man a title to such bodily possession. The advowson is the object of neither the sight nor the touch; and yet it perpetually exists in the mind's eye, and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer; nor can corporal possession be had of it. If the patron takes corporal possession of the church, the church-yard, the glebe, or the like, he intrudes on another man's property; for to these the parson has an exclusive right. The patronage can therefore be only conveyed by operation of law, by grant, which is a kind of invisible mental transfer; and being so vested it lies dormant and unnoticed, till occasion calls it forth, when it produces a visible corporeal fruit, by entitling some clerk, whom the patron shall please to nominate, to enter, and receive bodily possession of the lands and tenements of the church (*b*).

3. *Ways, Generally.*

A species of incorporeal hereditament is that of *ways;* or the right of going over another man's ground. We are speaking not here of the public highways, nor yet of the common ways dedicated to the public, or lanes; but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil.

This may be grounded on a special permission; as when the owner of the land grants to another the liberty of passing over his grounds, to go to church, to market or the like; in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and if the grantee leaves the

Bishop, such founder, his heirs and assigns being members of the said Church of England, or such body politic or corporate, as the case may be, shall have the rights of presentation to such church as an advowson in fee presentative, according to the rules and canons of the said united Church of England and Ireland."

By the canons of the Church of England the appointment to a vacancy rests in the Bishop of the diocese after consultation with the church wardens and lay representatives of the parish: see *Johnson* v. *Glen*, 26 Gr. 162.

(*b*) By the Church Temporalities Act, 3 V. c. 74, s. 1, the freehold of all churches of the communion of the Church of England, and of the church-yards and burying grounds attached or belonging thereto respectively, is in the parson or other incumbent thereof for the time being; and the possession thereof in the incumbent and church wardens, by whatever title held.

country, he cannot assign over his right to any other (*c*); nor can he justify taking another person in his company.

In other words, it is a mere personal licence. In order that there may be a true easement it is necessary that there should be a dominant and a servient tenement, and that the easement should be connected with, and for the enjoyment of, the dominant tenement (*d*). Where an easement is claimed by prescription the owner of the dominant tenement in substance admits that the property of the servient tenement is in another, and that the right claimed is being asserted over the property of another; and therefore where the claimant to the easement has been asserting title to the property over which he claims the easement, and exercises rights of ownership thereon as his own property, he cannot claim an easement in respect of the exercise of such rights (*e*).

An incorporeal right cannot be appurtenant to an incorporeal right. It is said that there are exceptions to this rule, and that there is nothing incongruous in the owner of a several fishery, which is an incorporeal hereditament, having a right of way over the land adjoining for the purpose of exercising his right(*f*).

A way may be also by prescription in England; as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose; for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses may clearly be created. But in Ontario no such right founded on alleged custom or immemorial usage could probably arise (*g*). But a right of way may arise in favour of individuals by prescription, and since 10 & 11 V. c. 5, R.S.O. c. 75, ss. 34 et seq., immemorial usage is no longer requisite; and under ordinary circumstances, open, known, uninterrupted enjoyment, as of right, for twenty years, will prevent such prescription from being defeated by showing that the way was first enjoyed at some time prior to such twenty years, and therefore not immemorially.

(*c*) *Ackroyd* v. *Smith*, 10 C.B. 164, explained in *Thorpe* v. *Brumfitt*, 8 Ch. App. 650.

(*d*) *Rangeley* v. *Midland R. Co.*, 3 Ch. App. 310.

(*e*) *A.-G. N.S.W.* v. *Holt*, (1915) A.C. at pp. 617, 618; *Lyell* v. *Hothfield (Lord)*, 30 T.L.R. 630.

(*f*) *Hanbury* v. *Jenkins*, (1901) 2 Ch. 401. But, cannot this be explained on the ground that, if the fishery was originally granted by the owner of the land, it would derogate from the grant to refuse access to the fishery?

(*g*) *Grand Hotel Co.* v. *Cross*, 44 U.C.R. 153.

Rights of way then may be created by grant, express or implied, and by prescription or user.

4. *Ways by Express Grant.*

In case of an express grant the language of the deed is primarily to be referred to in ascertaining the extent of the right (*h*), and it is thus a pure question of construction. But the surrounding circumstances, the nature of the road, the purposes for which it is intended (*i*), and the nature and state of the dominant tenement (*j*), are also to be regarded in aid of the bare interpretation of the grant. So it has been held that a grant of a way must be co-extensive with the requirements of the dominant tenement (*k*); but on the same principle the use may be restricted to the purposes for which the way was originally required. The question is not one that is easy of solution. On the one hand it may be said that the grant is to be taken most strongly against the grantor; and on the other, that the servient tenement is not to be burdened beyond the limits expressed in the deed (*kk*).

Where a right of way has been granted for general purposes, it is not to be restricted to such purposes only as were reasonably required for the purposes of the dominant tenement at the time of the grant; and therefore where a right of way to a private dwelling house was granted for general purposes, it was held not to be affected by the house being turned into an hotel (*l*).

But where a grant is limited to certain purposes its terms cannot be exceeded. Thus, where a lease reserved a "right of way on foot and for horses, cattle and sheep," it was held that it did not include a right to lead or draw manure over the way (*m*); and it has been held that a grant of the "free liberty

(*h*) *Williams* v. *James*, L.R. 2 C.P. 577.

(*i*) *Cannon* v. *Villars*, 8 Ch.D. 415.

(*j*) *Allan* v. *Gomme*, 11 A. & E. 759; *South Met. Cem. Co.* v. *Eden*, 16 C.B. 42.

(*k*) *Watts* v. *Kelson*, 6 Ch. App. 166.

(*kk*) *Williams* v. *Jones*, L.R. 2 C.P. 577.

(*l*) *White* v. *Grand Hotel*, (1913) 1 Ch. 113, following *United Land Co.* v. *G. E. R. Co.*, L.R. 7 Eq. 158; 10 Ch. App. 586. The dictum in *Heward* v. *Jackson*, 21 Gr. at p. 266, that "the nature of the enjoyment had at the time of the grant of the easement should be the measure of enjoyment during the continuance of the grant," was not necessary for the decision of the case, and must be taken to be overruled by the above cases.

(*m*) *Brunton* v. *Hall* 1 Q.B. 792.

and right of way and passage, and of ingress, egress and regress to and for (the lessee) and his workmen and servants, and all and every persons and person, by their or his authority, etc.," gave a right of way for foot passengers only (*n*).

"No doubt," as Mellish, L.J., said in *United Land Co.* v. *G.E.R. Co.* (*o*), "there are authorities that, from the description of the lands to which the right of way is annexed, and of the purposes for which it is granted, the Court may infer that the way was intended to be limited to those purposes." And especially is this so when the servient tenement would be subjected to a greater burden if the purposes were increased. Thus, where a right of way was reserved on a grant to a place "now used as a woodhouse," while it was held that, on the construction of the grant, these words were merely descriptive of the locality, and gave a right of way to the locality, they did not authorize the dominant owner to use the way for cottages which he subsequently built on the place described. The change was a change in substance of the original purpose, not a mere change in quality of the same purpose (*p*). So, in *Hemming* v. *Burnett* (*pp*), where there was a grant of a right of way to a dwelling-house, coach-house and stable, it was held that it did not entitle the grantee to build up the way and use it to enter a field, as the right was granted for a specific purpose. In *South Met. Cem. Co.* v. *Eden* (*q*), Jervis, C.J., said: "If I grant a way to a cottage which consists of one room, I know the extent of the liberty I grant; and my grant would not justify the grantee in claiming to use the way to gain access to a town he might build at the extremity of it." His Lordship distinguished *Hemming* v. *Burnett* from the case which he decided, where the grant was of a right of way to certain lands or any part thereof, and it was held to give a right of way to the lands in any condition and for any purpose.

A way cannot be put to a more burdensome purpose than that for which it was originally intended. Thus, where a right of way to land used for agricultural purposes was granted, it was held that the way could not afterwards be used for the purposes of a coal oil refinery which had been built on the

(*n*) *Cousens* v. *Rose*, L.R. 12 Eq. 366.

(*o*) 10 Ch. App. at p. 590.

(*p*) *Allan* v. *Gomme*, 11 Ad. & E. 759; doubted in *Hemming* v. *Burnett*, 8 Ex. 187; and said to be merely the construction of a particular deed, per Hamilton, L.J., *White* v. *Grand Hotel*, (1913) 1 Ch. at p. 117.

(*pp*) 8 Ex. 187.

(*q*) 16 C.B. at p. 57.

dominant tenement (*r*). And where a way was used to serve several houses for the purpose of the occupiers' business, and a railway company acquired the sites of two of the houses and built a station with an entrance into it from the way, it was held that the user by travellers was in excess of, and different from, that for which the way was intended, and that the railway company must be restrained from so using it (*s*). But where there was a grant of a right of way to premises which were leased, and the deed contained a covenant to keep insured the buildings "thereafter to be erected" upon the devised premises, it was held that the right to use the way was not restricted to the requirements at the time of the grant, but that it might be used for any purpose for which the demised premises might lawfully be used (*t*).

Neither can a way be used for the purpose of going to a place beyond, or other than, the dominant tenement (*u*). Nor can a merely colourable use of the dominant tenement be made for the purpose of going beyond it—as by carting building material to the dominant tenement and depositing it there, and subsequently taking it to another place which was its original and real destination (*v*). Where a house was built partly upon the dominant tenement and partly on land adjoining it, it was held that the way could not be used for going to that part of the house which was not built on the dominant tenement (*w*).

A grant of a right of way over a piece of land or a road does not necessarily carry with it the right to use the whole parcel(*x*). A grant of a right of way over and along "the roads or intended roads and ways delineated on the plan" according to which sales were made, in a deed which provided for the laying out and maintaining of roads, was held to give the grantee the right to a reasonable use of the road only, and not a right to use every square inch of it; and consequently a slight encroachment on the road made by the covenantor in the deed was held not to be an interference with the right of user of the road (*y*).

(*r*) *McMillan* v. *Hedge*, 14 S.C.R. 736.

(*s*) *Milner's Safe Co.* v. *G.N. & C.R. Co.*, (1907) 1 Ch. 208.

(*t*) *Baxendale* v. *North Lambeth L. & R. Club*, (1906) 2 Ch. 427.

(*u*) *Howell* v. *King*, 1 Mod. 190; *Colchester* v. *Roberts*, 4 M. & W. at p. 774; *Telfer* v. *Jacobs*, 16 Ont. R. 35; *Purdom* v. *Robinson*, 30 S.C.R. 64.

(*v*) *Skull* v. *Glenister*, 16 C.B.N.S. 81.

(*w*) *Harris* v. *Flower*, 21 Times L.R. 13.

(*x*) *Hutton* v. *Hamboro*, 2 F. & F. 218.

(*y*) *Clifford* v. *Hoare*, L.R. 9 C.P. 362; and see *Strick* v. *City Offices Co.*, 22 Times L.R. 667.

But where a demise of a dock included rights of way and passage over a roadway or passage twenty-three feet wide adjoining the dock, it was held that the lessor could not fence off fourteen feet of the way (*z*). Probably this case can be reconciled with *Clifford* v. *Hoare*, only on the ground that the disturbance in *Cousens* v. *Rose* substantially interfered with the reasonable use of the way, while in *Clifford* v. *Hoare* the reasonable use was not affected. And where premises were demised to a wood carver for a workshop by reference to a plan on which the demised premises were shown, together with a right of way over an adjoining parcel coloured green on the plan, and it was shown that large loads of lumber were taken in by the lessee, and that the whole parcel was necessary for the convenient use of the demised premises, it was held that the lessee had the right to use the whole parcel (*a*).

A public road differs from a private way, in this, that the dominant owner can enter the private way only at the accustomed or usual part (*b*); but where land abuts upon a highway, the adjoining proprietor is entitled to enter the highway from any part of his land (*c*); and if a private way leads to a highway, the one entitled to the private way may, on reaching the highway, go whither he will; for on reaching the highway he uses it, not by virtue of his easement, but in exercise of a public right (*d*).

Several rights of way may co-exist over the same road (*e*). A familiar instance of this is where land is plotted out on and sold according to a plan, and grants of the lots are made to various persons with the right to use the roads laid out in the plan.

It has been held in this province, with strong difference of opinion, that gates may be placed at the *termini* of a way by the owner of the servient tenement (*f*). In an English case the distinction between a private and a public way in this respect is pointed out. Any appreciable obstruction in a highway can be prevented by indictment, but in the case of a

(*z*) *Cousens* v. *Rose*, L.R. 12 Eq. 366.
(*a*) *Knox* v. *Sansom*, 15 W.R. 864.
(*b*) *Woodyer* v. *Hadden*, 5 Taunt. at p. 132.
(*c*) *Berridge* v. *Ward*, 2 F. & F. 208.
(*d*) *Colchester* v. *Roberts*, 4 M. & W. 769.
(*e*) *Semple* v. *Lon. & B.R. Co.*, 9 Sim. 209.
(*f*) *Siple* v. *Blow*, 8 O.L.R. 547. See *contra*, *Heward* v. *Jackson*, 21 Gr. 263.

private way the obstruction is not actionable unless it is substantial (*g*). It will, in this view, depend upon the construction of the grant, and upon the question of fact in each case, as to whether the gates do constitute a substantial obstruction to the user of the way, whether with regard to the space required or the time of user.

5. *Private Way Along Highway.*

In England, it is held that a private right of way may co-exist with the right of the public to use the same land as a highway, the public right being acquired subsequent to the grant or other acquisition of the private way. The owner of the soil, having granted a way, or allowed it to be acquired by prescription against him, cannot afterwards dedicate the land absolutely to the public as long as it remains subject to the private right. He can only dedicate it subject to the existing right (*h*). The owner of the right of way is not bound to justify his user as one of the public on what might be conflicting evidence of public user; and he consequently may maintain his title by the private right (*i*).

The law is probably the same in this province. So, where a private right was claimed, and the defendant pleaded that the land over which the way was claimed had been a public highway and had been closed by the municipality, the court allowed a demurrer to the plea on the ground that the antecedent right of way might still be extant, notwithstanding the facts averred in the plea (*j*). And in *Re Vashon & East Hawkesbury* (*k*), under a somewhat similar state of facts, Osler, J., said, "I do not, of course, mean to say that his private right of way is or can be at all affected by the by-law" closing a highway over the same lands. In this case the observation was a mere *dictum*, the point not being involved; and in the former case the question was a mere matter of pleading.

The question must be considered with reference to the provisions of the Municipal Act. No doubt, the proposition is true that a grant or a dedication cannot affect a pre-existing right, but must be subject to it. But in England the fee in the

(*g*) *Petty* v. *Parsons*, (1914) 2 Ch. 653.

(*h*) *R.* v. *Chorley*, 12 Q.B. 515; *Duncan* v. *Louch*, 6 Q.B. at p. 915; 1 M. & G. at p. 401.

(*i*) *Allen* v. *Ormond*, 8 East 4.

(*j*) *Johnson* v. *Boyle*, 11 U.C.R. 101.

(*k*) 30 C.P. at p. 202.

soil remains the property of the person dedicating, the public acquiring the right to use the land for the legitimate purposes of a highway only (*l*). By the Municipal Act, "unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it" (*m*). It was further provided in the former statute (*n*) that "every public road, street, bridge or other highway, in a city, township, town or incorporated village shall be vested in the municipality, *subject to any rights in the soil which the individual who laid out such road, street, bridge or highway reserved*" (*o*). The words in italics have been omitted in the last revision, but it is submitted that the effect is the same, because if the land is subject to rights in favour of a third person the owner can only dedicate it subject to such rights. As to all original road allowances, the fee never having passed from the Crown, there could not be a private right of way thereon, such allowances being dedicated by the Crown for public highways (*p*), except in the rare (if existent) case of a way previously acquired by prescription or grant from the Crown. But, as to land dedicated by a private owner to the public for a highway, though it ultimately becomes a highway to the same extent as an original road allowance (*q*), there must, as already stated, be a saving of rights reserved by the owner or of rights previously made. If a private right existed before dedication, it would apparently continue to exist after the dedication and vesting in the municipality of the public way, as a right in the soil reserved, or incapable of conveyance or dedication by the individual who laid out the road. And the owner of the private right might justify his user on that ground, if the public right were doubtful, or notwithstanding the public right. The municipality could acquire by the grant or dedication only such right as the owner could grant, *i.e.*, a public right of user subject to the private right. It could, however, acquire the private right of way by expropriation.

(*l*) *Harrison* v. *Duke of Rutland*, (1893) 1 Q.B. 142; *Hickman* v. *Maisey*, (1900) 1 Q.B. 752.

(*m*) The Mun. Act, R.S.O. c. 192, s. 433.

(*n*) R.S.O. 1897, c. 223, s. 601.

(*o*) Ibid., s. 601.

(*p*) *Rae* v. *Trim*, 27 Gr. 374; and see *Fraser* v. *Diamond*, 10 O.L.R. 90.

(*q*) *Re Trent Valley Canal*, 11 Ont. R. 687.

With regard to private rights, there is an exception, however, in the case of dower. Where an owner dedicates land for a highway it is freed from dower (*r*).

Such roads are, however, equally with original road allowances, subject to be closed by the municipality (*s*), under the authority of the Municipal Act (*t*). But "a by-law shall not be passed for stopping up, altering or diverting any highway or part of a highway if the effect of the by-law will be to deprive any person of the means of ingress and egress to and from his land or place of residence over such highway or part of it, unless, in addition to making compensation to such person, as provided in this Act, another convenient road or way of access to his land or place of residence is provided" (*u*). The provision as to supplying other means of access was first enacted in 1893 (*v*), after *Johnson* v. *Boyle* (*w*) was decided, but before *Re Vashon & East Hawkesbury* (*x*). The section in question postulates the non-existence of any means of access to the land served by the highway on its being closed, and requires such access by a convenient way to be made, if it does not already exist in another place (*y*); and the municipality is authorized, on closing a road, to offer the land for sale, first to the owner of the adjoining land, and if he refuses then to any other person. This is not conclusive, however, that the private right is extinguished by closing the highway. It is quite possible that on closing a highway the municipality might refuse to provide "some other convenient road," on the ground that the private right of way still existed, the dedication of the road having been subject to it, and the closing of the highway being the withdrawal of the public right only which the municipality acquired by the dedication. And although the conveyance of the land to the person owning the private way would extinguish it, there is no reason why, on the conveyance of the land to another person, the private right should not still be exercised.

(*r*) R.S.O. c. 70, s. 8.

(*s*) *Moore* v. *Esquesing*, 21 C.P. 277.

(*t*) The Mun. Act, R.S.O. c. 192, s. 472.

(*u*) The Mun. Act, R.S.O. c. 192, s. 472 See *Re Martin & Moulton*, 1 O.L.R. 645. The road affected by this enactment need not be a boundary of the land, if it affords means of access: *Re Brown & Owen Sound*, 14 O.L.R. 627.

(*v*) 36 V. c. 48, s. 422.

(*w*) 11 U.C.R. 101.

(*x*) 30 C.P. 194.

(*y*) *Re McArthur & Southwold*, 3 App. R. 295.

6. *Roads and Streets Shown on Plans.*

Roads and streets laid out upon a plan stand in a peculiar position. At one time the registration of such a plan did not constitute a dedication to the public of the streets laid out thereon (*z*). And in townships, including hamlets and unincorporated villages, that was the law (*zz*) until townships were, in 1897, included in the enactment about to be mentioned (*a*). By the Surveys Act (*b*) all allowances for roads, streets or commons surveyed in a city, town, village or township which have been or may be laid out by companies or individuals and laid down on the plans thereof, and upon which lots fronting on or adjoining such allowances for roads, streets or commons have been or may be hereafter sold to purchasers, shall be public highways, streets and commons. This is retroactive (*c*). The owner of the lands has, however, a controlling interest in the streets, and is not bound by the plan until he has made a sale under it (*d*). Upon a sale being made, the purchaser becomes entitled to an easement, in common with other purchasers, on all those streets which are necessary for the material enjoyment of his property, but not in any other streets unless he expressly stipulates for it (*e*). His rights are still, however, subject to the control of a Judge of the Supreme Court or a County Judge, who may, upon notification to all parties concerned, alter the plan and even the streets (*f*). The corporation is not bound to repair such streets unless the council establishes them as they are otherwise assumed for public use by the corporation (*g*).

It will be observed that the enactment in question becomes operative only when lots abutting on streets have been sold to purchasers. Before that happens, the owner has complete control, and if lots have been sold and are all re-acquired by the

(*z*) *Re Morton and St. Thomas*, 6 App. R. 323.

(*zz*) *Sklitzky* v. *Cranston*, 22 Ont. R. 590.

(*a*) 60 Viet. c. 27, s. 20.

(*b*) R.S.O. c. 166, s. 44.

(*c*) *McGregor* v. *Watford*, 13 O.L.R. 10; *Jones* v. *Tuckersmith* (*Township of*), 33 O.L.R. 634; 23 D.L.R. 569.

(*d*) *Re Chisholm & Oakville*, 9 Ont. R. 274; 12 App. R. 225; R.S.O. c. 124, s. 86.

(*e*) *Carey* v. *Toronto*, 11 App. R. 416; 14 S.C.R. 172; *Re McIlmurray and Jenkins*, 22 App. R. 398.

(*f*) R.S.O. c. 124, s. 86; *Roche* v. Ryan, 22 Ont. R. at p. 109.

(*g*) R.S.O. c. 192, s. 460, s.-s. 6.

original owner (and no doubt also by any one claiming under him), he is in the same position as if none had been sold (*h*).

There are two methods of stopping up highways laid out on a registered plan, one under the Registry Act, on an application to a Judge, and the other by a by-law passed by the Municipal Council having jurisdiction (*i*).

Apart from the laying out of streets on a plan, a road or way may also become a highway by dedication. In order to establish dedication there must be shown an intention to dedicate, and acceptance by user. User alone does not constitute a highway, but is evidence from which dedication may be inferred (*j*). And the inference to be deduced from user is not an inference of law, but one of fact (*k*).

Dedication can only take place where the person in legal occupation has power to dedicate. A tenant for life alone cannot do so (*l*). But a tenant for life and the remainderman in fee can do so (*m*).

Conveyances of lots referring to a road and public user of the road constitute dedication (*n*).

Prima facie the fences on each side of the alleged highway are presumed to be its boundaries, though this is not conclusive and may be rebutted (*o*). And the ditches or waste part between the road and the fences is the subject of dedication (*p*).

A public highway must *prima facie* lead from one public place to another. A *cul-de-sac* may be a highway, but dedication will not be presumed from mere public user (*q*); and the public cannot by user acquire a right to visit some object of interest on private property (*r*).

The right to pass over a highway is not an easement. An

(*h*) *Gooderham* v. *Toronto (City of)*, 25 S.C.R. 246.

(*i*) *Jones* v. *Tuckersmith*, 33 O.L.R. at p. 650; 23 D.L.R. 569.

(*j*) *Atty.-Gen.* v. *Esher Linoleum Co.*, (1901) 2 Ch. 647.

(*k*) *Folkestone Corp'n* v. *Brockman*, (1914) A.C. 338.

(*l*) *Roberts* v. *James*, 18 T.L.R. 777; and see *Corsellis* v. *London Co. Council*, 24 T.L.R. 80.

(*m*) *Farquhar* v. *Newburg Rur. Dis. Council*, (1908) 2 Ch. 586; (1909) 1 Ch. 12.

(*n*) *G.T.R. Co.* v. *Toronto*, 37 S.C.R. 210.

(*o*) *Offin* v. *Rochford Rur. Dis. Council*, (1906) 1 Ch. 342.

(*p*) *Chorley Corp'n* v. *Nightingale*, (1906) 2 K.B. 612; (1907), 2 K.B. 637.

(*q*) *Peters* v. *Sinclair*, 48 S.C.R. 57; 13 D.L.R. 468; affirmed by the Privy Council: 49 S.C.R. vii.; 18 D.L.R. 754.

(*r*) *Atty.-Gen.* v. *Antrobus*, (1905) 2 Ch. 188.

easement must be connected with a dominant tenement. Dedication is a gift to the public of the occupation of the surface for the purpose of passing and re-passing (*s*), but not for other purposes, such as shooting game (*t*), or other purposes not connected with ordinary travel.

The public right of passage on a highway is not such a right as is capable of having another incorporeal right annexed to it, as the right to discharge water on the neighbouring land (*u*), though after long user a legal origin for the right will be presumed if the matter is within the jurisdiction of the highway authority (*v*).

7. *Ways by Implied Grant.*

We have seen that where land is granted according to a plan showing roads and streets thereon, the purchasers acquire the right to use such of the roads and streets as serve the purchased premises (*w*). Where, however, a vendor sells according to such a plan there is no obligation cast upon him to construct the roads at his own expense, in the absence of an express agreement to that effect. The extent of his obligation is not to divert the ground appropriated for the roads to other purposes (*x*). And where a mere intention to lay out roads is expressed, the vendor may abandon or alter his intention without incurring liability (*y*).

Where, also, a grant is made of a parcel of land abutting on a road, street or lane (*z*), or a road is staked out on the ground and is mentioned in the grant, the grantee is entitled to use the whole way so mentioned or staked out (*a*). And where premises were described as abutting on a road on one side, it was held that the grantor could not afterwards set up, as against the grant, that a space lying between the premises granted and the road was not to be used by the grantee (*b*).

(*s*) *Rangeley* v. *Mid. R. Co.*, 3 Ch. App. 310.

(*t*) *Harrison* v. *Duke of Rutland*, (1893) 1 Q.B. 142.

(*u*) *Hickman* v. *Maisey*, (1900) 1 Q.B. 752.

(*v*) *Atty.-Gen.* v. *Copeland*, (1901) 2 K.B. 101; (1902) 1 K.B. 690.

(*w*) Ante, p. 28; see also *Rossin* v. *Walker*, 6 Gr. 619.

(*x*) *Cheney* v. *Cameron*, 6 Gr. 623.

(*y*) *Harding* v. *Wilson*, 2 B. & C. 96.

(*z*) *Adams* v. *Loughman*, 39 U.C.R. 247; *Espley* v. *Wilkes*, L.R. 7 Ex. 303.

(*a*) *Wood* v. *Stourbridge*, 16 C.B.N.S. 222.

(*b*) *Roberts* v. *Karr*, 1 Taunt. 495; explained in *Mellor* v. *Walmesley*, (1905) 2 Ch. 164.

8. *Ways of Necessity.*

A way of necessity arises where a landlocked parcel is granted, so that it is wholly inaccessible unless the grantee is permitted to use the surrounding land of the grantor as a means of approach (*c*). He is, therefore, entitled to a way across the land of the grantor to and from the landlocked parcel. And where the surrounding lands are granted and the landlocked parcel is retained, it is said that in this case also a way of necessity arises by implied re-grant to the grantor of the surrounding land.

But where land is enclosed on three sides by the land of the grantor, and on the fourth by the land of a stranger, there is no way of necessity (*d*). Nor does the right arise where the land is accessible on one side by navigable water though bounded elsewhere by the grantor's land (*e*).

First, of ways of necessity by implied grant. The way must be actually necessary and not merely convenient (*f*). It is a good answer to a claim for a way of necessity, that another way, though not so convenient, exists. So, where a way of necessity was claimed because a blind wall of the grantee's house abutted on the highway, the court answered that the "defendant might make a way by breaking through his wall" (*g*).

A way of necessity can exist only when a grant can be implied (*h*). So, where a parcel which was landlocked escheated, it was held that no way of necessity passed to the lord of the fee (*i*); and as such a way can only arise upon a grant of the soil, an equitable owner was held not entitled to maintain an action for such a way without joining the holder of the legal estate as a party (*j*). But a way of necessity will pass where the landlocked parcel is acquired by devise (*k*).

(*c*) *Fitchett* v. *Mellow*, 29 Ont. R. 6.

(*d*) *Titchmarsh* v. *Royston Water Co.*, (1899) W.N. 256.

(*e*) *Fitchett* v. *Mellow*, 29 Ont. R. 6.

(*f*) *Dodd* v. *Burchell*, 1 H. & C. 113; *Holmes* v. *Goring*, 2 Bing. 76; *City of Hamilton* v. *Morrison*, 18 C.P. at p. 224; *Fitchett* v. *Mellow*, 29 Ont. R. 6.

(*g*) *Barlow* v. *Rhodes*, 3 Tyr. at p. 284; *Pheysey* v. *Vicary*, 16 M. & W. at p. 490.

(*h*) *Pomfret* v. *Ricroft*, 1 Wms. Saund. p. 323 a, note (*c*).

(*i*) *Proctor* v. *Hodgson*, 10 Ex. 824.

(*j*) *Saylor* v. *Cooper*, 2 Ont. R. 398. See *Lupton* v. *Rankin*, 17 Ont. R. 599.

(*k*) *Dixon* v. *Cross*, 4 Ont. R. 465. See also *Briggs* v. *Semmens*, 19 Ont. R. 522.

Where a grantee is entitled to a way of necessity, the grantor has the right to assign the way (*l*); but if he neglects to do so, the grantee may select the way himself (*m*). The way, when selected by the grantor, need not be the most convenient one for the grantee (*n*), but it should be reasonably convenient (*o*).

It must be borne in mind that the means of access to the land must, in such cases, be considered solely with regard to reaching a point in the limits of the landlocked parcel; "a way of necessity," said Rolfe, B. (*p*), "means a convenient way to the close, not to the house as here claimed."

A way of necessity is such a way as is necessary or suitable for the grantee at the time of the grant, and the right does not increase with the increase of the necessitous circumstances of the dominant tenement (*q*). So, if the way leads to agricultural land at the time of its inception, the dominant owner cannot subsequently claim a right of way suitable to the user of this tenement as building land. The way lasts only as long as the necessity for it exists; consequently, if the dominant owner acquires other means of access to the highway, his right of way by necessity ceases (*r*). But changing the locality of the way from time to time does not destroy it; and where a grant of a specific way was made, and a purchaser of the dominant tenement bought it without notice of the specific grant of the way, it was held, nevertheless, that the way of necessity was not lost (*s*).

Secondly, as to ways of necessity by implied re-grant. When the surrounding land is granted, and the landlocked parcel is retained, it is said that the grantor has a way of necessity over the surrounding lands (*t*). This, although apparently established by the authorities, is contrary to the principle upon which a way of necessity by implied grant is

(*l*) *Clarke* v. *Rugge*, 2 Roll. Abr. 60, pl. 17; *Bolton* v. *Bolton*, 11 Ch.D. 968.

(*m*) *Fielder* v. *Bannister*, 8 Gr. 257; *Dixon* v. *Cross*, 4 Ont. R. 465.

(*n*) *Pheysey* v. *Vicary*, 16 M. & W. at p. 496.

(*o*) *Fielder* v. *Bannister*, 8 Gr. 257.

(*p*) *Pheysey* v. *Vicary*, 16 M. & W. at p. 495.

(*q*) *Gayford* v. *Moffat*, 4 Ch. App. 133; *City of London* v. *Riggs*, 13 Ch. D. 798; *Midland R. Co.* v. *Miles*, 33 Ch.D. at p. 644.

(*r*) *Holmes* v. *Goring*, 2 Bing. 76.

(*s*) *Dixon* v. *Cross*, 4 Ont. R. 465.

(*t*) *City of London* v. *Riggs*, 13 Ch.D. 798; *Holmes* v. *Goring*, 2 Bing. 75; *Davis* v. *Seor*, 7 Eq. 427; *Turnbull* v. *Merriam*, 14 U.C.R. 265.

alleged to arise. In *Wheeldon* v. *Burrows* (*u*), Lord Justice Thesiger, quoting Baron Martin's words, said, "it no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant; but the law is distinctly laid down to be so, and probably for the reason given in *Dutton* v. *Taylor* (*v*), that it was for the public good, as otherwise the close surrounded would not be capable of cultivation." This does not seem to be the true reason, otherwise the way would have been held to exist in the case of escheated land, and the contrary is held (*w*). It seems to proceed upon the maxim that a man shall not derogate from his own grant, *i.e.*, he shall not grant a landlocked parcel and deny the right to get to it, and so render his grant ineffective. And we have seen that a man cannot, by his own act, as by building up, create for himself a necessity to use another's land (*x*). And an examination of the authorities upon which the modern cases proceed will show that they do not support the doctrine.

Where strict pleading is required, a right of way claimed by the grantor of the surrounding land should be pleaded as a re-grant (*y*). Such a way is neither the subject of an exception nor a reservation. It is a newly created right over the land, and is the subject of a grant by the grantee of the land. If the form of words used is that of an exception or reservation, the deed should be signed by the grantee (*z*).

9. *Ways by Prescription.*

"In the case of proving a right by prescription, the user of the right is the only evidence. In the case of a grant, the language of the instrument can be referred to, and it is, of course, for the court to construe that language" (*a*). In the case of a grant, if there is no clear indication of the intention of the parties, the grant is to be taken most strongly against the grantor. At the same time, as an easement is a restriction on the rights of property in the servient tenement, the owner

(*u*) 12 Ch.D. at p. 58.

(*v*) 2 *Lutw.* 1487.

(*w*) Ante, p. 31.

(*x*) Ante p. 31; see also *Pomfret* v. *Ricroft*, 1 Wms. Saund. 323*a*, Serjeant Williams' note.

(*y*) *City of London* v. *Riggs*, 13 Ch.D. 798.

(*z*) *Wilson* v. *Gilmer*, 46 U.C.R. 545; and see *Wickham* v. *Hawker*, 7 M. & W. 63.

(*a*) *Williams* v. *James*, L.R. 2 C.P. at p. 581.

of it is not to be burdened with greater inconvenience than his grant warrants. In the case of a way by prescription, the evidence of user is the only evidence of the right, and the extent of the user is the measure of the extent of the right. It would seem, therefore, that, as there is no grant to be construed, the servient tenement ought not to bear a greater burden than the accustomed user warrants. Consequently, a right of way of one kind acquired by prescription does not necessarily include a right of another kind. Nor, indeed, does it necessarily exclude it. In *Ballard* v. *Dyson* (*b*), Chambre, J., pointed out that, if that were so, it would be necessary to drive every species of cattle over a way in order to preserve the right of passing with every species of cattle. It is necessary, as Parke, B., said in *Cowling* v. *Higginson* (*c*), to generalize to some extent, otherwise the use of the way would be confined to the identical carriages or cattle that had been driven over it. But, on the other hand, it must be borne in mind that, while a user under a grant is a user as of right, and the grantor must not be allowed to belittle his grant, a user by prescription is always, until the right is established by the prescription, a user against the right of the owner of the servient tenement. By a modified user for the necessary length of time, the prescriptive owner should not be allowed to claim a greater right or inflict a greater burden on the servient tenement than his user would warrant. And the effect of a trespass is never extended in favour of the trespasser beyond the actual fact. It was held in *Ballard* v. *Dyson*, by the majority of the court, that evidence of a right of way for carriages did not necessarily prove a right of way for cattle. So, proof of user of a way for agricultural purposes will not establish a right of way for mining, or for all purposes (*d*); nor will a right of way for the purpose of carting timber include a right of way for all purposes (*e*). It would be manifestly unfair to increase the burden in some instances, and the situation of and use to which the property is put might have a material effect upon the rights. Lord Abinger pointed out that, if the road lay through a park, the jury might naturally infer the right to be limited; but if it went over a common, they might infer a right for all pur-

(*b*) 1 Taunt. 279.

(*c*) 4 M. & W. 245.

(*d*) *Cowling* v. *Higginson*, 4 M. & W. 245; *Bradburn* v. *Morris*, 3 Ch. D. 812; *Wimbledon* v. *Dixon*, 1 Ch.D. 362.

(*e*) *Higham* v. *Rabett*, 5 Bing. N.C. 622.

poses (*f*). In a locality where private residences of a superior class were situated, an owner might well submit to the acquisition by his neighbour of a right to drive a private carriage in and out over his land; but should a business requiring the use of a large number of heavy drays be established, after the right to drive a carriage had been acquired, it would materially increase the burden on his land, and depreciate his tenement to a large extent.

10. *Right to Deviate from Way.*

If a highway be impassable from want of repair, the public may deviate therefrom and pass over the adjoining land (*g*). But where a way was dedicated, subject to the right of the proprietor, through whose land it passed, to plough it up when ploughing his land, it was held that there was no right to deviate from the way when it became impassable on account of the ploughing (*h*).

The grantee of a private way is, at common law, bound to keep it in repair, and so, when it falls into disrepair, he has no right to deviate (*i*).

11. *Severance of a Tenement.*

A third mode of creating an easement is by the severance of a tenement. And it proceeds upon the principle that a man shall not derogate from his own grant. Thus, if the owner of a parcel of land, on which is a house with windows overlooking the vacant portion, grant the house, he must not afterwards build on the vacant portion so as to obscure the windows, and thus the grantee of the house becomes entitled to an easement over the adjoining land (*j*). And so also with regard to all other continuous and apparent easements which are necessary to the reasonable use of the property granted (*k*).

(*f*) *Cowling* v. *Higginson*, 4 M. & W. at p. 252.

(*g*) *Carrick* v. *Johnston*, 26 U.C.R. 65. As to roads incumbered with accumulations of snow, and rights and duties of adjoining proprietors, see R.S.O. c. 211.

(*h*) *Arnold* v. *Holbrook*, L.R. 8 Q.B. 96.

(*i*) *Pomfret* v. *Ricroft*, 1 Wms. Saund. 322 *c*., n. 3. A grantee complained of the bad condition of the road, and asked what remedy he had if he was not allowed to go out of the prescribed line of road. He was told long ago by Mr. Justice Suit, that, "if he went that way before in his shoes, he might now pluck on his boots:" *Dike* v. *Dunston*, Godb. 53; *Ingram* v. *Morecraft*, 33 Beav. 49.

(*j*) *Wheeldon* v. *Burrows*, 12 Ch.D. 31.

(*k*) *Israel* v. *Leith*, 20 Ont. R. 361.

A right to the access of air through a definite aperture, as distinct from a right to light, may also be acquired in this way (*l*); and, generally, if land is granted for a specific purpose, the grantor must abstain from doing anything on adjoining land belonging to him which would prevent the use of the property for the purpose for which it was granted (*m*).

On the same principle of non-derogation from a grant if the grantor intends to reserve any rights over the land granted, he should expressly do so (*n*). He cannot, after the grant, seek to burden the land conveyed in derogation of his grant.

Where all the land is subsequently united in the same owner the easement is extinguished (*nn*).

But cases may arise in which the principle of non-derogation may still apply, although one person owns both freeholds. Thus, a lessor of a house with ancient lights conveyed his reversion in fee to the owner of the adjoining land over which the light was secured, and it was held that the unity of seisin did not extinguish the easement, for neither the lessor nor his grantee could derogate from the lease (*o*).

12. *Commons.*

Where land laid out on a building scheme contains open spaces set apart for the use and recreation of purchasers, and deeds are made giving them right of access thereto under the designation of commons, the word "commons" is not to be taken in a strict and technical sense; and the purchasers are entitled to use the open spaces and to restrict the vendors from doing anything which would prevent the purchasers from enjoying the rights acquired under the deeds (*p*).

13. *Annuities.*

An *annuity* is a thing very distinct from a rent-charge, with which it is frequently confounded; a rent-charge being a burthen imposed upon and issuing out of *lands*, whereas

(*l*) *Cable* v. *Bryant*, (1908) 1 Ch. 259.

(*m*) *Aldin* v. *Latimer Clark Muirhead & Co.*, (1894) 2 Ch. 437.

(*n*) *Wheeldon* v. *Burrows*, 12 Ch.D. 31; *Union Lighterage Co.* v. *London Graving Dock Co.*, (1902) 2 Ch. 557; *Ray* v. *Hazeldine*, (1904) 2 Ch. 17; *McClellan* v. *Powassan Lumber Co.*, 15 O.L.R. 67; 17 O.L.R. 32; 42 S.C.R. 249.

(*nn*) *McClellan* v. *Powassan Lumber Co.*, *supra*.

(*o*) *Richardson* v. *Graham*, (1908) 1 K.B. 39.

(*p*) *Re Lorne Park*, 30 O.L.R. 289; 18 D.L.R. 595; 33 O.L.R. 51; 22 D.L.R. 350.

an annuity is a yearly sum chargeable only against the *person* of the grantor. Therefore, if a man by deed grant to another the sum of £20 per annum, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity. Yet a man may have a real estate in it, though his security is merely personal. Thus an annuity granted to a man and his heirs at common law descended to the heirs and did not go to the personal representatives.

At common law annuities were not apportionable, so that if the annuitant died between the days of payment his representatives got no proportion. This is remedied by statute (*q*), under which annuities, rents and other periodical payments in the nature of income are to be considered as accruing from day to day and to be apportioned accordingly. The party liable to pay cannot be called on for payment however before the time agreed on (*r*).

14. *Rents.*

Rents were at common law another species of incorporeal hereditaments.

Whether they can be so denominated now, depends upon the interpretation of the statute abolishing the feudal nature of the relationship of landlord and tenant, by declaring that it shall not depend upon tenure, and that a reversion in the lessor shall not be necessary in order to create the relationship, or to make applicable the incidents by law belonging to that relation (*s*). The following remarks must therefore be understood as relating to the common law only.

The word rent or render, *reditus*, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance. It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit*; yet there is no occasion for it to be, as it usually is, a sum of money; for spurs, capons, horses, corn, and other matters may be rendered, and sometimes are rendered, by way of rent. It may also consist in services or manual operations; as to plough so many acres of ground, to attend the king or the lord to the wars, and the

(*q*) R.S.O. c. 156.

(*r*) See postea, p. 46.

(*s*) R.S.O. c. 155, s. 3. See this enactment further considered post Chap. VI.

like; which services in the eye of the law are profits (*t*). This profit must also be *certain*; or that which may be reduced to a certainty by either party. It must *issue out* of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always part of the thing granted. It must, lastly, issue out of *lands and tenements corporeal*; that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like. But a grant of such annuity or sum must operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt; though it doth not affect the inheritance, and is no legal rent in contemplation of law.

There are at common law three manner of rents: rent-service, rent-charge, and rent-seek. *Rent-service* is so called because it hath some corporal service incident to it, as at the least fealty or the feudal oath of fidelity. For, if a tenant holds his land by fealty and ten shillings rent; or by the service of ploughing the lord's land, and five shillings rent; these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or in arrear, at the day appointed, the lord might at common law distrain of common right, without reserving any special power of distress; provided he had in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee was expired. And if the lessor had at common law parted with his reversion, though the rent was due before, still he could not *distrain* (*u*), for the privity of *estate* was gone; he might, however, sue for the rent on the covenant to pay. And since the statute referred to, if a landlord should make a lease leaving no reversion in himself, and then afterwards should assign his right to receive the rents, he probably could not distrain for rent due before the assignment by analogy to the case at common law, though he might sue for the arrears then due to him.

Rent overdue at the time of the assignment of the reversion does not pass by the assignment merely, being a chose in action

(*t*) Cleaning a church and ringing the church bell at certain times, in return for the right to occupy a house, held to be rent: *Doe d. Edney* v. *Benham*, 7 Q.B. 976.

(*u*) *Hartley* v. *Jarvis*, 7 U.C.R. 545.

which must of itself be assigned; and the assignee of the reversion cannot enter for breach of covenant to pay rent which accrued before the assignment (*v*).

The assignee of the landlord could neither distrain nor sue in his own name prior to 35 V. c. 12 for rent *overdue before assignment*, though expressly assigned to him, for at the time it fell due there was no privity of estate between him and the lessee, and as regards any transfer of the right to sue for the breach of the covenant, it was void at law on the common law principles of maintenance (*w*), and though a statute of 32 Hen. VIII. c. 34 (*ww*) gave to the assignee of a reversion many of the rights of a reversioner, it did not transfer to him any chose in action, and rent in arrear was merely a chose in action (*x*).

Since the modern statute just referred to making choses in action assignable, it is competent for the landlord to assign rent in arrear, and the assignee having an express assignment may recover it as a debt (*y*). And where the assignee of the reversion sues the tenant for rent accrued after the assignment, the tenant cannot set off a claim for damage for breach of covenant against his original landlord which occurred before the assignment (*z*).

In one case a lessor had assigned *by deed* future rent with express power to distrain; no estate in the land was assigned; it was considered that the deed operated either as a grant by the assignor of a rent-charge with express power of distress, or of a rent-seek to which, by stat. 4 Geo. II. c. 28 (*zz*) such power is incident, and that in either view the assignee might distrain in his own name (*a*).

At common law a lessor could not distrain for rent after the term was ended; the consequence was that, as a landlord could not distrain for rent on the day it was due (the tenant being entitled to the whole day wherein to pay), he could not, when the rent fell due on the last day of the term, distrain at

(*v*) *Brown* v. *Gallagher*, 31 O.L.R. 323; 19 D.L.R. 682.

(*w*) *Wiltrock* v. *Hallinan*, 13 U.C.R. 135.

(*ww*) R.S.O. c. 155, s. 4.

(*x*) *Flight* v. *Bentley*, 7 Sim. 149.

(*y*) See *Hope* v. *White*, 19 C.P. 479, and *Hopkins* v. *Hopkins*, 3 Ont. R. 223, and cases cited.

(*z*) *Reeves* v. *Pope*, (1914) 2 K.B. 284.

(*zz*) R.S.O. c. 155, s. 39.

(*a*) *Hope* v. *White*, 19 C.P. 479.

all. To remedy this, it was enacted by 8 Anne c. 14 (*b*), that rent may be distrained for within six months after the end of the term, provided that it be "during the continuance of the landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

The possession of the tenant which is referred to in this enactment may be either a wrongful holding over or with the consent of the landlord, and may be of the whole of the demised premises or a part thereof (*c*). But such possession must not be under a new title, as, for example, by a new lease to have effect on the expiry of the old one (*d*).

In order to avoid difficulty as to distress for the last payment of rent, it is advisable to make it payable before the expiration of the term.

It is probable that the statute applies only to the case of a natural determination of the term, and not to a case where it has been determined by forfeiture (*e*). And it has been held that it does not apply where the tenancy has been put an end to by the tenant's wrongful disclaimer (*f*). Where it has been determined by a surrender of the term, it has been said that there is no reason why the statute should not apply (*g*).

After the death of the landlord the reversion passed, at common law, either to his heir or his devisee, though his administrator or executor became entitled to sue for the rent, but, not having the reversion, could not distrain. In order to remedy this it was enacted (*h*) that executors or administrators of a lessor might distrain for arrears of rent due to the lessor in his lifetime; but the distress must have been made within six months after the determination of the term or lease, and "during the continuance of the possession of the tenant from whom the arrears became due," and it was further enacted that the powers and provisions in the several statutes relating to distresses for rent should be applicable to such distresses.

There is no difference in meaning between the phrases

(*b*) R.S.O. c. 155, s. 40.

(*c*) *Nuttall* v. *Staunton*, 4 B. & C. 51; *Lewis* v. *Davies*, (1913) 2 K.B. 37, reversed on another point, 30 T.L.R. 301.

(*d*) *Wilkinson* v. *Peel*, (1895) 1 Q.B. 516.

(*e*) *Grimwood* v. *Moss*, L.R. 7 C.P. 360, at p. 365; *Kirkland* v. *Briancourt*, 6 T.L.R. 441.

(*f*) *Doe d. David* v. *Williams*, 7 C. & P. 322.

(*g*) *Lewis* v. *Davies*, (1913) 2 K.B. at p. 46.

(*h*) R.S.O. (1897) c. 129, ss. 13, 14.

"continuance of possession" in this clause and "the possession" in the clause above cited from the same c. 14, the latter expression having been held to be the equivalent of the former (*i*).

The present enactment (*j*) omits the condition as to distraining within six months after the ending of the term and during the possession of the tenant, being simply an enactment that the executors or administrators of a lessor may distrain for arrears of rent due the lessor in his lifetime. But the concluding provision has been retained, whereby all the provisions relating to distresses contained in the Act are to apply to such distresses. This provision, which, in the prior Act, obviously did not refer to distraining within the six months, may now be relied on to make s. 40 applicable, whereby any "person" having rent in arrear may distrain, after the determination of the lease, "if such distress is made within six months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due." The expression "during the continuance of the landlord's title" is obviously inapplicable where the power is given to the assign in law of the landlord by the succession of the executor or administrator, though (as this Act was passed for the benefit of landlords and should not receive a narrow construction) it might be held that his title was continued in his personal representative. But under the Devolution of Estates Act (*k*) the reversion now passes to the personal representative, and as reversioner he would have the right to distrain under the conditons mentioned in s. 40.

There is a further instance in which the person not having the reversion on a lease may nevertheless now by statute have the same remedies and rights as if he were reversioner. Thus, if before the statute A. seised in fee demised to B. for a term, reserving $20 yearly, and B. *sub-let* to C. for part of the term, reserving $100 yearly, with covenants for payment, and to repair, etc.; here A. could not sue C. on the rent reserved or covenants contained in the sub-lease, for there was neither *privity of contract nor privity of estate* between A. and C., such

(*i*) *Nuttall* v. *Staunton*, 4 B. & C. at p. 57; *Wilkinson* v. *Peel*, (1895) 1 Q.B. at p. 520, per Kennedy, J.; and see *Lewis* v. *Davies*, (1913) 2 K.B. at p. 45.

(*j*) R.S.O. c. 155, s. 59.

(*k*) R.S.O. c. 119, s. 3.

privity subsisting only between A. and B., and between B. and C. respectively. If B. in such a case assigned his reversion to a stranger, he, as assignee of the reversion, would be in privity with C., both in estate and in contract (so far, at least, as regards covenants running with the land), and so entitled to the rent and the benefit of such covenants under the sub-lease. But if B. surrendered his reversion to A., here by the doctrine of *merger*, which is hereafter alluded to, the reversion ceased to exist, being merged or drowned in the greater estate of inheritance of A. The consequence was, that though A. might have purchased from B. under the supposition that he would, as assignee of B.'s reversion, be entitled to the benefit of the whole rent and covenants in the sub-lease, he acquired, in fact, no such benefit, for the reversion had ceased to exist, and therefore he could not claim as assignee; nor, as before explained, could he otherwise sue C., by reason of want of all privity between them; neither could he recover the rent reserved on the lease granted by himself, as the term in respect of which it was payable was merged. The same unpleasant consequences followed if B. purchased from A. his (A.'s) reversion, for here the greater estate of A. equally meets and merges the lesser estate of B., which thenceforth ceases, and consequently with it all its incidents. To remedy these and other cases, a statute was passed by which it is enacted that where a reversion is merged or surrendered, the estate which confers, as against the tenant under the same lease, the next vested right to the same land, shall to the extent of and for preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease (*l*).

In *Littlejohn* v. *Soper* (*m*), the intermediate landlord agreed with his tenants to supply steam for driving machinery. He afterwards became insolvent and surrendered his lease to the superior landlord. The sub-tenants claimed the right to a continuance of the supply of steam as one of the "obligations on the reversion," and the Court of Appeal so held (*n*). But in an English case upon a similar state of facts, it was held that such a contract was a separate contract to supply a commodity used up by the tenants, and that it was not an obligation on

(*l*) R.S.O. c. 155, s. 18.

(*m*) 1 O.L.R. 172.

(*n*) Reversed in the Supreme Court, 31 S.C.R. 572, on another point.

the reversioner within the meaning of this enactment (*o*), and this is the preferable view.

Rent-service should not be reserved to a stranger. If there be any doubt as to whom it should be reserved to, the best way is to reserve it generally *during the term* without saying to whom, and the law will give the right to it to those entitled.

15. *Rent-charge.*

A *rent-charge* is where the owner of the rent has no future interest, or reversion expectant in the land; as where a man by deed makes over to others his *whole* estate in fee-simple, reserving rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be in arrear or behind, it shall be lawful to distrain for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a *rent-charge*, because in this manner the land is charged with a distress for the payment of it (*p*).

Such a case as the above varies altogether from the case of a demise at common law wherein the lessor had a reversion, and *reserved* rent, which is a rent-service. When a person grants his *whole* estate, leaving in himself no reversion, and reserves rent, it will not, by reason of the statute *Quia emptores* operate as a reservation of *rent-service* for which distress may be had of common right; but it operates as a reservation of a *rent-charge*, which will be a rent-seck, unless a power of distress be given. It may also be created by conveyance under the Statute of Uses; as if A., seised in fee, should grant to B and his heirs, to the *use* and intent that A. and his heirs may, out of the lands conveyed, receive a rent-charge; to which is further, sometimes, added further uses, as that on non-payment, A. and his heirs may distrain, or re-enter and hold till payment, etc. The Statute of Uses enacts (*q*) that when any person shall stand seised of any lands, in fee-simple or otherwise, *to the use and intent* that some other shall have yearly to them and their heirs or their assigns, any annual rent, the persons *that have such use* to have the rent, shall be adjudged and deemed in possession and seisin of it, of the same estate as they had in the use of it, and may distrain.

(*o*) *Bentley* v. *Metcalfe*, (1906) 2 K.B. 548.
(*p*) See *Re Gerard & Beecham*, (1894) 3 Ch. 295.
(*q*) R.S.O. App. A. p. ix., s. 4.

A rent-charge may also be created by express grant; as when A. grants to B. a rent-charge out of A.'s lands. Although the general result is the same, there is a substantial distinction as regards title between these two methods of creating a rent-charge. In the first two cases the title to the rent-charge depends upon the title to the land—it takes effect by reason of the assurance of the land. In the last of the three cases, if the title to part of the land fails, the rent-charge remains unaffected. Thus, if A. should grant land in fee to B., reserving a rent-charge, and B. should afterwards be evicted from part of the land by title paramount, the rent is to be apportioned according to the value of the land. But if A., owner in fee, grant a rent-charge to B., and then be evicted from part of the land, he cannot take advantage of the weakness of his own title to defeat, even in part, his grant of the rent-charge, which is therefore not apportioned in that case (*r*).

In addition to his remedy by distress, the owner of a rent-charge in fee may have an action of debt against the grantor of the rent charge, or against his assignee, being owner in fee, the fact of the land becoming vested in any one having the effect of charging him with a personal obligation to pay the rent-charge while he holds the land (*rr*). And the fact that the owner of the land receives no rents or profits from it is no answer to such an action (*s*). But where there is a tenant for years in possession he is not liable in debt for the rent-charge though his goods are subject to distress therefor (*t*).

A mortgagee of the land in fee entitled to have possession under his mortgage is also liable personally for the rent-charge, although he may not actually have taken possession and has received no rents or profits therefrom (*u*).

At common law, if the owner of the rent released part of the land from the charge, the whole rent was discharged, for the charge was entire, and issued out of and was charged on every part of the land, and was also against what is termed *common right* (*v*). So also, if the owner of the rent purchased,

(*r*) *Hartley* v. *Maddocks*, (1899) 2 Ch. 199.

(*rr*) *Re Herbage Rents, Greenwich*, (1896) 2 Ch. 811, at p. 816 *et seq.* And see *Foley's Charity Trustees* v. *Dudley Corporation*, (1910) 1 K.B. 317.

(*s*) *Re Herbage Rents, supra.*

(*t*) Ibid.

(*u*) *Cundiff* v. *Fitzsimmons*, (1911) 1 K.B. 513.

(*v*) Co. Litt. 148; see also generally, notes to *Clun's Case*, Tud. Lg. Ca. 4th ed. 33, at p. 83.

or took by devise (*w*), part of the lands charged, the whole charge was released by operation of law. But if part of the lands were acquired by descent, or by title paramount (*x*), no release would take place. The owner of the rent could always release part of it to an owner of the land.

By R.S.O. c. 109, s. 33, a release from the charge of part of the property charged shall not extinguish the whole charge, but shall operate only to bar the right to recover any part of the charge out of the property released, but without prejudice to the rights of all interested in the property unreleased and not concurring in or confirming the release.

It may, perhaps, be contended that the Act does not apply to prevent a release where it takes place by operation of law, as on purchase or taking by devise of part of the lands. The expression, that the release "shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released," implies the existence of some one owning the part released, other than the releasor, against whom the releasor was to be barred of right to recover; such expression would not be applicable where the lands released became the property of the owner of the charge, who cannot be supposed to have required legislation to bar his right to recover out of his own lands. Moreover, the Act contemplates a concurrence in, or confirmation of the release, and it may be said this would not apply when the release is the mere result, by operation of law, of acquiring the lands, and is not a release in deed.

With regard to the latter part of the above section, it must be borne in mind that if an owner of part of the land charged be forced to pay the whole charge, he has a right of contribution against owners of the other part (*y*).

A rent-charge may be granted in fee simple, or for a less estate; of course it cannot last longer than the estate of the grantor; thus, if the grantor have only a life estate, his grant will be commensurate with his estate.

16. *Rent-seck.*

Rent-seck, *reditus siccus*, or barren rent, was at common law, in effect, nothing more than a rent reserved by deed, but without any clause of distress. It must be understood, how-

(*w*) *Dennett* v. *Pass*, 1 B.N.C. 388.
(*x*) Co. Litt. 148 *b*.
(*y*) *Hunter* v. *Hunt*, 1 C.B. 300, and cases cited.

ever, that by the deed no reversion was left in the grantor, but that he made over his whole estate, for if a reversion were left in him, the rent would have been rent-service. And it would seem that, strictly speaking, there could be no reservation, *quâ* reservation, of a rent-seck; for, if the whole estate of the grantor were made over by deed, the rent-seck reserved or made payable would not enure by way of reservation, but by way of re-grant of the rent; and if the whole estate were not made over, the rent would not be rent-seck but rent-service. A rent-seck might also have arisen on grant of a rent without a clause of distress to a person having no estate or interest in the land; or, as before mentioned, by grant by a lessor or owner of rent-service of *future* rent only without the reversion (*z*). Attention must again be called to the statute which abolishes tenure between landlord and tenant, and renders unnecessary the retention of a reversion by the landlord. Whether a lease granted since that statute, for the whole interest of the lessor, reserving rent to him, would be treated as a re-grant to him of a rent-seck, or as an ordinary lease reserving rent for which he might distrain, it is impossible to say in the absence of any judicial pronouncement upon the Act.

By the Act of 4 Geo. II. c. 28 (*a*), the like remedy by distress was given to recover rent-seck as existed in case of rent-service reserved upon a lease.

17. *Apportionment of Rent.*

By R.S.O. c. 156, s. 4, rent, like interest on money lent, is to be considered as accruing from day to day, and is apportionable in respect of time accordingly, unless it is stipulated in the instrument that no apportionment shall take place (s. 7). Hence, where a tenant was evicted, the landlord was held entitled to recover rent up to the day of eviction only (*b*). And where a garnishing order issues at the instance of a creditor of the landlord, the apportioned part of the rent which has accrued up to the date of the attaching order may be ordered to be paid to the creditor on the next gale day, the statute (s. 5) providing that the apportionment shall not accelerate the payment (*c*), and where a lease is determined by act of the parties

(*z*) *Hope* v. *White*, 19 C.P. 479.

(*a*) R.S.O. c. 155, s. 39.

(*b*) *Barnes* v. *Bellamy*, 44 U.C.R. 303; see also *Boulton* v. *Blake*, 12 Ont. R. 532; *Crozier* v. *Trevarton*, 32 O.L.R. 79; 22 D.L.R. 199.

(*c*) *Massie* v. *Toronto Printing Co.*, 12 P.R. 12.

between the gale days, the rent is likewise apportionable under this enactment (*d*). It is also enacted (s. 6) that all persons and their representatives, whose interests determine with their own deaths, have the same remedies for recovering the apportioned parts of the rents as they would have had for the entire portion if entitled thereto.

The Act affects not only the right to recover, but also the liability for the rent, so that the tenant may be sued for an apportioned part of the rent (*e*).

Rack-rent is only a rent of the full value of the tenement, or near it.

18. *Profits à prendre.*

A *profit à prendre* is a right to enter upon the land of another and take some profit of the soil, such as minerals, oil, stones, trees, turf, fish or game. The right to take water is not a *profit à prendre*, but an easement (*f*).

A *profit à prendre* differs from an easement in this, that an easement entitles the dominant owner to enter his neighbour's land and make some use of it, while a *profit à prendre* entitles the owner of it to take some profit from the soil. It differs also in this, that an easement must be appurtenant to some land other than that over which the easement exists. In other words, there must be a dominant tenement to which the easement is appurtenant. Whereas, a *profit à prendre* may exist in gross, that is, as a separate inheritance enjoyed independently of the ownership of any land (*g*).

It differs also from the ownership of the soil. Thus, a grant of all the coal or other mineral in or upon certain land, is a grant of part of the land itself, and passes complete ownership in the mineral to the grantee. But a grant of the right to enter, search for and dig coal, and carry away as much as may be dug, is a grant of an incorporeal right to enter and dig, and passes the property in such coal only as shall be dug (*h*). The grant of such a right does not prevent the owner from exercising his right, as owner, of taking the same sort of thing from off

(*d*) *Crozier* v. *Trevarton*, 32 O.L.R. 79; 22 D.L.R. 199.

(*e*) See *Rochester, Bishop of*, v. *Le Fanu*, (1906) 2 Ch. 513, and cases cited.

(*f*) *Race* v. *Ward*, 4 E. & B. 701.

(*g*) *Shuttleworth* v. *Le Fleming*, 19 C.B.N.S. 687; *Welcome* v. *Upton*, 6 M. & W. 536; *Barrington's Case*, 8 Rep. 136.

(*h*) *Wilkinson* v. *Proud*, 1 M. & W. 33; *Chetham* v. *Williamson*, 4 East 469; and see *McIntosh* v. *Leckie*, 13 O.L.R. 54.

his own land. The right granted may limit, but does not exclude, the owner's right. Clear and explicit language must be used in order to give the grantee the right to the exclusion of the land-owner (*i*).

It differs also from a mere licence of pleasure or personal licence, which must be exercised by the licensee only and is not assignable. Thus, if a land-owner grants merely the right to shoot, fish or hunt, without the liberty to carry away what is killed, it is a mere personal licence, or licence of pleasure, and is not assignable, or exercisable with or by servants (*j*). But if, with the right to kill, there is given also the right to carry away what is killed, or part of what is killed, then the grant is of an incorporeal hereditament, a *profit à prendre* (*k*). And so, being for profit, this right may be exercised with or by servants, and *a fortiori* is that so when the right is granted to one, his heirs and assigns (*l*). Each grant must be interpreted by itself; but a grant of the "exclusive right of fishing" has been held to imply the right to take away such fish as may be caught, and so to be a *profit à prendre* (*m*).

A *profit à prendre* is an interest in land, and an agreement to grant one is therefore within the Statute of Frauds (*n*). And it cannot be sold under an execution against goods (*o*). But it has been held that such a right, resting in agreement not under seal, is not such an interest in land as entitles the possessor of it to compensation under the wording of the English Lands Clauses Consolidation Act, 1848, from a railway company which expropriates part of the land which is subject to the right (*p*).

Being an incorporeal hereditament, a *profit à prendre* must be created or transferred by deed (*q*). But a writing, void as a grant, may operate as an agreement for one, and specific per-

(*i*) *Duke of Sutherland* v. *Heathcote*, (1892) 1 Ch. at p. 484.

(*j*) *Wickham* v. *Hawker*, 7 M. & W. at pp. 73, 77, 79; *Webber* v. *Lee*, 9 Q.B.D. at p. 317, per Bowen, J.

(*k*) *Wickham* v. *Hawker*, 7 M. & W. 63; *Webber* v. *Lee*, 9 Q.B.D. 315; *Rex* v. *Surrey Co. Ct. Judge*, (1910) 2 K.B. at p. 417.

(*l*) *Wickham* v. *Hawker*, 7 M. & W. 63.

(*m*) *Fitzgerald* v. *Firbank*, (1897) 2 Ch. 96.

(*n*) *Webber* v. *Lee*, 9 Q.B.D. 315; *Rex* v. *Surrey Co. Ct. Judge*, (1910) 2 K.B. at p. 417; *Smart* v. *Jones*, 15 C.B.N.S. 724.

(*o*) *Canadian Railway Acc. Co.* v. *Williams*, 21 O.L.R. 472.

(*p*) *Bird* v. *G.E.R. Co.*, 19 C.B.N.S. 267.

(*q*) *Bird* v. *Higginson*, 2 A. & E. 696; 6 A. & E. 824; *Bird* v. *G.E.R. Co.*, 19 C.B.N.S. 268.

formance of it will be enforced in a proper case. And so, where a land-owner asked an injunction to restrain one who had such an agreement from shooting over his land, the injunction was refused, and specific performance of the agreement by the execution of a proper deed was ordered (*r*). And where the circumstances are such that specific performance would be granted, the rights of the parties would now be adjusted as if the formality of a deed had been observed (*s*).

Where a lease of sporting rights has been made not under seal, and the tenant has actually enjoyed the rights thereunder, he will be liable to perform any agreement made therein on his part (*t*).

Where land is granted or leased, and the right of sporting over it is reserved by the instrument to the grantor, this is not properly a reservation or exception, but is a re-grant of a new right exercisable over the lands of the grantee or lessee; and therefore the deed should be executed by the grantee or lessee; and where a right was so expressed to be reserved to the grantor and another, it was held to operate as a re-grant to the persons to whom the so-called reservation was made (*u*).

Where a grant to shoot or sport over lands is made, and no restriction as to user of the land is imposed upon the land-owner, the grantee takes merely the right to shoot or sport over the lands as he finds them from time to time. And so, a lessor of the right to shoot over his lands is not prevented from cutting timber in due course, although the result may be to interfere with the shooting (*v*). And the owner may also sell in lots for building purposes, or make the necessary roads through his property, but the purchaser would necessarily take subject to the shooting rights if he had notice of them (*w*). And, on the other hand, where a lease is made of lands reserving to the lessor all the shooting and sporting rights, the tenant may use the land in the ordinary way under his lease (*x*). Where there is a grant of the right to sport for a term of years, and the grantee covenants with the owner of the land to leave it well stocked with game, the benefit of this covenant runs

(*r*) *Frogley* v. *Lovelace*, John. 333.
(*s*) *Walsh* v. *Lonsdale*, 21 Ch.D. 9.
(*t*) *Adams* v. *Clutterbuck*, 10 Q.B.D. 403.
(*u*) *Wickham* v. *Hawker*, 7 M. & W. 63.
(*v*) *Gearns* v. *Baker*, 10 Ch. App. 355.
(*w*) *Pattison* v. *Gilford*, L.R. 8 Eq. 259.
(*x*) *Jeffrys* v. *Evans*, 19 C.B.N.S. 246.

with the reversion, and on breach it may be sued on by the assignee of the reversion (*y*).

Where a right to shoot was enjoyed from year to year on payment of an annual sum, and the landlord gave less than half a year's notice to determine the right, after a shooting season had closed, it was held to be a reasonable notice, under the circumstances, and sufficient to determine the right, and the Court refused to hold that half a year's notice was necessary (*z*).

At common law the property in game, when alive and free, is temporary, and consequent upon possession of the soil (*a*). There is no right to game as chattels (*b*). But when game is killed or otherwise reduced into possession, the property becomes absolute. So, at common law, if a man keeps game on his land he has a possessory property in it as long as it remains there, but if it escapes into the land of his neighbour, the latter may kill it, for then he has the possessory property. If a trespasser starts game on the grounds of another and hunts and kills it there, the property continues in the owner of the land. But if one, having no licence to do so, starts game on the land of one and hunts it into, and kills it on, the lands of another, it belongs to the hunter; but he is liable in trespass to both land-owners (*c*).

Where the public have a right of navigation on water covering the land of a private owner, there is no right to shoot wild fowl from a boat under guise of the exercise of the right of navigation (*d*). And that is so, also, where the waters have been made navigable by artificial means (*e*). Nor can one of the public use a highway for the purpose of shooting game which strays or flies over the highway from the lands of the adjoining proprietor who owns the fee in the soil of the highway (*f*).

(*y*) *Hooper* v. *Clark*, L.R. 2 Q.B. 200.

(*z*) *Lowe* v. *Adams*, (1901) 2 Ch. 598.

(*a*) *Graham* v. *Ewart*, 11 Ex. at p. 346; *Lonsdale* v. *Rigg*, 11 Ex. at p. 672.

(*b*) *Blades* v. *Higgs*, 12 C.B.N.S. at p. 513.

(*c*) *Sutton* v. *Moody*, 1 Ld. Raym. 250, explained in *Blades* v. *Higgs*, 11 H.L.C. at p. 632; *Churchward* v. *Studdy*, 14 East 249; *Lonsdale* v. *Rigg*, 11 Ex. at p. 672.

(*d*) *Fitzhardinge* v. *Purcell*, (1908) 2 Ch. 139; *Micklethwaite* v. *Vincent*, 8 Times L.R. 268.

(*e*) *Beatty* v. *Davis*, 20 O.R. 373.

(*f*) *Harrison* v. *Rutland (Duke of)*, (1893) 1 Q.B. 142; and see *Hickman* v. *Maisey*, (1900) 1 Q.B. 752; *Reg.* v. *Pratt*, 4 E. & B. 860.

The right to kill game is somewhat affected by statute in Ontario. By R.S.O. (1887) c. 221, s. 10, it was provided that "in order to encourage persons who have heretofore imported or hereafter import different kinds of game, with the desire to breed and preserve the same on their own lands, it is enacted that it shall not be lawful to hunt, shoot, kill or destroy any such game without the consent of the owner of the property wherever the same may be bred." And a penalty was provided for breach of the Act. In an action by the owner of preserves for the value of deer which had strayed from the preserves upon the defendant's land and had there been killed by the defendant, the opinion was expressed that the Act was not intended to affect the common law right of the owner of any other land to kill and take any such game as might from time to time be found upon his land, and that the preserver of the deer had no right of action against the defendant (*g*). In other words, the defendant acquired a temporary possessory property in the game as soon as it came upon his land. The result would seem to be, if this opinion is correct, that the penalty provided by the Act could not be enforced in a similar case, because to do so would be to exact a penalty from the defendant for killing his own deer. This would restrict the operation of the Act to hunting or killing game either on the preserved property or elsewhere than on the land of the person who kills it.

This enactment, somewhat modified, was continued in R.S.O. (1897) c. 287; and by R.S.O. (1914) c. 262, s. 22, it is now provided that (1) "where a person has put or bred any kind of game upon his own land for the purpose of breeding and preserving the same, no person, knowing it to be such game, shall hunt, shoot, kill or destroy it without the consent in writing of the owner of the land." (2) "This section shall not prevent any person from shooting, hunting, taking or killing upon his own land, or upon any land over which he has a right to shoot or hunt, any game which he does not know or has not reason to believe has been so put or bred by some other person upon his own land." And penalties are provided for infringement of the Act. By the express wording of this enactment, the common law right of the owner of land to kill game which he finds thereon is preserved, provided that he does not know or has not reason to believe that it is preserved game, and the expression of this right seems to predicate that if the

(*g*) *Re Long Point Co.* v. *Anderson*, 19 O.R. 487; reversed on the ground that prohibition would not lie: 18 A.R. 401.

landowner does know or has reason to believe that the game is preserved, he must not kill it on his own land.

There is nothing in this enactment to change or affect the character of the right to shoot or kill game. In other words, it still remains an incorporeal right, and should be created or assigned by deed, although the "consent in writing" of the owner of the land is all that is required by the Act. But a proper consent, if not under seal, would no doubt be treated as an agreement for a deed as before mentioned. (*h*)

19. *Fisheries.*

The right of fishing is a territorial right, an incident of ownership of the soil; and the owner, in exercising his right of fishing, is merely exercising one of his rights of property in the soil, whether the river or other fresh water is navigable or not (*i*), and this is sometimes called a territorial fishery (*j*).

"Fresh waters of what kind soever do of common right belong to the owners of the soil adjacent; so that the owners of the one side have of common right the property of the soil, and consequently the right of fishing *usque filum aquæ;* and the owners of the other side the right of soil or ownership and fishing unto the *filum aquæ* on their side; and if a man be owner of the land on both sides in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length" (*k*). By an Act passed in 1 Geo. V. c. 6 (*l*), it is enacted that where land bordering on a navigable body of water or stream has been heretofore or shall hereafter be granted by the Crown, it shall be presumed, in the absence of an express grant of it, that the bed of such body of water or stream was not intended to pass to the grantee of the land, and the grant shall be construed accordingly, and not in accordance with the rules of the English common law. Thus, the property in the beds of all navigable streams and lakes owned by private persons before the Act has been confiscated, and with it the right of fishing possessed, as a territorial right, by the owners.

(*h*) Ante, p. 48.

(*i*) *Re Provincial Fisheries*, 26 S.C.R. at p. 517; *Murphy* v. *Ryan*, 2 Ir. Rep. C.L. at p. 149.

(*j*) *Marshall* v. *Ulleswater Steam Nav. Co.*, 3 B. & S. 732.

(*k*) Hale, De Jure Maris, cap. 1, p. 1.

(*l*) R.S.O. c. 31.

Waters which are not navigable, and waters which lie upon land specifically granted, are not within the Act, and to such only, therefore, will the common law as to the private right of fishing apply. There are also, no doubt, cases where a small lake is completely surrounded by land privately owned, which is fed and drained by a stream which is not navigable, and to which, therefore, the public have no access. There may also be cases where some reaches of a stream are navigable, but not accessible to the public because above and below the reaches the waters are not navigable. It is difficult to say how such waters should be treated. But the Act, being in derogation of common right, should be strictly construed.

A several fishery is the exclusive right to fish in a given place, and may exist either apart from, or as incident to, the ownership of the soil (*m*).

Where the owner of the soil exercises the right, he is, as we have seen, merely exercising one of his rights of property as owner of the soil. If he should grant to another the exclusive right of fishing, the right becomes an incorporeal hereditament, and is a *profit à prendre* (*n*).

The right of fishing, being an incorporeal hereditament, lies in grant, and can only be created or conveyed by deed. A right for a term of years must be created by deed (*o*). And it has been said that to give the right even for an hour a deed is necessary (*p*). But specific performance of an agreement to give a right would be adjudged in a proper case, and if proper to grant it, the court would now adjust the rights of the parties as if a deed had been made. And where the right of fishing has actually been enjoyed under a parol writing, the owner may recover for use and occupation of the fishery (*q*).

A grant of the "exclusive right of fishing" implies the right to take away such fish as are caught, and is therefore not a mere licence of pleasure, but a *profit à prendre;* and an action will lie by the grantee against any person who wrongfully does any act, such as fouling the water, by which the enjoyment of the right is prejudicially affected (*r*).

(*m*) *Hanbury* v. *Jenkins*, (1901) 2 Ch. at p. 411; *Halford* v. *Bailey*, 13 Q.B. 426; *Malcolmson* v. *O'Dea*, 10 H.L.C. at p. 619.

(*n*) *Hindson* v. *Ashby*, (1896) 2 Ch. at p. 10; *Bland* v. *Lipscombe*, 4 E. & B. 713, *n.*

(*o*) *Somerset* (*Duke of*) v. *Fogwell*, 5 B. & C. 875.

(*p*) *Halford* v. *Bailey*, 13 Q.B. at p. 446.

(*q*) *Halford* v. *Pritchard*, 3 Ex. 793.

(*r*) *Fitzgerald* v. *Firbank*, (1897) 2 Ch. 96.

By a lease of lands on the banks of a stream, whether for agricultural purposes or otherwise, the tenant acquires the right of fishing in the stream (*s*).

A right of way along the bank of a river may be appurtenant to an incorporeal right of fishing (*t*); and if the owner of a territorial fishery should grant the right of fishing, no doubt a right of way over his land to the fishery would be implied, either as a way of necessity (if the facts warranted it) or on the principle that the grantor should not derogate from his grant.

The public right of fishing is, like the private right, a territorial one, and is a right exercised by the public over lands the fee in which is in the Crown in trust for the public. Before Magna Charta the Crown had by various grants to private persons excluded the general public from fishing in certain parts of tidal waters, by which grants the exclusive right of fishing in those localities became vested in the various grantees. But since Magna Charta the Crown cannot without statutory authority exclude the public from fishing in tidal waters, though those fisheries which were created before Magna Charta were left unaffected (*u*).

It is not necessary that the water should be salt in order to constitute tidal water. Wherever the influence of the regular tides affects a river, it is tidal; but where the flow of the tide at certain seasons has the effect of damming back the fresh water and so causing it to rise, that does not constitute the fresh water so affected tidal so as to give the public a right of fishing in it (*v*).

Though the public have the right to fish in tidal waters, they have not the right to use the adjoining lands for fishing purposes if privately owned (*w*).

In the Province of Ontario, before the Act 1 Geo. V. c. 6 was passed, the common law presumption that the soil of a non-tidal navigable river or lake is in the riparian owner was not applied to the great lakes and rivers, the letters patent from the Crown granting the lands adjoining them being interpreted

(*s*) *Davies* v. *Jones*, 18 T.L.R. 367.

(*t*) *Hanbury* v. *Jenkins*, (1901) 2 Ch. 401.

(*u*) *Malcolmson* v. *O'Dea*, 10 H.L.C. at p. 618; *Free Fishers of Whitstable* v. *Gann*, 11 C.B.N.S. at p. 417; *Carlisle Corporation* v. *Graham*, L.R. 4 Ex. 361; *Somerset (Duke of)* v. *Fogwell*, 5 B. & C. 875, 884.

(*v*) *Reece* v. *Miller*, 8 Q.B.D. 626.

(*w*) *Blundell* v. *Caterall*, 5 B. & Ald. at p. 294; *Parker* v. *Elliott*, 1 C.P. 470.

to extend to the water's edge only (*x*). These waters were treated as subject to the same law as tidal waters, and therefore the right to fish in both tidal navigable waters and in the great lakes and rivers is in the public, where the land under the waters has not been specifically granted to a private person (*y*). And since the Act 1 Geo. V. c. 6 in all waters to which it applies the right of fishing is in the public where they can get access to them without going over private property.

The public right of fishing does not arise out of the right of navigation, though in fishing the public necessarily exercise the right of navigation (*yy*). In *Smith* v. *Andrews* (*z*), North J., said that the idea is sometimes entertained that the right to pass along a public navigable river carries with it the right to fish in it, but so far as regards non-tidal rivers this is not so. Where a river is navigable and tidal the public have a right to fish therein as well as to navigate it; but where it is navigable but not tidal no such right can exist if the bed is owned by a private person (*a*).

As the right of fishing is primarily an incident of ownership of the soil, the public cannot, by prescription or otherwise, acquire a right to fish in fresh water rivers whose beds are private property (*b*). Nor can the owner of a several fishery, which can pass only by deed, "abandon" his right or lose it under any statute of limitations (*c*).

Where the ownership of the soil of a non-navigable river is in private persons, and the river is made navigable by artificial means, without affecting the rights of the land-owners, it is equally impossible that any public right of fishing should exist therein (*d*).

20. *Franchises—Ferries.*

Franchises are another species of incorporeal hereditament. Their definition is a royal privilege, or branch of the Sovereign's prerogative subsisting in the hands of a subject. Being,

(*x*) See *Re Provincial Fisheries*, 26 S.C.R. at p. 520, and cases there cited.

(*y*) *Gage* v. *Bates*, 7 C.P. 116.

(*yy*) *Baldwin* v. *Chaplin*, 34 O.L.R. at p. 23; 21 D.L.R. 846.

(*z*) (1891) 2 Ch. at p. 695.

(*a*) *Pearce* v. *Scotcher*, 10 Q.B.D. 102.

(*b*) *Smith* v. *Andrews*, (1891) 2 Ch. 678; *Hudson* v. *MacRae*, 4 B. & S. 585.

(*c*) *Neill* v. *Devonshire* (*Duke of*), 8 A.C. 135.

(*d*) *Hargreave* v. *Diddams*, L.R. 10 Q.B. 582.

therefore, derived from the Crown, they must arise from the grant of the Sovereign. They are of various kinds. Among other franchises are those to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, markets, and ferries.

A ferry is a liberty by prescription or the King's grant to have a boat for passage upon a river for carriage of horses and men for reasonable toll (*e*).

Although the right originates in a grant, or licence, yet on proof of possession and long user a legal origin may be presumed (*f*). It is entirely incorporeal, and is unconnected with the occupation of land, and exists only in respect of persons using the right of way (*g*). It is not necessary that the owner of the ferry should own land on both sides of the water. It is sufficient if he has a right to land on both sides (*h*). And in order to enable the court to presume a lost grant it is sufficient to show that one of the points is on a public highway, and that the claimant could and did give to persons using the ferry leave to land at the other point and access therefrom to a highway (*i*). Generally speaking, however, a public ferry is a public highway of a special description, and its *termini* must be in places where the public have rights, as towns or vills (*j*), or highways leading to towns or vills (*k*). Therefore, there must be a line of way on land coming to a landing place on the water's edge, or where the ferry is, from or to a vill, from or to one or more landing places in the vill (*l*). In other words, a ferry has been said to be the continuation of a public highway across a river, and as such is for the benefit of the public (*m*).

"A right of ferry is in derogation of common right, for by common right any person entitled to cross a river in a boat is entitled to carry passengers too. Within the limits of an ancient ferry no one is permitted to convey passengers across, but the owner of the ferry. No one may disturb the ferry. The ferry carries with it an exclusive right or monopoly. In consideration of that monopoly the owner of the ferry is bound

(*e*) Stroud, Jud. Dict. sub verb.

(*f*) *Trotter* v. *Harris*, 2 Y. & J. 285; *Huzzey* v. *Field*, 2 C.M. & R. at p. 440.

(*g*) *Newton* v. *Cubitt*, 12 C.B.N.S. at p. 58.

(*h*) *Peter* v. *Kendall*, 6 B. & C. 703.

(*i*) *Dysart* (*Earl of*) v. *Hammerton*, (1914) 1 Ch. 822.

(*j*) Villages. See Jacob's Law Dict'y, sub verb.

(*k*) *Huzzey* v. *Field*, 2 C.M. & R. at p. 442.

(*l*) *Newton* v. *Cubitt*, 12 C.B.N.S. at p. 58.

(*m*) *Letton* v. *Goodden*, L.R. 2 Eq. at p. 130.

to have his ferry always ready" (*n*). The public thus receive a benefit from the obligation of the owner to supply boats and to keep up the ferry (*o*).

If a river passes several towns or places, the existence of a franchise of a ferry over it, from a certain point on one side to a certain point on the other, does not preclude the use of the river as a public highway from or to all the towns or places on its banks, or oblige the public at their inconvenience to pass from one terminus to the other (*p*). Thus, a ferry from A. to B. does not preclude a passage from A. to C., unless it is colourable, and with the intention of going to B. by way of C. (*q*).

The limits of a ferry are not defined by the common law. It seems to be a question of fact in each case as to whether the setting up of another ferry is a disturbance (*r*). In one case, where a licence had been granted to ferry "between the Town of Belleville to Ameliasburg," the latter being a township with a frontage of ten or twelve miles on the Bay of Quinte, providing for one landing place at each side, and it was shown that by usage one point at each side had been fixed upon as the *termini*, it was held not to be a disturbance to establish another ferry whose *termini* were at a distance of two miles from each of the *termini* of the first, that on the Belleville side not being within Belleville (*s*).

Ferries have been regulated for many years in Upper Canada and Ontario by statute (*t*), and where a licence is granted under that statute exclusive privileges are confined to a mile and a half on each side of the point at which the ferry is usually kept. The mile and a half might be measured either in a straight line, or by the roads, or along the water's edge. In a case where a franchise was given by statute to construct a bridge across a river, and the statute contained a prohibition against constructing another bridge "within half a league above the said bridge and below the said bridge," it was held that the distance should be measured along the course of the river (*u*).

(*n*) *Simpson* v. *Atty.-Gen.*, (1904) A.C. at p. 490.

(*o*) See *Hopkins* v. *G.N.R. Co.*, 2 Q.B.D. at p. 231; *Letton* v. *Goodden*, L.R. 2 Eq. at p. 131.

(*p*) *Huzzey* v. *Field*, 2 C.M. & R. at p. 442; *Dixon* v. *Curwen*, W.N. (1877), 4.

(*q*) *Tripp* v. *Frank*, 4 T.R. 666.

(*r*) See *General Estates Co.* v. *Beaver*, (1914) 3 K.B. 918.

(*s*) *Anderson* v. *Jellett*, 9 S.C.R. 1.

(*t*) R.S.O. c. 127.

(*u*) *Rouleau* v. *Pouliot*, 36 S.C.R. 224.

A change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water highway, and so to set up a new ferry, and it is obvious that the single landing place which suffices for an uninhabited marsh would be utterly inadequate for several towns thronged with industrial mechanics (*v*). New conditions also producing new traffic will justify a new ferry at another landing place (*w*). But the failure or inability to carry all persons who present themselves at once is no excuse for another person's carrying those who are left over (*x*).

Where there is a grant or a licence for a ferry, there is no guarantee by the Crown against change of circumstances. The right and the obligations of the owner of a ferry should be commensurate. His obligation to maintain a ferry cannot be discharged by building a bridge (*y*). And therefore his only right is to carry passengers by boat. Consequently the building of a bridge is not a disturbance of his right. The monopoly given is in return for an obligation to carry the public, and so is for the benefit of the public, and if the public are put in possession of a different and more convenient means of crossing, it is not to their advantage to be obliged to use the ferry (*z*). And so where railway bridges, with foot bridges for passengers to go to the railway station, were built near a ferry, whereby the custom of the ferry was diverted, it was held that the owner of the ferry was not entitled to compensation (*a*).

A ferry may be to carry from A. to B. only, and not from B. to A., but a right to ferry "between" two places confers the right to carry passengers both ways (*b*).

In Ontario a grant or licence for a ferry may be issued by the Lieutenant-Governor under the Great Seal (*c*) and (except in the case of municipalities) the exclusive privileges are confined to a mile and a half on each side of the point at which

(*v*) *Newton* v. *Cubitt*, 12 C.B.N.S. at p. 39; *Hopkins* v. *G.N.R. Co.*, 2 Q.B.D. 224.

(*w*) *Cowes* v. *Southampton*, (1905) 2 K.B. 287; *General Estates Co.* v. *Beaver*, (1914) 3 K.B. 918.

(*x*) *Hickley* v. *Gildersleeve*, 10 C.P. 460.

(*y*) *Pain* v. *Patrick*, 3 Mod. 289; 1 Salk. 12, sub nom. *Payne* v. *Partridge*.

(*z*) *Dibden* v. *Skirrow*, (1907) 1 Ch. 437; (1908) 1 Ch. 41.

(*a*) *Dibden* v. *Skirrow*, (1908) 1 Ch. 41; *Hopkins* v. *G.N.R. Co.*, 2 Q.B.D. 224.

(*b*) *Smith* v. *Ratté*, 15 Gr. at pp. 480, 481.

(*c*) R.S.O. c. 127.

the ferry is usually kept. The Lieutenant-Governor may issue licences to municipalities, and the Council of any municipality may sub-let the right and grant exclusive privileges to the lessee.

The Act of 1897 (*d*) applied only to ferries "within Ontario," and under the same statute in Upper Canada it was held that a ferry across the Ottawa river was not subject to the Act (*e*). Ferries between provinces or between a province and a foreign country are now exclusively within the jurisdiction of the Parliament of Canada (*f*). Where the powers of the Lieutenant-Governor to issue licences for ferries were vested in a municipality by statute, and the municipality was also given power by statute to "control and license" ferries, it was held that a licence under the seal of the corporation was sufficient, without a by-law, to create a ferry, and that the licence was valid to give a right to ferry from the municipality across a river to a point not within its limits (*g*).

Where a person is authorized by Act of Parliament to ply boats on certain days, but is under no obligation to ply or keep up the ferry, he has no right of action against another for plying boats on the same line. It is the obligation of the owner of a ferry to maintain the ferry at all times that gives him the right to be protected from disturbance (*h*).

A person may, both by the common law, and under the Ontario statute (*i*), use his own boat in which he may, within the limits of a ferry, carry his family, servants and workmen, or his employer, without hire (*j*). But the privilege is not to be exercised directly or indirectly to enable any of such persons to evade payment of tolls at the ferry (*k*).

(*d*) R.S.O. c. 139.
(*e*) *Smith* v. *Ratté*, 15 Gr. 473.
(*f*) B.N.A. Act, s. 92, s.-s. 10.
(*g*) *Dinner* v. *Humberstone*, 26 S.C.R. 252.
(*h*) *Letton* v. *Goodden*, L.R. 2 Eq. 123.
(*i*) R.S.O. c. 127, s. 8.
(*j*) *Ives* v. *Calvin*, 3 U.C.R. 464.
(*k*) And see *Dinner* v. *Humberstone*, 26 S.C.R. 252.

CHAPTER IV.

OF FREEHOLD ESTATES OF INHERITANCE.

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1. *Estates Generally.*

THE next objects of our disquisitions are the nature and properties of *estates*. An estate in lands, tenements and hereditaments, signifies such interest as the tenant hath therein; so that, if a man grants all *his estate* in Dale to A. and his heirs, everything that he can possibly grant shall pass thereby (*a*). It is called in Latin *status;* it signifying the condition or circumstance in which the owner stands with regard to his property. And, to ascertain this with proper precision and accuracy, estates may be considered in a threefold view: first, with regard to the *quantity of interest* which the tenant has in the tenement; secondly, with regard to the *time* at which that quantity of interest is to be enjoyed; and thirdly, with regard to the *number* and *connections* of the tenants.

First, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life or the life of another man; to determine at his own decease, or to remain to his descendants after him; or it is circumscribed within a certain

(*a*) Co. Litt. 345.

number of years, months, or days; or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of estates into such as are *freehold* and such as are *less than freehold*.

The *quality* of an estate has reference to its tenure, as whether in common, in joint tenancy, on condition, etc.

An estate of freehold, *liberum tenementum*, or franktenement, is such an estate as at common law required actual possession of the land; and no other is, legally speaking, freehold; which actual possession could, prior to the statute 14 & 15 V. c. 7 (R.S.O. c. 109, s. 3), by which the immediate freehold lies in grant as well as in livery, by the course of the *common law*, be only given by the ceremony called livery of seisin, which is the same as the feudal investiture. And from these principles we may extract this description of a freehold: that it is such an estate in lands as was formerly only conveyed by livery of seisin; or, in tenements of an incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton that, where a freehold shall pass, it behoveth to have livery of seisin. As, therefore, estates of inheritance and estates for life could not by *common law* be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates were required to be conveyed with the same solemnity, therefore no others were or yet are properly freehold estates (*b*).

Estates of freehold (thus understood) are either estates *of inheritance* or estates *not of inheritance*. The former are again divided into inheritances *absolute* or fee-simple, and inheritances *limited*, one species of which we usually call fee-tail.

(*b*) It is suggested that the above definition by Blackstone, so far as it makes *possession* essential to the existence of a freehold estate, is perhaps at the present day subject to some qualification. If lands be limited to A. for life, remainder to B. for life; or to A. for life, remainder to B. in tail, remainder to C. for life or in fee, these remainders are still now regarded as freehold estates, though the possession is in A.; and A., as the taker of the first of the freehold estates, is said to have the *immediate* freehold: Preston Estates, vol. I, 214, 215. This distinction is also recognized by R.S.O. c. 109, s. 3, which enacts that corporeal hereditaments shall, as regards the *immediate* freehold thereof, lie in grant as well as in livery. The Act clearly recognizes freehold estates other than immediate, and consequently not accompanied by possession; these it does not provide for, as they lay in grant before the Act, since possession could not be given or livery made. Moreover, possession in the strict sense of the word cannot be had in an incorporeal tenement, and yet a freehold estate may exist in it. To this may be added that "such interests only as may continue for the period of a life are estates of freehold; all interests for a shorter period, or, more properly speaking, for a definite space of time, are chattel interests": Prest. Estates, 203.

2. *Fee-Simple.*

Tenant in fee-simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever, generally, absolutely, and simply; without mentioning *what* heirs, but referring that to the disposition of the law. The true meaning of the word fee (*feudum*) is the same with that of feud or fief, and in its original sense, it is taken in contradistinction to *allodium*; which latter the writers on this subject define to be of every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seised thereof absolutely *in dominico suo*, in his own demesne. But *feudum*, or fee, is that which is held of some superior, on condition of rendering him service; in which superior the ultimate property of the land resides. And therefore Sir Henry Spelman defines the feud or fee to be the right which the vassal or tenant hath in lands, to *use* the same, and take the profits thereof to him and his heirs, rendering to the lord his due services; the mere allodial *property* of the soil always remaining in the lord. This allodial property no subject in England has (*c*); it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the king. The king, therefore, only hath *absolutum et directum dominium*; but all subjects' lands are in the nature of *feudum* or fee; whether derived to them by descent from their ancestors or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs which were laid upon the first feudatory when it was originally granted. A subject, therefore, hath only the usufruct, and not the absolute property of the soil; or, as Sir Edward Coke expresses it, he hath *dominium utile*, but not *dominium directum*. And hence it is, that, in the most solemn acts of the law, we express the strongest and highest estate that any subject can have by these words: "he is seised thereof *in his demesne as of fee*." It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs for ever; yet, this *dominicum*, property, or demesne, is strictly not absolute or allodial, but qualified or feudal; it is his demesne *as of fee*; that is, it is not purely and simply his own, since it is

(*c*) Co. Litt. 1.

held of a superior lord, in whom the ultimate property resides. And hence it is that the holder of lands, though in fee-simple, is still termed *tenant* in fee.

In the Province of Ontario all lands are, by the Imperial Act, 31 Geo. III. c. 31, s. 43, held in free and common soccage; and as all lands in the province were originally granted by the Crown on this tenure, they are all held of the Crown as the feudal superior (*d*).

This is the primary sense and acceptation of the word *fee*. But (as Sir Martin Wright very justly observes) the doctrine, "that all lands are holden," having been for so many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word *fee* in this its primary, original sense, in contradistinction to *allodium* or absolute property, with which they had no concern; but generally use it to express the continuance or quantity of estate. A *fee*, therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud; and when the term is used simply, without any other adjunct, or has the adjunct of *simple* annexed to it (as a fee, or a fee-simple), it is used in contradistinction to a fee conditional at the common law, or a fee-tail by the statute *De donis*; importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the King said to be seised in fee, he being the feudatory of no man.

Although the word "fee," standing alone, is ordinarily used to express an estate in fee simple, yet, where technical or accurate language is necessary the expression "fee simple" ought to be used in order to distinguish the estate from fee-tail, and in order to express accurately what is intended. Thus, in a statute (*e*) which allows the use of the expression "fee simple" instead of words of inheritance, the word "fee" has been held not to be sufficient to bring it within the statute (*f*).

Taking, therefore, *fee* for the future, unless where otherwise explained, in this its secondary sense, as an estate of inheritance, it is applicable to, and may be had in, any kind of hereditaments, either corporeal or incorporeal. But there is this distinction between the two species of hereditaments: that, of a corporeal

(*d*) Houst. Const. Doc., p. 130.
(*e*) R.S.O. c. 109, s. 5 (2).
(*f*) *Re Ethell & Mitchells*, (1901) 1 Ch. 945.

inheritance, a man shall be said to be seised *in his demesne as of fee;* of an incorporeal one, he shall only be said to be seised *as of fee,* and not in his demesne. For, as incorporeal hereditaments are in their nature collateral to and issue out of, lands and houses, their owner hath no property, *dominicum,* or demesne, in the *thing* itself, but hath only something derived out of it, resembling the *servitutes,* or services of the civil law. The *dominicum* or property is frequently in one man, while the appendage or service is in another. Thus Caius may be seised *as of fee* of a way leading over the land, of which Titius is seised *in his demesne as of fee.*

3. *Words Necessary to Create a Fee.*

At the common law, before 2nd July, 1886, the word "heirs" was necessary in the grant or donation, in order to make a fee, or inheritance, and the word, if used, must be in the plural; for the word "heir," in the singular, may describe merely the person who will answer that description at the death of the ancestor, and so is not a word of inheritance or limitation (*g*). If land were given to a man forever, or to him and his assigns forever, this vested in him but an estate for life. This very great nicety about the insertion of the word "heirs" in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness; by which, we may remember, it was required that the form of the donation should be punctually pursued. And, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs.

But this rule of the common law was subject to many exceptions. It did not extend to devisees by will; in which as they were introduced at the time when the feudal rigour was apace wearing out, a more liberal construction was allowed; and therefore by a devise to a man forever, or to one and his assigns forever, or to one in fee-simple, the devisee took an estate of inheritance; for the intention of the devisor was sufficiently plain from the words of perpetuity annexed, which were to some extent descriptive of the estate intended to be devised, though he had omitted the technical words of in-

(*g*) *Re Davison's Settlement,* (1913) 2 Ch. 498.

heritance. In many cases, also, a fee would pass by a will though there were no words of perpetuity; as on a devise to A., coupled with a *personal* duty which might require that the fee should pass, as to settle children in business, or to pay a sum of money to another; but if the duty enjoined were a mere *charge* on the estate, and the acceptance of the devise involved the devisee in no personal responsibility, the fee would not pass (*h*). Now, by R.S.O. c. 120, s. 31, a devise of land without any words of limitation shall pass the fee simple or other the whole estate in the land which the testator had power to dispose of, unless a contrary intention appears by the will.

Neither did this rule as to words of inheritance extend to fines or recoveries, considered as a species of conveyance; for thereby an estate in fee passed by act and operation of law without the word "heirs;" as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate in fee. Thus a release from one coparcener to another, or from one joint-tenant in fee to another, of the entire estate (*i*) of all the right of the releasor, will, without any words of limitation, convey a fee. It was said, also, that the word "heirs" is not necessary to pass the fee where one holding under a conveyance in fee grants the lands to another, expressing in the grant that the grantee was to have the lands "as fully as they were conveyed to him the grantor" (*j*). Nor was the word requisite in case of a release of a right in extinguishment of the right, and not in the creation or transfer of, or to enlarge, an estate; thus a release by the grantee in fee of a rent charge of all his right to the freeholder passed the fee without the use of the word "heirs." And in contracts for sale of lands, as where A. seised in fee contracts to sell to B., without use of the word "heirs," or defining the quantity of estate intended to be conveyed, it will be assumed to be a contract for an estate in fee simple (*k*).

In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs;" for as heirs take from the ancestor, so does the successor from the predecessor.

But in a grant of land to a corporation aggregate, the word

(*h*) *Lloyd* v. *Jackson*, L.R. 2 Q.B. 269.
(*i*) *Ruttan* v. *Ruttan*, R. & J. Dig. Col. 3286.
(*j*) 2 Prest. on Est. 2; Shepp. Touch. 101.
(*k*) See Armour on Titles, 4.

"successors" is not necessary and is meaningless (*l*), though usually inserted; for, albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one. Still it differs from an ordinary fee-simple in this, that if by any means the corporation be dissolved whilst holding the land, the interest it then has will revert to the grantor or his heirs, and not go to the Crown by escheat.

So where a lease for years was made to a corporation aggregate, which was wound up and dissolved without the term of years having been disposed of, it was held that the term ceased and the land reverted to the lessor (*m*).

The word "assigns" was and is superfluous, and has no conveyancing significance (*n*).

In the case of the King, a fee-simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the King in judgment of law never dies.

But the general rule is that the word "heirs" was necessary to create an estate of inheritance.

It may be observed that the word "heirs," so used, is a mere word of limitation, marking out or defining the estate granted to the person whose heirs are spoken of, and does not indicate that the heirs have any present interest in the land. No one is the heir of a living person (*o*). The person who, if the ancestor died at present, would succeed as his heir-at-law, is the heir apparent. The utmost interest that he has in the ancestor's land is an expectancy or *spes successionis*, which may be defeated by the ancestor's conveyance or devise.

With regard to equitable estates, ordinarily similar limitations to those of a legal estate were required; but the rule was not a rigid one, inasmuch as equity regarded the intention rather than the form. But, if words of limitation were not used, it was necessary that there should be on the face of the deed an evident intention to pass the fee—as by reference to the limitations of other property comprised in the settlement in which an absolute interest was given, or by words showing

(*l*) *Re Woking Urban Dist. Council*, (1914) 1 Ch. 300.

(*m*) *Hastings* v. *Letton*, (1908) 1 K.B. 378.

(*n*) *Milman* v. *Lake*, (1901) 2 K.B. 745; *Re Woking Urban Dist. Council*, (1914) 1 Ch. 300.

(*o*) *Re Parsons*, 45 Ch.D. 51, 55, cited in *Re Green*, (1911) 2 Ch. 275.

that the grantee was to have all the estate and interest that the grantor had, or that the grantee had, independently of the deed a right to have, or call for, the fee simple (*p*).

A mere disposition of an equitable estate in favour of a *cestui que trust* for life, with remainder to the children, there being no words of limitation of the interest of the children, gave them a life estate only (*q*); and a recital in the deed that the settlor was desirous of settling all his property for the benefit of himself, his wife and their children, was held not to be sufficient evidence of an intention to pass a fee to the children, as it was quite consistent with an intention that the reversion in fee should result to himself (*r*).

A gift over of the settled property "in default of issue" has been held to show an intention to pass a fee, without words of limitation, to the person in default of whose issue the interest is given over (*s*). And where in a certain event the trustees of the settlement were directed to convey the trust estate to children, it was held that the natural meaning was to convey all the estate which the trustees had, viz., a fee simple (*t*).

Similarly, where an equitable estate was given to trustees upon the trusts of a settlement, if there were no words of limitation of the trustees' interest, it was held that there must be an intention, otherwise expressed in the settlement, to give the fee to the trustees, otherwise they would take an estate for life only (*u*).

These decisions, however, will be much modified by the terms of the enactment now to be mentioned.

After the 1st July, 1886, an enactment came into force which dispenses with the use of the former technical words of inheritance in a conveyance of an estate in fee (*v*).

The Act is not in the original form in which it was first passed, and the changes are indicated in the footnotes.

"(1) In a conveyance (*w*) it shall not be necessary, in the

(*p*) *Re Irwin*, (1904) 2 Ch. 752 at p. 764; *Re Thursby's Settlement*, (1910) 2 Ch. at p. 188; *Re Nutt's Settlement*, (1915) 2 Ch. 431.

(*q*) *Halliday* v. *Overton*, 15 Beav. 480; *Lucas* v. *Brandreth*, 28 Beav. 274; *Totham* v. *Vernor*, 29 Beav. 604.

(*r*) *Re Whiston's Settlement*, (1894) 1 Ch. 601.

(*s*) *Re Tringham's Trusts*, (1904) 2 Ch. 487.

(*t*) *Re Oliver's Settlement*, (1905) 1 Ch. 191.

(*u*) *Re Irwin*, (1904) 2 Ch. 752; *Re Monckton's Settlement*, (1913) 2 Ch. 636.

(*v*) R.S.O. c. 109, s. 5.

(*w*) "Deed or other instrument," in the original Act.

limitation of an estate in fee simple, to use the word heirs; or in the limitation of an estate in tail to use the words heirs of the body, or in the limitation of an estate in tail male or in tail female, to use the words heirs male of the body or heirs female of the body.

"(2) For the purpose of any such limitation it shall be sufficient in a conveyance (*x*) to use the words in fee simple, in tail, in tail male, or in tail female, according to the limitation intended, or to use any other words sufficiently indicating the limitation intended.

"(3) Where no words of limitation are used, the conveyance shall pass all the estate, right, title, interest, claim and demand, which the conveying parties have, in, to or on the property conveyed, or expressed or intended so to be, or which they (*a*) have power to convey in, to, or on the same.

"(4) Sub-section 3 shall apply only if and as far as a contrary intention does not appear from the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

"(5) This section shall apply only to conveyances made after the first day of July, 1886."

This enactment was compiled from two clauses of an Imperial statute (*b*), but that statute does not contain the provision that where no words of limitation are used the whole estate of the grantor passes.

The enactment in its present form applies only to a conveyance which by the interpretation clause (*c*) includes assignment, appointment, settlement, and other assurance *made by deed*, on a sale, mortgage, or settlement of any property or on any other dealing with or for any property. The conveyance, therefore, must be by deed. "Other instruments," which were included in the original Act, are now excluded.

As illustrations of other instruments, there may be mentioned vesting orders, declarations of trust not under seal, and declarations of vesting contained in instruments appointing new trustees under the Trustee Act (*d*).

A grant of an annuity to the annuitant and his heirs would be a "dealing with property," which includes personal prop-

(*x*) "Deed or other instrument as in a will," in the original Act.
(*a*) "Respectively" was in the original Act.
(*b*) 44 & 45 Vict. c. 41, ss. 51 and 63.
(*c*) S. 2 (*a*).
(*d*) R.S.O. c. 121, s. 5.

erty (*e*), within the meaning of the Act, and the words "in fee simple" might be used. But, in granting an annuity, if no words of limitation were used, the result would be doubtful. If the annual payments were charged on a fund, it might operate as a gift of the whole fund absolutely to the annuitant as coming within the words of the Act (*f*), "all the estate, right, etc., which the conveying parties have in, to, or on the property conveyed, or expressed or intended so to do, or which they have *power to convey*, etc." But if the annuity is not charged on a fund, but is a mere personal obligation, the grant would probably pass only an annuity for the life of the grantee.

In dealing with personalty, it must be borne in mind that personal property cannot be entailed, and a grant of an annuity to A. "in fee tail' would not necessarily have the same effect as to A. and the heirs of his body.

The effect of the enactment, in permitting the use of the words "in fee simple," "in tail," etc., is merely to substitute one set of technical phrases for another. In England it has been held that it is not sufficient to use the expression "in fee" to convey a fee-simple (*g*), and a conveyance containing this expression only was held to pass merely a life estate. In the Imperial statute, however, there is no clause dispensing with words of inheritance altogether; whereas in the Ontario statute, if no words of limitation are used, the whole estate which the conveying party had power to pass will pass.

That statute also allows the use of "other words sufficiently indicating the limitation intended," *i.e.*, words other than the common law words of inheritance, or the substitutional statutory words. The expression "in fee" is ambiguous. It does not indicate whether the estate intended to be granted is a fee simple or a fee tail (*h*), and so might not by itself "sufficiently indicate the limitation intended;" though, when coupled with other expressions in the deed, it might be held sufficient (*i*). In allowing other words than words of limitation to describe the estate intended to pass, the statute seems to put the case of conveyances of legal estates upon the same plane as equitable estates before the statute. In other words, where a court of equity would have held that, from the whole deed, the intention

(*e*) R.S.O. c. 109, s. 2 (*g*).
(*f*) Ibid. s. 5, s.-s. (3).
(*g*) *Re Ethel & Mitchells*, (1901) 1 Ch. 945.
(*h*) *Re Miller*, (1914) 1 Ch. at p. 18.
(*i*) See *Re Ottley's Estate*, (1910) 1 Ir. 1.

was evident to pass the fee simple in an equitable estate, so the courts would, pursuant to the statute, in a similar case hold that, if the estate were legal, it would pass pursuant to the intention.

If no words of limitation are used then the whole estate which the grantor has, or which he has power to convey, will pass, unless a contrary intention appears by the deed. That is to say, if neither the common law words of inheritance, nor the statutory substitutional words, are used, the whole fee passes. But if descriptive words are used in the conveyance, instead of words of limitation, they will of course control the meaning.

The result is that, (1) words of limitation may be used as at common law; (2) instead of the common law words of limitation, the words "in fee simple," etc., may be used; (3) other words descriptive of the estate intended to pass may be used; (4) if no words of limitation are used, the whole estate passes, unless there are descriptive words which limit or control the effect of the statute in that respect.

4. *Limited or Qualified Fees.*

We are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions, or qualifications, of any sort. And these we may divide into two sorts: (1) *Qualified* or *base* fees, and (2) fees *conditional*, so called at the common law; and afterwards fees-*tail*, in consequence of the statute *De donis*.

5. *Base Fees.*

A base, or qualified fee, as defined by Blackstone, is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to A. and his heirs, *tenants of the manor of Dale;* in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So, when Henry VI. granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of Barons of Lisle; here, John Talbot had a base or qualified fee in that dignity, and, the instant he or his heirs quitted the seigniory of this manor, the dignity was at an end. This estate is a fee because by possibility it may endure forever in a man and his heirs; yet, as that duration depends on the concurrence of

collateral circumstances, which qualify and debase the purity of the donation, it is therfeore a qualified or base fee.

It is sometimes called a determinable fee. Whether there can be such an estate as a determinable fee, since the statute of *Quia Emptores*, has occasioned some controversy. Preston treats such estates as valid, not mentioning the statute, and gives a list of cases which are supported by *dicta* in the older books (*j*). Challis adopts these, and in an appendix (*k*) formulates an argument in answer to Professor Gray, who contends that no such estate is known to the law since the statute of *Quia Emptores* (*l*). Sanders is of opinion that none such can exist since that statute (*m*). And such is the opinion of the Real Property Commissioners. "But the statute of *Quia Emptores*, by destroying the tenure between the donor and donee, in cases where the fee was granted subsequent to the statute, put an end to any right of reverter on such grants. Accordingly, it is said in 2 And. 138, to have been held in a case in the Book of Assizes, that if land be granted to one and his heirs, so long as J.S. or his heirs may enjoy the manor of D. the words 'so long as,' etc., are utterly vain and idle, and do not abridge the estate" (*n*). In the modern cases there is a similar difference of opinion. In *Collier* v. *Walters*(*o*), Sir Geo. Jessel, M.R., said: "In fact, there is not any authority to be found for any such determinable fee. I have looked at an enormous number of cases to see if I could find such an authority, but I have been quite as unsuccessful as the counsel for the plaintiff, and I think there is no such case to be found." On the other hand, Joyce, J., said: "This limitation to R. of a determinable fee simple appears to me to be free from objection in every respect, notwithstanding what may be said in any book as to the effect of the statute of *Quia Emptores* upon the creation of estates in fee simple, determinable or qualified. Upon this part of the case I may refer to p. 114 of Lewin on Trusts, 12th ed., and pp. 61 and 192 of Goodeve's Law of Real Property, 5th ed., and there are other authorities (*p*)." The

(*j*) Prest. Est. 431.

(*k*) 3rd ed., p. 437. The present editor of Mr. Challis' book disagrees with his opinion: p. 439.

(*l*) Gray, Perp., 2nd ed., sec. 31.

(*m*) Sand. Uses, 4th ed. 200.

(*n*) 3rd Rep. 36.

(*o*) L.R. 17 Eq. at p. 261.

(*p*) *Re Leach*, (1912) 2 Ch. at p. 427.

authorities cited by the learned Judge do not, in the writer's opinion, bear out the opinion expressed in the judgment. The cases given by the editors of Lewin are of two classes, viz., estates for life with a proviso for determination on alienation, bankruptcy, etc., and settlement upon A. *until* alienation, bankruptcy, etc., with a limitation over on the happening of these events. It is clear that as the limitation is only *until* a certain event, with a limitation over on the happening of that event, there is no repugnance in the limitations. And Mr. Lewin concludes with the following statement: "But a gift of real estate to A. *her heirs and assigns*, subject to a proviso determining her estate in the event of her bankruptcy and limiting the estate over, in that event, to other persons, is an absolute gift to A., and the proviso is void for repugnancy"—citing *Re Machu*, 21 Ch.D. 838.

Goodeve's illustrations are of this same character, viz., a devise to R. *until* he shall assign, and then over; settlement of income on A. *for life* or *until* he attempts to alienate; or so long as he remains unmarried; in which case the estate determines according to the limitation on the happening of the event.

Without affecting to determine the matter, it seems to be the better opinion that where there is a limitation in fee simple, any proviso or collateral limitation which would affect to curtail it in any way would be repugnant to the nature of the estate actually limited, and so void.

Such an estate could, of course, be created by Act of Parliament (*q*).

A base fee under the Act respecting Estates Tail, R.S.O. c. 113, s. 2 (1) (*b*), signifies that estate in fee simple into which an estate tail is converted, where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred; as where there is a protector to the settlement who refuses to consent to the disposition by the tenant in tail who conveys in fee simple; here only the issue in tail are barred and not those in remainder or reversion, and the estate of the grantee is called a base fee. The result is that an estate in fee simple passes which endures as long as there exist issue of the donee in tail, but comes to an end when they fail. It will be seen that such an estate, though of a different origin, is within the definition given above, for it may by possibility endure forever in the grantee and his heirs, viz., if the issue of the

(*q*) See *Foley's Charity Trustees* v. *Dudley Corp'n*, (1910) 1 K.B. at pp. 322, 324, 325.

donee in tail endure forever, and its duration depends on that collateral circumstance which qualifies and debases the purity of the grant in fee simple by the tenant in tail.

6. *Conditional Fees.*

A conditional fee, at the common law, was a fee restrained or restricted to some particular heirs, exclusive of others; as to the heirs *of a man's body*, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs *male of his body*, in exclusion both of all collaterals, and of lineally descended females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that, if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever; that, on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its ancient proprietor. Such conditional fees were strictly agreeable to the nature of feuds, when they first ceased to be mere estates for life, and were not yet arrived to be absolute estates in fee-simple.

Now, with regard to the condition annexed to these fees by the common law, our ancestors held, that such a gift (to a man and the heirs of his body), was a gift upon condition that it should revert to the donor, if the donee had no heirs of his body; but if he had, it should remain to the donee. They therefore called it a fee-simple, on condition that he had issue. Now, we must observe, that, when any condition is performed, it is henceforth entirely gone; and the thing to which it was before annexed, becomes absolute, and wholly unconditional. So that, as soon as the grantee had any issue born, his estate was supposed to become absolute, by the performance of the condition; at least, for these three purposes: (1) To enable the tenant to aliene the land, and thereby to bar not only his own issue, but also the donor of his interest in the reversion (*r*). (2) To subject him to forfeit it for treason; which he could not do, till issue born, longer than for his own life; lest thereby the inheritance of the issue and reversion of the donor, might have been defeated (*s*). (3) To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue And this was thought the more reasonable, because,

(*r*) Co. Litt. 19.

(*s*) See *Stafford (Earl of)* v. *Buckley*, 2 Ves. Sr. 170.

by the birth of the issue, the possibility of the donor's reversion was rendered more distant and precarious; and his interest seems to have been the only one which the law, as it then stood, was solicitous to protect; without much regard to the right of succession intended to be vested in the issue. However, if the tenant did not in fact aliene the land, the course of descent was not altered by his performance of the condition; for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation, the land, by the terms of the donation, could descend to none but the heirs *of his body*, and, therefore, in default of t .em, must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fees simple took care to aliene as soon as they had performed the condition by having issue; and afterwards repurchased the lands, which gave them a fee-simple absolute, that would descend to the heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees; which things, says Sir Edward Coke, though they seem ancient, are yet necessary to be known; as well for the declaring how the common law stood in such cases as for the sake of annuities, and such like inheritances as are not within the statutes of entail, and therefore remain as at the common law (*t*).

7. *Origin of Estates Tail.*

The inconveniences which attended these limited and fettered inheritances, were probably what induced the judges to give way to this subtle finesse of construction (for such it undoubtedly was), in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the Statute of Westminster the Second, 13 Edw. I. c. 1 (*u*) (commonly called the Statute *De donis conditionalibus*) to be made, which paid a greater regard to the private will and intentions of the donor, than to the propriety of such intentions or any public considerations whatsoever. This statute revived in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, "that the will of the giver, according

(*t*) See postea, Chapter VII., as to Estates on Condition.
(*u*) R.S.O. App. A., p. vi.

to the form in the deed of gift manifestly expressed, shall be from henceforth observed; so that they to whom the land was given under such condition shall have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail, either by reason that there is no issue at all, of if any issue be, and fail by death, or heir of the body of such issue failing."

Upon the construction of this Act of Parliament, the judges determined that the donee had no longer a conditional fee-simple which became absolute and at his own disposal the instant any issue was born. According to Butler (*v*), "this statute did not create any new estate, but, by disaffirming the supposed performance of the condition, preserved the fee to the issue, while there was issue to take it, and the reversion to the donor when the issue failed." Thus they divided the estate into two parts, investing in the donee a particular estate, which they denominated a *fee-tail—i.e.*, a *feudum talliatum* or fee cut down to the heirs of the body only—and leaving in the donor the ultimate fee-simple of the land expectant on the failure of issue, which expectant estate is what we now call a reversion. And hence it is that Littleton tells us that tenant in fee-tail is by virtue of the Statute of Westminster the Second.

8. *What May be Entailed.*

Having thus shown the *original* of estates-tail, we now proceed to consider *what things* may or may not be entailed under the Statute *De donis*. *Tenements* is the only word used in the statute; and this Sir Edward Coke expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments which savour of the realty, that is, which issue out of corporeal ones, or which concern or are annexed to, or may be exercised within the same; as rents, estovers, commons and the like. Also offices and dignities, which concern lands or have relation to fixed and certain places, may be entailed. But mere personal chattels, which savour not at all of the realty, cannot be entailed; nor even chattels real, as terms of years; and in each of these cases, if the gift be in such terms as would, in case the donor were seised in fee-simple, confer an estate-tail on the donee, such donee will, as a general rule, take the whole absolute interest though

(*v*) Note 2 on Co. Litt. 327a.

without issue (*w*). Neither can an office be entailed which merely relates to such personal chattels; nor an annuity which charges only the person and not the lands of the grantor; that is, if the owner in fee of such an office or annuity (as in the case of grant to a man and his heirs of such office or annuity, which, as before explained, would confer an incorporeal hereditament) should give the same to another and the heirs of his body, such other hath still a fee conditional at common law as before the statute; and by his alienation (after issue born) may bar the heir or reversioner (*x*).

9. *The Several Species of Estates Tail.*

Next, as to the several *species* of estates-tail and how they are respectively created. Estates-tail are either *general* or *special*, and that in two senses—one with regard to the body from which the heirs proceed, the other with regard to sex. They may be *general*, as being limited to the issue of the donee without regard to the wife or husband upon whose body or by whom the issue is begotten; or *special*, as being limited to the issue of the donee by a particular wife or husband. Again, they may be *general*, as being unlimited with regard to sex; or *special*, as being limited to the heirs of one sex or the other.

Thus, tenant in tail general, or tenant in tail simply, without using the qualification, is where lands are limited to the donee and the heirs of his body, without specifying the wife who shall bear them or the sex of the issue. How often soever such donee in tail be married, his issue in general by all and every such marriage is capable of inheriting the estate *per formam doni*.

And tenant in tail *special* is where lands are limited to the donee and the heirs of his body (without regard to sex) by a specified wife; or to the donee and the heirs male or female of his body (without specifying the wife), which is called *tail male* or *tail female*, as the case may be. Thus in the former case, if lands be given to a man and the heirs of his body on his wife Mary to be begotten, here no issue can inherit but such special issue as may be engendered between the two. And in the latter case, if lands be given to a man and the heirs male of his body, this is an estate in tail male; and it is sometimes called an estate in tail male general, because it is not

(*w*) *Leventhorpe* v. *Ashbie*, Tud. Lg. Ca. 4th ed. 382.

(*x*) 2 Preston Est. p. 290; *Seymor's Case*, Tud. Lg. Ca. 4th ed. at p. 198.

restricted to the heirs by a specified wife. And, in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor, *è converso*, the heirs male, in case of a gift in tail female. Thus, if the donee in tail male hath a daughter, who dies leaving a son, such grandson in this case cannot inherit the estate-tail; for he cannot deduce his descent wholly by heirs male. And as the heir male must trace his descent wholly by males, so must the heir female wholly by females. And therefore if a man hath two estates-tail, the one in tail male, the other in tail female; and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates; for he cannot trace his descent wholly either in the male or female line.

And, again, the estate may be limited both to the heirs by a particular wife and to those of a particular sex. Thus, if lands be given to a man and the heirs male of his body by a specified wife, this is an estate in tail male special. And so if such a donee has lands limited to him and the heirs male of his body by his present wife Mary, and his wife Mary should die leaving as issue a daughter, and the donee should marry a second wife, Jane, who should die leaving as issue a son, neither child can inherit. For, though he had issue a male by his wife Jane, the estate was limited to the issue by another wife, and by that other wife Mary he had no male issue but a daughter only.

As the word *heirs* was before 2nd July, 1886, necessary to create a fee-simple, so in further limitation of the strictness of the feudal donation, the word *body*, or some other words of procreation, were necessary to make it a fee-tail, and ascertain to what heirs in particular the fee was limited. If, therefore, before the date mentioned, either the words of inheritance or words of procreation were omitted, albeit the others were inserted in the grant, this would not make an estate-tail. As, if the grant were to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children*, or *offspring;* all these were only estates for life, there wanting the words of inheritance, his heirs. So, on the other hand, a gift to a man, and his *heirs male* or *female*, was an estate in fee-simple, and not in fee-tail; for there were no words to ascertain the body out of which they should issue. But this was not so in last wills and testaments, wherein greater indulgence has always been allowed. An estate-tail might have been and still may be created by a devise to a man and his *seed*, or to a man and his *heirs male;* or by

other irregular modes of expression descriptive of the estate intended to be devised.

But, since the Act already referred to, it is not necessary to use the former technical words, either of inheritance or procreation, in conveying an estate tail, but it is sufficient if the estate is described by the use of the terms in tail, in tail male, in tail female, as the case may be, or any other words sufficiently indicating the limitations intended. It is to be observed, however, that this enactment does not cover all the cases treated of, for it has no reference to the case of an estate-tail special by reason of the limitation to the heirs by a particular wife or husband. It covers only the case of an estate to a man and the heirs of his body, either male or female, without regard to the wife who may bear them. And if it is desired to create an estate-tail special by reason of the particular wife who is to bear the issue, it will still be wise, if not necessary, to resort to the old limitation to the donee and the heirs of his body (general, male or female, as the case may be), to be begotten on the body of the particular wife.

10. *Incidents of an Estate Tail.*

The *incidents* of a tenancy in tail under the Statute Westm. 2, are chiefly these: 1. That a tenant in tail may commit *waste* on the land, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same. But, tenant in tail after possibility of issue extinct may be restrained on equitable grounds from committing humoursome or malicious waste, such as tearing down the mansion-house of an estate without cause. 2. That the wife of the tenant in tail shall have her *dower*, or thirds, of the estate-tail. 3. That the husband of a female tenant in tail may be tenant by the *curtesy* of the estate tail. 4. That an estate tail might formerly have been *barred* or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir, and may now be barred by a conveyance in conformity with the provisions of the statute R.S.O. c. 113. All which will hereafter be explained at large.

Thus much for the nature of estates-tail; the establishment of which family law (as it is properly styled by Pigott), occasioned infinite difficulties and disputes. Children grew disobedient when they knew they could not be set aside; farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then, under colour of long leases, the issue

might have been virtually disinherited; creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth; innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our ancient books are full; and treasons were encouraged, as estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded as the source of new contentions and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm. But as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature, and therefore, by the contrivance of an active and politic prince, a method was devised to evade it.

11. *Fines and Recoveries.*

About two hundred years intervened between the making of the Statute *De donis*, and the application of common recoveries to this intent, in the twelfth year of Edward IV., which were then openly declared by the judges to be a sufficient bar of an estate-tail. For though the courts had, so long before as the reign of Edward III., very frequently hinted their opinion that a bar might be effected upon these principles, yet it was never carried into execution till Edward IV., observing (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families whose estates were protected by the sanctuary of entails; gave his countenance to this proceeding, and suffered *Taltarum's Case* to be brought before the court (*y*); wherein, in consequence of the principles then laid down, it was in effect determined that a common recovery suffered by tenant in tail should be an effectual destruction thereof. Common recoveries were fictitious proceedings, introduced by a kind of *pia fraus*, to elude the Statute *De donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal; and these recoveries, however clandestinely introduced, became, by long use and acquiescence, a most common assurance of lands; and were looked upon as the legal mode of conveyance, by which tenant in tail might

(*y*) See notes to *Seymor's Case*, Tud. Lg. Ca. 4th ed. at p. 195.

dispose of his lands and tenements; so that no court would suffer them to be shaken or reflected on, and even Acts of Parliament have, by a side wind, countenanced and established them.

This expedient having greatly abridged estates-tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeitures for treason (*z*).

The next attack which they suffered in order of time was by the Statute 32 Hen. VIII. c. 28, whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail. But they received a more violent blow, in the same session of Parliament, by the construction put upon the Statute of Fines by the Statute 32 Hen. VIII. c. 36, which declares a fine duly levied by tenant in tail to be a complete bar to him and his heirs, and all other persons claiming under such entail. This was evidently agreeable to the intention of Henry VII., whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. By a statute of the succeeding year (*a*), all estates-tail are rendered liable to be charged for payment of debts due to the King by record or special contract.

Estates-tail might have been formerly barred by warranty descending with assets to the heir, as well as by a fine or recovery. The operation of fines and recoveries, their abolition, and the mode of barring substituted therefor by R.S.O. c. 113, is reserved for future consideration in treating of conveyances by tenants in tail. It may now, however, be mentioned shortly, that, by that statute, every actual tenant in tail in possession, remainder, expectancy, or otherwise, except issue inheritable in expectancy to an estate-tail, and tenants in tail after possibility of issue extinct, and those restrained by statute or by any Act from barring their estates-tail, may by proper assurance under seal to be registered within six months after execution, convey such estate-tail in fee-simple absolute, or for any lesser estate, and thereby bar the issue in tail, and all in remainder or reversion to the extent of the estate conveyed; but if it should

(*z*) 26 Hen. VIII. c. 13.

(*a*) 33 Hen. VIII. c. 39, s. 75; see Cru. Dig. Tit. 2, c. 2, s. 34.

happen that at the time of such conveyance there should be a *protector to the settlement* (generally a person having under the same settlement the first life estate prior to the estate-tail), then the consent of such protector is requisite, otherwise the issue in tail only will be barred, and not those in remainder or reversion.

12. *Estates Tail not Exigible.*

Estates tail are not liable to execution in Ontario unless they can be brought within the words of the Execution Act, which is perhaps more than doubtful. It is clear that at common law the tenant in tail cannot charge more than his own interest, either by voluntary or involuntary alienation or charge (*b*), for the heirs could oust the creditors of his ancestor under the paramount title derived from the original gift (*c*). An estate tail cannot be transferred (*d*); it is possible for the tenant in tail only to alienate his own interest, or to bar the entail and convert it into a fee simple. Consequently, we must look to the Execution Act for power or authority to sell the entailed land under execution.

By s. 34 (1) of the Execution Act (*e*), it is enacted that "any *estate, right, title,* or *interest* in lands which under s. 10 of the Conveyancing and Law of Property Act may be conveyed or assigned by any person, or over which he has *any disposing power* which he may, without the assent of any other person, exercise for his own benefit, shall be liable to seizure and sale under execution against such person, in like manner and on like conditions as *land* is by law liable to seizure and sale under execution, and the sheriff selling the same may convey and assign it to the purchaser in the same manner and with the same effect as the person might have done." Section 10 of the Conveyancing Act, provides that a contingent, an executory and a future interest, etc., may be disposed of by deed, "but no such disposition shall, by force only of this Act, defeat or enlarge an estate tail."

The section of the Execution Act under discussion appears to be taken from an Imperial Act, though there is a very marked difference in the language. The latter provides that a judgment "shall operate as a charge upon all *lands* . . .

(*b*) Cru. Dig. Tit. 2, c. 2, s. 33.
(*c*) *Doe d. Butler* v. *Stevens,* 6 O.S. 63.
(*d*) *Re Gaskell & Walters' Contract,* (1906) 2 Ch. 1.
(*e*) R.S.O. c. 80.

of or to which such person shall . . . be seised . . . or over which such person shall . . . have any disposing power which he might, without the assent of any other person, exercise for his own benefit, . . . and shall also be binding as against *the issue of his body*, and *all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion*, or other interest, etc." (*f*). The words in italics are evidently pointed at estates tail; and yet the process for realizing on entailed lands is to bring another action to realize the charge and to get a judgment requiring the tenant in tail to execute a disentailing assurance (*g*), though in one case (which, however, did not call for the determination of the point) it was said that the process of the court might be sufficient without the disentailing deed (*h*).

The presence of the italicized words in the Imperial Act and their absence from the Ontario Act is the first indication that the latter is not as far-reaching as the former. But the language of the Ontario enactment, which corresponds partly to the opening part of the Imperial enactment, does not contain words apt to cover the case of an estate tail. It seems clear that the only words which can be resorted to for the purpose are "disposing power, etc." It may, and probably must, be conceded that the capacity which a tenant in tail has to bar the entail is a "power" vested in him which he may, without the assent of any other person, exercise for his own benefit (*i*). But a distinction between the use of that word in the Ontario enactment and its use in the Imperial legislation must be pointed out. The Imperial Act makes a judgment a charge upon "lands . . . over which such person . . . shall have any disposing power, etc." Whereas the Ontario enactment provides that any "*estate, right, title* or *interest* in lands . . . over which he has any disposing power, etc.," shall be liable to seizure, etc. If the wording had been "or any land over which the debtor has any disposing power," the case would have been entirely different. That the language has been carefully chosen, or that it, at any rate, applies strictly to estates or interests in land, and not to the land itself, is appar-

(*f*) 1 & 2 Vict. c. 110, s. 13.

(*g*) *Lewis* v. *Duncombe*, 20 Beav. 398. And see and consider *Re Gaskell & Walters Contract*, (1906) 1 Ch. 440; *Re E. D. S.*, (1914) 1 Ch. 618.

(*h*) *Re Anthony*, (1893) 3 Ch. at p. 502.

(*i*) *Re E.D.S.*, (1914) 1 Ch. 618, over-ruling a dictum to the contrary in *Re Pares*, 12 Ch.D. 333.

ent from the context; for the section proceeds to enact that such shall be liable to seizure and sale under execution "in like manner and on like conditions as *land* is by law liable to seizure, etc."

Following this out, the section proceeds to enact that the sheriff selling the same may convey and assign it to the purchaser "in the same manner and with the same effect as the person might have done." As we have seen, the tenant in tail cannot convey or assign the estate in the land; an estate tail is not transferrable, and therefore the sheriff cannot transfer it. In order that the sheriff should be able to sell the land, there should be words sufficient to enable him to exercise the power of barring the entail. The power of barring the entail is inherent in the tenant in tail, and is incapable of assignment; it always adheres to the estate tail (*j*).

If a debtor has a power of appointment over an estate in fee simple, or a life estate, the sheriff may sell this "estate" and convey it, in the same manner as he might sell "land." But where the estate is an estate tail, he cannot transfer the estate. It seems, therefore, that the words of the section are not apt to cover the case of an estate tail.

Again, that the legislature recognized the difference pointed out is apparent from s.-s. (2) of this section, where it speaks of "property over which a deceased person had a general power of appointment, etc."

It will also have been observed that, while s. 10 of the Conveyancing Act provides for the assignment of various interests, there is a proviso that no such disposition shall, by force only of that Act, defeat or enlarge an estate tail. The

(*j*) It may be useful here to point to other Imperial enactments of a similar kind. Under the Forfeiture Act (33 & 34 V. c. 23), the property of a convict rests in the administrator who may be appointed under the Act "for all the estate and interest of the convict therein" (sec. 10). By sec. 12 there is power to sell, etc., any part of such property. By s. 8 a convict is made incapable of alienating any property, and it has been held that, before an administrator can sell the entailed property of the convict, the convict himself must execute a disentailing assurance: *Re Gaskell & Walters' Contract*, (1906) 2 Ch. 1.

By the Lunacy Act (53 & 54 V. c. 5), the Judge may order that the committee of the estate (*a*) may sell any property of the lunatic; (*e*) exercise any power when the power is vested in the lunatic for his own benefit, etc. It has been held that the court cannot authorize the committee to sell an entailed estate of the lunatic, but that it can under the power given to order the exercise of a power, direct the committee to exercise the power by barring the entail: *Re E.D.S.*, (1914) 1 Ch. 618. It will be noticed that express authority is given to exercise powers, whereas, in the Ontario enactment, there is no authority given to the sheriff to exercise the power.

section of the Execution Act under review incorporates by reference all the interests mentioned in s. 10 of the Conveyancing Act; and it is fair to assume that it makes such interests saleable by the sheriff on the same condition as they are made assignable by the interested person, as the clause provides that the sheriff may convey the same with the same effect as the owner might have done. The Execution Act, if extended, would thus provide that all interests which are assignable under the Conveyancing Act may be sold by the sheriff, provided that such disposition shall not operate to defeat or enlarge an estate tail. If that is a correct reading of the section in question, then it is most improbable that the legislature, in the latter part of the same section, by veiled and doubtful language should have intended impliedly to include estates tail, when they were expressly excluded by the prior part of the section. It seems, therefore, that estates tail cannot be sold under execution.

CHAPTER V.

OF FREEHOLDS, NOT OF INHERITANCE.

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1. *Life Estates Generally.*

ESTATES for life are estates of freehold, and not of inheritance. Some are *conventional*, or expressly created by the act of the parties; others merely *legal*, or created by construction and operation of law.

Estates for life, expressly created by deed or grant (which alone are properly conventional), are where a grant or lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one, in any of which cases he is styled tenant for life only. When he holds the estate by the life of another, he is usually called tenant *pur autre vie*; and this may occur either when a grant is made to A. for the life of B., or where tenant for his own life grants to another who thus holds for the life of the grantor, and consequently has an estate *pur autre vie*.

Before 2nd July, 1886, an estate for life might have been created by a general grant omitting technical words of inheritance (*a*), and so not defining or limiting any specific estate. As, if one, before the date mentioned, granted to A.B. the manor of Dale, this made him tenant for life. For though, as there were no words of inheritance or *heirs* mentioned in the grant, it could not be construed to be a fee, it was however construed to be as large an estate as the words of the donation would bear, and therefore an estate for life. And this grant was also construed to be an estate for the life *of the grantee* in case the grantor had authority to make such grant; for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that, where there is an ambiguity which cannot otherwise be solved, all grants are to be taken most strongly against the grantor, unless in the case of the King granting gratuitously at the suit and instance of the grantee.

A conveyance made on or after 2nd July, 1886, in general terms, i.e., without any words of limitation, will have a different interpretation from that of a conveyance of like kind made before that date (*b*). Such a conveyance now operates to convey the whole estate or interest of the grantor in the land conveyed, unless a contrary intention appears thereby. And therefore, if tenant in fee simple should desire to create an estate for the life of the grantee, it will be necessary, since that statute, to define in the conveyance the estate intended to be conveyed, that is to say, to declare that it shall be for the natural life of the grantee.

Such estates for life will, generally speaking, endure as long as the life for which they are granted; but there are some estates for life, which may determine upon future contingencies, before the life for which they were created expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by

(*a*) *Shank* v. *Cotes*, 11 U.C.R. 207, where the grant was to "B and her children forever;" *T. & L. Co.* v. *Clark*, 3 App. R. 429, where the grant was to "the said party of the second part forever."

(*b*) 49 V. c. 20, s. 4 (3); now R.S.O. c. 109, s. 5.

possibility last for life, if the contingencies upon which they are to determine do not sooner happen.

2. *Estates pur autre vie.*

When land is granted to one for the life of another, it is called, as we have seen, an estate *pur autre vie*. The person for whose life the land is granted is called *cestui que vie*, and the grantee, tenant *pur autre vie*.

A tenant *pur autre vie* can alienate in his lifetime for the life of *cestui que vie*, but he could not, at common law, alienate by will. Consequently, if the tenant *pur autre vie* died during the life of *cestui que vie*, there was no person entitled to the land; for, as long as *cestui que vie* lived it could not revert to the grantor who had parted with it for the life of *cestui que vie*. It was not an estate of inheritance, and so could not go to the heir; and not being a chattel interest it could not go to the executor or administrator. And it did not escheat to the lord of the fee, for only the entire fee can escheat. Therefore, as Blackstone says, he that could first enter on the land might lawfully retain the possession, as long as *cestui que vie* lived, by right of *occupancy*; and he was called a *general occupant*.

But there was no right of occupancy allowed where the King had the reversion of the land, for the reversioner has an equal right with any other man to enter; and where the King's title and a subject's concur, the King's shall always be preferred (*c*).

Nor can there be any occupancy of that upon which an entry cannot be made, such as rents and other incorporeal hereditaments (*d*).

Where land is limited to one and his heirs during the life of another, this is not properly an estate of inheritance at common law. Sometimes it was, though improperly, called a descendible freehold (*e*).

The heir is treated as the person specially named to occupy the land after the death of the grantee, instead of leaving it open to general occupancy; and he is called a *special occupant*.

An estate *pur autre vie* cannot be entailed (*f*). If a *quasi* entail be created by limiting the land to one and the heirs of

(*c*) Cru. Dig. Tit. iii., c. 1, s. 43.

(*d*) Cru. Dig. Tit. xxviii., c. 2, s. 4.

(*e*) *Doe d. Blake* v. *Luxton*, 6 T.R. at p. 291; *Re Michell*, (1892) 2 Ch. 87, and cases cited.

(*f*) *Grey* v. *Mannock*, 2 Eden 339.

his body, the issue would take as special occupants, and the first taker can dispose of it at his pleasure (*g*). But a *quasi* tenant in tail in remainder, expectant upon a life estate, cannot, without the concurrence of the tenant for life, defeat the subsequent remainders (*h*).

The heir must be named in the grant, even in the case of a settlement where the estate given is equitable, in order to constitute him special occupant (*i*).

As land limited for the life of another could not, at common law, go to executors, and when it was limited to the heir as special occupant did not pass to him by descent, it was not assets for creditors (*j*). By the Statute of Frauds it was enacted that such estates should be devisable (*k*), and if no devise should be made that the same should be chargeable in the hands of the heir, if it should come to him by special occupancy, as assets by descent, and if there were no special occupant, that it should go to the executor or administrator and be assets in his hands. Therefore, if an estate *pur autre vie* were limited to a man, his heirs and assigns, and if it were not devised, it went to the heir under the Statute of Frauds, and was liable to the same debts as a fee simple. Where it was granted to a person, his executors, administrators and assigns, the executors took it, subject to the same debts as personalty of any other description, etc. (*l*).

This enactment did not provide for distribution of the proceeds after payment of debts, and another statute was subsequently passed for this purpose (*m*), under which distribution was made as of a chattel interest.

Although devisable, these estates were not made descendible by the Statute of Frauds. But by provincial enactments they are made descendible. On and after 1st July, 1834, an estate "for any life or lives" passed by descent under the rules of the common law as modified by the provincial statute (*n*). On and after 1st July, 1852, every estate "for the life of another" passed under the Inheritance Act by descent (*o*) in the same

(*g*) *Doe d. Blake* v. *Luxton*, 6 T.R. at p. 292.
(*h*) *Allen* v. *Allen*, 2 Dr. & War. 307.
(*i*) *Mountcashell (Earl of)* v. *More-Smyth*, (1896) A.C. 158.
(*j*) *Raggett* v. *Clerke*, 1 Vern. 234.
(*k*) They are also devisable by the Wills Act, R.S.O. c. 120, ss. 2 (*a*), 9.
(*l*) *Atkinson* v. *Baker*, 4 T.R. at p. 230.
(*m*) 14 Geo. II. c. 20.
(*n*) R.S.O. (1897), c. 127 s. 22 (1) et seq.
(*o*) Ibid., ss. 38 et seq.

manner as a fee simple. The heirs, in consequence of these enactments (at any rate the latter), would under them take by descent, and not as special occupants, and such estates therefore became, properly speaking, descendible freeholds. It is also noticeable that every estate for the life of another was, by the Inheritance Act (*p*) made descendible as a fee simple, and it is a question whether in consequence of this enactment a *quasi* entail could be created of such an estate.

On and after 1st July, 1886, estates "limited to the heir as special occupant" were made to pass to the personal representative (*q*). And on 13th March, 1902, this statute was amended so as to make all estates for the life of another pass in the same way (*r*). And now, by the Devolution of Estates Act (*s*) they pass to the personal representative. And they are to be distributed as personal property by the executor or administrator in so far as they are not disposed of by deed, will or contract.

In England it has been laid down that such estates are to be treated as far as possible in the same manner as a fee simple (*t*). And where an estate *pur autre vie* is devised to A. for a *quasi* fee simple, with an executory devise over to B. in case A. should die without leaving issue living at his death, A. cannot defeat the executory devise over by his own disposition (*u*).

Notwithstanding the enactments which have been referred to, and partly in consequence of the *Devolution of Estates Act*, the possibility of a title by occupancy has not wholly disappeared. Between the death of a tenant *pur autre vie* and the grant of letters of administration there is an interval during which the land is without an owner, and it again becomes a question whether a general occupant could not enter. All such estates, and indeed also estates in fee simple, are again in the same position as were estates *pur autre vie*, where there was no special occupant, after the passing of the Statute of Frauds, when by that statute they were made to pass to the personal representative. The opinion entertained at that time will therefore be applicable to the same results thus flowing from the Devolution of Estates Act.

(*p*) Ibid., s. 41.
(*q*) Ibid., s. 3.
(*r*) 2 Edw. VII. c. 1, s. 3.
(*s*) R.S.O. c. 119.
(*t*) *Re Barber's Settled Estates*, 18 Ch.D. 624.
(*u*) Ibid.

By the present enactment (*v*) the personal representative holds the land in trust for the beneficiaries, but subject to the payment of debts. But still this does not provide for the legal ownership before letters of administration are issued. And the trust being subject to the payment of debts, what is really held in trust is the surplus after payment of debts and cost of administration, and not the land itself, unless it becomes unnecessary to sell it.

3. *Waste.*

A tenant for life is to some extent restricted in his enjoyment of the land. While he has the right to all the rents and profits during the continuance of his estate, he has only a limited interest, and must leave the land unimpaired for the remainderman; and therefore he must not commit waste.

At common law waste was punishable in three persons, viz., tenant by the courtesy, tenant in dower, and the guardian; the reason being that as the law created their estates and interests, the law gave them their remedy. But where the owner of the land created an estate for life or for years, it was said that he might have provided against the doing of waste by his deed, and if he did not do so it was his own negligence (*w*). To remedy this it was enacted by the Statute of Marlebridge (*x*) that fermors, by which was meant, "all such as hold by lease for life or lives, or for years, by deed or without deed," should be liable in damages for waste. This was followed by the Statute of Gloucester (*y*), by which tenants by the courtesy, in dower, for life or for years, and guardians of infants' estates, were made impeachable of waste, and additional penalties were provided. Tenants in common and joint tenants had still to be provided for, and by the Statute of Westminster the Second (*z*) tenants in common and joint tenants are made liable to their co-tenants for waste, or, in the event of partition, the parts wasted may be assigned to the tenant committing the waste at the value thereof to be estimated as if no waste had been committed (*a*).

Waste, as defined by Blackstone, is a spoil or destruction

(*v*) R.S.O. c. 119, s. 3.
(*w*) 2 Inst. 145, 299.
(*x*) 2 Inst. 144; now R.S.O. c. 109, s. 32.
(*y*) Now R.S.O. c. 109, s. 29.
(*z*) 2 Inst. 403; now R.S.O. c. 109, s. 31.
(*a*) See *Monro* v. *Toronto Ry. Co.*, 9 O.L.R. 399.

in houses, gardens, trees or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail.

It also consists in altering the character of the property, as by turning arable land into woodland, or meadow, or *vice versa*, as it alters the identity of the land. But there is little or no weight in this in a country where land is laid out in lots and a system of registration of title obtains (*b*).

Waste is either voluntary or permissive—voluntary where a house is pulled down or mutilated, being an act of commission; permissive, where it is by neglect suffered to become dilapidated or to fall down, being an act of omission. Tenant for life is not liable for permissive waste (*c*).

A third species of waste is called equitable waste. Where land is settled on a tenant for life "without impeachment of waste," he is not punishable for waste; but equity will not allow him to commit wanton or malicious acts, such as the destruction of houses, or the felling of timber which has been planted or left for ornament or shelter (*d*). It is not sufficient, however, to show merely that timber is ornamental or useful for shelter; it must be shown that it was in fact planted or left for one of those purposes (*e*).

When it is desired to give a tenant for life the right to cut timber and do other acts which would otherwise be waste, he is made tenant for life "without impeachment of waste." It is not sufficient merely to give "full and absolute control" over the land (*f*), or to direct that it may be used by the tenant for life "as he might deem fit" (*g*).

Tenant for life, however, is entitled to reasonable estovers or botes, for the repair of houses, fences, and agricultural implements, and for fuel.

To open the land to search for mines is waste, even if the mines should prove of value and profitable to the inheritance. Both in the case of felling timber and mining, the tenant is actually carrying away part of the inheritance itself, which he has no right to do. But if mines are open when the title

(*b*) See the observations of Lord O'Hagan, in *Doherty* v. *Allman*, 3 A.C. at p. 726.

(*c*) *Patterson* v. *Central Canada L. & S. Co.*, 29 Ont. R. 134; *Re Parry & Hoskin*, (1900) 1 Ch. 160; *Currie* v. *Currie*, 20 O.L.R. 375.

(*d*) And this is now regulated by statute: R.S.O. c. 109, s. 30.

(*e*) *Weld-Blundell* v. *Wolseley*, (1903) 2 Ch. 664.

(*f*) *Pardoe* v. *Pardoe*, 16 T.L.R. 373; *Clow* v. *Clow*, 4 Ont. R. 355.

(*g*) *Currie* v. *Currie*, 20 O.L.R. 375.

of the tenant for life accrues, he may go on working them for his own use.

There is another species of waste called *meliorating* waste, such as no jury would give damages for, and no court of equity would restrain, such as changing one kind of edifice to another of greater value (*h*).

The question of what is waste in this province has occasioned some controversy. Tapping maple trees, for the purpose of making sugar of the sap, though a cutting of timber in a sense, is not, as a question of law, waste. It has been held to be a question for a jury whether it tends to shorten the life of, and in the end destroy, the trees (*i*). But where an estate is kept for the purpose of producing saleable timber, and the timber is cut periodically, that is considered as the mode of cultivation, and not waste (*j*). And so, if maple trees are kept for the purpose of producing sugar, this mode of user by a tenant for life should probably on the same principle not be considered as waste.

Clearing wild land in the ordinary course of husbandry, for the purpose of rendering it fit for cultivation, is not waste in this province (*k*). As to the right of the tenant to dispose of the timber cut, there has been a difference of judicial opinion. In one case it was said that the tenant was at liberty to destroy the timber when cut, without being impeachable of waste; but that if he sold it, he would be guilty of waste as to the timber sold (*l*). But in a subsequent case it was said that if the cutting for the purpose of clearing were lawful, and not waste, the subsequent sale of the timber could not render the cutting unlawful, and so waste (*m*).

As regards the clearing of land, the latter seems to be the better, as it is the ruling opinion, being the decision of a Divisional Court. The wood is not cut in such a case, for one purpose, and then diverted from that purpose by sale. It is merely removed as a hindrance to cultivation. But where timber is cut for one purpose which is lawful, and is then sold or applied to another purpose, the conversion is waste.

(*h*) *Doherty* v. *Allman*, 3 A.C. 709.

(*i*) *Campbell* v. *Shields*, 44 U.C.R. 449.

(*j*) *Honeywood* v. *Honeywood*, L.R. 18 Eq. 306; and see *Dashwood* v. *Magniac*, (1891) 3 Ch. 306.

(*k*) *Drake* v. *Wigle*, 24 C.P. 405.

(*l*) *Saunders* v. *Breakie*, 5 Ont. R. 603.

(*m*) *Lewis* v. *Godson*, 15 Ont. R. 252.

"Wood cut for house bote, but proving unfit, must not be converted by the tenant to any other use (22 Viner, p. 456); *qu.*, unless it is required for some other bote and there is no preferable wood. Also, a tenant may only cut in order to use; he may not sell his cuttings in order to buy timber or materials for building. Thus in *Gower* v. *Eyre*, (1815) Cooper 156, a tenant for life sold timber to reimburse herself for outlaying repairs made year after year; but, Sir William Grant said: 'It is laid down in the books, and particularly by my Lord Coke (Co. Litt. 53 *b*), that a tenant cannot cut down trees for repairs and sell the same; he must use the timber itself in repairs, the sale being waste'" (*n*). So, in *Simmons* v. *Norton* (*o*), an action of waste for cutting timber, the defence was that the defendant had cut down for the purpose of necessary repairs what appeared to him to be likely trees, but that when they were down they turned out to be unfit for the purpose, whereupon the defendant, after an application to the guardian of the plaintiff's estate, exchanged them for other timber fit for repairing the premises. Evidence of this was rejected, and the court, on a motion for a new trial, held that the plea afforded no defence, for the defendant should have confined himself to felling such trees only as were fit for repairs. "So it will be waste if he sells trees cut for fuel, and with the money repairs, or afterwards repurchases and uses for repairs" (*p*). "The tenant cutteth down trees for reparations, and selleth them, and after buyeth them again, and employs them about necessary reparations, yet it is waste by the *vendition;* he cannot sell trees and with the money cover the house" (*q*). "If lessee cut trees for repairs, and sells them, and buys them back, and employs them on repairs, yet it is waste for the *vendition*" (*r*). It seems, therefore, that the purpose for which timber is cut, or the disposition of it after it is cut, may render a cutting waste, which would not have been waste if proper use had been made of it when cut.

In *Hixon* v. *Reaveley* (*s*), Boyd, C., refused an injunction to restrain a tenant for life from cutting and selling enough timber on the land to produce a sufficient amount of money to

(*n*) Bewes on Waste, p. 50.
(*o*) 7 Bing. 640.
(*p*) Com. Dig. Waste (D) 5.
(*q*) Co. Litt. 53 *b*.
(*r*) 2 Roll. Abr. 823, l. 14.
(*s*) 9 O.L.R. 6.

effect repairs to the house, saying that "all the niceties of the ancient learning as to waste which obtain in England are not to be transferred without discrimination to a new and comparatively unsettled country like this province." It is hardly a nicety of law that permits timber suitable for repairs to be cut and used for repairs, but forbids the cutting and selling of timber unfit for repairs in order to produce money for making repairs. If there were no timber, but minerals were found, the tenant for life might on the same reasoning open a mine and sell enough ore to effect repairs, which would undoubtedly be waste. Nor is the law of England to be applied only with such discrimination as the court may think fit. In *Keewatin Power Co.* v. *Kenora* (*t*), it was said by Moss, C.J.O., that "when . . . it is distinctly and unequivocally declared that, in controversies relating to certain subjects, such as property and civil rights, resort should be had to the common law of England as it existed at a certain day, what warrant is there for saying that the rules of property prevailing at that time are not to be administered?"

4. *Emblements.*

Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain. Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executors shall have the *emblements*, or profits of the crop; for the estate was determined by the *act of God*, and it is a maxim in the law that *actus Dei nemini facit injuriam*. The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labour and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which, being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege the law can give. So it is also if a man be tenant for the life of another, and *cestui que vie*, or he on whose life the land is held, dies after the corn is sown, the tenant *pur auter vie* shall have the emblements. The same is also the rule if a life estate be determined by the *act of law*. Therefore, if a lease be made to husband and wife during coverture (which gives them a determinable estate for life), and the husband sows the land, and afterwards they are divorced *a*

(*t*) 16 O.L.R. at p. 189.

vinculo matrimonii, the husband shall have the emblements in this case; for the sentence of divorce is the act of law. But if an estate for life be determined by the tenant's *own act* (as by forfeiture; or, if a tenant during widowhood thinks proper to marry), in these and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements. The doctrine of emblements extends not only to corn sown, but to other annual products of annual labour, as to roots planted, or other annual artificial profit, but it is otherwise of fruit trees, grass, and the like, which are not planted annually at the expense and labour of the tenant, but are either a permanent, or natural profit of the earth. For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants.

A third incident to estates for life relates to the under-tenants, or lessees. For they have the same, nay greater indulgences than the lessors, the original tenants for life. The same—for the law of estovers and emblements with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place. Thus, where tenant for life demised the land for five years, and died while the crops were in the ground, the tenant for years was held to be entitled to the crops as emblements. But straw and manure made on the land are not emblements, and they belong to the remainderman, especially if the tenant has covenanted to leave them on the land (*u*). And greater—for in those cases where the tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate*, her taking husband is her own act, and therefore deprives her of the emblements; but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her. The lessees of tenants for life had also at the common law another most unreasonable advantage; for, at the death of their lessors, the tenants for life, these under-tenants might, if they pleased, quit the premises, and pay no rent to anybody for the occupation of the land since the last quarter-day, or other day

(*u*) *Atkinson* v. *Farrell*, 27 O.L.R. 204; 8 D.L.R. 582.

assigned for payment of rent (*v*). To remedy which it was enacted (*w*) that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a rateable proportion of rent, from the last day of payment to the death of such lessor (*x*).

5. *Tenant for Life Must Keep Down Charges.*

As a tenant for life has certain rights, so also, he is under certain obligations to the reversioner or remainderman (*y*) with reference to the estate. He must pay all taxes imposed on the land (*z*). But when he pays a tax or rate imposed on the inheritance for a local improvement, he can claim to keep it alive as against the inheritance (*a*). Where part of the estate is productive and part is unproductive, he cannot receive the rents of the productive portion and refuse to pay the taxes on the unproductive portion (*b*). If the estate comes to him subject to a mortgage in fee he must keep down the interest (*c*); but the principal, when it becomes due, must be paid by the remainderman or reversioner (*d*); and where a dowress had her dower assigned in mortgaged land, she was held bound to pay one-third of the interest until the mortgage was paid off (*e*). But if a tenant for life should pay off an incumbrance on the fee, he would be presumed, unless the contrary were shewn, to do so for his own benefit, and not for the benefit of the settlement (*f*); and the presumption is not rebutted by showing that the relation of parent and child subsists between the tenant for life and the remainderman (*ff*). When he pays it off he is entitled to hold it without interest, as a charge on the land

(*v*) *Clun's Case*, Tud. Lg. Ca. 4th ed. at p. 50.

(*w*) 11 Geo. II. c. 19, s. 15. The remedy is now provided by the Apportionment Act, R.S.O. c. 156, s. 6.

(*x*) As to apportionment of rent, see ante p. 46.

(*y*) *Re Morley*, L.R. 8 Eq. 594.

(*z*) *Biscoe* v. *VanBearle*, 6 Gr. 438; *Gray* v. *Hatch*, 18 Gr. 72.

(*a*) *Re Smith's Settled Estates*, (1901) 1 Ch. 689.

(*b*) *Re Denison*, 24 Ont. R. 197.

(*c*) *Macklem* v. *Cummings*, 7 Gr. 318; *Marshall* v. *Crowther*, 2 Ch. D. 199.

(*d*) *Reid* v. *Reid*, 29 Gr. 372.

(*e*) Ibid.

(*f*) *Giffard* v. *Fitzhardinge*, (1899) 2 Ch. 32; *Currie* v. *Currie*, 20 O.L.R. 375.

(*ff*) *Re Harvey*, (1896) 1 Ch. 137.

as against the reversioner (*g*). And the taking of a reconveyance to himself or registering a statutory discharge of mortgage does not affect his right (*h*). In a case where the owner in fee simple mortgaged the land and then conveyed it subject to a life estate in himself, the effect of the transaction being to oblige the grantee to assume the liability of the mortgage debt and relieve the life estate therefrom, it was held that on payment of the mortgage the grantee was not entitled to an assignment under the Mortgage Act, but was entitled to have it assigned in such a way that it could remain an incumbrance on the remainder in fee vested in him (*i*). And where land, subject to an annual charge in favour of an annuitant for life, was devised to one for life with remainder over, it was held that the annual sum paid by the life tenant being partly interest and partly capital should be apportioned between the tenant for life and the remainderman, in the proportion which the value of the life estate bore to the value of the reversion (*j*). The rule also applies to a tenant for life of a term of years, who is bound to pay the rent and observe the covenants (*k*). An equitable tenant for life of leaseholds is not liable for repairs necessary at the commencement of his interest, or for breaches which occurred before that date (*l*).

Where a house was burned which was settled on a tenant for life with remainder over, and which was insured, the premiums being paid out of the income of the estate, it was held, under an Imperial statute, that the insurance moneys did not belong to the tenant for life, but must be used in restoring the building (*m*).

6. *Tenant in Tail after Possibility of Issue Extinct.*

The next estate for life is of the legal kind, as contradistinguished from conventional; viz., that of tenant *in tail after possibility of issue extinct*. This happens where one is tenant in special tail, and the person from whose body

(*g*) *Macklem* v. *Cummings*, 7 Gr. 318. See also *Carrick* v. *Smith*, 34 U.C.R. at p. 394, and cases cited.

(*h*) *Currie* v. *Currie*, 20 O.L.R. 375.

(*i*) *Leitch* v. *Leitch*, 2 O.L.R. 233.

(*j*) *Whitesell* v. *Reece*, 5 O.L.R. 352. And see *Re Harrison*, 43 Ch.D. 55.

(*k*) *Re Gjers, Cooper* v. *Gjers*, (1899) 2 Ch. 54.

(*l*) *Re Betty, Betty* v. *Attorney-General*, (1899) 1 Ch. 821.

(*m*) *Re Quick's Trusts*, (1908) 1 Ch. 887.

the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct. In either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue; in this case the man has an estate-tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely *tenant in fee-tail special*, that would not have distinguished him from others; and besides, he has no longer an estate of inheritance, or fee, for he can have no heirs capable of taking *per formam doni*. Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition, therefore, could so exactly mark him out as this of *tenant in tail after possibility of issue extinct*, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail, which he once had, but also states that this possibility is now extinguished and gone.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring, for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them. A possibility of issue is always supposed to exist in law, unless extinguished by the death of the parties, even though the donees be each of them an hundred years old. A court of equity will, however, often act on the contrary presumption; thus, if property be vested in trustees in trust for a married woman for life, with remainder to children of the marriage, the court will, for the benefit of the parties, after the wife has attained a certain age, allow the property to be dealt with as they may agree on, if each be *sui juris*, on the assumption that the wife is past child-bearing (*n*).

(*n*) See Armour on Titles, 130.

In general the law looks upon this estate as equivalent to an estate for life only, but the tenant has some of the advantages of tenant in tail, as, not to be punishable for waste (*o*).

7. *Tenant by the Curtesy.*

Tenant *by the curtesy of England* is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee-simple or fee-tail, and has, by her, issue born alive capable of inheriting her estate. In this case he shall, on the death of his wife, hold the lands for his life as tenant by the curtesy of England.

There are four requisites necessary to make a tenant by the curtesy—marriage, seisin of the wife, issue, and death of the wife.

8. *Marriage.*

The marriage must be legal. It was thought at one time that the marriage must be canonical as well as legal (*p*), but it seems reasonably clear that there are no legal degrees of consanguinity or affinity within which a marriage cannot be validly contracted in Ontario; excepting possibly those mentioned in the Criminal Code. The ecclesiastical courts acted against the parties, *pro salute animarum*, to punish illegal or uncanonical marriages and to separate the parties; but in the common law courts, where property rights were involved or personal injuries were sued for, the question of marriage or no marriage *de facto* was the sole issue. Thus, a marriage *de facto* was good at law, though voidable in the spiritual courts, until it was, in fact, dissolved by one of the latter courts. While the matter was one of ecclesiastical jurisdiction only, the spiritual courts acted for the good of the spouses, and separated them in their lifetimes, if appealed to, in order to put an end to the incestuous intercourse, and it followed that, after the death of one of them the remedy could not be applied, and the only effect of making a decree would have been to bastardize the issue. Therefore it was said that an incestuous marriage could not be set aside after the death of one of the spouses. The ecclesiastical law was not introduced into Upper Canada (*q*), and the English statutes forbidding marriage within certain degrees

(*o*) *Williams* v. *Williams*, 12 East 206.
(*p*) *Hodgins* v. *McNeil*, 9 Gr. 305.
(*q*) See *The Lord Bishop of Natal's Case*, 3 Moo. P.C.N.S. 115.

were passed after English law was introduced into the province. And as there is no law defining the degrees within which it is unlawful to marry, and no court exists exercising the jurisdiction of the ecclesiastical courts, there is no way by which a marriage can be dissolved, except by Act of Parliament. In dealing with property rights after the death of one of the spouses, our courts have adopted the English rule which was in force while incestuous marriages were the subject of ecclesiastical jurisdiction. So that, whether there are, or are not, degrees within which parties cannot validly marry, after the death of one of the spouses the validity of the marriage cannot be called in question (*r*).

By the Criminal Code (*s*) sexual intercourse between parent and child, brother and sister, grandparent and grandchild, is incest, and an indictable offence. It is inconceivable that a marriage should be attempted within these degrees, but if intercourse were preceded by a ceremony of marriage there is nothing in the Act to invalidate such a marriage. And it is significant that intercourse between more remote relatives, and intercourse between persons related by affinity only, who probably might marry, and who, as experience shows, do sometimes marry, is not made incestuous; and if their marriage is not incestuous it must be valid.

It is sufficient, therefore, in order to found a property right on marriage, to prove a marriage properly celebrated between the contracting parties, without regard to their relationship (*t*).

It is essential, however, that the union should answer the requirements of a marriage as understood by our law. Where a marriage has been contracted in and according to the rites of a country where polygamy is allowed, the union is not a marriage, although no second or other union may have been formed, standing the first. In *Re Bethell* (*u*), the union of an Englishman, who had retained his domicile of origin, with a woman of the Baralong tribe in Bechuanaland, where polygamy was permitted, was held not to be a marriage in the Christian sense, which is defined as "the voluntary union for life of one man and one woman to the exclusion of others," but a union which permitted the taking of other wives,

(*r*) *Kidd* v. *Harris*, 3 O.L.R. 60.

(*s*) R.S.C. c. 146, s. 204.

(*t*) *Re Murray Canal*, 6 Ont. R. 685; and see further on this, 1 C.L.T. pp. 509, 569, 617, 665; and, as to proof of marriage, Armour on Titles, 131.

(*u*) 38 Ch.D. 220.

and so was not a marriage, although no second wife was ever taken (*v*).

In Canada a contrary view has been maintained. In *Connolly* v. *Woolrich* (*w*), a man domiciled in Lower Canada went through the ceremony of marriage with a squaw in the North-West after the manner of her tribe, the taking of other wives being permitted, and it was held by the court in Lower Canada that the marriage was valid. And in Ontario, Robertson, J., held a similar marriage to be valid, following *Connolly* v. *Woolrich*, though he based his decision also on evidence of reputation and cohabitation (*x*). The English decisions probably express the true rule (*y*).

9. *Seisin of the Wife.*

The seisin of the wife must be an actual seisin or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed (*z*). And, therefore, a man shall not be tenant by the curtesy of a remainder or reversion expectant on an estate of freehold, for it is the tenant for life who is seised (*a*). But it is otherwise if the remainder or reversion is expectant on an estate for years, as in this case the seisin of the freehold is not in the tenant for years, but in the remainderman or reversioner, and the possession of the tenant is the possession of the reversioner. But of some incorporeal hereditaments, and of mere equitable interests, a man may be tenant by the curtesy, though there have been no actual seisin of the wife; as in case of an advowson, where the church has not become void in the lifetime of the wife; which a man may hold by the curtesy, because it is impossible ever to have actual seisin of it, and *impotentia excusat legem*.

10. *Issue Must be Born Alive.*

The issue must be born alive (*b*). The issue also must be born during the life of the mother; for if the mother dies in

(*v*) See also *Hyde* v. *Hyde*, L.R. 1 P. & D. 930.

(*w*) 11 L.C. Jur. 197; 1 Rev. Leg. 263.

(*x*) *Robb* v. *Robb*, 20 Ont. R. 591.

(*y*) See *Warrender* v. *Warrender*, 2 Cl. & F. at p. 532, *per* Lord Brougham.

(*z*) But a Crown grant by letters patent confers sufficient seisin and possession: *Weaver* v. *Burgess*, 22 C.P. 104.

(*a*) *Re Gracey & Tor. R.E. Co.*, 16 Ont. R. 226.

(*b*) As to the evidence, see *Jones* v. *Ricketts*, 10 W.R. 576.

labour, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the curtesy; because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child while he was yet in his mother's womb, and the estate, being once vested, shall not afterwards be taken from him (*c*). In general, there must be issue born, and such issue as is also capable of inheriting the mother's estate. Therefore, if a woman be tenant in tail *male*, and hath only a *daughter* born, the husband is not thereby entitled to be tenant by the curtesy, because such issue female can never inherit the estate in tail male. And this seems to be the principal origin of the rule that the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised, *i.e.*, that in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one, by the standing rule of law prior to 4 Wm. IV. c. 1, could be heir to the ancestor of any lands whereof the ancestor was not actually seised, and therefore, as the husband had never begotten any issue that could take as heir to the mother, he shall not be tenant of them by the curtesy. And hence we may observe with how much nicety and consideration the old rules of law were framed, and how closely they are connected and interwoven together—supporting, illustrating, and demonstrating one another. The time when the issue was born is immaterial, provided it were during the coverture; for whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin or at the time of the wife's decease, the husband shall be tenant by the curtesy.

11. *Death of the Wife.*

The husband, by the birth of the child, becomes tenant by the curtesy *initiate*, but his estate is not *consummate* till the death of the wife, which is the fourth and last requisite to make a complete tenant by the curtesy.

If the wife's estate should be equitable only, thus if the lands should be vested in trustees for her and her heirs, her husband would be entitled to be tenant by the curtesy under the same circumstances as would entitle him in case the legal estate were vested in the wife, which is one instance of the maxim that equity follows the law.

(*c*) *Bowles' Case*, Tud. Lg. Ca. 4th ed. 110.

12. *Dower.*

Tenant in *dower* at law is where the husband of a woman is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life.

The law of dower may be considered under the following heads: 1. Who may be endowed. 2. Of what legal estates the widow may be endowed. 3. Of what equitable estates she may be endowed. 4. How dower may be barred and defeated, and the right thereto conveyed.

13. *Marriage.*

She must be the actual wife (*d*). It is not necessary that issue should be born, but the estate must be of such a nature that issue if born would be capable of inheriting.

14. *Dower in Legal Estates.*

A widow is entitled to be endowed of all lands and tenements of which her husband was seised in fee simple or fee tail in possession at any time during the coverture, otherwise than in joint tenancy, and of which any issue which she might have had might by possibility have been heirs.

After the death of the husband the widow is entitled to tarry in the chief house of her husband for forty days after his death, within which time her dower is to be assigned to her, if it has not been assigned before, and during that time she is entitled to her reasonable maintenance (*e*). This is called the widow's right of quarantine.

There must, to entitle the widow to dower *at common law*, be seisin in the husband during coverture, and that of an estate of inheritance in possession; but actual seisin is not requisite, and seisin in law suffices. Since R.S.O. c. 70, s. 5, though the husband were disseised before coverture and so continued during coverture till death, the widow would yet be entitled to dower, but it must be sued for and obtained within the same period that the husband's right of entry might be enforced. If, however, the husband were once seised during

(*d*) See ante p. 99.
(*e*) R.S.O. c. 70, s. 2.

coverture, his subsequent disseisin and bar by the Statute of Limitations would not operate against his widow (*f*).

But where the husband is seised in trust for another, she is not entitled to dower (*g*). Inasmuch as seisin is necessary, dower does not attach on a remainder in fee expectant on a life estate, if the remainderman die or alien pending the life-estate (*h*); for the seisin of the freehold is in the tenant for life, and the remainder also is not an estate of inheritance *in possession* (*i*). But if a remainder or reversion be expectant only on a term of years, as the possession of the tenant is the possession and constitutes the seisin of the remainderman or reversioner, dower will attach.

If the estate be subject to a term of years granted before coverture by way of mortgage, the widow of the mortgagor will be entitled to dower at law, with a *cesset executio* during the term (*j*), and in equity be entitled to redeem if she thinks fit. If the lease be absolute, the widow will be entitled to a third of the rent immediately, and also dower of the land with a *cesset executio* during the term.

Where the seisin of the husband is transitory only, when the same act which gives him the estate conveys it out of him again, the seisin will not entitle the wife to dower; for the land was merely *in transitu*, and never rested in the husband. Thus, the widow of a grantee in fee to uses, from whom the use is immediately executed into possession in the *cestui que use* by the Statute of Uses, is not entitled to dower. Thus, if A. grants to B. and his heirs to the use of C. and his heirs; here the widow of B. shall not have dower, for the seisin of B. was but transitory, the same conveyance which gave him the estate also immediately took it from him by declaring a use on which the Statute of Uses would operate (*k*). But if the land abides in the husband for the interval of but a single moment, the wife shall be endowed thereof (*l*); as where a vendor executed a deed of conveyance to a purchaser in fee,

(*f*) *McDonald* v. *McMillan*, 23 U.C.R. 302.

(*g*) R.S.O. c. 70, s. 2.

(*h*) *Cumming* v. *Alguire*, 12 U.C.R. 330; *Pulker* v. *Evans*, 13 U.C.R. 546; *Leitch* v. *McLellan*, 2 Ont. R. 587.

(*i*) Cf. *Re Gracey & Tor. R.E. Co.*, 16 Ont. R. 226.

(*j*) *Chisholm* v. *Tiffany*, 11 U.C.R. 338.

(*k*) *Norton* v. *Smith*, in Appeal, 7 U.C.L.J. O.S. 263. It is upon this principle that the conveyance to uses to defeat dower, which will presently be explained, is drawn.

(*l*) Cro. Eliz. 503.

who in pursuance of a prior agreement, and without his wife joining, immediately after such execution, reconveyed the lands to the vendor by way of mortgage, to secure the unpaid purchase money, it was held the widow of the purchaser was entitled to dower (*m*). But in such a case the dower allotted will be chargeable in favour of the holder of the mortgage with a third of the interest of the mortgage, unless the dowress will pay a third of the mortgage debt (*n*). And the acquisition of the equity of redemption by the owner of the legal estate, or mortgagee, will not cause a merger so as to preclude him as against the dowress from insisting that the mortgage is on foot and unsatisfied (*o*).

The seisin of a mortgagee in fee, however, will not entitle his widow to dower, for his estate is subject to be defeated by performance of the condition (*p*). And as long as he has a redeemable estate, dower will not attach although it may be uncertain who has the right to redeem (*q*).

There is no dower in partnership property. If partners purchase land merely for the purpose of their trade, and pay for it out of partnership property, it retains its character and qualities of partnership capital or stock in trade, and like other partnership assets is held first to satisfy the demands of the partnership and secondly for distribution amongst the partners according to their shares in the capital. As no partner can claim a share in specie of partnership property, but only a share in the surplus after satisfaction of partnership liabilities, it follows that there can be no dower in partnership lands (*r*). It is always a pure question of fact, apart altogether from the form of the conveyance, whether land is or is not partnership assets; for co-owners are not necessarily partners, and partners may be co-owners of land which is not included in the partnership assets.

(*m*) *Potts* v. *Myers*, 14 U.C.R. 499; *Norton* v. *Smith*, 20 U.C.R. 213; S.C. in Appeal, 7 U.C.L.J. 263; *Heney* v. *Low*, 9 Gr. 265.

(*n*) *Heney* v. *Low*, supra; and see *Campbell* v. *Royal Canadian Bank*, 19 Gr. 341.

(*o*) *Heney* v. *Low*, 9 Gr. 265; see, however, the judgment of Esten, V.C., as to the necessity of some evidence of express intention in the owner of the legal estate to keep alive the mortgage by assignment to a trustee or otherwise; see also as to dower on merger, *Bowle's Case*, Tud. Lg. Ca. 4th ed. 115.

(*p*) *Ham* v. *Ham*, 14 U.C.R. 497.

(*q*) *Flack* v. *Longmate*, 8 Beav. 420.

(*r*) *Darby* v. *Darby*, 3 Drew. at p. 503, and cases cited therein; *Re Music Hall Block*, 8 Ont. R. 225.

Where a man before marriage contracts to sell land, he becomes a quasi trustee for the purchaser, and upon marriage his wife is not entitled to dower, unless, indeed, the purchaser should forfeit his rights and the husband should again become seised to his own use (*s*). And where a locatee of Crown lands had, before marriage, made an agreement to sell his interest to his son by a former wife, and subsequently obtained the patent, it was held that he took under the patent subject to the obligation in favour of the son, and that on his death his widow was not entitled to dower (*t*).

The widow of a tenant in common is entitled to dower; for the estate of the tenant in common descends to his heirs (*u*). But the widow of a joint-tenant is not entitled to dower, for the survivor takes the whole estate by the original gift and nothing descends (*v*).

In case of exchange of lands, the widow is not entitled to dower in the land both taken and given in exchange; she is in such case put to her election as to the lands out of which she will be endowed. But the conveyance must be technically an exchange. Proof is not allowed *aliter* that one parcel was given for the other (*w*).

Where the land of which the husband is seised is, at the time of alienation by him or at the time of his death, if he died seised, in a state of nature and unimproved by clearing, fencing or otherwise for the purpose of cultivation or occupation, the wife is not entitled to dower therein (*x*).

Land from which a portion of the timber has been cut with a view to cultivation is not in a state of nature within the meaning of this enactment (*y*).

And where lands are dedicated by any owner thereof for a street or public highway, they are not to be subject to any claim for dower by the wife of any person by whom the same were dedicated (*z*).

(*s*) *Gordon* v. *Gordon*, 10 Gr. 466; *Lloyd* v. *Lloyd*, 4 Dr. & War. at p. 370.

(*t*) *Brown* v. *Brown*, 8 O.L.R. 332.

(*u*) *Ham* v. *Ham*, 14 U.C.R. 497; see also 2 C.L.T. 15.

(*v*) *Haskill* v. *Fraser*, 12 C.P. 383.

(*w*) *McLellan* v. *Meggatt*, 7 U.C.R. 554; *Towsley* v. *Smith*, 12 U.C.R. 555; *Stafford* v. *Trueman*, 7 C.P. 41.

(*x*) R.S.O. c. 70, s. 6.

(*y*) *Re McIntyre*, 7 O.L.R. at p. 554.

(*z*) R.S.O. c. 70, s. 8.

And no dower shall be recoverable out of any land which before the Act cited below had been, or thereafter shall be, granted by the Crown as mining land, in case such land is on or after the 31st December, 1897, conveyed to the husband of the person claiming dower, and such husband does not die entitled thereto (*a*).

Land held under the Public Lands Act (*b*), on the death of the locatee, whether before or after patent, descends to the widow of the locatee or patentee during her widowhood in lieu of dower; but the widow may elect to take her dower instead.

15. *Dower in Equitable Estates.*

Dower in equitable estates. Before the Act 4 Wm. IV. c. 1 (*c*), a widow was not entitled to dower in equitable estates.

By this statute it is enacted that, "where a husband dies beneficially entitled to any land, for an interest which does not entitle his widow to dower at common law, and such interest, whether wholly equitable or partly legal and partly equitable, is, or is equal to, an estate of inheritance in possession (other than an estate in joint-tenancy), his widow shall be entitled to dower out of such land."

Examples of interests partly legal and partly equitable, which are equal to an estate of inheritance in possession, to which this section would apply, are as follows: Where an estate is conveyed to uses to bar dower, viz., to the use of A. for life with remainder on the determination of A.'s estate in his lifetime to the use of B. and his heirs for the life of A. in trust for A., with remainder to the use of A. and his heirs. Or, a limitation to the use of B. and his heirs during the life of A. upon trust for A. and his heirs, with remainder to the use of A. and his heirs. Or, a limitation to the use of A. and his heirs during the life of A. with remainder to the use of B. and his heirs, upon trust for A. and his heirs (*d*). But where A. had two interests, viz., first, an equitable estate during B.'s life, determinable by the birth of a son to B., and, secondly, a legal remainder expectant on the death of B. without having a son, the equitable interest being severed from the estate of inheritance by the

(*a*) R.S.O. c. 70, s. 7.
(*b*) R.S.O. c. 28, s. 47.
(*c*) Now R.S.O. c. 70, s. 14.
(*d*) *Re Michell*, (1892) 2 Ch. at p. 99.

interposition of estate tail in B.'s possible son, it was held that the case was not within the Act (*e*).

Where a husband contracts to purchase land and dies before conveyance, the contract still subsisting, he dies beneficially entitled, and his widow is entitled to dower (*f*), and would probably be entitled to call upon the personal representatives to administer and pay the purchase money and complete the contract. And where a husband purchases an equity of redemption he, of course, acquires only an equitable interest, and his wife is not entitled to dower unless he dies beneficially entitled. Cases of that kind fall wholly within the section above quoted, and must be distinguished from cases where the husband is seised during the coverture and mortgages the land, his wife joining to bar dower. Thus, where a husband purchased an equity of redemption, and, upon the mortgage falling due, borrowed from another mortgagee whose mortgage was registered before he advanced the money, and who then paid off the existing mortgage and registered a statutory discharge, it was held that the husband, who had died entitled to redeem, was beneficially entitled only to the surplus after the sale of the land had satisfied the mortgage, and that his widow was entitled to dower computed upon the surplus only (*g*).

It will be observed that the husband must die beneficially entitled, before the widow can have any claim. There is no inchoate right in the husband's lifetime. He is able to defeat her claim altogether by alienation *inter vivos* (*h*).

Where a purchaser mortgaged his equitable right, and authorized the mortgagee to complete the contract on his behalf, and in his mortgage gave a power of sale to the mortgagee, and died, it was held that a sale under the power of sale related back to the creation of it, and was, in fact, an alienation of his equitable right by the husband, and therefore that his widow was not entitled to dower, though he died entitled to redeem (*i*). And where a husband entitled to demand a patent, before obtaining it, assigned during the coverture, and then died, his widow was held not to be entitled to dower (*j*).

(*e*) Ibid.

(*f*) *Craig* v. *Templeton*, 8 Gr. 483.

(*g*) *Re Williams*, 7 O.L.R. 156.

(*h*) *Gardner* v. *Brown*, 19 Ont. R. 298; *Re Luckhardt*, 29 Ont. R. 111; *Fitzgerald* v. *Fitzgerald*, 5 O.L.R. 279.

(*i*) *Smith* v. *Smith*, 3 Gr. 451.

(*j*) *Brown* v. *Brown*, 8 O.L.R. 332.

So again, a widow may, on the principle that equity considers that as done which ought to be done, be entitled equitably to dower out of what would be personal estate at law; thus, under certain circumstances, money vested in trustees with express injunctions to lay out the same in the purchase of lands in fee-simple or fee-tail for the benefit of the husband and his heirs, even though never so laid out during the husband's lifetime, will nevertheless be looked on in equity as actually converted into lands, and the delay of the trustees in doing what they ought to have done shall not prejudice the widow.

Where the husband has been seised during the coverture, and has mortgaged the land, his wife joining to bar dower, a distinction must be drawn between cases arising before and those arising after 11th March, 1879. Before 11th March, 1879 (*k*), the enactment just dealt with being the only Act in force respecting dower in equitable estates, there was some fluctuation of opinion as to the right of the wife to dower unless the husband died beneficially entitled, his estate in the land of which he was seised being by the mortgage converted into an equitable estate with the wife's consent. In *Moffatt* v. *Thompson* (*l*) it was held that he could aliene his equity of redemption without the necessity of his wife's joining to bar dower. In *Forrest* v. *Laycock* (*m*), the contrary opinion was expressed. In *Black* v. *Fountain* (*n*), *Fleury* v. *Pringle* (*o*), and *Re Robertson* (*p*), it was agreed that the wife in such a case was dowable of the equity of redemption only in case her husband died beneficially entitled. And in *Beavis* v. *McGuire* (*q*) the same principle was affirmed by the Court of Appeal. And in *Anderson* v. *Elgie* (*r*) the facts were that a husband had, on 29th January, 1899, mortgaged his land, his wife joining to bar dower. On 8th February, 1881, he again mortgaged it, his wife not joining. Part of the money advanced on the latter mortgage was applied in payment of the first mortgage, and a statutory discharge was registered on 5th March, 1881. It was held that, by the mortgage of 1899, the parties had con-

(*k*) See 42 V. c. 22, now R.S.O. c. 70, s. 10.
(*l*) 3 Gr. 111.
(*m*) 18 Gr. 611.
(*n*) 23 Gr. 174.
(*o*) 26 Gr. 67.
(*p*) 25 Gr. 276; affirmed Ibid. 486.
(*q*) 7 App. R. 704.
(*r*) 6 O.L.R. 147.

verted the legal estate into an equitable one, and the wife was therefore not entitled to dower unless the husband died beneficially entitled, and that the second mortgage defeated the wife's right to dower, and that the purchaser from the mortgagees held the land free from dower.

The Act of 1879, however, introduced a different rule. It applied only to mortgages made after it was passed (*s*). It provided that no bar of dower in a mortgage, or other instrument having that effect, should operate to bar the dower to any greater extent than was necessary to give full effect to the rights of the mortgagee; and that on a sale under the power of sale in such an instrument, or under legal process, the wife should be entitled to dower in any surplus after satisfaction of the mortgage to the same extent as she would have been entitled to dower in the land if the same had not been sold. Opinion fluctuated as to the construction of this statute. On the one hand it was held that the wife was entitled to dower only in case the husband died beneficially entitled (*t*). And on the other, that as the bar of dower was effectual only for the purposes of the mortgage, there was a residue in which the dower was not barred, and therefore in any conveyance subsequent to the mortgage it was necessary for her to join in order to free the equity of redemption from the claim for dower (*u*). The question came for the first time before a Divisional Court in *Pratt* v. *Bunnell* (*v*), where it was held that the wife was a necessary party to a conveyance of the equity of redemption. In this case it was also held that the basis of computation of the amount of the dower was the surplus purchase money. In *Gemmill* v. *Nelligan* (*w*), however, another Divisional Court differed from the reasoning in *Pratt* v. *Bunnell*, and held that dower in such a case should be computed on the whole purchase money, and be paid out of the surplus as far as it would extend.

Where a husband in 1893 took by devise a parcel of land, charged with the payment of legacies, and he mortgaged it, his wife joining to bar dower, to raise money out of which he satisfied the legacies, and died without paying off the mortgage, it

(*s*) *Martindale* v. *Clarkson*, 6 App. R. 1.

(*t*) *Smart* v. *Sorenson*, 9 Ont. R. 64; *Re Music Hall Block*, 6 Ont. R. 225; *Calvert* v. *Black*, 8 P.R. 255.

(*u*) *Re Croskery*, 16 Ont. R. 207.

(*v*) 21 Ont. R. 1.

(*w*) 26 Ont. R. 307.

was held that his widow was entitled to dower computed on the whole value of the land (*x*).

In 1895 another Act was passed (*y*), which declares that in the event of mortgaged land being sold under power of sale or by legal process, the wife shall be entitled to dower in any surplus, and the amount to which she is entitled shall be calculated upon the basis of the amount realized for the whole land and not upon the surplus.

Where the mortgage has been given for purchase money, the value of the dower is calculated on the surplus over and above the mortgage money (*z*).

16. *Bar and Forfeiture of Dower.*

Dower may be barred by jointure, as regulated by the statute 27 Hen. VIII. c. 10 (*a*), or by ante-nuptial settlement in lieu of dower. A *jointure*, which strictly speaking means a joint estate, limited to both husband and wife, but in a common acceptation extends also to a sole estate limited to the wife only, is thus defined by Sir Edward Coke: "A competent livelihood of freehold for the wife, of lands and tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least." Before the Statute of Uses the greater part of the land of England was conveyed to uses, and the *cestui que use* then stood in much the same position as a *cestui que trust* after the statute, and had but an equitable beneficial interest. Now, though the husband had the *use* of lands in absolute fee simple, yet the wife was not entitled to any dower therein, he not being *seised* thereof; wherefore it became usual on marriage to settle by express deed some special estate to the use of the husband and his wife for their lives, in joint tenancy or jointure, which settlement would be a provision for the wife in case she survived her husband. At length the Statute of Uses ordained that such as had the *use* of lands should to all intents and purposes be reputed and taken to be absolutely *seised* and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special

(*x*) *Re Zimmerman*, 7 O.L.R. 489.
(*y*) 58 V. c. 25, s. 3, now R.S.O. c. 70, s. 10.
(*z*) *Re Auger*, 26 O.L.R. 402; 5 D.L.R. 680.
(*a*) R.S.O. App. A., p. ix., s. 5.

lands that might be settled in jointure, had not the same statute provided that upon making such an estate in jointure to the wife before marriage she shall forever be precluded from her dower. But then these four requisites must be punctually observed: (1) The jointure must take effect immediately on the death of the husband. (2) It must be for her own life at least, and not *pur autre vie*, or for any term of years, or other smaller estate. (3) It must be made to herself, and no other in trust for her. (4) It must be made, "though it need not in the deed be expressed to be" (*b*) in satisfaction of her whole dower, and not of any particular part of it.

If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiæ*, and may either accept it or refuse it, and betake herself to her dower at common law; for she was not capable of consenting to it during coverture (*c*). Since the Married Women's Act, her power to consent must be presumed to exist, and in *Eves* v. *Booth* (*d*) it was said that she might elect during the coverture. In that case the husband made provision by conveying to trustees for the wife a parcel of land. She enjoyed it in possession for many years, survived her husband, and seven months after his death sued for dower. It was held that she was bound to act promptly after the husband's death, and that she had not done so, and therefore could not claim dower.

And if the widow be lawfully evicted from her jointure without fraud by lawful entry, action, or by discontinuance of her husband, then she is to be endowed of so much of the residue of her husband's lands whereof she was before dowable, as the same lands from which she was evicted amounted to (*e*).

A more usual mode, in Ontario at least, of preventing the right of dower in present or future acquired property, is by settlement or agreement before marriage, by which the intended wife accepts any provision in her favour which is declared to be in lieu of dower in such present or future to be acquired property; and if the intended wife were adult at the time of the agreement, the inadequacy, precariousness, or failure of the provision for her will not, as to purchasers from the husband,

(*b*) *Gilkison* v. *Elliott*, 27 U.C.R. 95.
(*c*) R.S.O. App. A., p. x., s. 9.
(*d*) 27 App. R. 420.
(*e*) R.S.O. App. A., p. x., s. 6.

prevent her from being barred. On this point Lord St. Leonards (*f*) thus expresses himself: "If the present were a jointure operating as a bar under the Statute of Uses the case would have been governed by s. 7 of that statute; but *in equity the bar rests solely on contract*, and my opinion is that in this court, if a woman, being of age, accepts a particular something in satisfaction of dower, she must take it with all its faults, and must look at the contract alone; and cannot in case of eviction come against one in possession of the lands on which otherwise her dower might have attached; this has nothing to do with the performance of covenants or the like. . . . My conclusion is, that the plaintiff has accepted in lieu of dower payment of money at least, and that she is also concluded by the acceptance of the bond, and that, though the bond was not satisfied, she has no right to resort to lands of her husband bought and sold during marriage."

Infants may be barred *at law* by sufficient legal jointure under the Statute of Henry VIII., as already explained. If the jointure be *competent* it will be good though it be not of the value of the dower (*g*); and though at law an infant may not be bound by her ante-nuptial agreement to accept a provision in lieu of dower, still in equity a provision made for an infant on her marriage, at least if with the assent of her father or guardian, and in all respects as certain, secure, and substantially equivalent to a good legal jointure, would be sufficient as a good *equitable jointure*, to restrain her from enforcing her legal right to dower (*h*). A mere precarious and uncertain provision, however, which she might never enjoy, though it might bar an adult on her *contract* to accept it as above mentioned, would not bar in case of an infant (*i*); thus, a settlement of an estate on an infant for life, after the death of the intended husband and of some *third person*, will not be a bar as a good equitable jointure; for the third person might survive not only the

(*f*) *Dyke* v. *Rendall*, 2 De G.M. & G. 209; see also *Earl of Buckingham* v. *Drury*, 2 Eden, 60; *Corbet* v. *Corbet*, 1 S. & S. 612; see also Tud. Lg. Ca. 4th ed. 120.

(*g*) *Earl of Buckingham* v. *Drury*, 3 Bro. P.C., Toml. ed. 492; *Drury* v. *Drury*, 4 Bro. C.C. 506, note; *Harvey* v. *Ashley*, 3 Atk. 607.

(*h*) See cases last note; Tud. Lg. Ca. 4 ed. 120; see also Davidson Conv., vol. 3, 2 ed., p. 728 note *a*, where the law is fully discussed; Sugd. Statutes, 2 ed., 246; but see *Fisher* v. *Jameson*, 12 C.P. 601, in which case, however, the provision made was precarious, insecure, and failed; see also this case in Appeal, 2 E. & A. 242, the remarks of Esten, V.C.

(*i*) *Carruthers* v. *Carruthers*, 4 Bro. C.C. 500, 513; *Smith* v. *Smith*, 5 Ves. 188; *Fisher* v. *Jameson*, 12 C.P. 601; 2 E. & A. 242.

husband, but the wife, who might therefore never take anything.

A conveyance to a husband may be so drawn that the husband may convey the land and defeat dower. Thus, a conveyance may be made to a third person, to such uses as the husband (the real purchaser) shall appoint, and in default of and till appointment, to the use of the husband in fee; (the limitations are usually more complex than as above in fee, but it simplifies so to state them). Under such limitations, dower does attach, subject to be divested, on exercise of the power of appointment; for the husband, till exercise of the power, is seised of an estate of inheritance in possession; but on execution of the power, the appointee (a purchaser from the husband) comes in as if named in the conveyance to the third person (in consequence of the peculiar operation of such powers and appointments), and so paramount to the right of dower of the wife. The operation and effect of these conveyances is this: A. conveys by common law conveyance, or by grant, to B. in fee, to such uses as C. (the husband) shall by deed appoint, and in default of and till appointment, to C. in fee. C. sells to D., and conveys and appoints the estate to D. in fee, reciting the power of appointment. The whole transaction is now to be read as though by the first conveyance A. had conveyed to B. and his heirs, to the use of D. and his heirs; B. thus, in the event, has been a mere grantee to uses, and the Statute of Uses vests the legal estate and fee in D., by virtue of the original conveyance, and so dower is defeated. Of course, if C. dies without exercise of the power, then if the limitation be in the simple form put, the widow of C. would be entitled to her dower, which was never divested (*j*).

(*j*) It was thought at one time that it was sufficient to convey to the husband in fee to such uses as he should appoint, and until appointment to him in fee, all without the intervention of a third person as grantee to uses. There are probably few points in the law of real property which have been the subject of more conflicting weighty authority than that just stated. At one time it was supposed that inasmuch as an estate limited in default, or till exercise of a power, is a vested estate, and therefore as dower did attach, that it could not be defeated by subsequent exercise of the power. There are authorities, however, that it can be so defeated; see Park on Dower, 186; Sugden on Powers, 8th ed. 194, 479; see also *Ray* v. *Pung*, 5 B. & Ald. 561; s. c., 5 Madd. 310; and as to judgments and executions being thus defeated, *Doe d. Wigan* v. *Jones*, 10 B. & C. 459; *Tunstall* v. *Trappes*, 3 Sim. 300. It was, however, on another point that the chief difficulty arose, viz., whether, where the estate is not limited to some *third person* to uses, but directly to the purchaser himself, as stated in the text, so that he is *in by the common law*, any uses declared in his favour or on his appointment are not void. It was said that a common

The right to dower may be forfeited by elopement and adultery. By the Statute of Westminster the Second (*k*), if a wife willingly leaves her husband and goes away and continues with her adulterer, she is barred of her dower, unless her husband willingly and without coercion is reconciled to her and suffers her to dwell with him, in which case she is restored to her right. And the forfeiture occurs if the wife voluntarily lives in adultery apart from the husband, whether in the first place she has left him voluntarily, or has been driven from his house by cruelty or violence, or has been deserted, unless there has been a reconciliation (*l*). It is not necessary, for the purpose of the statute, that she should live with one man. In a case where a wife left her husband in order to live the life of a prostitute, it was held that dower was forfeited under this Act (*m*).

Dower may also be forfeited by detention of the title deeds. Thus, where to a demand for dower, it is pleaded that the demandant detains the title deeds, and she takes issue thereon,

law seisin and a use or power cannot be co-existent in the same estate in the same person; that the power would be merged in the fee; that the purchaser being in, and having the whole fee, as at common law, any further uses declared in *his* favour or on his appointment were simply nugatory and void; that in order that any such uses should have any effect, it would be requisite to separate the seisin and the use, as by conveyance to some *third person* to such uses as the purchaser should appoint, and till appointment to the use of the purchaser. These views were strongly advocated by men as eminent as Mr. Sanders and Mr. Preston; see Sanders on Uses, Vol. 1, p. 155; Preston Conveyancing, Vol. 2. p. 482; Vol. 3, pp. 265, 271, 494; see also the *first* part of the note to Watkin's Conveyancing, 9th ed., p. 281; and *Goodill* v. *Brigham*, 1 B. & P. 192. See also *Gorman* v. *Byrne* 8 Ir. C.L. Rep. 394. This constitutes a formidable array of authority against the doctrine; on the other hand, there was no less weighty and more modern authority in its favour. Lord St. Leonards, in his work on Powers, 8th ed., p. 93, reviewed all the authorities, and came to the conclusion that an estate under such an appointment could well take effect; and of this opinion also was Mr. Coventry: see his note in brackets to the first part of the note in Watkin's Conveyancing above referred to: see also per Draper, C.J., in *Lyster* v. *Kirkpatrick*, 26 U.C.R. 228. But it seems clear that on a grant to A. in fee to the use of himself and his heirs, A. takes by the common law, and not under the Statute of Uses, the statute providing that when one is seised to the use of *another*, the legal seisin shall pass to him that hath the use: see *Savill Brothers* v. *Bethell*, (1902) 2 Ch. 523.

The conveyancer should avoid all question by limiting the estate to some third person in fee to such uses as the purchaser may appoint, and in default of and till appointment to the use of the purchaser and his heirs.

(*k*) R.S.O. c. 70, s. 9.

(*l*) *Woolsey* v. *Finch*, 20 C.P. 132; *Neff* v. *Thompson*, 20 C.P. 211.

(*m*) *Re S.*, 14 O.L.R. 536.

and the issue is found against her, she shall lose her dower in the lands of which she detains the deeds (*n*).

A sale of land for taxes operates as an extinguishment of every claim upon the land, and in fact forms a new root of title, and therefore extinguishes the right to dower therein (*o*).

But a sale under an execution against the husband is a sale of the husband's interest only, and does not affect the right to dower (*p*).

Inasmuch as dower is the property of the widow, any benefit given her by the will of her husband is *prima facie* in addition to her dower, and any disposition by will of lands subject to dower is *prima facie* a disposition thereof subject to the widow's right to dower therein. But the husband's will may indicate an intention, either expressly or by implication, that the benefits given by the will are to be in lieu of dower, and in such cases the widow must elect between her dower and the testamentary gift. The acceptance by a widow of what is thus given to her in lieu of dower is a bar to her claim for dower. Where the gift is not expressed to be in lieu of dower, but is left to inference or implication, "it is not enough to say that on the whole will it is fairly to be inferred that the testator did not intend that his widow should have dower in order to justify the court in putting her to her election; it must be satisfied that there is a positive intention to exclude her from dower, either expressed or implied"(*q*).

The rule is that where the demand of dower by metes and bounds would be inconsistent with or repugnant to the disposition by the will, the widow is put to her election (*r*).

Parol evidence of the intention of the testator to exclude dower is, of course, not admissible.

In order that the widow be barred by acceptance of the provision in lieu of dower, there must have been an opportunity to elect, and a knowledge of all the facts necessary to a choice, and the acceptance must not have been in ignorance of the

(*n*) Park on Dower, p. 227.

(*o*) *Tomlinson* v. *Hill*, 5 Gr. 231.

(*p*) *Walker* v. *Powers*, R. & J. Dig. 1125.

(*q*) *Gibson* v. *Gibson*, 1 Drew. 51; see also generally *Baker* v. *Baker*, 25 U.C.R. 448; *Walton* v. *Hill*, 8 U.C.R. 562; *Pulker* v. *Evans*, 13 U.C.R. 546; *Parker* v. *Sowerby*, 4 DeG.M. & G. 321; *Baker* v. *Hammond*, 12 Gr. 485; *McLennan* v. *Grant*, 15 Gr. 65; *Fairweather* v. *Archibald*, 15 Gr. 255.

(*r*) This being a matter which falls more properly within the interpretation of wills, the subject is not pursued further. See Theobald on Wills, Can. Ed. p. 116 *b*.

provision being in lieu of dower (*s*). But she will be presumed to know that she is entitled to dower, and may by her action be held, on that presumption, to have elected (*t*).

Where a widow is entitled to dower, she may also elect between her dower and her distributive share in her husband's undisposed of realty, under the Devolution of Estates Act (*u*). This applies to cases of intestacy (*v*). She is not limited as to time by the enactment, but may elect within any time allowed by the exigencies of the administration (*w*), unless the personal representative serves a notice on her requiring her to elect; in which case, unless she elects within six months from the date of service of the notice, she will be deemed to have elected to take her dower. She is entitled to know, before electing, what the estate will produce; for, as the distributive share is a portion of the estate which remains after payment of debts, while her dower, being her own property, is not subject to her husband's debts, she cannot make a fair choice until she can compare the values of the two interests (*x*). If she has released her dower by settlement, for a consideration, she is not entitled to elect under this Act (*y*).

The election is to be made by deed or instrument in writing, attested by at least one witness (*z*), and therefore it may be made by her will (*a*).

By the R.S.O. c.75, s. 26, "no action of dower shall be brought but within ten years from the death of the husband of the dowress, notwithstanding any disability of the dowress or anyone claiming under her."

When the husband's interest was a mere right of action, the time which would bar the husband will also bar the wife, notwithstanding her coverture; and if the bar against the husband be not complete on his death, the time which has run against him will count as against the widow; for the R.S.O. c. 70, s. 5, which in such case gives her dower in virtue of such

(*s*) *Sopwith* v. *Maughan*, 30 Beav. 235.

(*t*) *Reynolds* v. *Palmer*, 32 Ont. R. 431.

(*u*) R.S.O. c. 119, s. 9. See *Re Reddan*, 12 Ont. R. 781.

(*v*) *Cowan* v. *Allen*, 26 S.C.R. 292, at p. 314.

(*w*) *Baker* v. *Stuart*, 29 Ont. R. 388; 25 App. R. 445.

(*x*) See *Re Rose*, 17 P.R. 136.

(*y*) *Tor. Gen. Trusts Co.* v. *Quin*, 25 Ont. R. 250.

(*z*) *Re Galway*, 17 P.R. 49. But she might by her conduct estop herself.

(*a*) *Re Ingolsby*, 19 Ont. R. 283.

right in her husband, limits the period of suit for dower to that within which such right might be enforced.

By R.S.O. c. 75, s. 28, "no arrears of dower or damages on account of such arrears shall be recovered or obtained by any action for a longer period than six years next before the commencement of such action."

Before the Act, 43 V. c. 16, now R.S.O. c. 75, s. 27, if a dowress remained in possession of the land out of which she was dowable to the exclusion of the heirs, the Statute of Limitations began to run against the heirs at the expiration of forty days from her husband's death, and at the end of the period of limitation they were barred (*b*). And being then solely seised in fee she could not be also dowress.

By that statute it is enacted that where a dowress is in possession, either alone or with an heir or devisee, or a person claiming, by devolution from the husband, the period of ten years within which her action of dower must be brought is to be computed from the time when her possession ceased. So that by simply remaining in possession she postpones the time of operation of the Statute of Limitations. If the widow remained in exclusive possession for the statutory period the heirs or devisees would be barred as before the statute; and if she thus gained a title in fee she could no longer be dowress. But if she gave up her exclusive possession before the statutory bar was complete, she would have ten years thereafter within which to bring her action for dower. If, however, the widow occupied the land with the heirs or devisees, the possession would be attributed to them and not her, and in that case she would gain no title by possession, but could at any time leave the land and bring her action for dower within ten years thereafter.

Since 1895 dower may be barred by deed made by the husband in which the wife joins, or signs otherwise than as a witness, although there is no bar of dower contained in the deed (*c*). Dower may also be barred by deed made by the wife alone (*d*).

Since 1894, where the wife is under age, and of sound mind, she may bar her dower by joining with her husband in a deed to a purchaser for value, or a mortgagee, in which is contained

(*b*) *Johnston* v. *Oliver*, 3 Ont. R. 26; *Hartley* v. *Maycock*, 28 Ont. R. 508.

(*c*) R.S.O. c. 70, s. 20.

(*d*) R.S.O. c. 150, s. 3.

a bar of dower (*e*). Provision is also made for enabling a husband to convey free from dower where his wife is confined in a hospital for the insane in Ontario (*f*).

Where a wife has been living apart from her husband for two years under such circumstances as disentitle her to alimony, an order may be made dispensing with the concurrence of the wife for the purpose of barring her dower (*g*). Under the previous statute the words "by law" were inserted before the word "disentitle," and, in a case where husband and wife were living apart under a contract by which she released him from any claim for alimony, it was held that she was not disentitled "by law," but by the contract, and that the statute did not apply (*h*). But under the enactment in its present form any separation disentitling the wife to alimony would bring her within the statute. It is sufficient to show merely that the wife is living apart from the husband, and that the circumstances are such that she is not entitled to alimony. The order ought not to be made *ex parte* unless under exceptional, if under any, circumstances, and the judge makes the order as *persona designata* and it is not subject to appeal (*i*).

And where a wife has been living apart from her husband for five years or more, and the husband sells or mortgages to a purchaser or mortgagee without notice that the vendor was married, such purchaser or mortgagee may obtain an order to free the land from dower (*j*).

And where the personal representatives of a deceased person desire to sell free from dower the lands of the deceased, provision is made for applying to the court for leave (*k*).

17. *Assignment of Dower.*

The widow is entitled to reside in her husband's chief house for forty days after his death, within which time her dower is to be assigned to her, and during this time she is entitled to her reasonable maintenance (*l*). This is called the widow's quarantine.

(*e*) R.S.O. c. 150, s. 6; *Crosset* v. *Haycock*, 6 O.L.R. 259; 7 O.L.R. 655.

(*f*) R.S.O. c. 70, ss. 13 *et seq.*

(*g*) R.S.O. c. 70, s. 14.

(*h*) *Re Tolhurst*, 12 O.L.R. 45.

(*i*) *Re King*, 18 P.R. 365.

(*j*) R.S.O. c. 70, s. 17.

(*k*) R.S.O. c. 119, s. 11.

(*l*) R.S.O. c. 70, s. 2.

If she is deprived of dower or quarantine, she may recover damages (*m*).

Her dower consists of the right to one-third of the land for her lifetime. She may agree with the tenants of the freehold, by an instrument in writing under their hands and seals, executed in the presence of two witnesses, either upon the assignment of dower, or upon a yearly sum, or upon a gross sum, in lieu of dower. This instrument may be registered, and its effect is, as the case may be, to entitle the dowress to hold the land assigned as tenant for life as against the assignor and all parties claiming under him; or to distrain for, or sue for the yearly sum or gross sum agreed upon in lieu of dower; and a lien on the land for the yearly or gross sum is created by the instrument when registered, and no action for dower can thereafter be brought (*n*). The primary right of the widow, however, is to have one-third of the land, and all substitutional rights must be based upon this.

If the dower is not assigned by agreement and judgment is recovered therefor, a writ of assignment may be issued to the sheriff, or it may be referred to a Master to assign the dower, or, if the parties agree, to give a yearly or gross sum to be paid in lieu of dower. If dower is to be assigned, the value of improvements made by a purchaser from the husband after the alienation, or by the heir or devisee of the husband after his death, is not to be taken into account. If such improvements have been made it is the duty of the commissioners appointed by the sheriff, or the Master, to ascertain what improvements have been made, and to award the dower out of such part of the land as does not embrace or contain such permanent improvements; but if that cannot be done, the commissioners or Master are to deduct, either in quantity or value, from the portion to be assigned in proportion to the benefit which the dowress will derive from having assigned to her a portion of the improved land (*o*). In other words, she is to have assigned to her such proportion of the improved land as would be equal to one-third of the whole land if it had not been improved (*p*). If an assignment of dower cannot be made by allotting a portion of the land, or, if the parties agree thereto, a yearly sum may be fixed, being as nearly as possible one-third of the clear

(*m*) Ibid., s. 3.
(*n*) R.S.O. c. 70, s. 21.
(*o*) R.S.O. c. 70, s. 29.
(*p*) *Robinet* v. *Pickering*, 44 U.C.R. 337.

yearly rents after deducting rates or assessments and allowances for improvements (*q*).

Where dower has been refused and the dowress seeks to recover damages therefor (*r*), or arrears of dower, the measure of damages is based upon the dowress' right to one-third of the land at the death of the husband, excluding permanent improvements, and deducting yearly rates and assessments. Although, in many cases, this cannot be accurately ascertained, the proper measure is said to be the average rental of the property since the husband's death. The dowress thus gets the benefit of a rise in the rents, and must suffer from a fall in the rents, just as she would if she had one-third of the land assigned to her (*s*).

If the land is under mortgage, so that the husband dies owning an equity of redemption, the dowress must pay one-third of the interest on the mortgage (*t*). But where the mortgage has been given for a part of the purchase money of the land, she is entitled only to one-third in the surplus over and above the mortgage money (*u*).

18. *Life Estates by Descent.*

Lastly, amongst estates for life created by operation of law might be included certain estates acquired by descent. Where, under the Inheritance Act (*v*), the person last seised died without any descendants, the land descended to his father, if living, or to his mother, if living, according to circumstances, for life, and after his or her death then to the brothers and sisters or their descendants, if any. But this has been superseded by the Devolution of Estates Act (*vv*).

And where the locatee of free grant land dies, either before or after issue of the patent, all his interest descends to his widow, if any, *durante viduitate*; but she may elect to take her dower instead (*w*).

(*q*) R.S.O. c. 70, s. 29 (2); *Wallace* v. *Moore*, 18 Gr. 56.

(*r*) See the history of her right in *Williams* v. *Thomas*, (1909) 1 Ch. 713.

(*s*) *Robinet* v. *Lewis*, Dra. 260; *Norton* v. *Smith*, 20 U.C.R. 213; *Wallace* v. *Moore* 18 Gr. 56; *McNally* v. *Anderson*, 31 O.L.R. 561; 19 D.L.R. 775.

(*t*) *Reid* v. *Reid*, 29 Gr. 372.

(*u*) *Re Auger*, 26 O.L.R. 402, 5 D.L.R. 680.

(*v*) R.S.O. (1897) c. 127, ss. 45, 46.

(*vv*) R.S.O. c. 119.

(*w*) R.S.O. c. 28, s. 47.

19. *Production of Life Tenant or Cestui que vie.*

If a *cestui que vie* or tenant for life remains out of Ontario, or absents himself in the province for seven years together, and no sufficient proof is made of the life of such person in any action to recover the land by the lessor or reversioner, such person is to be taken as naturally dead. But if, after the eviction, he is proved to have been alive, the land may be recovered by the person evicted who is entitled to recover for damages the full profits of the land (*x*).

Provision is also made for the production of any person within age, married woman, or any other person whomsoever, on the application of any person entitled in remainder, reversion or expectancy, after the death of such person.

Where the person in possession claiming under the life tenant does not respond to the application, the court will make an order for the production of the life tenant (*y*). And where there is no satisfactory proof that the *cestui que vie* is living, a similar order will be made (*z*).

An assignee of the life tenant can be ordered to produce the life tenant (*a*). And if the production is not made the tenant for life or *cestui que vie* will be declared to be dead (*b*).

(*x*) R.S.O. c. 109, ss. 42, 43.
(*y*) *Re Owen*, 6 Ch. D. 166.
(*z*) *Re Clossey*, 2 Sm. & G. 46; 8 W.R. 649.
(*a*) *Re Hall*, 44 L.T. 469.
(*b*) Ibid.

CHAPTER VI.

OF ESTATES LESS THAN FREEHOLD.

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1. *Estates for Years.*

An estate for *years* is a contract for the possession of lands or tenements, for some determinate period; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon. If the lease be but for half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of. But a lease may be for a week or from week to week, or for a month, or from month to month; still it is called an estate for years.

In 1895 and 1896 two Acts were passed which may have an important bearing upon this subject, and may render it doubtful whether the interest created by a lease can now be said to be an estate for years. The first Act (*a*) declared that "the relation of landlord and tenant shall be deemed to be founded in the *express or implied contract* of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all

(*a*) 58 V. c. 26, s. 4.

cases where there shall be an agreement to hold land from or under another in consideration of any rent." The second Act repealed this enactment, and substituted the following therefor, declaring that the repealed section was intended to express the same meaning as the new section (*b*): "The relation of landlord and tenant is not hereafter to depend on tenure, and a reversion or remainder (*c*) in the lessor shall not be necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation; nor shall any agreement between the parties be necessary to give a landlord the right of distress;" and in this form it appeared in the Landlord and Tenant Act (*d*). In the present Landlord and Tenant Act it assumes the following form: "The relation of landlord and tenant shall not depend on tenure, and a reversion in the lessor shall not be necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation; nor shall it be necessary in order to give a landlord the right of distress that there shall be an agreement for that purpose between the parties" (*e*).

It will be noticed that the present enactment contains no affirmative declaration that the relationship is to depend on contract, but contains simply four negatives, of which one is that the relationship of landlord and tenant is not to depend on tenure. As an estate in land is inseparable from tenure, it may be that the consequence of the abolition of tenure in this connection reduces the relationship of landlord and tenant to a contract of hiring of land, and that there is no such thing, properly speaking, as an estate for years in land, arising from the making of a lease. It was held in *Harpelle* v. *Carroll* (*f*), however, that the first enactment did not abolish the relationship of landlord and tenant and make the bargain a mere contract, but merely altered the mode of creating the ancient relationship. If this be the effect of the enactment, then it worked no change in the law, except that the relationship may probably now exist where the so-called landlord parts with his whole interest in the land, retaining no reversion, thus

(*b*) 59 V. c. 42, s. 3.

(*c*) It seems hardly necessary to state that the relation of landlord and tenant never existed between remainderman and particular tenant.

(*d*) R.S.O. (1897) c. 170, s. 3.

(*e*) R.S.O. c. 155, s. 3.

(*f*) 27 Ont. R. at p. 249.

extending the whole law of landlord and tenant to such a case. The question still remains unanswered, however, has the tenant an estate for years under such circumstances? (*g*) This enactment must be borne in mind as perhaps qualifying what follows as to estates for years.

Another very important question is, how the law of distress is affected? "The right of distraining seems to have originated as follows: When the tenant did not perform the feudal service due to his lord he might have been punished by the forfeiture of his estate. But these feudal forfeitures were afterwards turned into distresses according to the pignory method of the civil law; that is to say, the land set out to the tenant was hypothecated, or as a pledge in his hands, to answer the rent agreed to be paid to the landlord; and the whole profits arising from the land were liable to the lord's seizure for the payment and satisfaction of it: (Gilbert on Rents, 4). Afterwards the severity of the law came to be mitigated to a seizure of everything found on the land, and the distress was substituted for the *seizure* of the feud, so that we may easily account for the fact that the power of distraining always attended the fealty, and was inseparably incident to the reversion; for as fealty could not have been demanded by a stranger from the tenant, nor, consequently any forfeiture have been incurred by a refusal of it, so likewise a stranger could not distrain the goods of another person's tenant for non-payment of rent" (*h*). The abolition of *tenure*, the fact that the tenant should no longer hold from or under his landlord, and consequently could owe no service or fealty to him, would necessarily have ended the right of distress, but that the legislature seems to have assumed that the law on that subject remained unaffected, inasmuch as the Landlord and Tenant Act still deals with restrictions upon the right of distress.

The declaration that it shall not be necessary, in order to give a landlord the right of distress, that there shall be an agreement between the parties, seems to be based on the hypothesis that the right of distress arose out of the agreement of the parties; but this is not so. The right of distress was an incident of the reversion, a feudal right, and no agreement could give the right of distress if there were no reversion. Such an agreement would operate only to authorize the landlord to seize

(*g*) See further 17 Can. L.T. p. 253.

(*h*) *Clun's Case*, and notes, Tud. Lg. Ca. 4th ed. at p. 40.

such of the tenant's goods as might be found on the demised premises, but not the goods of other persons which might be seized where there was a reversion.

If a lease should, since this enactment, be made of the whole interest of a landlord, so that he would retain no reversion, the statute not positively giving a right of distress, but negatively declaring that no agreement shall be necessary to give the landlord the right of distress, it seems reasonably clear that no right of distress would exist in that case. Opinion on this enactment, however, is purely speculative, and as hazardous as it is speculative.

2. *Leases Required to be by Deed.*

By the Statute of Frauds it was enacted that all leases or terms of years (except those not exceeding three years on which a rent equivalent to two-thirds of the full improved value was reserved) should be in writing, otherwise they should have the effect of estates at will only. But if entry were made under a lease not within the statute and rent were paid by the year, or with reference to the aliquot part of a year, it was held that the tenant became tenant from year to year. By another statute (*i*) it was enacted that "a lease, required by law to be in writing, of land . . . shall be void at law, unless made by deed." At law this was interpreted to mean that a deed was merely substituted for the signed writing required by the earlier enactment, and that the imperfect document created only an estate at will (*j*). But if the tenant entered and paid rent he held as tenant from year to year (*k*). But in equity, if there was an agreement for a lease, or if a lease in form failed as such for want of a seal, and the circumstances were such that specific performance would be decreed, the tenant was not held to be tenant at will, but was held to be entitled to the term called for by the writing (*l*). Since the Judicature Act came into force in England it has been uniformly held that where there is an agreement for a lease (and a lease wanting a seal would fall within this), and possession has been taken under it, and the circumstances are such that specific performance would be

(*i*) R.S.O. (1897) c. 119, s. 7.

(*j*) See *Hobbs* v. *Ont. L. & D. Co.*, 18 S.C.R. at p. 498.

(*k*) *Tress* v. *Savage*, 4 El. & Bl. 36.

(*l*) *Parker* v. *Taswell*, 2 DeG. & J. 559; *Zimbler* v. *Adams*, (1903) 2 K.B. 577.

adjudged, the parties are, for some purposes, treated exactly as if a formal lease had been executed, and the landlord may distrain for rent (*m*).

In *Manchester Brewing Co.* v. *Coombs* (*n*), Farwell, J., said: "Although it has been suggested that the decision in *Walsh* v. *Lonsdale* takes away all difference between the legal and the equitable estate, it, of course, does nothing of the sort, and the limits of its applicability are really somewhat narrow. It applies only to cases where there is a contract to transfer a legal title, and an act has to be justified or an action maintained by force of the legal title to which the contract relates. It involves two questions: (1) Is there a contract of which specific performance can be obtained? (2) If yes, will the title acquired by such specific performance justify at law the act complained of, or support at law the action in question? It is to be treated as though before the Judicature Act there had been, first, a suit in equity for specific performance, and then an action at law between the same parties, and the doctrine is applicable only in those cases where specific performance can be obtained between the same parties, in the same court, and at the same time as the subsequent legal question falls to be determined. Thus, in *Walsh* v. *Lonsdale*, the landlord under an agreement for a lease for a term of seven years distrained. Distress is a legal remedy, and depends on the existence at law of the relation of landlord and tenant, but the agreement between the same parties, if specifically enforced, created that relationship. It was clear that such an agreement would be enforced in the same court and between the same parties. The act of distress was therefore held to be lawful" (*o*).

Though the parties to such an agreement are for some purposes treated as landlord and tenant, they are not so considered for all purposes, *e.g.*, the agreement was not, before the present statute (*p*), a lease within the meaning of the enactment requiring notice to be given before re-entering for "breach of any covenant or condition contained in the lease" (*q*).

(*m*) *Walsh* v. *Lonsdale*, 21 Ch.D. 9; *Lowther* v. *Heaver*, 41 Ch.D. at p. 264; *Crump* v. *Temple*, 7 Times L.R. 120; *Rogers* v. *National Drug Chemical Co.*, 23 O.L.R. 234; 24 O.L.R. 486.

(*n*) (1901) 2 Ch. at p. 617.

(*o*) And, as to the difference between equitable rights and equitable interests, see *Commissioners of Inland Rev.* v. *Angus*, 23 Q.B.D. 579.

(*p*) 1 Geo. V. c. 37, s. 20, now R.S.O. c. 155, s. 20.

(*q*) *Swain* v. *Ayres*, 20 Q.B.D. 585; 21 Q.B.D. 289.

These cases treat the Judicature Act as impliedly repealing the enactment in question, and the practical result is that, except for certain purposes, and in the conditions mentioned, an agreement for a lease, or a lease in due form but wanting a seal, puts the parties to it for many purposes in the same position as if a proper lease had been duly executed. The matter, however, remains somewhat uncertain in Ontario. In *Hobbs* v. *Ont. L. & D. Co.* (*r*), Strong, J., thus explained the combined effect of the two statutes: "The later statute is to be read and construed merely as substituting a deed for the signed writing required by the earlier enactment, and the avoidance of the lease has reference only to its nullity as a lease of a term; the tenancy at will arising in such a case is not created by, nor is it dependent on, the lease, but is a creation of the statute, a statutory consequence of the attempt to create a lease by parol for more than three years, and of the nullity of such a proceeding declared by the statute . . . In other words, it is apparent that the tenancy at will in such a case did not arise from the agreement of the parties, but was the effect of the statute which has never been repealed." And Mr. Justice Patterson in the same case said: "I am not prepared to hold, without more direct authority than is furnished by the cases cited, that the enactment of the Judicature Act that, in matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail, has so completely done away with distinction between a lease and an agreement for a lease as to render lands which are the subject of an agreement only 'lands or tenements which are or shall be for life or lives term of years at will or otherwise'; which are the words of the statute."

At present the enactment is in the present form: "All leases and terms of years of any messuages, lands, tenements or hereditaments shall be void at law unless made by deed" (*s*). But this enactment is not to apply to a lease or an agreement for a lease, not exceeding the term of three years from the making thereof, the rent upon which amounts to two-thirds at the least of the full improved value of the thing demised (*t*). The only difference between the present and the prior enact-

(*r*) 18 S.C.R. at p. 498.
(*s*) R.S.O. c. 102, s. 2 (2).
(*t*) Ibid. s. 4.

ments is that, whereas the Statute of Frauds declared that where a writing was required and none was made the effect would be to create an estate at will, the present enactment leaves open the consequences of omission to make a deed. But it is apprehended that the result would be the same as before. If no writing is made and the tenant enters and pays rent, he would become tenant from year to year. If a writing is made but it is not sealed it would, on equitable grounds form an agreement for a lease.

3. *Division of Time.*

The reference to the term of a year may not improperly lead us into a short digression concerning the division and calculation of time by the English law.

The space of a year is a determinate and well-known period, consisting commonly of 365 days; in leap-years it consists of 366. That of a month was at common law more ambiguous, there being in common use two ways of calculating months—either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year; or as calendar months of unequal lengths, according to the Julian division in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve. A month in law was a lunar month or twenty-eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for "twelve months" was only for forty-eight weeks; but if it were for "*a* twelvemonth," in the singular number, it was good for the whole year. For herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases; it being generally understood that by the space of time called thus, in the singular number, a twelvemonth is meant the whole year, consisting of one solar revolution (*u*).

The word "month" now universally means a calendar month (*v*). In the space of a day all the twenty-four hours are usually reckoned, the law generally rejecting all fractions of a day in order to avoid disputes; therefore, if I am bound to pay a certain sum of money "within ten days," I discharge the obligation if I pay before twelve o'clock at night of the

(*u*) See *Manufacturers' Life Assurance Co.* v. *Gordon*, 20 App. R. 309.
(*v*) R.S.O. c. 132, s. 3.

last day. And the general rule is that Acts of the legislature and judicial proceedings take effect from the earliest moment of the day on which they originate or come into force (*w*). Thus a writ of execution issued and tested at four in the afternoon of the first day of January was held not to remain in force till a corresponding hour on the first day of January following, but the whole of the day of its issuing was included, and consequently the whole of the first day of January following excluded, and at midnight of the thirty-first day of December the writ expired unless acted on (*x*). As to this the language of the former Execution Act, R.S.O. 1887, c. 66, s. 11, was that the writ "shall remain in force for one year *from the teste*," etc. The law does not reject the consideration of a portion of a day in any case in which it is requisite to consider it, as for instance in determining the priority of delivery of executions to a sheriff. The rule, as stated in a recent case, that judicial proceedings are, where it is necessary to sustain them or to preserve their priority, to have relation to the earliest hour of the day, is a fiction not to be extended or applied when it is not necessary for these purposes (*y*).

4. *Incidents of Estate for Years.*

But to return to estates for years. These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own, and from this has sprung the principle of law that the possession of the tenant is the possession of the landlord or reversioner.

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited and determined; for every such estate must have a certain begin-

(*w*) *Converse* v. *Michie*, 16 C.P. 167; *White* v. *Treadwell*, 17 C.P. 488.
(*x*) *Bank of Montreal* v. *Taylor*, 15 C.P. 107.
(*y*) *Barrett* v. *The Merchants Bank*, 26 Gr. 409.

ning and certain end. But *id certum est, quod certum reddi potest*; therefore, if a man make a lease to another, for so many years as J.S. shall name, it is a good lease for years; for though it is at present uncertain, yet when J.S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease. A lease for so many years as J.S. shall live, is void from the beginning; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease; but possibly if on such a lease, livery of seisin were made by a lessor seised of the freehold, it might operate as a feoffment for the life of J.S. (*z*); or, if livery were not made, it would be construed as a contract to grant an estate for the life of J.S. by a proper conveyance. But a lease for twenty years, if J.S. should so long live, or if he should so long continue parson, is a good lease for twenty years; for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J.S., or his ceasing to be parson there.

We have before remarked, and endeavoured to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance; observing, that an estate for life, even if it be *pur autre vie*, is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate. Hence it follows, that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate of freehold can commence *in futuro*; because it could not be created at common law without livery of seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter (*zz*).

The statement that no estate of freehold can be created to commence *in futuro*, must, however, be considered as confined to the direct effect of a common law conveyance or a grant; for by deed of bargain and sale or other conveyance operating under the Statute of Uses, wherein livery of seisin or prior possession in the grantee is not required, a freehold estate can

(*z*) Co. Litt. 45b, n. 2, by Hargrave. See per Kennedy, J., *Austin* v. *Newham*, (1906) 2 K.B. 167.

(*zz*) *Savill Bros.* v. *Bethell*, (1902) 2 Ch. 523

be limited to commence *in futuro*; thus A. can bargain and sell to, or covenant to stand seised to the use of, or grant to the use of, B. and his heirs, from a future day, on the arrival of which the estate will vest, the seisin of the freehold in the meantime remaining in the bargainor, covenantor or grantor.

And because no livery of seisin is necessary to a lease for years, such lessee is not said to be *seised* or to have true legal seisin of the lands, nor indeed does the bare lease vest any estate in the lessee, but only gives him a right of entry on the tenement, which right is called his *interest in the term*, or *interesse termini*. A lease to commence *in futuro* merely gives a right to the possession at a future time, or an *interesse termini*. Until that time it creates a right, but not an estate, even though the tenant is in possession under another existing lease terminating at the commencement of the future lease (*a*). When, however, the tenant has actually entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is *possessed*, not properly of the land, but of the term of years; the seisin of the *land* remaining still in him who hath the freehold. Thus the word *term* does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire during the continuance of the *time*; as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A. for the term of three years, and after the expiration of the said *term* to B. for six years, and A. surrenders or forfeits his lease at the end of *one* year, B.'s interest shall immediately take effect; because the term is at an end (*b*); but if the remainder had been to B., from and after the expiration of the said *three years*, or from and after the expiration of the said *time*, in this case B.'s interest will not commence till the time is fully elapsed, whatever may become of A.'s term.

Estates less than freehold are chattels only in the eye of the law, yet inasmuch as they savour of the realty, they are sometimes termed *chattels real*. They devolve on death upon executors and administrators, and never went to the heir; and the proper limitation in a lease for years is to executors, though it will be sufficient if such limitation be omitted, as the law in such case will cast the estate on the executors or

(*a*) *Lewis* v. *Baker*, (1905) 1 Ch. 46; *Llangattock* (*Lord*) v. *Watney*, (1910) 1 K.B. 236.

(*b*) *Wrotesley* v. *Adams*, Plow. 198. See *Hall* v. *Comfort*, 18 Q.B.D. 11.

administrators. It follows also that these estates are not saleable by the sheriff under a writ against lands, but are under a writ against goods.

5. *Emblements.*

With regard to emblements, or the profits of lands sowed by tenant for years, there is this difference between him and the tenant for life; that where the term of tenant for years depends upon a certainty, as if he holds from Midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before Midsummer, the end of his term, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of. But where the lease for years depends upon an uncertainty; as, upon the death of the lessor, being himself only tenant for life, or if the term of years be determinable upon a life or lives, or on notice by either party, and the lessor give the notice (*c*); in all these cases the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, or of the lessor, the tenant, or his executors, shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. Not so, if it determine by the act of the party himself; as if a tenant for years does any thing that amounts to a forfeiture; in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default.

6. *Waste.*

At common law tenant for years was not liable for waste; because he came in by the act of the lessor, and he might have provided against waste on making the lease (*d*). But by the Statute of Marlbridge (*e*), tenant for years, and by the Statute of Gloucester (*f*), tenant for life, by act of the parties, were made liable for waste.

Tenant for years is liable for permissive waste (*g*), though his liability is usually defined by express covenant.

Alterations of shop premises by a tenant for years, under

(*c*) *Campbell* v. *Baxter*, 15 C.P. 42.

(*d*) 2 Inst. 145.

(*e*) R.S.O. c. 109, s. 32.

(*f*) Ibid., s. 29.

(*g*) *Harnett* v. *Maitland*, 16 M. & W. 257; *Yellowly* v. *Gower*, 11 Ex. 293; *Morris* v. *Cairncross*, 14 O.L.R. 544.

covenants to repair and keep in repair, by making a door through a brick wall to get access to a portion of the demised premises which could theretofore be reached from the outside only, altering a partition, converting a front shop window into a door, there being no damage to the reversion, were held not to constitute waste (*h*). In *Holman* v. *Knox* (*i*), making an opening in a brick wall so as to afford access to the adjoining building which the tenants had a lease of, was considered to be waste, although there was no injury to the reversion. But in *Hyman* v. *Rose* (*j*), changing a chapel into a theatre was held not to be waste, there being no injury to the reversion. In order to establish waste as against the tenant it must be shown that there is an injury to the reversion (*k*).

Where a lease was made of wild lands, the tenant covenanting to yield up all improvements though the lease did not bind him to make any, he was restrained from cutting down timber without clearing the land, although that was the only source of profit to him, as he intended merely to sell the timber and neither make improvements nor to clear the land (*l*).

And where a lease of land covered with water was made, the tenant was held liable for damages for removal of sand (*m*).

7. *Estates at Will.*

The second species of estates not freehold are estates at *will*. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession. It may perhaps be laid down, that wherever a person is in possession of land in which he has no freehold interest, or tenancy for a term certain, and which he nevertheless holds by the mutual consent of himself and the true owner, such person is tenant at will, and as such is liable to pay for his occupation (*n*); but, as will presently appear, if rent be paid,

(*h*) *Holderness* v. *Lang*, 11 Ont. R. 1.

(*i*) 24 O.L.R. 588.

(*j*) (1912) A.C. 623.

(*k*) *Jones* v. *Chappell*, L.R. 20 Eq. at p. 541; *Tucker* v. *Linger*, 21 Ch.D. at p. 29.

(*l*) *Goulin* v. *Coldwell*, 13 Gr. 493.

(*m*) *Toronto Harbour Com'rs* v. *Royal Can. Yacht Club*, 29 O.L.R. 391. And see *West Ham. Central Charity Board* v. *East Lond. W.W. Co.*, (1900) 1 Ch. 624.

(*n*) See *Clayton* v. *Blakey*, 2 Smith Lg. Ca., 10th ed. 124, and notes.

quâ rent, with reference to a year or any aliquot part of a year, the law will usually construe the tenancy as one from year to year; and, if rent be paid by the week or by the month, it will be evidence of a weekly or monthly tenancy. A tenant at will has no certain indefeasible estate, nothing that can be assigned by him to any other; for the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant, so that either of them may determine his will, and quit his connection with the other at his own pleasure. Yet this must be understood with some restriction. For, if the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits. And this for the same reason upon which all the cases of emblements turn, viz., the point of uncertainty, since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will, for in this case the landlord shall have the profits of the land.

By the Statute of Limitations (*o*) it is enacted that every tenancy at will shall be deemed to determine at the expiration of one year from its commencement, unless it is determined sooner, after which time begins to run against the landlord; so that, for the purpose of that enactment at any rate, an estate at will can last but a year.

What act does or does not amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer, which must either be made upon the land, or notice must be given to the lessee) the exercise of any act of ownership by the lessor, as entering upon the premises and cutting timber, or making a feoffment, with livery of seisin (in which case notice to the tenant is presumed), or making an ordinary conveyance, or lease for years of the land, to commence immediately, coupled with notice to the tenant of

(*o*) R.S.O. c. 75, s. 6 (7).

such conveyance or lease is a sufficient determination by the lessor of the tenancy.

It is requisite that the landlord should give the tenant *notice* if the act relied on be done *off* the premises; where the act is done *on* the land it is presumed the tenant is there and knows of it (*oo*). As regards acts done by the landlord on the land, it has been laid down that "if he do any act on the lands for which he would otherwise be liable to an action of trespass at the suit of the tenant, such act is a determination of the will, for so only can it be a lawful and not a wrongful act" (*p*). Any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with the tenure (*q*); or, which is *instar omnium*, the death of either lessor or lessee, puts an end to or determines the estate at will (*r*). It would seem, however, that where the tenant *by his own act*, as by assignment of his estate, does that which, if coupled with notice, would be a determination as against the lessor, still if the latter have no notice of such act, the tenancy is not thereby to be deemed determined so as to deprive the lessor of his remedies as landlord. Thus if a tenant at will at a rent should assign, the lessor, having no notice of the assignment, may distrain for the rent (*s*).

The law is, however, careful that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of emblements before mentioned; and, by a parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils. Where a lease expired, and a tenancy at will was created by express agreement, it was held that the terms of the lease applied to the tenancy at will as far as they were applicable (*t*). And, if rent be payable quarterly or half-yearly, and the lessee de-

(*oo*) *Pinhorn* v. *Souster*, 8 Ex. 770, per Parke, arguendo. See also *Doe d. Davies* v. *Thomas*, 6 Ex. 856; *Richardson* v. *Langridge*, Tud. Lg. Ca. 4th ed. 4, and note 17.

(*p*) Per Denman, C.J., *Turner* v. *Doe d. Bennett*, 9 M. & W. 646.

(*q*) *Richardson* v. *Langridge*, *supra*.

(*r*) Blackstone adds that taking a distress for rent and impounding it on the premises would be a determination by the landlord of the tenancy; and this formerly was so, because formerly the landlord could not impound on the premises; but now he can so impound (R.S.O. c. 155, s. 50 (4)), per Martin, B., *Doe d. Davies* v. *Thomas*, 6 Ex. 858.

(*s*) *Pinhorn* v. *Souster*, 8 Ex. 856.

(*t*) *Morgan* v. *William Harrison Ltd.*, (1907) 2 Ch. 137.

termines the will, the rent shall be paid to the end of the current quarter or half year, but if the lessor determines he loses the rent (*u*).

These remarks must be understood as confined to a case where the tenancy at will has not been converted into a tenancy for years by the act of the parties, of which periodical payment of rent is evidence. And possibly, since the Apportionment Act, the rent would be apportioned in such a case. It must also be observed that there cannot be a tenancy at will for a term certain (*v*).

8. *Tenancy from Year to Year.*

Courts of law have leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will, but have rather held them to be *tenancies from year to year*, so long as both parties please, especially where an annual rent is reserved; in which case they will not suffer either party to determine the tenancy, even at the end of the year, without reasonable notice to the other, which is to be, under ordinary circumstances, half a year at least prior to the expiry of the current year of the tenancy. Thus, if the tenancy commenced on the tenth day of July, a notice to quit given on the next tenth day of January would be too late, and the tenant be entitled to hold for another year from the next tenth day of July, and be entitled further to a proper notice, to be given him half a year at least prior to such last named day. The notice is to be half a year, not six months, and the difference is material if February happen to be one of the months included in the period, in which case the period would not comprise half a year, which must be a full half year, and thus not 182, but 183 days. The mode of computation is to exclude the first and include the last day of the time covered by the notice, and the day of quitting mentioned in the notice may be the day after the expiration of the term. Thus a notice given on 17th November, 1893, to quit on 19th May following, the tenancy having begun on 19th May, 1890, was held good (*w*).

Inasmuch as a lease from year to year requires a half year's notice ending with the year to determine it, any modification of the right to give a terminating notice must be distinctly

(*u*) *Richardson* v. *Langridge*, Tud. Lg. Ca. 4th ed. 19.

(*v*) Bac. Abr. Tit. Leases (L) 3. And see *Morton* v. *Woods*, L.R. 4 Q.B. 293; *Re Threlfell*, 16 Ch.D. 274.

(*w*) *Sidebotham* v. *Holland*, (1895) 1 Q.B. 378.

expressed. Thus where a lease was made to continue "until such tenancy shall be determined as hereinafter mentioned," and it contained an agreement that either party might determine the tenancy by giving three months' notice in writing for that purpose, it was held to be a lease from year to year, determinable only by a three months' notice expiring with a year of the tenancy (*x*). The time for giving the notice was not affected by this agreement, but only the length of the notice.

But if the agreement is that the lease may be determined by three months' notice "at any time," it is not necessary that the notice shall expire at the end of a quarter (*y*).

A demise for two years certain, and thereafter from year to year, until either party gives a three months' notice to determine the tenancy, is a tenancy for three years at least, and not for two years, and is only determinable by a notice expiring at the end of the third or any subsequent year (*z*). And where a farm was let for three years commencing on 25th March, 1907, and so on from year to year until the tenancy should be determined by one party giving to the other one year's notice, it was held that a notice given on 21st March, 1910, to quit on the 25th March, 1911, was good (*a*).

And where a tenant under a lease containing a provision that the lease might be determined "at the end of any month" by either party giving the other one month's notice, and the tenant held over and paid rent whereby he became tenant from year to year, it was held that the provision for determining the lease was not inconsistent with a tenancy for year to year, and that the latter might be terminated by a month's notice; the month being a month of the tenancy, and not a calendar month (*b*).

A yearly tenancy determinable on a six months' notice given on 1st March or 1st September in any year may be determined by a notice given before one of these dates, expiring six months after the next date, and is good although it is a notice to quit "at the earliest possible moment" (*c*).

In tenancies from week to week or month to month, re-

(*x*) *Lewis* v. *Barker*, (1905) 2 K.B. 576; (1906) 2 K.B. 599; *Dixon* v. *Bradford*, (1904) 1 K.B. 444.

(*y*) *Soames* v. *Nicholson*, (1902) 1 K.B. 157.

(*z*) *Re Searle*, (1912) 1 Ch. 610.

(*a*) *Herron* v. *Martin*, 27 T.L.R. 431.

(*b*) *Re Rabinovitch & Booth*, 31 O.L.R. 88; 19 D.L.R. 296.

(*c*) *May* v. *Borup*, (1915) 1 K.B. 830.

spectively, a week's and a month's notice to quit, respectively, ending with the week or month, suffices to determine the tenancy (*d*).

Service of a notice to quit need not be personal; a notice by parol to the tenant is good; it must be positive and not in the alternative; thus notice to quit "or that you agree to pay double rent" would be bad (*e*).

A notice to quit, if improperly given by the tenant, may still be accepted, and if accepted by the landlord, even without knowledge that it was improperly given, it puts an end to the tenancy. Thus, in a lease to a naval officer, there was a provision that if he should be ordered away from Portsmouth he might put an end to the lease by giving one quarter's notice in writing. He received orders to leave, but they were cancelled and he retired on half pay. Subsequently he gave the notice, vacated the house, and the landlord, believing the notice to be good, accepted the surrender. It was held that the lease was put an end to, but that the giving of the notice when he was not entitled to do so was a breach of the agreement in the lease, and that the landlord was entitled to damages for the breach, viz., the equivalent of the rent lost (*f*).

Where a notice to quit contains a condition for cancelling which is illegal, it is not thereby vitiated. Thus, a tenant, in a proper notice to quit, stated that he hoped to re-organize his business, in which case he would cancel the notice, and it was held that it did not affect the validity of the notice (*g*).

The leaning of the courts against uncertain tenures at will in favour of the more certain tenures from year to year has caused the latter to be of no unfrequent occurrence. It may be stated, as a general rule, that wherever there is a tenancy, and a payment of rent with reference to a year, or some aliquot part of a year, and there is no evidence from which it can be shown that a tenancy of another nature was agreed on, the law will assume the tenancy to be one from year to year; and where a tenant, having no certain interest, pays rent, with reference to a year, or aliquot part of a year, this unexplained is evidence of a tenancy from year to year. But the payment must be with reference to a certain period of holding; for if there be an agreement without reference to any certain period

(*d*) R.S.O. c. 155, s. 28.
(*e*) *Doe d. Matthew* v. *Jackson*, per *Lord Mansfield*, 1 Doug. 176.
(*f*) *Gray* v. *Owen*, 26 T.L.R. 297.
(*g*) *May* v. *Borup*, (1915) 1 K.B. 830.

of holding, and the rent reserved accrue due, or be paid *de die in diem*, or without reference to any fixed portion of a year, thereby alone a tenancy from year to year will not arise. And if the intention of the parties be express and apparent to create a mere tenancy at will, even the fact of the rent being reserved payable with reference to a year, or aliquot portion, as, for instance, quarterly or yearly, will not create a tenancy from year to year, and override the clearly expressed intention of the parties (*h*). Though payment of rent with reference to a year, or aliquot portion, unexplained, gives rise to an implication of a yearly tenancy, still both payer and receiver may show the circumstances under which payment was made for the purpose of repelling the implication (*i*).

And where a tenant for a term certain holds over after the expiration of the term, and pays rent, or agrees to payment at the previous rate, a presumption is raised that a new tenancy from year to year is created upon all of the same terms and conditions as are contained in the expired lease, which are applicable to and not inconsistent with a yearly tenancy (*j*). And although, after the expiration of the original term, rent be paid by the month, the tenancy is still presumably a tenancy from year to year, unless it is affirmatively established against this presumption that the intention was to make a monthly tenancy (*k*). This presumption is founded upon the assent of both parties to the continuance of the relationship, and may be rebutted by evidence of mistake or want of knowledge of facts which would have prevented the assent (*l*).

A tenancy from year to year is not a succession of terms of a year each, but is one continuous term (*m*), every succeeding year springing out of the original contract and being part of it (*n*).

An agreement for a lease for twelve months, with an option for a lease after that at £30 per annum, under which possession

(*h*) *Richardson* v. *Langridge*, 4 Taunt. 128; see *Clayton* v. *Blakey*, 2 Smith Lg. Ca. 10th ed. 124, and notes.

(*i*) Ibid.; *Doe d. Rigge* v. *Bell*, 2 Smith Lg. Ca. 10th ed., notes at p. 121.

(*j*) *Bishop* v. *Howard*, 2 B. & C. 100; *Hyatt* v. *Griffiths*, 17 Q.B. 505.

(*k*) *Young* v. *Bank of Nova Scotia*, 34 O.L.R. 176.

(*l*) *Mayor of Thetford* v. *Tyler*, 8 Q.B. 95; *Doe d. Lord* v. *Cerago*, 6 C.B. 90; *Oakley* v. *Monck*, 4 H. & C. 251.

(*m*) *Sherlock* v. *Milloy*, 13 C.L.T. Occ. N. 370.

(*n*) See *Oxley* v. *James*, 13 M. & W. at p. 214; *Cottley* v. *Arnold*, 1 J. & H. at p. 660.

was taken, was held to entitle the lessee to a lease for twelve months, at least, at the expiration of the first year, being all that was asked (*o*). Kennedy, J., thought that the lessee might have a lease for his life. And in *Zimbler* v. *Adams* (*p*), the plaintiff signed an agreement saying, "I have let . . . at a weekly rental . . . and I agree not to raise Mr. A. any rent as long as he lives in the house and pays rent regular and shall not give him notice to quit;" and it was held to be an agreement for a life lease at a weekly rent, though void as a lease for want of a seal.

9. *Tenancy at Sufferance.*

A tenancy at *sufferance* is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all; as if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate (*q*).

The tenancy can only arise by implication of law, and it cannot be created by contract.

In actions for the recovery of land, it is frequently necessary to determine whether the defendant is tenant at will or by sufferance; for if he be tenant at will, he cannot be ejected without a determination of the tenancy by notice to quit, or demand of possession, or other act sufficient for that purpose; but if he be a tenant at sufferance, or overholding tenant, there is no necessity for any such steps prior to the action. And in reference to this question of some practical importance, Richards, J., remarks (*r*): "As a general rule where a party is let into possession as purchaser he becomes tenant at will, and cannot be turned out of possession without a previous demand, but many cases in our courts go to the extent that where a party enters agreeing to pay by a certain day, and makes default, then he may be ejected as having forfeited his right. Where parties, after the expiry of the time for payment in a mortgage or agreement, or after a forfeiture in a lease, remain on premises without being recognized as lawfully in possession, they are tenants at sufferance, and not entitled to a demand of possession" (*s*).

(*o*) *Austin* v. *Newham*, (1906) 2 K.B. 167.
(*p*) (1903) 1 K.B. 577.
(*q*) 2 Inst. 134; 1 Inst. 271.
(*r*) *Lundy* v. *Dovey*, 7 C.P. 40.
(*s*) *Doe d. Bennett* v. *Turner*, 7 M. & W. 225.

Tenants at sufferance are not entitled to emblements (*t*).

10. *Overholding Tenants—Remedies.*

Remedies are afforded to landlords as against their tenants, who hold over after the determination of their leases, by various statutes presently referred to. The determination (among other modes, as by surrender or merger) may be by efflux of time and the expiry of the term granted; by forfeiture, as where the landlord has the right to re-enter on non-payment of rent; or by notice to quit by either party, as in cases of tenancies at will or from year to year. As above stated, a tenant merely holding over after determination of his term becomes tenant at sufferance.

The landlord, if he have acted so as to raise a presumption of continued tenancy, may sue the tenant for his use and occupation of the land from the time of the determination of the original tenancy.

By statute 4 Geo. II. c. 28, s. 1 (*u*), where a tenant for life, lives or years, or any person claiming under or by collusion with the tenant, *wilfully* holds over after the determination of the term, and after notice in writing given by the landlord for delivering the possession thereof, the tenant is to pay to the landlord at the rate of double the yearly value of the land so detained, for and during the time he so holds over, and against this penalty there is no relief.

This enactment does not apply to weekly or monthly tenants (*v*).

The controlling word, as to the nature of the holding over, is "wilfully;" and in order to render the tenant liable for the penalty there must be shown "clear contumacy" on the part of the tenant, and no doubt as to the landlord's right (*w*), or wilful and contumacious holding over by the tenant after notice to quit, and no *bona fide* holding on by mistake (*x*), or an absence of a *bona fide* belief that he is justified in holding over, as where it was questionable whether A. or B. had the title to the reversion and he believed that B. was the owner when in fact it was A. who was entitled (*y*).

(*t*) Ibid.
(*u*) Now R.S.O. c. 155, s. 57.
(*v*) Foa L. & T. 4th ed. 758.
(*w*) *Wright* v. *Smith*, 5 Esp. 215.
(*x*) *Soulsby* v. *Newing*, 9 East 313.
(*y*) *Swinfen* v. *Bacon*, 6 H. & N. 184.

By a subsequent Act, 11 Geo. II. c. 19, s. 18 (*z*), where a tenant gives notice to quit and does not accordingly deliver up possession at the time mentioned in the notice, the tenant is to pay thenceforward to the landlord double the yearly *rent* to be levied, sued for and recovered at the same time and in the same manner as the single rent before such notice could be levied, sued for or recovered, during the time that the tenant continues in possession.

It will be noticed that where the landlord demands possession of an overholding tenant the penalty is payment of double the yearly value of the land, and this can be recovered by action only, whereas where the tenant gives notice to quit and holds over he must pay double the yearly rent, and this may be recovered in any way in which the single rent might have been recovered, and therefore the landlord may distrain, as well as sue, for it.

An additional remedy against an overholding tenant is provided by a summary proceeding to recover possession of the demised premises.

The present enactment provides that where the lease or right of occupation has expired or been determined, either by the landlord or by the tenant, by notice to quit or by any other act whereby a tenancy or right of occupancy may be determined, and the tenant "wrongfully refuses or neglects to go out of possession," the landlord may apply to the County Court Judge for an inquiry (*a*). It will be noticed that the two grounds for the application are wrongful refusal, and neglect, to go out of possession. No demand on the part of the landlord is expressly required, but the use of the word "refusal" seems to imply it, especially when contrasted with "neglect."

The judge then makes an appointment for the inquiry as to whether the tenancy has determined, whether the tenant "holds the possession against the right of the landlord," and whether "having no right to continue in possession" he "wrongfully refuses to go out of possession" (*b*). It will be noticed that "neglect" is omitted from this sub-section, and the judge is authorized to inquire whether the tenant holds against the right by the landlord, and if so whether he wrongfully refuses to go out.

(*z*) Now R.S.O. c. 155, s. 58.
(*a*) R.S.O. c. 155, s. 75 (1).
(*b*) Ibid. s. 75 (2).

On the return of the appointment, whether the tenant appears or not, "if it appears to the judge that the tenant wrongfully holds against the right of the landlord," he may order a writ of possession to issue (*c*). It will be noticed that this section does not expressly mention neglect, and says nothing about refusal, to go out of possession, but authorizes the judge to act if the tenant "wrongfully holds against the right of the landlord." The latter expression would probably include mere neglect to give up possession, having regard to the fact that such neglect is, by sec. 75 (1), one of the grounds for applying. But it is a matter of doubt whether there must be a "refusal" to go out, which is one of the grounds for applying, and one of the matters directed to be inquired into by s. 75 (2). But as an express demand of possession was necessary under the former statute (*d*), and that has been repealed, a formal demand probably need not now be made, but some evidence of refusal to go out should be given unless that part of the enactment relating to refusal is to be quite disregarded, or unless mere neglect will be sufficient. Although on the final inquiry the judge has merely to be satisfied that the tenant "wrongfully holds against the right of the landlord," it is part of the inquiry to ascertain whether the tenant wrongfully refuses to go out of possession; and, if effect is to be given to this part of the enactment, the judge must be satisfied of two things, viz., that tenant wrongfully holds against the right of the landlord, and wrongfully refuses to give up possession; and there is nothing inconsistent in so interpreting the statute. On the contrary, it gives effect to both clauses.

It has been held that the County Court Judge must now determine all cases (*e*), but if, on an appeal to a Divisional Court, that court should be of opinion that the right to posesssion should not be determined in a proceeding under this enactment it may discharge the order and leave the parties to an action (*f*).

There are therefore some cases which ought not to be determined under this procedure, but only the Divisional Court can pronounce upon them.

The inconvenience of this procedure is apparent, for all the

(*c*) Ibid. s. 77.

(*d*) R.S.O. (1897) c. 171, s. 3.

(*e*) *Re St. David's Mountain Spring Water Co.*, 7 D.L.R. 84; *Re Dickson Co. & Graham*, 8 D.L.R. 928.

(*f*) R.S.O. c. 155, s. 78; *Re Dickson Co. & Graham*, 8 D.L.R. 928.

proceedings before the judge become useless if the Appellate Court thinks that the case ought not to be so disposed of. It would be more in harmony with the spirit of the Act if the jurisdiction of the judge were limited to cases where the tenant holds over with no *bona fide* belief that he has a right to do so, i.e., that he "wrongfully" so holds, and "wrongfully refuses to give up possession."

We have seen that, where it is sought to make an overholding tenant liable for double the yearly value of the land, it must be shown, in order to satisfy the expression "wilfully holds" (*g*), that the holding over is contumacious, and with no *bona fide* belief in the tenant that he has any right to hold over. And the expression "wrongfully holds" in proceedings for possession is even stronger, and indicates some mental attitude on the part of the tenant which has to be considered in the inquiry (*h*). At present, however, the practice is for the judge in the first instance to try every case, and if a Divisional Court thinks that a case ought not to be so tried, it may discharge the order, and leave the parties to an action.

Where the lease is determinable for breach of covenants, and the landlord elects to forfeit, he must give the notice required by s. 20 before he can take proceedings under this part of the Act (*i*).

Mere non-payment of rent or breach of covenant by the tenant does not *per se* determine the lease, unless determined under a right acted on expressly reserved to the landlord to re-enter thereon; but now in all leases there is deemed to be included, unless otherwise agreed on, an agreement that if any rent remain unpaid for fifteen days after it is due, the landlord may re-enter without any formal demand for the rent (*j*). So much does the law lean against forfeiture, that to determine a lease for forfeiture for non-payment of rent, great nicety formerly existed, unless, as was usual, the proviso for re-entry dispensed therewith. Thus, a demand must have been made of the rent; on the very day when due; for the precise sum—a penny more or less made the demand bad; a convenient time before sunset; on the land, and at the most notorious

(*g*) S. 57.

(*h*) For decisions under the prior Act, where "wrongfully" was held to imply this: *Re Magann & Bonner*, 28 O.R. 37; *Re Snure & Davis*, 4 O.L.R. 82; *Re Lumbers & Howard*, 9 O.L.R. 297.

(*i*) *Re Snure & Davis*, 4 O.L.R. 82.

(*j*) R.S.O. c. 155, s. 19.

place on it; and this, though no one were on the land ready to pay. In one case (*k*) it was held that a demand at half-past ten in the morning was too early, and not a good demand, as not being a convenient time before sunset; and the Court referred to Co. Litt 202*a*, where it is said that the demand must be such a convenient time just before sunset as to admit of the money being numbered and received. To obviate the difficulties of such a demand, the proviso for re-entry usually dispenses expressly with its necessity, and in the absence of such a provision the statute will apply.

11. *Re-entry and Forfeiture.*

A right of entry or forfeiture under a provision therefor contained in a lease, other than a proviso in respect of payment of rent, cannot now be enforced without notice to be given in the manner to be presently mentioned (*l*).

This enactment does not apply to conditions against assigning, under-leasing or parting with the possession, or disposing of the land leased, nor to conditions for forfeiture on the bankruptcy of the lessee, or on the lessee making an assignment for creditors, nor on the taking in execution of the lessee's interest. Nor does it apply, in the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, etc., or to enter or inspect the mine or the workings thereof.

Formerly the Act did not apply to an agreement for a lease which, in all other respects, constituted the parties thereto landlord and tenant (*m*). But now a "lease" includes "an agreement for a lease where the lessee has become entitled to have his lease granted." It may be noted that an equitable assignment, by a declaration of trust to dispose of the term in such manner as an assignee for creditors should direct, is not a breach of the covenant not to assign; and an assignment for creditors of all property except the term is not within the exception contained in s. 20 (9) (*a*) (*n*). And a landlord who has mortgaged his reversion cannot bring an action to recover from the tenant, notwithstanding the Judicature Act (*o*).

(*k*) *Alcocks* v. *Phillips*, 5 H. & N. 183.

(*l*) R.S.O. c. 155, s. 20.

(*m*) *Swain* v. *Ayres*, 20 Q.B.D. 585; 21 Q.B.D. 289; *Coatsworth* v. *Johnson*, 55 L.J.Q.B. 220.

(*n*) *Gentle* v. *Faulkner*, (1900) 2 Q.B. 267.

(*o*) *Matthews* v. *Usher*, 16 T.L.R. 493.

With these exceptions, where there is a right of re-entry or forfeiture for breach of a condition or covenant contained in the lease, it shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy it, and, in any case, requiring the lessee to make compensation in money for the breach. Then, in case the lessee fails, within a reasonable time after such service, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach, the lessor may proceed.

"The object of the notice," said Lord Russell of Killowen(*p*), "seems to be to require in the defined cases (1) that a notice shall precede any proceeding to enforce a forfeiture; (2) that the notice shall be such as to give the tenant precise information of what is alleged against him and what is demanded from him; and (3) that a reasonable time shall, after notice, be allowed the tenant to act before an action is brought. The reason is clear: he ought to have the opportunity of considering whether he can admit the breach alleged; whether it is capable of remedy; whether he ought to offer any, and, if so, what compensation; and, finally, if the case is one for relief, whether he ought or ought not promptly to apply for such relief. In short, the notice is intended to give to the person whose interest it is sought to forfeit the opportunity of considering his position before an action is brought against him."

The giving of the notice is indispensable in order to enable the lessor to maintain the action (*q*), and if no notice, or an insufficient one, be given, the action will be dismissed (*r*). The enactment does not take away any right of re-entry or forfeiture which the lessor may have; it only postpones his right to re-enter until after he has served on the lessee a notice specifying the particular breach complained of (*s*). It is intended merely to give the tenant an opportunity of preserving his interest and saving himself from the consequences of forfeiture, and does not take away from the landlord any right of re-entry if there has been a substantial breach of covenant. The notice may be addressed to the original lessee and all

(*p*) *Horsey Estate* v. *Steiger*, (1899) 2 Q.B. at p. 91.
(*q*) *North London, etc., Land Co.* v. *Jacques*, 49 L.T.N.S. 659.
(*r*) *Greenfield* v. *Hanson*, 2 T.L.R. 876.
(*s*) *Creswell* v. *Davidson*, 56 L.T. 811.

others whom it may concern, and it is sufficient if left with the occupant of the premises demised and ultimately reaches the person liable (*t*). It should specify with particularity what the lessor complains of. In *McMillan* v. *Vannatto* (*u*), the notice was, "I hereby give you notice that you have broken the covenants as to cutting timber, etc." This was held to be sufficient. But in England greater particularity is required. In *Fletcher* v. *Nokes* (*v*), the notice was, "I hereby give you notice that you have broken the covenants for repairing the inside and outside of the house, etc." This was held to be insufficient because no particular breach was specified; and the court held that the notice should be as precise as particulars delivered of a breach assigned in an action, though where particulars are given in the action, and they differ from the particulars in the notice, it does not affect the sufficiency of the notice (*w*). Subsequent cases are to the same effect. In *Penton* v. *Barnett* (*x*), it was said that the expression "particular breach" in the statute refers to the particular condition of the premises which the tenant is required to remedy, and the tenant is to have full notice of what he is required to do. And in *Re Serle* (*y*) a notice that "he has not kept the said premises well and sufficiently repaired, etc.," was held insufficient. The notice ought also to refer to the particular covenant alleged to have been broken, and specify the breach of which the landlord complains (*z*). The weight of authority is therefore in favour of a notice specifying the physical condition of the premises which is alleged to constitute the breach. But if the notice is sufficient in this respect it is not necessary for the notice to indicate what the tenant is to do in order to remedy the breach (*a*).

The notice must further require the lessee to remedy the breach, if it is capable of being remedied (*b*), but it need not contain a demand for compensation unless there is something

(*t*) *Cronin* v. *Rogers*, Cab. & El. 348.

(*u*) 24 Ont. R. 625.

(*v*) (1897) 1 Ch. 271.

(*w*) *Jolly* v. *Brown*, (1914) 2 K.B. 109.

(*x*) (1898) 1 Q.B. 276.

(*y*) (1898) 1 Ch. 652.

(*z*) *Jacob* v. *Down*, (1900) 2 Ch. 156; *Jolly* v. *Brown*, (1914) 2 K.B. 109; *Fox* v. *Jolly*, 31 T.L.R. 579.

(*a*) *Piggott* v. *Middlesex Co. Council*, (1909) 1 Ch. 134; *Fox* v. *Jolly*, 31 T.L.R. 579.

(*b*) *North London, etc., Land Co.* v. *Jacques*, 49 L.T. 659; *Lock* v. *Pearce*, (1893) 2 Ch. 271.

to compensate for and the lessor desires it (*c*). A notice which is bad in part for want of particularity in specifying some one breach complained of, is not saved because it contains a good specification of another breach also complained of. "The notice cannot be saved as a whole because a part of it is good" (*d*). But where a notice sufficiently specifies two or more breaches, and the plaintiff proves some of them, but fails to prove others, the notice remains good for those proved(*e*). The remarks of the Lord Chief Justice in *Horsey* v. *Steiger* (*f*) seem to indicate the contrary, but the case proceeded really on the ground that a reasonable time was not given after the notice as pointed out in the case cited.

And a notice is not bad if it calls upon the tenant to do repairs which may turn out not to be required and not necessary to be done under his covenant. The obligation of the tenant is to comply with the covenant to repair, and not necessarily with the terms of the notice. If at the trial it is found that he has complied with the terms of the covenant, it is immaterial that there are some matters contained in the notice which have not been complied with (*g*). Nor is a notice bad which specifies particular breaches if it contains a general clause at the end (*h*); and the notice need not specify the methods which are to be adopted to remedy each breach (*i*).

The notice is not bad because it demands something which the plaintiff is not entitled to get, *e.g.*, the costs of employing a solicitor and surveyor to advise (*j*).

Finally, a reasonable time must elapse between the service of the notice and the bringing of the action. What is a reasonable time must be determined according to the facts of each particular case. Three months within which to make repairs was held reasonable in one case (*k*); four months in another (*l*); but two days was quite unreasonable (*m*).

(*c*) *Lock* v. *Pearce*, (1893) 2 Ch. 271; *Skinners' Co.* v. *Knight*, (1891) 2 Q.B. at pp. 544, 545.

(*d*) *Re Serle*, (1898) 1 Ch. at p. 657.

(*e*) *Pannell* v. *City of London Brewing Co.*, (1900) 1 Ch. 496.

(*f*) (1899) 2 Q.B. at p. 92.

(*g*) *Jolly* v. *Brown*, (1914) 2 K.B. 109, at pp. 116, 130.

(*h*) Ibid. p. 117.

(*i*) Ibid. p. 122.

(*j*) *Skinners' Co.* v. *Knight*, (1891) 2 Q.B. 542; *Lock* v. *Pearce*, (1893) 2 Ch. at p. 280.

(*k*) *Cronin* v. *Rogers*, Cab. & El. 348.

(*l*) *Pannell* v. *City of London Brewery Co.*, (1900) 1 Ch. 496.

(*m*) *Horsey* v. *Steiger*, (1899) 2 Q.B. 79.

By the same enactment the lessee is entitled to relief against forfeiture in certain cases (*n*). Where the lessor is proceeding, by action or otherwise, to enforce his right, the lessee may, in the lessor's action, or in an action brought by himself, apply to the court for relief, and the court has power to relieve upon terms. Relief can only be granted when the lessor is proceeding to enforce his rights; and therefore where a lessor was resisting specific performance of a covenant for renewal conditional upon the performance of covenants which had been broken, it was held that the tenant could not obtain relief against the breach of his covenant (*o*). And the proceedings for relief must be begun before the re-entry has taken place; if the re-entry has been made it is too late (*p*). The enactment applies to breaches committed before it was passed, and to proceedings pending when it was passed (*q*). No rules or principles can be laid down upon which relief should be granted. It is said that the free discretion which the Act gives as to relief from forfeiture is not to be fettered by limitations which have been nowhere enacted, and which might have to be disregarded in future cases (*r*).

Although the issue of a writ is a final election to determine the lease, yet if an order for relief against the forfeiture is granted, its effect is to restore the lease as if it had never become forfeited (*s*).

If a lessee is simply accorded the right to redeem, he incurs no obligation to do so, and redemption cannot be specifically enforced against him; but if he undertakes to redeem, if allowed to do so, the lessor may enforce his undertaking against him (*t*).

This enactment formerly did not apply to a sub-lessee (*u*). But it is now provided that where a lessor is proceeding to enforce a right of entry, the court may, on the application of an under-lessee, either in the lessor's action or in an action brought by the under-lessee, make an order vesting for the whole term of the lease, or any less term, the property comprised

(*n*) R.S.O. c. 155, s. 20 (3).

(*o*) *Greville* v. *Parker*, (1910) A.C. 335.

(*p*) *Lock* v. *Pearce*, (1893) 2 Ch. at. p. 274; *Quilter* v. *Mapleson*, 9 Q.B.D. at p. 672; *Rogers* v. *Rice*, (1892) 2 Ch. 170.

(*q*) *Quilter* v. *Mapleson*, 9 Q.B.D. 672.

(*r*) *Hyman* v. *Rose*, (1912) A.C. 623.

(*s*) *Dendy* v. *Evans*, (1910) 1 K.B. 263.

(*t*) *Talbot* v. *Blindell*, 24 T.L.R. 477.

(*u*) *Burt* v. *Gray*, (1891) 2 Q.B. 89.

in the lease, or any part thereof, in any person entitled as under-lessee, upon terms; but in no case can the under-lessee require a longer term than he had under his original sub-lease (*v*). The result of a vesting order is not to revive the under-lessee's estate, but to give him an entirely new one (*w*).

12. *Severance of the Reversion.*

The right of entry for condition broken was indivisible at common law; consequently, if the owner of the reversion conveyed away a portion of the demised premises, he destroyed the condition and deprived himself of the right of re-entry for breach of covenants (*x*). The first relief from this was a provision with respect to rent. Where the reversion on a lease was severed, and the rent was legally apportioned, the assignee of each part of the reversion was given, in respect of the apportioned rent allotted to him, the benefit of all powers of re-entry for non-payment of the original rent, in like manner as if the power had been reserved to him as incident to his part of the reversion, in respect of the apportioned rent allotted to him (*y*). The severance here spoken of was not a conveyance of the whole land for part of the reversion, but a conveyance of the reversion of part of the lands demised. Before the right of entry could arise under this statute, the rent must have been legally apportioned, either by agreement between the lessor, assignee and tenant, or by act of law, *i.e.*, by judgment of a court (*z*). If actual apportionment had not taken place, payment of the rent by the tenant to the original lessor would be a rightful payment, and the assignee of part of the reversion therefore could not enter (*a*).

This enactment was repealed in the recent revision, and a general provision made for apportionment of all conditions of re-entry (*b*). A reversion may be severed by conveying away a part of the demised premises, by surrender of part to the lessor, or by a cesser of the term as to part of the demised premises, as by eviction from part. In each case, "every

(*v*) R.S.O. c. 155, s. 21.

(*w*) *Ewart* v. *Fryer*, (1901) 1 Ch. 499; (1902) A.C. 187.

(*x*) *Baldwin* v. *Wanzer, Baldwin* v. *C.P.R. Co.*, 22 Ont. R. 612; and see *Piggott* v. *Middlesex Co. C'l*, (1909) 1 Ch. 134; Co. Litt. 215 *a*.

(*y*) R.S.O., (1897) c. 170, s. 9.

(*z*) *Bliss* v. *Collins*, 5 B. & Ald. 876; *Reeve* v. *Thompson*, 14 Ont.R. 499.

(*a*) *Mitchell* v. *Mosley*, (1914) 1 Ch. 438.

(*b*) R.S.O. c. 155, s. 8.

condition or right of re-entry and every other condition contained in the lease shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in the land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease."

While this provision may be applied in the case of breaches of covenants other than for payment of rent, it is difficult to see how it can be applied to a condition for re-entry on non-payment of rent where the rent has not been apportioned. It was a condition precedent of the repealed enactment that the rent must have been legally apportioned in order that the right of entry might arise. No such condition is expressly required by this enactment. And yet if the rent is not apportioned so that the tenant shall come under an obligation to pay the apportioned parts to the several reversioners, it seems that no right of entry could arise. There is no general right of entry, for each reversioner can only enter on his portion of the demised premises as if the right of entry had originally been reserved as to that portion only, and he can enter only for non-payment of that portion of the rent which is payable in respect of that portion. It seems still necessary, therefore, that there should be an apportionment of rent before any right of entry can be exercised for non-payment of rent.

The section just dealt with applies only to conditions of re-entry, and other conditions. But, by s. 5, rent and covenants, as well as conditions, are dealt with in a somewhat similar way. This section applies to the case of severance of the reversionary estate, and provides that rent, the benefit of every covenant or provision on the part of the lessee, having reference to the subject matter of the lease, and every condition of re-entry and other condition, shall be "annexed and incident to and shall go with the reversionary estate in the land or in any part thereof immediately expectant on the term . . . notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced and taken advantage of by any person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

This section and s. 8 overlap to some extent, inasmuch as both of them deal with conditions. But, under s. 8, only the person legally entitled to enforce the condition can do so; while under s. 5 "any person" entitled "to the income of the whole or any part, as the case may require," may enforce the right. It may therefore enable a beneficiary entitled to the income to act, or an equitable assignee of part of the reversion, or a person entitled to the income under a trust declared in favour of such person.

In addition to conditions, it applies to covenants, which are severed by the severance of the reversion, and which thereafter may be enforced by any person entitled to the income or a part thereof, and not necessarily the legal covenantee.

With regard to rent, the same difficulty arises as will arise under s. 8, namely, that until apportionment of the rent the tenant ought not to be subjected to action by the reversioner of a severed portion.

Where the reversion in the whole of the demised premises is assigned, the right of the assignee is governed by the statute of 32 Hen. VIII. c. 34, s. 1 (*c*), under which the assignee has the same benefit of a condition, in case of a breach subsequent to the assignment, as his grantor would have had, "by entry for non-payment of the rent, or for doing of waste, or other forfeiture, and also shall have and enjoy all and every such like and the same advantage, benefit and remedies, by action only, for not performing of other conditions, covenants or agreements." But the assignee of the reversion cannot enter for, or take advantage of, a breach occurring before the assignment to him (*d*).

For the benefit of the lessee, it is provided that lessees and their assigns may enforce performance of conditions and covenants against assignees of the reversion or any part thereof in the same manner as they might against their lessors (*e*).

And it is further provided that the obligation of a covenant by a lessor, with reference to the subject matter of the lease, shall bind the reversionary estate immediately expectant on the term, and shall be annexed and incident to and go with the reversionary estate, or the several parts thereof, notwithstanding severance of the reversion. And it is provided that it may be enforced by "the person in whom the term is from time to

(*c*) Now R.S.O. c. 155, s. 4.
(*d*) *Cohen* v. *Tannar*, (1900) 2 Q.B. 609.
(*e*) R.S.O. c. 155, s. 6.

time vested, by conveyance, devolution in law, or otherwise" (*f*). This section does not apply to conditions, and its benefit is apparently restricted to the person entitled to the whole term. Where a lessor by covenant gave to the lessee an option to purchase the fee, it was held that an assignee of the reversion was not bound by the covenant, as the giving of the option had nothing to do with the lease, but was concerned with something wholly outside the relation of landlord and tenant, and that this enactment did not apply (*g*).

Rights of entry for condition broken are not assignable by instrument *inter vivos* (*h*). The rights of entry which are made assignable by statute (*i*) are rights of entry on a disseisin (*ii*). But a right of entry for condition broken, as well as other rights of entry, is capable of being disposed of by will (*j*).

13. *Licences.*

At common law when a licence was given by the lessor to the lessee to do any act, which, but for the licence, would have occasioned a forfeiture under the right of re-entry reserved to the lessor, such licence destroyed the condition of re-entry; so that thereafter a similar act might be done by the lessee without any danger of forfeiture. By the Act now in review (*k*), such a licence now extends only to the particular act authorized to be done. And similarly, where there has been a waiver by the lessor of the benefit of a covenant or condition in a lease, the waiver is deemed to extend only to the particular breach to which it relates and not to the whole covenant or condition (*l*).

14. *Forcible Entry.*

There remains to be considered the summary remedy of ouster of the overholding tenant by the landlord by force, if

(*f*) Ibid. s. 7.

(*g*) *Woodall* v. *Clifton*, (1905) 2 Ch. 257.

(*h*) *Baldwin* v. *Wanzer*, 22 Ont. R. at p. 641; *Cohen* v. *Tannar*, (1900) 2 Q.B. 609.

(*i*) R.S.O. c. 109, s. 10.

(*ii*) *Hunt* v. *Bishop*, 8 Ex. 675; *Hunt* v. *Remnant*, 9 Ex. 635; *Bennett* v. *Herring*, 3 C.B.N.S. 370.

(*j*) R.S.O. c. 120, s. 9.

(*k*) R.S.O. c. 155, ss. 24, 25. See *Baldwin* v. *Wanzer*, 22 Ont. R. at pp. 628, *et seq.*

(*l*) R.S.O. c. 155, s. 26.

necessary. Where the premises are vacant, though the tenant may have left some chattels thereon, the landlord is constructively in possession of the freehold, and is entitled to break his own door and take actual posession (*m*). And where the tenant still remains in occupation, the authorities are uniform that the landlord may enter forcibly without rendering himself liable to a civil action of trespass or for damages for the forcible entry (*n*). In one case it was said that there is no case in which a party may maintain ejectment in which he cannot enter (*o*). Though the landlord should enter peaceably, if possible, he is not civilly liable even if his entry is attended with such acts of violence as will subject him to a criminal prosecution (*p*). But he may render himself liable to an action of assault if the facts justify it, though the same acts do not subject him to liability for trespass to land (*q*). The result of the cases is thus summed up by Fry, J., in *Beddall* v. *Maitland* (*r*): "The result of the cases appears to be this, that, inasmuch as the possession of the defendant was unlawful, he can recover no damages for the forcible entry of the plaintiff. He can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because though the statute of Richard II. creates a crime, it gives no civil remedy. But in respect of independent wrongful acts which are done in the course of or after the forcible entry, a right of action does arise, because the person doing them cannot allege that the acts were lawful unless justified by a lawful entry; and he cannot plead that he has a lawful possession. This, as it appears to me, is the result of the cases" (*s*). And so it was held in another case that the landlord had a right to take down a cottage which an overholding tenant obstinately refused to leave, and was not liable in trespass, nor for incidental damage to the furniture of the tenant unavoidably

(*m*) *Turner* v. *Meymott*, 1 Bing. 158 at p. 160.

(*n*) *Pollen* v. *Brewer*, 7 C.B.N.S. 671; *Harvey* v. *Brydges*, 14 M. & W. 442; *Davidson* v. *Wilson*, 11 Q.B. 890; *Beattie* v. *Muir*, 10 L.R. Ir. 208 (1882).

(*o*) *Rogers* v. *Pitcher*, 6 Taunt. at p. 207.

(*p*) *Taylor* v. *Cole*, 3 T.R. 292.

(*q*) *Newton* v. *Harland*, 1 M. & G. 644; *Pollen* v. *Brewer*, 7 C.B.N.S. 371.

(*r*) 17 Ch.D. 174.

(*s*) See also *Lows* v. *Telford*, 1 App. Ca. 414; *Toronto Brewing & M. Co.* v. *Blake*, 2 Ont. R. at p. 183.

occasioned by the operation (*t*). And where a landlord enters he can maintain an action of trespass against the late tenant wrongfully in at the time of entry and continuing in occupation thereafter (*u*), or replevin for distraining on his cattle which were put on the premises by way of taking possession (*v*). For though the tenant may remain in occupation while the landlord enters, the possession follows the title and is attributed to the landlord, and the tenant is therefore a trespasser (*w*). But it is said that if the tenant during his term expressly license the landlord to enter and oust him without process of law during the term, the licence is void as authorizing the landlord to commit a forcible entry, an act made illegal by the Statute of Rich. II., Stat. 1, c. 8, and the tenant may recover damages for the entry (*x*).

On an indictment for a forcible entry and detainer, it is in the discretion of the court to grant a writ of restitution (*y*), but the discretion would probably not be exercised in favour of a prosecutor whose interest, if any, had determined at the time of the entry.

(*t*) *Jones* v. *Foley*, (1891) 1 Q.B. 730.
(*u*) *Butcher* v. *Butcher*, 7 B. & C. 399.
(*v*) *Taunton* v. *Costar*, 7 T.R. 431.
(*w*) *Jones* v. *Chapman*, 2 Ex. 803.
(*x*) *Edwick* v. *Hawkes*, 18 Ch.D. 199.
(*y*) *Regina* v. *Smith*, 43 U.C.R. 383; *Regina* v. *Wightman*, 29 U.C.R. 211; *Toronto B. & M. Co.* v. *Blake*, 2 Ont. R. at p. 183.

CHAPTER VII.

OF ESTATES UPON CONDITION.

(1) *Conditions, p. 157.*
(2) *Implied Conditions, p. 157.*
(3) *Express Conditions, p. 159.*
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(5) *Conditions and Limitations, p. 163.*
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1. *Conditions.*

BESIDES the several divisions of estates in point of interest, which we have considered in the preceding chapters, there is also another species still remaining, which is called an estate *upon condition*; being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated. And these conditional estates are indeed more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates then, upon condition, thus understood, are of two sorts: Estates upon condition *implied*; estates upon condition *expressed*, under which last may be included estates held in *vadio*, *gage*, or *pledge*; estates by *statute merchant* or *statute staple*; estates held by *elegit*; of these, the two latter are unknown here. Estates held in *vadio*, *gage* or *pledge* will be considered in the chapter on Mortgages.

2. *Implied Conditions.*

Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition that the grantee shall duly execute

his office, on breach of which condition it is lawful for the grantor or his heirs to oust him, and grant it to another person. For an office, either public or private, may be forfeited by *mis-user* or *non-user*, both of which are breaches of this implied condition. By *mis-user* or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. By *non-user*, or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special advantage is proved to be occasioned thereby. For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention; but private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief; upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect.

Upon the same principle proceed all the forfeitures which are given by law of life estates and others, for any acts done by the tenant himself that are incompatible with the estate which he holds. As if tenant for life or years enfeoffed a stranger in fee simple; this was, by the common law, a forfeiture of his estate; being a breach of the condition which the law annexed thereto, viz., that he should not attempt to create a greater estate than he was entitled to. So, if any tenants for years, for life, or in fee, committed a felony; the king or other lord of the fee was, at common law, entitled to have their tenements, because their estate was determined by the breach of the condition "that they shall not commit felony," which the law tacitly annexed to every feudal donation.

The common law doctrine in both the above instances has been modified by statute; thus, a feoffment, in the case put, will no longer cause a forfeiture, since by R.S.O. c. 109, s. 4, a feoffment no longer has a *tortious* operation, *i.e.*, while at common law the feoffment in fee by tenant for life, accompanied by livery, would convey a fee *by wrong*, and divest the estates in remainder or reversion, the statute declares it shall no longer have such effect. In the other case it is declared by the Criminal Code (*a*) that "no confession, verdict, inquest, conviction

(*a*) R.S.C. c. 146, s. 1033.

or judgment of or for any treason or indictable offence or *felo de se* shall cause any attainder or corruption of blood or any forfeiture or escheat; provided that nothing in this section shall affect any penalty or fine imposed on any person by virtue of his sentence, or any forfeiture in relation to which special provision is made by any Act of the Parliament of Canada."

3. *Express Conditions.*

An estate on condition expressed in the grant itself, is where an estate is granted either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition. Or, as defined in the Touchstone (*b*), "it is a *modus*, a quality annexed by him that hath estate, interest, or right, to the land, etc., whereby an estate, etc., may either be created, defeated, or enlarged, upon a certain event. And this doth differ from a limitation, which is the bounds or compass of an estate, or the time how long an estate shall continue." Or, "a condition is a qualification or restriction annexed to a conveyance of land, whereby it is provided that, in case a particular event does or does not happen, or in case the grantor or grantee does, or omits to do, a particular act, an estate shall commence, be enlarged, or defeated" (*c*).

4. *Conditions, Precedent and Subsequent.*

These conditions are therefore either *precedent*, or *subsequent*. Precedent are such as must happen or be performed before the estate can vest or be enlarged; subsequent are such as, by the failure or non-performance of which an estate, already vested, may be defeated. Thus, if a man make a lease of land for years, and grant to his lessee, that, upon payment of a hundred marks within the term, he shall have the fee, this is a condition precedent, and the fee simple passeth not till the hundred marks be paid (*d*). But, if a man grant an estate, reserving to himself and his heirs a certain rent, and that if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate;

(*b*) P. 117.
(*c*) Cru. Dig. Tit. 13, s. 1.
(*d*) Shepp. Touch. 117, 128.

in this case the grantee has an estate upon condition subsequent, which is defeasible if the condition be not strictly performed. Whether a condition is precedent or subsequent depends not upon its position in the deed, but upon its operation, and the intention of the parties to be deduced from the whole instrument (*dd*); and the same words may be construed as a condition precedent or subsequent, according to the nature of the transaction (*e*). But where a condition attached to a devise is capable of being construed either as a condition precedent or as a condition subsequent, the latter construction will be preferred (*f*). However the clauses of the deed may be arranged, the question whether a condition is precedent or subsequent must depend upon the order of time in which the intent and nature of the transaction requires its performance (*g*). "Thus, where a condition must be performed before the estate can commence, it is called a condition precedent. But where the effect of a condition is either to enlarge or defeat an estate already created, it is then called a condition subsequent" (*h*). A condition annexed to a devise requiring residence on the land is a condition subsequent (*hh*).

All conditions annexed to estates, being compulsory to compel a man to do anything that is in its nature good or indifferent, or being restrictive to restrain or forbid the doing of anything which in its nature is *malum in se*, as to kill a man, or the like, or *malum prohibitum*, being a thing forbidden by any statute, or the like, all such conditions are good, and may stand with the estates. But if the matter of the condition tend to provoke or further the doing of some unlawful act, or to restrain or forbid a man the doing of his duty; the condition for the most part is void (*i*); as where a bequest was to be void if the legatees should live with or be under the custody or guardianship of their father, the object being to deter the father from performing his paternal duties (*j*). Hence, if the condition be precedent, or such as must be performed before any estate can vest, and require something to be done against

(*dd*) *Roberts* v. *Brett*, 11 H.L.C. 337.
(*e*) *Hotham* v. *East India Co.*, 1 T.R. at p. 645.
(*f*) *Re Greenwood*, (1903) 1 Ch. 749.
(*g*) *Jones* v. *Barkley*, 2 Doug. 691.
(*h*) Cru. Dig. Tit. 13, c. 1, s. 6.
(*hh*) *Re Ross*, 7 O.L.R. 493.
(*i*) Shepp. Touch. 132.
(*j*) *Re Sandbrook*, (1912) 2 Ch. 471.

law, or public policy, or impossible, both the condition and the estate are void, and the estate will never vest. And if the condition be possible at the time of making it, but become impossible by the act of God, and an estate is to arise on the condition, the estate will not vest (*k*). Where the condition is subsequent, in these and the like cases the estate vests, and the condition, being unlawful or impossible, will be void and the estate absolute (*l*). So also, if a condition subsequent becomes impossible by the act of the grantor himself, he would not be allowed to take advantage of the non-performance in order to forfeit or defeat the estate which he had granted (*m*).

And if it becomes impossible by the act of God the estate is freed from the condition and becomes absolute (*n*).

An infant cannot be bound to exercise a discretion as to performing a condition. Threrefore, where land was devised upon a direction that every person becoming entitled thereto should within six months assume the name and arms of the testator, and in case of refusal or neglect to do so that the estate should go to the next person entitled, and an infant became entitled, it was held that during infancy he could not refuse or neglect and did not forfeit the devise for not assuming the name and arms (*o*).

If the condition is to enlarge an estate, it is said that there must be these things in the case: "1. There must be a precedent particular estate, as an estate in tail, for life or years, for a foundation to erect the subsequent estate upon, and the first estate also must be certain and irrevocable, not upon contingency, or with power of revocation. 2. The privity must remain until the time of the performance of the condition, for if the donee or lessee do grant away the first estate, the condition cannot afterwards be performed, to effect and produce the increasing estate. 3. The subsequent estate must vest *eo instanti*, when the contingency upon which the condition dependeth shall happen, or never. 4. The first and second estate must take effect by one and the same deed, or else by two deeds delivered at the same time, for *quæ incontinenti fiunt inesse videtur*. 5. The condition upon which the increase is, must

(*k*) Shepp. Touch. 132, 133; *Graydon* v. *Hicks*, 2 Atk. 16; *Dawson* v. *Oliver-Massey*, 2 Ch.D. 753.

(*l*) *Re Crozon*, (1904) 1 Ch. 252.

(*m*) Cru. Dig. Tit. 13, c. 2, s. 21.

(*n*) *Re Greenwood*, (1903) 1 Ch. 749.

(*o*) *Re Edwards*, 26 T.L.R. 308.

be possible and lawful, for upon an impossible condition it cannot, and upon an unlawful condition it shall not, increase" (*p*).

A condition in defeasance of an estate must defeat or determine the whole estate (*q*). "So that if there be a lease for life made by deed, and not by will, the remainder over in fee, on condition that the lessee for life shall pay ten pounds to the lessor; if the lessee pay not this ten pounds, the estate in remainder is avoided also" (*r*). So also "if a feoffment [or grant] be on condition that upon such an event the feoffor [or grantor] shall enter and have the land for a time; or the estate shall be void for part of the time; or a lease be for ten years, provided that upon such an event it shall be void for five years; these conditions are not good. But if a feoffment be made of two acres of land, provided that upon such an event the estate shall be void as to one acre only, this is a good condition" (*s*).

But where the condition might fail as a condition, the leaning of the courts at the present day would be to carry out the contract and give effect to the expressed intention of the parties if possible, and if it did not contravene any rule of law, the condition being now regarded to a great extent as a security for the performance of some act.

When a re-entry takes place by force of a condition, inasmuch as the whole estate is avoided, all incumbrances put on the land after the condition are also avoided (*t*).

Where a devise was made to the testator's widow for life, remainder over, and the will contained a proviso that "in case his said wife should sell, release, or charge her said life estate in the said real estates, or should do, make, or execute, any deed, matter, or thing, whereby, or by means whereof, she should be deprived of the rents and profits of the same, or the power or right to receive, or control over, the same, so that her receipt alone should not at all times be a good and sufficient discharge for the same, then her life estate and interest should cease and determine as fully and effectually as it would by her natural decease," and the widow married again without a settlement,

(*p*) Shepp. Touch. 128, 129.
(*q*) Cru. Dig. Tit. 13, c. 4, s. 13.
(*r*) Shepp. Touch. 120.
(*s*) Cru. Dig. Tit. 13, c. 1, s. 13.
(*t*) Shepp. Touch. 121.

whereby her husband became entitled to receive the rents, her estate was forfeited, and the remainder accelerated (*u*).

5. *Conditions and Limitations.*

A distinction must be made between a condition and a limitation. A condition is a term or stipulation on which an estate may arise, or be enlarged or defeated; whereas a limitation marks the boundaries of the estate or interest granted. A limitation of an estate may be made to take effect upon the happening of a condition, in which case it is sometimes called a conditional limitation, or, more properly, a limitation over upon condition. Thus, if land be granted to A., habendum to him and his heirs *until* he go to Rome, or *until* he pays to B. £20, or *so long as* A. shall live, or for years if A. shall so long live, these are not conditions, but *limitations* of an estate. So, also, if land be granted to one *dum sola*, or to a widow *durante viduitate*, these are *limited estates* and not conditional. They show the full period assigned for the duration of the estate, and are not conditions made to defeat or determine estates (*v*). But a condition is where an uncertain event must happen before the estate can vest, or where an estate comes to an end before its expiration in natural course, by the happening of an uncertain event.

The difference in operation or result upon a pure common law condition and upon a conditional limitation (or, more properly, a limitation to take effect on the happening of a condition), is that in the case of the happening or failure of the condition the estate reverts to the grantor or his heirs; in the other case it passes over to other persons upon the happening or failure of the condition, as the case may be (*w*). And where a condition in defeasance of an estate is broken, the estate nevertheless continues, though the grantor by the breach gets a title to re-enter, which he may waive if he please; but he must enter in order to determine the estate. But in the case of a conditional limitation, or a limitation over on a condition, when the conditioned event happens, the estate shifts without any entry and vests in the person to whom it is next limited on the happening of the condition (*x*).

So when an estate is so expressly confined and limited by

(*u*) *Craven* v. *Brady*, L.R. 4 Eq. 209; 4 Ch. App. 296.
(*v*) Shepp. Touch. 125.
(*w*) *Re Dugdale*, 38 Ch.D. at p. 179; *Re Machu*, 21 Ch.D. at p. 843.
(*x*) See *Re Machu*, 21 Ch.D. at p. 843.

the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation*, as if land should be granted to a municipality *so long as* it should be used for a public market. In such case the estate determines as soon as the contingency happens, viz., when the municipality ceases to use the land for a market. But, if there be a limitation of the estate over to another upon the happening of the conditioned event, then, upon that happening, the next subsequent estate, which depends upon such determination, becomes immediately vested without any act to be done by him who is next in expectancy.

But when an estate is, strictly speaking, upon *condition in deed*, as if granted expressly *upon condition* to be void upon the happening of an event, etc., the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate.

Words of express condition are not ordinarily construed as a limitation, unless there is a limitation over (*y*). So, though strict words of condition be used in the creation of the estate, yet, if on breach of the condition the estate be limited to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A. to B. on condition that within two years B. intermarry with C., and on failure thereof then to D. and his heirs), this the law construes to be a limitation and not a condition. Because, if it were a condition, then, upon the breach thereof, only A. or his representatives could avoid the estate by entry, and so D.'s remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of B. determines, and that of D. commences, and he may enter on the lands the instant that the failure happens. So also, if a man by his will devises land to his heir-at-law, on condition that he pays a sum of money, and for non-payment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of condition.

6. *How a Condition is Made.*

A condition is usually created by the use of the phrases "provided that," "so as," or "under, or subject to, this con-

(*y*) Shepp. Touch. 124, Atherley's note (*l*).

dition." But the form is not essential, and may give way to the general sense of the deed. A condition is sometimes confounded with a covenant. If found amongst the covenants of a deed, it is said that it makes the estate conditional when "these things are in the case: 1. When the clause wherein it is hath no dependence upon any other sentence in the deed, nor doth participate with it, but stands originally by and of itself. 2. When it is compulsory to the feoffee, donee, etc. 3. When it comes on the part and by the words of the feoffor, donor, lessor, etc. 4. When it is applied to the estate and not to some other matter" (*z*). But if the clause be dependent upon another clause, or be the words of the grantee compelling the grantor to do something; or if it be applied to something collateral, and not to the thing granted, then it is a covenant and not a condition (*a*). Between a covenant and a condition there is a difference as to the remedy. A condition broken defeats an estate and gives a right of entry, but a covenant broken gives a right of action only (*b*). A proviso or condition may, however, be both a condition and a covenant. Thus, "provided always, and the feoffee, etc., doth covenant, etc., that neither he nor his heirs shall do such an act, this is both a condition and a covenant" (*c*).

"As to things executed, the condition must be made and annexed to the estate at the time of the making of it; but as to things executory, it may be made afterwards. And if the condition be made in another deed, and not the same deed wherein the estate is made, if it be delivered at the same time, it is as good as if it were contained in the same deed" (*d*). So a deed and defeasance may be made by the one instrument, or by two provided they be delivered together. But if an annuity be granted absolutely, and afterwards the grantee execute a deed conditioned to defeat the annuity, the annuity is conditional, for it is executory (*e*). So also a lease for years might be defeasanced by a condition created after it is granted; and, before the statute permitting a lessor to give a licence to do an act prohibited by the lease, it was customary, in order to

(*z*) Shepp. Touch. 122; Bac. Abr. Tit. Condition (A).
(*a*) Shepp. Touch. 122; Bac. Abr. Tit. Condition (G).
(*b*) Owen, 54.
(*c*) Shepp. Touch. 122; *Pearson* v. *Adams*, 27 O.L.R. 154; 28 O.L.R. 154.
(*d*) Shepp. Touch. 126; Cru. Dig. Tit. 13, c. 1, ss. 10, 12.
(*e*) *Ibid.*

avoid the consequences of such a licence (the complete destruction of the condition for re-entry), to have a deed of defeasance executed, when such a licence was granted, providing for defeating the lease if the prohibited act were again done without licence (*f*).

A condition cannot be annexed to an estate of freehold except by deed (*g*); and it cannot be made by, nor reserved to a stranger, but must be made by and reserved to him who makes the estate (*h*).

7. *Re-entry on Condition Broken.*

As a condition can only be annexed to an estate by him who grants the estate, and reserved to himself, so, no one can enter for breach of the condition but the grantor, or his heirs or executors (*i*) by right of representation, or his devisee (*j*). But in order to enable the heirs to enter the benefits of the conditions must be extended to heirs and not restricted to the grantor (*jj*). Rights of entry for condition broken were not assignable at common law by instrument *inter vivos*, nor are they now, though they descend and may be devised by will. In the case of a devise, however, it may be a question arising on the interpretation of the statutes, as to which of the two, the executor or the devisee, may enter for such a breach. By the Wills Act a right of entry for condition broken is expressly made capable of devise. By the Devolution of Estates Act (*k*), not all devisable estates, rights and interests, but only "real and personal property which is vested in any person" are included in the enactment, and pass to the executor. Therefore, if a testator has only a right of entry for condition broken, and devises this right, it may well be that the devisee alone can enter, as being capable of taking within the Wills Act, and not the executor, who succeeds by the Devolution of Estates Act only to those interests specially mentioned in it (*l*).

At the present day re-entry for condition broken is rare, except in the case of landlord and tenant, which has been already

(*f*) See Leith, R.P. Stat. 3.
(*g*) Bac. Abr. Tit. Condition (C).
(*h*) Shepp. Touch. 120; Challis on R.P., 3rd ed. 219.
(*i*) Shepp. Touch. 149.
(*j*) R.S.O. c. 120, s. 9.
(*jj*) Shepp. Touch. 133.
(*k*) R.S.O. c. 119, s. 3.
(*l*) See postea, Chap. XIX.

treated of (*m*), and even in those cases forfeiture occasioned by breach can be relieved against in certain circumstances. And in the case of other conditions, if they are to secure the performance of some particular thing, they would probably be construed as trusts, performance of which would be adjudged to prevent a breach of the condition, or as the price (or a portion of the price) of relief against the forfeiture occasioned by the breach (*n*). The court has a general power to relieve against all penalties and forfeitures upon such terms as to costs, expenses, damages, compensation, and all other matters as the court thinks fit (*o*).

8. *Conditions Void for Repugnancy.*

A condition repugnant to the nature of the estate to which it is annexed is void. Thus, in a grant in fee upon condition that the grantee shall not take the profits, the condition is repugnant and void, and the estate absolute (*p*). So, also, the following conditions are repugnant and void: A condition annexed to an estate in fee simple that the tenant shall not alien; for a power to alien is inseparably annexed to an estate in fee simple (*q*), a condition annexed to an estate tail that the donee shall not marry, for without marriage he cannot have an heir of his body (*r*); a condition annexed to an estate in fee simple that his heir shall not inherit the land (*s*), or that the grantee shall do no waste, or that his wife shall not be endowed; a condition annexed to a grant for life, "if it shall please the grantor so long to suffer him;" a condition annexed to an estate in joint tenancy, that the survivor shall have the whole, notwithstanding any severance or partition (*t*); a condition annexed to an estate tail that the donee shall not alien (*u*); a condition that a devisee for charitable purposes shall not sell the devised land within the statutory period required by the

(*m*) Ante p. 146.

(*n*) See Gray, Perp. s. 282, note. Per Burton, J.A., *Earls* v. *McAlpine*, 6 App. R. at p. 153.

(*o*) Jud. Act, R.S.O. c. 56, s. 19.

(*p*) Cru. Dig. Tit. 13, c. 1, s. 20; Shepp. Touch. 131.

(*q*) Cru. Dig. Tit. 13, c. 1, s. 22.

(*r*) Ibid., s. 23.

(*s*) *Re Willcocks' Settlement*, 1 Ch.D. at p. 231, where it is said that a man cannot create any new mode of devolution by operation of law.

(*t*) Shepp. Touch. 131.

(*u*) *Dawkins* v. *Lord Penrhyn*, 4 App. Ca. at p. 64.

Charitable Uses Act (*v*); a condition that if a devisee "die without a will and childless," the property is to go over; for, though the condition as to dying childless alone would be good; when coupled with the condition as to making a will the whole is void (*vv*); and all such like.

A condition in a devise against the devisee's entering either the army or navy is void as being against the public good and welfare (*w*); and so is a condition that legacies should cease and determine if the legatees should live with or be under the custody, guardianship or control of their father (*x*).

Amongst conditions of this class must be included conditions imposing restraints on alienation of land (*y*), for, inasmuch as the right of alienation is inseparably annexed to estates in land, every restriction placed thereon is, if not wholly, at least to some extent, repugnant to the nature of the estate. It has been said, that, though a total restraint on alienation is bad, a partial restraint is good, as that the grantee or devisee shall not alien to such an one (*z*), or for such a time (*a*). The authorities upon which this has been asserted have been challenged as not supporting the proposition (*b*), though it was adopted and acted upon in a modern English case (*c*). And in a case from the Province of Quebec before the Judicial Committee of the Privy Council, a condition that a devisee should not in any manner incumber, affect, mortgage, sell, exchange, or otherwise alienate the land for a period of twenty years from the testator's death, was said to be void, not from anything peculiar to the law of Quebec, but on general principles of jurisprudence (*d*).

Following the case of *Re Macleay*, however, the Court of Appeal in Ontario held that a partial restraint on alienation was good, the condition in the devise in question being that the devisees should not sell or transfer the property without

(*v*) *Re Brown*, 32 Ont. R. 323.

(*vv*) *Re Dixon*, (1902) 2 Ch. 458.

(*w*) *Re Beard*, (1908) 1 Ch. 383.

(*x*) *Re Sandbrook*, (1912) 2 Ch. 471.

(*y*) Upon this subject see 16 C.L.T. 1; and an excellent article by A. H. Marsh, Q.C., 17 C.L.T. 105, 136.

(*z*) Shepp. Touch. 129.

(*a*) Ibid., Atherley's note (*l*).

(*b*) *Re Rosher*, 26 Ch.D. at pp. 811, *et seq.* and 818.

(*c*) *Re Macleay*, L.R. 20 Eq. 186.

(*d*) *Renaud* v. *Tourangeau*, L.R. 2 P.C. 4.

the written consent of the testator's wife during her life (*e*). In consequence of this we have a variety of cases in Ontario in which partial restraints have been held to be valid. Thus, the following were held good as partial restrictions: Not to sell, or cause to be sold during the devisee's life, but with liberty to grant to her children (*f*); a devise to the devisee "and his heirs and executors forever," condition, neither to mortgage nor sell the land, "but that it shall be to his children after his decease" (*g*); not to "dispose of the same only by will and testament" (*h*); not to alien or incumber until one of two devisees should attain forty years of age (*i*); not to be at liberty to sell "to any one except to persons of the name of O'Sullivan in my own family" (*j*); not to sell or mortgage during the devisees' lives, but with power to each to devise to children (*k*); not to be sold during the devisee's life and not after his death till his youngest child is twenty-one years of age (*l*); the land not to be at the devisees' disposal at any time till the end of twenty-five years from the date of the testator's decease, and that the same shall remain free from all incumbrances, and that no debts contracted by the devisees shall by any means incumber the same during the said twenty-five years (*m*); "shall not sell or dispose of this 100-acre lot to any person or persons except to one or more of my children or my grandchildren, to whom she may dispose of it if it is her will to do so" (*n*); "none of my sons shall have the privilege of mortgaging or selling" (*o*).

The following were held to be void as being total restraints:

(*e*) *Earls* v. *McAlpine*, 6 App. R. 145.

(*f*) *Smith* v. *Faught*, 45 U.C.R. 484; morgtage not forbidden.

(*g*) *Dickson* v. *Dickson*, 6 Ont. R. 278. This was held to give the devisee an estate for life, remainder to his children for life, remainder to himself in fee simple.

(*h*) *Re Winstanley*, 6 Ont. R. 315.

(*i*) *Re Weller*, 16 Ont. R. 318.

(*j*) *O'Sullivan* v. *Phelan*, 17 Ont. R. 730. The judgment in this case was set aside by the Court of Appeal for want of parties: 14 P.R. 278 *n*.

(*k*) *Re Northcote*, 18 Ont. R. 107. See also *Re Porter*, 13 O.L.R. 399

(*l*) *Meyers* v. *Hamilton Prov. L. & S. Co.*, 19 Ont. R. 358.

(*m*) *Chisholm* v. *London & W. Trust Co.*, 28 Ont. R. 347. The will which was in question in this case was before the Supreme Court as to another parcel subject to the same condition, and it was held to be void: *Blackburn* v. *McCallum*, 32 S.C.R. 65.

(*n*) *Rogerson* v. *Campbell*, 10 O.L.R. 748.

(*o*) *Re Martin & Dagneau*, 11 O.L.R. 349.

That the devisee never will or shall make away with it by any means, but keep it for his heirs (*p*); that the land shall not be disposed of by the devisees either by sale, by mortgage, or otherwise, except by will to their lawful heirs (*q*); that none of the devisees should either sell or mortgage the lands devised (*r*).

It is impossible either to reconcile these cases with each other, or to reduce them to any common principle. They arrange themselves in three classes, having regard to the terms of the conditions, namely: 1. Restrictions as to the time during which alienation may or may not take place; but a restriction is none the less total if it is limited in point of time only (*rr*); 2. restrictions as to the mode of alienation; 3. restrictions as to the persons to whom land may or may not be conveyed. But they are all opposed to the principle of law that the right of alienation is inseparably annexed to land. We may look elsewhere in vain (except in the case of restraint on anticipation of a married woman's separate estate) for any authority that a private person may impose restraints upon the enjoyment of land inconsistent with the incidents of ownership annexed to it by law, or make any condition inconsistent with and repugnant to the gift (*s*).

A more logical and convenient rule was laid down in *Re Rosher* (*t*), where it was held that inasmuch as every grant or devise in fee simple is upon the tacit or implied condition that the grantee or devisee shall have power to mortgage, lease, or sell the estate, any condition that he shall not do one or more of these things is necessarily repugnant and void. And the formidable objection to the validity of such restraints is the statute of *Quia Emptores*(*u*). A custom in a manor, in which the freehold was in the tenants, to exact a fine on alienation to a "foreigner," or one born without the manor, was held to be bad "as inconsistent with the nature of the estate and a restraint on alienation." Cozens-Hardy, J., said: "This is inconsistent with the statute 18 Edw. I., *Quia Emp-*

(*p*) *Re Watson & Woods*, 14 Ont. R. 45.

(*q*) *Heddlestone* v. *Heddlestone*, 15 Ont. R. 280.

(*r*) *Re Shanacy & Quinlan*, 28 Ont. R. 372; see *Hutt* v. *Hutt*, 24 O.L. R. 574.

(*rr*) *Blackburn* v. *McCallum*, *supra*.

(*s*) *Bradley* v. *Peixoto*, 3 Ves. at p. 324.

(*t*) 26 Ch.D. 801.

(*u*) R.S.O. App. A., p. vii., s. 2.

tores, which enacts that, from henceforth, it shall be lawful to every freeman to sell of his own pleasure his lands and tenements or part of them, so that the feoffee shall hold the same lands or tenements of the same chief lord by the same services and customs as his feoffor held before. . . . Moreover, no such custom can, in my opinion, hold good against the express language of the statutes I have referred to" (*uu*). It will be noticed that the freehold of the land in this case was in the tenant. In Ontario all lands are held by the Crown in free and common socage, and the cases are therefore parallel. If it is a restraint or alienation, and contrary to the statute *Quia Emptores* to exact the condition of a fine, how is any other condition restricting alienation valid?

Of a similar nature are conditions that the devisee or grantee *shall* dispose of the land; because the right of property includes the right to enjoy without alienating as well as to alienate. Consequently, it was held that a devise in fee simple, conditioned that if the devisee should not live to attain the age of twenty-one years, "or having attained the age of twenty-one years shall not have made a will," then over, was absolute in the devisee; because if he died intestate the law prescribed that his heir should inherit, and the condition was therefore repugnant (*v*). So also an executory devise which is to defeat an estate and which is to take effect on alienating or attempting to alienate, or not alienating, is void (*vv*).

A condition that a devisee should, on any sale of the land, pay certain sums to other persons, was held bad, there being no obligation to sell, and no intention otherwise to benefit the other persons, the devisee's right as absolute owner being to receive all the purchase money, and the condition that he should pay some of it to others being repugnant thereto (*w*).

(*uu*) *Merttens* v. *Hill*, (1901) 1 Ch. at p. 857.

(*v*) *Holmes* v. *Godson*, 8 DeG. M. & G. 152.

(*vv*) *Shaw* v. *Ford*, 7 Ch.D. 669; see also *Ross* v. *Ross*, 1 J. & W. 154; *Bradley* v. *Peixoto*, 3 Ves. 324.

(*w*) *Re Elliott*, (1896) 1 Ch. 353.

CHAPTER VIII.

OF MORTGAGES.

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1. *Welsh Mortgages.*

We now come to estates held *in vadio*, in gage or pledge, which are of two kinds, *vivium vadium*, or living pledge, and *mortuum vadium*, dead pledge, or mortgage. *Vivum vadium*, or living pledge, is where a man borrows a sum (suppose £200) of another, and grants him an estate, as of £20 *per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void as soon as such sum is

raised. And in this case the land or pledge is said to be living; it subsists and survives the debt, and immediately on the discharge of that, results back to the borrower. Cases of this kind are very unusual, and are known as Welsh mortgages. In one instance, the owner gave a mortgage to one who was in possession, to be void on payment of £75, "at such time when he, the said party of the second part, his, etc., shall be dispossessed;" and there was a further stipulation that the mortgagee should retain possession until the sum of £75 was paid. It was held that the general effect was to entitle the mortgagee to retain possession and receive the rents until the amount of the mortgage money had been satisfied, with liberty to the mortgagor to pay the whole amount at any time and "dispossess" the mortgagee; that the instrument was in effect a Welsh mortgage, and that the possession of the mortgagee was not such as to give him an absolute title under the Statute of Limitations (*a*).

2. *Equitable Mortgages.*

A mortgage may also be created by depositing title deeds with the mortgagee as security for an advance, either with or without an accompanying memorandum, in which case the property remains in the mortgagor; or, by conveyance to a trustee for the mortgagee; and in these cases it is called an equitable mortgage (*b*). But in consequence of the registry laws they are of rare occurrence (*c*).

3. *Legal Mortgages, Nature of.*

Mortuum vadium, a dead pledge, or *mortgage*, is where a man borrows of another a specific sum (*e.g.* £200), and grants him an estate on condition that if he, the mortgagor, shall repay the mortgagee the said sum of £200 on a certain day mentioned in the deed, then the grant shall be deemed void; or, that then the mortgagee shall reconvey the estate to the mortgagor. In this case, the land which is so put in pledge was by law, in case of non-payment at the time limited, for ever dead and gone from the mortgagor, and the mortgagee's estate in the lands was then at law no longer conditional, but absolute.

(*a*) *Re Yarmouth*, 26 Gr. 593.

(*b*) See *Zimmerman* v. *Sproat*, 26 O.L.R. 448; 5 D.L.R. 452.

(*c*) An equitable mortgage was held good as against an assignment for creditors, though the assignee had no notice of it: *Re Wilson Estate*, 33 O.L.R. 500.

A legal mortgage may then be defined as a grant of land to the mortgagee, with a defeasance clause or proviso for redemption, whereby it is agreed that the estate granted shall be defeated or become void, or shall be re-conveyed to the mortgagor, on payment of a sum of money, or performance of some other condition. In addition to the grant and defeasance clauses, there are usually inserted covenants by the mortgagor for title, covenants to secure the repayment of the money and observe the terms of the mortgage, to pay the taxes while the mortgage subsists, to insure, if there are buildings on the land, stipulations regulating the rights of the parties on default being made, and a power of sale in case of default. A mortgage is therefore a composite instrument, containing a grant of lands with covenants for title, a defeasance or condition to defeat the grant, and a bond, obligation, or covenant to repay a sum of money borrowed, or to perform some other conditioned act. While a mortgage retains this form, and, for conveyancing purposes, retains also this character, except where it is affected by statute, yet by the current of equity decisions it is now regarded merely as a security for money advanced, or for the performance of some other act (*d*), and, if it contains a covenant to pay, a debt by specialty secured by a pledge of lands. If there is no covenant to pay, or other stipulation importing a debt, the mortgage itself, *i.e.*, the conveyance of the land with a proviso for redemption, is not conclusive evidence of a debt upon which an action will lie (*e*); and in one case evidence was admitted to show that a mortgage, which did not contain a covenant to pay, had been given in satisfaction of the debt of another who had in consideration of receiving it relieved the mortgagor from all liability, and that in fact no money had ever been advanced on it (*f*).

The liability of a mortgagor may, of course, be regulated by express stipulation. Thus, where a mortgage contained an express stipulation that, before proceeding upon the covenant for payment, the mortgagee was to realize on the lands, and that the mortgagor was to be liable only for $600, or such

(*d*) *Jamieson* v. *London and Can. L. & A. Co.*, 30 S.C.R. 14.

(*e*) But by the Mortgage Act, R.S.O. c. 112, s. 7, where a mortgagor conveys and is expressed to convey as beneficial owner, covenants for payment of the mortgage money, and the other short form covenants, are implied.

(*f*) *London Loan Co.* v. *Smyth*, 32 C.P. 530. And see *Kreglinger* v. *New Patagonia Meat & Cold Storage Co.*, (1914) A.C. at p. 47.

less sum as would, with the proceeds of sale, amount to the mortgage money, and in no event for more than $600, it was held that no action would lie on the covenant for payment until after proceedings for sale had been taken (*g*). And in another case, where it was agreed that the lands only should be liable for the payment of the mortgage, and the mortgagee distrained for interest under a clause to that effect in the mortgage, the mortgagor recovered the amount distrained for (*h*).

A mortgage need not therefore follow any prescribed form, if from the documents it appears that the transaction is in fact a pledge of lands to secure payment of a sum of money, or the performance of some act. And if it further evidences an indebtedness from the mortgagor to the mortgagee an action will lie for the debt as well as for foreclosure or sale. If, however, the informal documents show that a sale was intended with a right to re-purchase, and not a pledge, there is no right of redemption which the court can equitably deal with, but the contract of re-purchase must be carried out within the time agreed upon (*i*). The test in many cases of redemption is whether the so-called mortgagee has the corresponding right to compel payment. And in cases of informal documents, and of deeds absolute in form, evidence is admissible of the surrounding circumstances in order to lead to a conclusion as to whether the documents in fact constitute a mortgage (*j*).

Since the Judicature Act, an agreement for a mortgage capable of being specifically performed (*k*), would now probably be treated as a mortgage, on the same principle as an agreement for a lease is treated as equivalent to a lease (*l*).

4. *Right of Redemption.*

Wherever it appears that a transaction is one of pledge or mortgage, it imports that the property mortgaged is redeemable on payment of the money borrowed, or on performance of the

(*g*) *Wilson* v. *Fleming*, 24 Ont. R. 388.

(*h*) *McKay* v. *Howard*, 6 Ont. R. 135.

(*i*) *Barrell* v. *Sabine*, 1 Vern. 268; *Dibbins* v. *Dibbins*, (1896) 2 Ch. 348.

(*j*) See *Livingston* v. *Wood*, 27 Gr. 515; *Barton* v. *Bank of N.S. Wales*, 15 App. Cas. 379.

(*k*) *Hunter* v. *Lanfgord*, 2 Moll. 572; *Kreglinger* v. *New Patagonia Meat & Cold Storage Co.*, (1914) A.C. at pp. 36, 46, 47.

(*l*) See *ante*, p. 137.

condition stipulated for if the mortgage is given to secure the performance of something other than payment of money. And therefore any stipulation which is repugnant to, or which clogs or fetters, the right of redemption, is void (*m*). The mortgagor is entitled, on payment of the money, or on performance of the condition, to have his property re-conveyed to him.

When a mortgage is made the mortgagor has the right to redeem at the times and according to the terms of the contract. This is his legal, and may be called the contractual, right of redemption. But, at law, if he did not redeem according to the conditions of the mortgage, he forfeited his property, which then became absolute in the mortgagee. Equity, however, did not treat time as of the essence of the contract, and regarded the mortgage simply as a security for the debt, and, on failure to redeem within the time limited by the contract, would relieve against the penalty, and allow redemption on payment of principal, interest and costs in the case of a mortgage to secure repayment of money, or on performance of the terms of the bargain as far as possible in other cases. This right is the equity to redeem or the equitable right of redemption.

There being, thus, two separate and distinct rights of redemption, the legal and the equitable, it is manifest that either right might be fettered or clogged by some stipulation which is inconsistent with, or repugnant to, the right of redemption, and the matter may be considered with regard to these respective rights.

First, as to the contractual right of redemption. If it is a condition that the mortgagee is to have an option to purchase the property for a period which begins before the time for redemption has arrived, or which reserves to the mortgagee any interest in the property after the exercise of the contractual right, it is inconsistent with the contractual right to have a re-conveyance of the property on payment of the money secured (*n*). And so, where debenture stock was mortgaged to secure an advance which was to be payable on thirty days' notice, and an option was given to the mortgagee to purchase the stock within twelve months, it was held that the option was inconsistent with the right to demand a re-conveyance of the stock on payment, and therefore void (*o*). And where a

(*m*) See *Fairclough* v. *Swan Brewery Co.*, (1912) A.C. 565.

(*n*) *Kreglinger* v. *New Patagonia Meat & Cold Storage Co.*, (1914) A.C. at pp. 50, 51.

(*o*) *Jarrah Timber and Wood Paving Co.* v. *Samuel*, (1904) A.C. 323.

mortgage of a leasehold public house to certain brewers contained a covenant that the mortgagor and his assigns would not, during the term of the lease, whether any money was owing on the mortgage or not, use or sell in the public house any malt liquors except such as should be bought from the mortgagees, it was held that the covenant was bad, being inconsistent with the mortgagor's right to a re-conveyance on payment of what was due on the mortgage for principal and interest (*p*). But a contract that the mortgagor would buy only from the mortgagee during the currency of the mortgage was held to be valid (*q*).

As to the equitable right of redemption. If default is made in payment of the money according to the contract, the equitable right to redeem arises, and any stipulation tending to prevent, clog or fetter this right of redemption is void. Therefore, a stipulation that the mortgagee shall be allowed to purchase the property at a fixed sum in case default in payment is made, is void, because inconsistent with the right to call for a re-conveyance on payment of principal, interest and costs (*r*). A mortgage of shares to secure payment of money at a fixed date, contained a stipulation that on default in payment the mortgagee might take over the shares in satisfaction of the debt, and this was held to be void as being in the nature of a penalty and a clog on the equity to redeem on default (*s*). An insurance society advanced money to C. on the security of a reversionary interest to which C. was entitled if he survived his father; under the agreement the society insured C.'s life. It was agreed that if C. paid off the loan before the death of his father the policy should be assigned to him, but if C. died before his father without payment the policy should belong to the society. C. died before his father, not having paid anything, and it was held that, as the policy was part of the security and so redeemable by C., the stipulation that on default of payment it should belong to the society was inconsistent with the equitable right of redemption, and void (*t*). So, also, a stipulation that a mortgage in fee simple should be redeemable by the mortgagor and his heirs male, but should be irredeemable

(*p*) *Noakes* v. *Rice*, (1902) A.C. 24.

(*q*) *Biggs* v. *Hoddinott*, (1898) 2 Ch. 307.

(*r*) *Fallon* v. *Keenan*, 12 Gr. at p. 394.

(*s*) *Bradley* v. *Carritt*, (1903) A.C. 253; *Kreglinger* v. *New Patagonia, etc., Co.*, (1914) A.C. at p. 59.

(*t*) *Salt* v. *Northampton* (*Marquess of*), (1892) A.C. 1.

after the death of the mortgagor and failure of his heirs male, was set aside as a clog on the right of redemption (*u*).

But a mortgagor or mortgagee may by a separate and independent agreement subsequent to the mortgage make a valid agreement, there being no unfairness, whereby the mortgagor may be deprived of his right to redeem (*v*).

It is now established that in any case the mortgagee may stipulate for a collateral advantage at the time of making the mortgage. With respect to mortgages given to secure the performance of conditions other than the payment of money, it is said that there is no instance of the application of a rule that a collateral advantage could not be stipulated for. With respect to mortgages to secure the repayment of borrowed money, while the usury laws were in force, if any collateral advantage was stipulated for beyond repayment of the principal and legal interest, it was considered in courts of equity that such stipulation was against the spirit of those laws, and so void. But since the repeal of the statutes against usury, the reason for the rule has disappeared, and therefore such mortgages now stand upon the same footing as other mortgages; and it is now the law that a collateral advantage may be stipulated for at the time of making the mortgage, provided that it is not unfair and unconscionable, or in the nature of a penalty, or inconsistent with or repugnant to the contractual or equitable right to redeem (*w*). Therefore, where advances were made on a speculative security, a building estate, and the mortgagee stipulated for, and actually deducted, commissions on his advances at the times of making them, as part of the mortgage contract, there being no undue pressure on the mortgagor, it was held that he was entitled to do so (*x*). And where the right or advantage given to the mortgagee is not part of the mortgage transaction, it is of course unobjectionable (*y*).

The recent case of *Kreglinger* v. *The New Patagonia Meat & Cold Storage Co.* (*z*), reviews the principal cases on this branch of the subject, and indeed contains most of the learning on it. In that case the mortgagees agreed to lend a sum of

(*u*) *Howard* v. *Harris*, 1 Vern. 33.

(*v*) *Reeve* v. *Lisle*, (1902) A.C. 461.

(*w*) *Kreglinger* v. *New Patagonia Meat, etc., Co.*, (1914) A.C. at p. 61.

(*x*) *Mainland* v. *Upjohn*, 41 Ch.D. 126.

(*y*) *De Beers Consolidated Mines Ltd.* v. *British South Africa Co.* (1912) A.C. 52.

(*z*) (1914) A.C. 25.

money to the mortgagors on certain terms, and further provided that for a period of five years from the date of the mortgage (which might be paid off by the mortgagors on one month's notice) the mortgagors should not sell their goods to any other person than the mortgagees so long as the latter were willing to buy, and that the mortgagors should pay a commission to the mortgagees on all goods sold to any other person. The loan having been paid off, it was held that the collateral contract as to sale of goods was not repugnant to the right to redeem, though it was a condition on which the mortgagors obtained the loan.

It will be seen, of course, that it will be a question of fact in each case, or a question of interpretation of the documents, if no facts are proved, as to whether an agreement is collateral to or independent of the right to redeem, and whether it does in fact in any case clog or fetter the right of redemption.

5. *Foreclosure and Sale.*

As soon as a mortgage in fee is created, the mortgagee may immediately enter upon the lands, but is liable to be dispossessed upon performance of the condition by payment of the mortgage money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till he makes default, upon which the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land now is forever dead. But, as we have already seen (*a*), courts of equity will not allow the mortgagee to keep the mortgaged property. They allow the mortgagor a further time within which to redeem. If the mortgagor does not redeem within the time fixed by the court therfor, he is forever foreclosed and debarred from redeeming thereafter, unless indeed the court in a proper case should open the foreclosure and give him further time.

Instead of foreclosure the mortgagee may ask for sale by the court, if the mortgagor does not redeem. These remedies are entirely apart from the remedy afforded by the power of sale, which will be spoken of hereafter. By an old statute, giving a second mortgage without disclosing the first, was punished by the fraudulent mortgagor's forfeiting all equity of redemption whatever. But in consequence of our Registry Act, such a transaction could hardly take place.

(*a*) Ante, p. 176.

6. *Possession and Leases of Mortgaged Lands.*

A legal mortgage being, as we have seen, a conveyance of the land to the mortgagee, either with or without a privilege to the mortgagor to remain in possession until default, it follows that the mortgagor can make no lease of the mortgaged lands, which will be binding on the mortgagee unless there is power given by the mortgage to the mortgagor to make such a lease (*b*).

Where the mortgagor has, *after* the mortgage, demised to a tenant, and on default in payment, or otherwise, has become disentitled to the possession, the mortgagee may, by recognizing the possession of the tenant, preclude himself from being able to treat him as a trespasser; and it is said he becomes tenant to the mortgagee on payment to him of the rent reserved by the mortgagor (*c*). But it would seem that the mere receipt of interest by the mortgagee from the mortgagor will not amount to such recognition (*d*). The mortgagee cannot without some assent of such tenant, express or implied, constitute him his tenant, and cause him to hold of him the mortgagee; and without such assent evidencing a new tenancy between the mortgagee and the tenant, no privity of estate exists between them, and the mortgagee would not, as in the case of a tenant before mortgage, have the rights and remedies of the mortgagor to the rent (*e*). It is said, "that in order to create a tenancy between the mortgagee and the tenant let into possession by a mortgagor, there must be some evidence whence it may be inferred that such relation has been raised by mutual agreement, and that in such case the terms of the tenancy are to be ascertained (as in an ordinary case) from the same evidence which proves its existence; and where the tenant does consent to hold under the mortgagee, *a new tenancy* is created, not a continuation of the old one between him and the mortgagor" (*f*).

(*b*) *Keech* v. *Hall*, 1 Sm. L.C. 11th ed. 511; *Moss* v. *Gallimore*, Ibid. 514, and notes thereon.

(*c*) *Keech* v. *Hall*, 1 Sm. L.C. 11th ed. 511; *Doe d. Whitaker* v. *Hales*, 7 Bing. 322.

(*d*) *Doe d. Rogers* v. *Cadwallader*, 2 B. & Ad. 473; see, however, *Evans* v. *Elliott*, 9 A. & E. 342, per Denman, C.J.

(*e*) *Evans* v. *Elliott*, 9 A. & E. 342; *Partington* v. *Woodcock*, 6 A. & E. 690, per Patteson, J.

(*f*) *Moss* v. *Gallimore*, 1 Sm. L.C., 11th ed. 514, *in notis*. Of what nature would be the new tenancy between the mortgagee and tenant? For instance, if the demise from the mortgagor were by deed having more than three years to run, with covenants to repair, or cultivate in a particular mode, and all that passed between the mortgagee and the tenant was a verbal consent under threat of eviction to hold of the mortgagee,

It would seem, however, that the consent must be of a distinct character to create such new tenancy, at least to have the effect of absolving the tenant from liability to pay the rent to the mortgagor reserved on the lease from him, when the same has not been actually paid under some constraint to the mortgagee, and that mere consent alone to hold of the mortgagee will not have this effect. Thus, *mere notice* by the mortgagee to such a tenant will be no defence to an action by the mortgagor either for rent due before or after the notice. The ordinary principle as to a tenant is that he must pay rent, or for use and occupation, to the person from whom he took, and cannot deny his landlord's right short of eviction, or what is tantamount to eviction by a title paramount to the landlord, or payment under constraint of paramount charges as rent charges, or other claims issuing out of the land. Applying these principles to the case of the mortgagor's tenant on demise after mortgage, then it is clear, if the tenant be rightfully evicted by the mortgagee and let into possession again on a new agreement between him and the mortgagee, that the old lease ceases; so also it would seem to be (though it is by no means clear), that if there be only a constructive eviction, as, for instance, a threat to evict, coupled with an attornment to the mortgagee as his tenant (*g*). And though there have been no eviction, either actual or constructive, and no attornment or new tenancy created between the mortgagee and the tenant, still payment to the former under constraint in discharge of his claims will be a good defence by the tenant in an action for the rent by the mortgagor (*h*). But as before mentioned, *mere notice* by the mortgagee to the tenant who becomes such after the mortgage will not absolve the tenant from liability to his lessor for past or future rent; and there has been some question as to whether notice from the mortgagee, though coupled with payment of the rent, is any defence to an action by the mortgagor if the rent was overdue before notice given (*i*).

on payment of the rent reserved by the old lease, it would seem that at the most this could not create a greater interest than from year to year; per Cockburn, C.J., *Carpenter* v. *Parker*, 3 C.B.N.S. 235. If so, would the terms of the old lease as to repairs and cultivation govern and be incorporated into the new tenancy?

(*g*) *Doe d. Higginbotham* v. *Barton*, 11 A. & E. 315; *Mayor of Poole* v. *Whitt*, 15 M. & W. 571; but see the judgments in *Delaney* v. *Fox*, 2 C.B. N.S. 768; *Carpenter* v. *Parker*, 3 C.B.N.S. 237.

(*h*) *Johnson* v. *Jones*, 9 A. & E. 809. See also *Murdiff* v. *Ware*, 21 U.C.R. 68.

(*i*) *Wilton* v. *Dunn*, 17 Q.B. 295; see also per Hagarty, J., in *Fairbairn* v. *Hilliard*, 27 U.C.R. 111; and *Waddilove* v. *Barret*, 2 Bing. N.C. 538.

It not infrequently happens that the mortgagee permits the mortgagor to receive the rents, and does not in any way interfere with the tenancy, and that the tenant omits to pay rent to either; the question then arises, how the mortgagor can enforce payment. It is clear that where there is *no subsisting re-demise* to the mortgagor by the mortgagee, and the mortgagee is the reversioner, the mortgagor is not entitled to sue or distrain in his own name, and so no proceedings can be had unless in the name of the mortgagee. Recent cases go to show that under such circumstances as above, the mortgagor is "*presumptione juris* authorized," "if it should become necessary, to realize the rent by distress, and to distrain for it in the mortgagee's name as his bailiff" (*j*). It is to be observed that those cases, however, were cases in which there was no re-demise in the mortgage to the mortgagor, and from all that appears in them there was no right of possession in the mortgagor.

The mortgagor can receive the rents only by the leave and licence of the mortgagee, and where the mortgagee goes into possession the leave and licence to the mortgagor to collect the rents is put an end to (*k*). And this position is not affected by the statutes mentioned below (*l*), which create a mode of procedure only (*m*).

Where a lease has been made before the mortgage, the latter has the effect only of conveying the reversion to the mortgagee, and the tenant then becomes the tenant of the mortgagee (*n*).

In any case in which there should be a lease at a rent, and then the lessor should mortgage his reversion with a re-demise to himself, then it would seem that during the right of a mortgagor to the pernancy of the profits, any distress for rent due from the tenant during such subsistence, should be by the mortgagor and in his name only. He would appear then to be

(*j*) *Trent* v. *Hunt*, 9 Ex. 24, per Alderson, B.; *Snell* v. *Finch*, 13 C.B. N.S. 651; see also *Dean of Christchurch* v. *Duke of Buckingham*, 17 C.B. N.S. 391, per Willes, J.

(*k*) *Moss* v. *Gallimore*, *supra*; *Re Ind. Coope & Co.*, (1911) 2 Ch. at p. 231.

(*l*) R.S.O. c. 112, s. 5. A mortgagor entitled for the time being to the possession or receipt of the rents, as to which no notice of intention to take possession has been given by the mortgagee, may sue for such possession, sue or distrian for rent, etc. R.S.O. c. 155, s. 5. Rent reserved, and the benefit of covenants and conditions, shall go with the reversionary estate.

(*m*) *Re Ind., Coope & Co.*, (1911) 2 Ch. at p. 232.

(*n*) *Keech* v. *Hall*, 1 Sm. Lg. Cas., 11th ed., notes p. 519.

the reversioner, not indeed of the whole reversion, but of part, and so entitled to the rent and to distrain. If A. seised in fee demise for a thousand years at a rent, and, pending the lease, demise to B. for five years, B. becomes reversioner and entitled to the rent as to the first lease during the term granted to him, and, instead of enjoying the possession of the land, he takes the rent (*o*). The position of B., the second lessee, and of the mortgagor, in the case above put, appear in principle identical.

7. *Possession as between Mortgagor and Mortgagee.*

The right to possession as between mortgagee and mortgagor may be considered under the following heads:—

1. When nothing is said as to possession in the mortgage, or at or after its execution, and no tenancy is created by any implied or express agreement; here the mortgagee's right of possession exists from the time of execution of the mortgage (*p*); and the mortgagor continuing in possession is in the position of a tenant at sufferance.

2. If the mortgage is silent as to possession, and the mortgagee either expressly consent to the mortgagor remaining in possession, or the facts are such that such consent can be implied, then the mortgagor cannot be treated as a trespasser or tenant at sufferance, and so ejected without demand of possession. The position of a mortgagor under these circumstances is like that of a tenant at will, both as regards right to possession and the application of the Statute of Limitations (*q*).

3. If nothing appear as to a tenancy or right to possession beyond a covenant by the mortgagor that *after* default the mortgagee may *enter*, hold, possess, and enjoy, this will not by implication override the effect of the conveyance, which gives an immediate right of entry to the mortgagee; such a covenant may be regarded only as an ordinary covenant for quiet enjoyment, to take effect after default (*r*).

4. If the mortgage contain a positive agreement or proviso that till default in payment on certain named days the mort-

(*o*) Preston Conv. Vol. 2, p. 145; Co. Litt. 215*a*; *Harmer* v. *Bean*, 3 Car. & Kir. 307.

(*p*) *Doe d. Mowat* v. *Smith*, 8 U.C.R. 139.

(*q*) *Litchfield* v. *Ready*, 5 Ex. 939; and see *Doe d. Higginbotham* v. *Barton*, 11 A. & E. 314. Can such consent be implied so as to create a tenancy at will from the mere fact of silence by the mortgagee and his knowledge that the mortgagor remains in possession? See notes to *Keech* v. *Hall*, 1 Sm. Lg. C., 11th ed. 511, and *Evans* v. *Elliott*, 9 A. & E. 342; *Royal Canadian Bank* v. *Kelly*, 19 C.P. 196, per Gwynne, J.

(*r*) *Doe d. Roylance* v. *Lightfoot*, 8 M. & W. 553.

gagor may remain in possession, as, for instance, when a day is named for payment of principal and prior days for payment of interest, this operates as a re-demise to the mortgagor "for as long as he had time given him to redeem by payment of the mortgage money, unless he make default in any intermediate payment," as being an *affirmative* agreement by the mortgagee for a *definite named* time, and the mortgagee's right of entry will accrue only on default (*s*).

It would seem that where the proviso for possession would give a right to possession exceeding three years, though subject to earlier determination on default by the mortgagor, non-execution by the mortgagee will cause the proviso to be invalid to create the term or right to possession intended (*t*); unless, indeed, the mortgage can operate to execute the term by way of use. Thus it may well be contended that on a mortgage in fee by way of release or statutory grant, wherein the day for payment should be more than three years from execution of the mortgage, with a proviso for possession by the mortgagor till default, it might operate to create a use for the term in the mortgagee for the mortgagor, which the statute would execute (*u*), and as to which the execution by the mortgagee would be immaterial. If, however, the conveyance should be *unto and to the use of* the mortgagee, or otherwise there should be a use on a use, or the mortgage were to a corporation in whom no use can be executed, then no legal estate in the term would be executed for the benefit of the mortgagor (*v*).

(*s*) *Wilkinson* v. *Hall*, 3 Bing. N.C. 533; *Ford* v. *Jones*, 12 C.P. 358. See remarks under the sixth head.

(*t*) *Swatman* v. *Ambler*, 8 Ex. 72; *Pitman* v. *Woodbury*, 3 Ex. 4; *Doe d. Roylance* v. *Lightfoot*, 8 M. & W. 553; *Wilkinson* v. *Hall*, 3 Bing. N.C. 533; *Ford* v. *Jones*, 12 C.P. 358. See *Trust and Loan Co.* v. *Lawrason*, 6 App. R. 286; 10 S.C.R. 679.

(*u*) *Morton* v. *Woods*, L.R. 3 Q.B. 658, per Blackburn, J., in argument and judgment. See *Simpson* v. *Hartman*, 27 U.C.R. 460, where a mother seised in fee in consideration of five shillings and natural love, granted, bargained, and sold to her daughter, and her heirs, *to their own use*, for ever, "reserving, nevertheless, to my (the grantor's) own use, benefit and behoof, the occupation, rents, issues and profits of the above granted premises during my natural life." The Court considered that the fee passed to the grantee. The operation of the Statute of Uses was not alluded to; and if it had been, it would seem that taking the conveyance to operate by way of grant (whatever might have been the case if it were to operate as a covenant to stand seised, or by way of bargain and sale), the use in favour of the grantor would still have been a use upon a use, and so unexecuted by the statute, and a mere trust. This case, therefore, does not conflict with what is stated in the text.

(*v*) See *Simpson* v. *Hartman*, *supra*.

Where the term intended to be created cannot be executed in the mortgagor under the Statute of Uses, and assuming, as it would seem to be the case (*w*), that where it would exceed three years, the non-execution by the mortgagee would prevent its taking effect, the clause as to possession would still be evidence of a tenancy at will. And if there be an attornment clause in the mortgage under which the mortgagor agrees to pay as rent sums equivalent to the interest, and occupation subsequently by him, the position of landlord and tenant will be created at a rent, and the mortgagee can distrain (*x*). Probably also, if rent were paid *qua* rent, with reference to a year or aliquot part of a year, and there was nothing in the mortgage showing that a tenancy at will only were intended, a tenancy from year to year would be created.

If the mortgagor be tenant at will to the mortgagee, an assignment or sub-lease by the mortgagor does not *per se*, without notice to the mortgagee, determine the tenancy (*y*).

5. On default in the last instance, where the licence is to remain in possession till default, the mortgagor becomes tenant at sufferance.

6. If the duration of the intended demise be uncertain, or couched in the shape only of a *negative* covenant by the mortgagee, it has been said this will not operate as a valid demise (*z*). Thus a mere covenant by the mortgagee that in case of non-payment on the day named he would *not* enter till after a month's notice in writing, has been said to be invalid as a demise, on the double objection of want of certainty and of affirmative language. And even though there were affir-

(*w*) *Ante* note *u*.

(*x*) *West* v. *Fritche*, 3 Ex. 216; *Morton* v. *Woods*, L.R. 3 Q.B. 668; *Royal Canadian Bank* v. *Kelly*, 19 C.P. 196; see further, postea, s. 18.

(*y*) *Pinhorn* v. *Souster*, 8 Ex. 763; *Melling* v. *Leak*, 16 C.B. 652, 669; *Richardson* v. *Langridge*, Tud. Lg. Ca. 4th ed. at p. 18. The position of a tenant of a mortgagor, himself tenant at will to the mortgagee, seems to be involved in some obscurity. As a general rule, a lessor being reversioner can treat the tenant of his tenant at will as a trespasser; but there is a case "which goes so far as to show that a mortgagor in possession, who is not treated by the mortgagee as a trespasser, may confer on his lessee the legal possession, although the mortgage was in fee." *Doe d. Higginbotham* v. *Barton*, 11 A. & E. 307; *James* v. *McGibney*, 24 U.C.R. 158, per Draper, C.J. See also *Evans* v. *Elliott*, 9 A. & E. 342, per Ld. Denman, C.J.

(*z*) See the notes to *Keech* v. *Hall*, 1 Sm. Lg. Ca., 11th ed. 511; see also on the question as to certainty, *Ashford* v. *McNaughten*, 11 U.C.R. 171; *McMahon* v. *McFaul*, 14 C.P. 433; *Konkle* v. *Maybee*, 23 U.C.R. 274; *Sidey* v. *Hardcastle*, 11 U.C.R. 162; *Copp* v. *Holmes*, 6 C.P. 373; *Richardson* v. *Langridge*, Tud. Lg. Ca. 4th ed. at p. 13, and cases there referred to; see also a review of the cases in *Royal Canadian Bank* v. *Kelly*, 19 C.P. 196.

mative language giving to the mortgagor a possessory right, it will not avail unless the period for possession be fixed and certain; thus an agreement that the mortgagor might remain in possession till a month's *notice* in writing to quit after default, would not create a term certain. Where, as is usual, the mortgage names a day for payment of principal money with intermediate days for payment of interest, and a provision that till default in payment the mortgagor may remain in possession, no objection can be made on the ground of want of certainty. Such provision operates as creating a term till the day named for payment of the principal, with a cesser of the term on default in payment of interest. A lease for ten years, if the lessee so long live, is a good lease.

7. If by the operation of an attornment clause, as before explained, the mortgagor should expressly become tenant to the mortgagee, either at will or from year to year, at a rent, then he will have the ordinary right to possession of any such tenant, except in so far as such right may be qualified by the mortgage itself in giving right to entry without notice on default in payment or non-observance of covenants.

8. Those cases where, as in the fourth and seventh instances above, the proviso for possession is valid as a re-demise by the mortgagee if the mortgage were executed by him, but if not so executed, might fail to create the term intended, as not being in compliance with R.S.O. c. 102, ss. 3, 4.

Unless there be some absolute necessity for the mortgagee to enter into possession, such a course is usually avoided, for it involves an account between him and the mortgagor. A mortgagee in possession is liable to account not only for what he has received, but also for what, but for his wilful default, he might have received (*a*). He is chargeable with an occupation rent in respect of property held by himself, and is liable for voluntary waste (as in pulling down houses and opening mines). As a mortgagee in possession is regarded in some measure in the light of a trustee, he will, if he assign the mortgage and possession to another without the assent of the mortgagor, *continue* to be accountable and chargeable for rents and profits after assignment; a matter of some importance where they should be large, and the assignee should receive, or, but for his wilful default, might have received, more than sufficient to pay the mortgage debt. For many improvements he might

(*a*) As to the nature and extent of liability, see *Coldwell* v. *Hall*, 9 Gr. 110; *Paul* v. *Johnson*, 12 Gr. 474.

make he will not be allowed, as otherwise by large expenditure he might preclude the mortgagor from redeeming (*b*). This would be what has been termed "improving the mortgagor out of his estate" (*c*).

8. *Actions to Protect Property.*

Though a mortgagor has, by the conveyance, parted with the property to the mortgagee, yet, where there is a clause entitling him to remain in possession until default, and no default has been made, he has always in equity been entitled to sue to prevent any injury or violation of right without joining the mortgagee (*d*). And so a mortgagor in possession under such a clause and not in default was held entitled to proceed for an injunction to restrain the breach of a covenant not to use the property in a certain way (*e*). And at law under similar circumstances actions of trespass (*f*) and ejectment (*g*) could be brought. After default, however, the mortgagor would no longer be entitled to possession nor to receipt of the rents and profits. By the Mortgage Act (*h*) it is now enacted that "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or sue, or distrain for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person, and in that case he may sue or distrain, jointly with such person." Since this enactment a mortgagor may maintain an action even after default if no notice of taking possession has been given, but after such a notice his right ceases (*i*). But where land is demised and the reversion is

(*b*) *Kerby* v. *Kerby*, 5 Gr. 587.

(*c*) *Sandon* v. *Hooper*, 6 Beav. 246.

(*d*) *Van Gelder* v. *Sowerby*, 44 Ch.D. 374, at pp. 390, 392, *et seq.* In *Platt* v. *Attrill*, 12 Ont. R. 119, the contrary is stated, but the case there relied on, *Swan* v. *Adams*, 23 Gr. 120, does not so decide.

(*e*) *Fairclough* v. *Marshall*, 4 Ex. D. 37.

(*f*) *Rogers* v. *Dickson*, 10 C.P. 481.

(*g*) *Ford* v. *Jones*, 12 C.P. 358.

(*h*) R.S.O. c. 112, s. 5.

(*i*) *Keech* v. *Hall*, 1 Sm. L.C., notes at pp. 507, 508.

mortgaged, the mortgagor cannot under this Act maintain an action for breach of covenant in the lease, though the mortgagee has not given notice of intention to take possession, because the covenants are assigned to the mortgagee (*j*).

9. *Custody of Title Deeds.*

A mortgagee becomes immediately entitled to the title deeds, and in the case of mortgages made on or before 1st July, 1886, the mortgagor is not entitled to inspect them in the hands of the mortgagee for any purpose whatever (*k*). But, now, a mortgagor, as long as his right to redeem subsists, is entitled at reasonable times, on his request and at his own cost, and on payment of the mortgagee's costs, to inspect and make copies or abstracts of, or extracts from the documents of title in the mortgagee's custody or power (*l*).

10. *Interest.*

The defeasance clause, or proviso for redemption, contains the terms upon which the mortgagor or those claiming under him may redeem, and the rate and mode of payment of interest and principal. A provision that if interest be not punctually paid the rate will be increased is considered, on equitable grounds, to be a penalty for not paying in time, and is relieved against by compelling the mortgagee to receive the lower rate. On the other hand, if a higher rate be stipulated for, with a provision that a smaller rate will be accepted if paid punctually, there is no relief against this, which is regarded as a mere matter of contract (*m*). In one case, the mortgage required payment of interest on the 16th of the month at twelve per cent. per annum, "but to secure prompt payment of said interest, the said mortgagee hereby agrees to take and receive at the rate of ten per cent. providing the said interest is paid on the said 17th, etc." On the 17th a bill was filed for foreclosure claiming the higher rate, and the court held that the first date (16th) being unequivocally mentioned as the day for payment, default had been made when the bill was filed, and, though the mortgagor tendered the lower rate on the 17th after

(*j*) *Turner* v. *Walsh*, (1909) 2 K.B. 484.
(*k*) See cases cited, Armour on Titles 98.
(*l*) R.S.O. c. 112, s. 4.
(*m*) 2 Davidson Conv. 3 ed. 292.

the filing of the bill, the mortgagee was not bound to accept it (*n*).

In the case of mortgages falling due after 20th April, 1907, where provision is made for accepting a lower than the contract rate for prompt payment, and interest at such lower rate has been paid up to maturity, the mortgagor is entitled to pay the principal money and interest at such lower rate at any time after maturity on giving three months' notice of his intention to make such payment, or on paying three months' interest at such lower rate in lieu of notice (*o*). If he fails to make payment at the time mentioned in the notice, he may thereafter make the payment on paying interest at the lower rate to date of payment together with three months' interest in advance (*p*).

A stipulation that, if the interest be not paid punctually, the principal shall bear a higher rate after the day fixed for payment of interest, is not regarded as a penalty, but as a contract for a lower rate up to a certain day and a higher rate afterwards (*q*).

Where a claim is made for interest after maturity of the mortgage, it may be allowed as a claim for damages for detention of the money beyond the day fixed for payment, and therefore it will be computed at five per cent. per annum, the statutory rate (*r*), unless the mortgage contains a stipulation for payment at some other rate after maturity. And where a stipulation is made for payment of the contract rate after as well as before maturity, the contract rate may be recovered after maturity (*s*). A provision that the mortgagor shall pay a certain rate "until the whole amount shall be fully paid and satisfied," or words to that effect, is not sufficient to carry the obligation beyond the maturity of the mortgage—these words having reference only to the date of payment fixed by the mortgage (*t*). And there is no difference in this respect between an action on the covenant by the mortgagee, and an action for redemption by the mortgagor (*u*).

(*n*) *Bennett* v. *Foreman*, 15 Gr. 117.

(*o*) R.S.O. c. 112, s. 18.

(*p*) Ibid. s.-s. 2.

(*q*) *Waddell* v. *McColl*, 14 Gr. 211; *Downey* v. *Parnell*, 2 Ont. R. 82.

(*r*) R.S.C. c. 120, s. 3.

(*s*) *Middleton* v. *Scott*, 4 O.L.R. 459; *Pringle* v. *Hutson*, 19 O.L.R. 652.

(*t*) *Powell* v. *Peck*, 15 App. R. 138. See also *St. John* v. *Rykert*, 10 S.C.R. 278.

(*u*) *Powell* v. *Peck*, *supra*.

By the section last referred to an exception is made "as to liabilities existing immediately before the seventh day of July, 1900." A "liability" in this section has been held to mean a liability for interest, *qua* interest, upon the contract, and not a liability to pay interest as damages for detention of money. And, therefore, where a mortgage made in 1887 and maturing in 1900, called for interest at seven per cent. during that period, but did not call for any rate after maturity, it was held that the damages for detention of the money after maturity were not within the exception, and that 5 per cent. only could be recovered (*v*).

Where after maturity of a mortgage a mortgagor continued to pay eight per cent. per annum, not knowing that he was liable only for six per cent., it was held that he could not recover back the excess, nor have it credited on principal (*w*). But where a mortgagee sold under his power of sale and retained the contract rate after maturity, it was held that he was bound to account for the excess over the statutory rate (*x*). For this reason, where the contract rate is higher than the statutory rate, it is usual to stipulate that interest shall be paid at the rate mentioned after as well as before maturity, and after as well as before default.

It is necessary that the rate of interest should be stated in the mortgage in order to comply with the Interest Act (*y*). When the mortgage is payable on a sinking fund plan, or by blended payments of principal and interest, or on any plan which involves an allowance of interest on stipulated payments, no interest is chargeable or recoverable unless the rate is set out in the mortgage and the amount of principal money is also shown (*z*). And by another section (*a*), when any principal is not made payable until a time more than five years after the date of the mortgage, then at any time after the expiration of such five years any person entitled to redeem may tender the principal money with interest to date and for three months in advance, and no further interest is then chargeable.

(*v*) *Penderlith* v. *Parsons*, 14 O.L.R. 619.

(*w*) *Stewart* v. *Ferguson*, 31 Ont. R. 112.

(*x*) *Peoples Loan Co.* v. *Grant*, 18 S.C.R. 262.

(*y*) R.S.C. c. 120, s. 4. Held to be valid in *Bradburn* v. *Edinburgh Life Ass'ce Co.*, 5 O.L.R. 657.

(*z*) S. 6.

(*a*) S. 10, and see R.S.O. c. 112, s. 17.

11. *Interest and Taxes After Default.*

After a mortgage matured it was always the rule in equity that a mortgagee was not bound to take his mortgage money without six months' notice (*b*). Where the mortgagee calls in the money due on the mortgage (as, where it has been allowed to lie after default), he must accept the money when tendered by the mortgagor, and if the money is not paid promptly he cannot, as long as his demand remains in force, insist upon notice by the mortgagor to pay off (*c*).

In the case of mortgages made after the 1st July, 1888, and before 12th June, 1903, unless it is otherwise provided in the mortgage with respect to notice or the payment of interest in lieu of notice, the mortgagor may pay the whole principal money, if overdue, or any instalment thereof which has become payable according to the terms of the mortgage, without previous notice to the mortgagee, and without the payment of any interest in lieu of notice (*d*). Principal is not deemed to be overdue under this section where it has become payable merely by reason of default in payment of part of the principal or interest (*e*).

As to mortgages made on or after 12th June, 1903, notwithstanding any agreement to the contrary, where default has been made in the payment of any principal or interest, the mortgagor may at any time, upon payment of three months' interest on the principal money so in arrear, pay the same, or he may give the mortgagee three months' notice in writing of his intention to pay, and this entitles him to pay off the mortgage money (*f*). If he fails to make the payment at the time mentioned in the notice, he may thereafter at any time pay off by paying the principal and interest with interest on the principal to the date of payment with three months' interest in advance (*g*).

The proviso for redemption in the statutory short form appears to be defective in an important particular (*gg*). The stipulations are to be taken, according to the decisions re-

(*b*) See *Archbold* v. *Building & Loan Association*, 15 Ont. R. 237; 16 App. R. 1.

(*c*) *Edmundson* v. *Copeland*, (1911), 2 Ch. 301.

(*d*) R.S.O. c. 112, s. 15.

(*e*) Ibid. s.-s. 2.

(*f*) R.S.O. c. 112, s. 16.

(*g*) Ibid. s.-s. 2.

(*gg*) R.S.O. c. 117, Sch. B. s. 2.

specting the duration of the covenant (*h*), as applying only to the period up to maturity of the mortgage, and the covenant to pay to the same period; and indeed the proviso requires the payments to be made and all things to be done under the proviso "until default." The covenant is to make the payments and perform the acts required by the proviso. Payment of taxes is included in the proviso. Hence the covenant extends only to the payment of taxes "until default," and there appears to be no obligation on the mortgagor to pay taxes after default (*i*), though he could not redeem without paying them.

12. *Covenants—For Title.*

Following the defeasance are the covenants for title, and for security of the mortgage obligation, and other stipulations. The short form covenants for title are the same as in ordinary purchase deeds, except that the covenant for quiet enjoyment is made to take effect only after default in payment of the mortgage money; and the covenants are not limited, as in case of an ordinary purchase deed, to the acts of the grantor, but are unlimited and absolute. This has been complained of, on the ground that the result is, after foreclosure, or sale under a power of sale in the mortgage, that the mortgagor continues liable more extensively on his covenants which run with the land, than if he had sold the estate in the first instance; and no doubt this is so. On the other hand, if, through defect in title, the mortgagee lost the security of the land on recovery by a stranger through some defect in title not occasioned by the mortgagor, and the covenants for title were limited to his acts, the mortgagee might be in a very precarious position, in case the day appointed for payment of the principal were distant; whereas, if the covenants were general, he might sue on them at once in such case without waiting for the day appointed for payment, and the measure of damages would be, it is apprehended, the amount of the loan; for the mortgagee is entitled to what he stipulated for, viz., the security of the land, and failing that, to be reinstated and to a return of his money.

13. *For Quiet Possession.*

The covenant that on default the mortgagee shall have quiet possession (No. 7 in the Statutory form), the power to

(*h*) *St. John* v. *Rykert*; *Powell* v. *Peck*; and *People's Loan* v. *Grant*, *supra*.

(*i*) Leith R.P. Stat. 419.

enter and sell (No. 14), and the proviso that until default the mortgagor shall have quiet possession (No. 17) are not quite in harmony with each other. Clause 7 gives the mortgagee the right to possession from and after default in payment of principal or interest, and also apparently of taxes and statute labour; clause 14 gives the right only after default in payment of principal or interest, and then only after a certain written notice; clause 17, on the other hand, allows the mortgagor the right to possession till default in payment of principal or interest, or in *observance of covenants*. Thus the right of the mortgagee to possession is more extensive under the grant of the lands to him and of clause 17 negativing his right to possession, than under the positive effect of clauses 7 and 14, giving him the right to enter. If these various clauses be used together without any modification, as is probable, then it would seem that they may yet to a great extent be reconciled. Thus, suppose the covenant to insure be inserted, and default be made therein by the mortgagor, whereon the mortgagee should bring ejectment; the mortgagor would contend that clauses 7 and 14, which give a right to the mortgagee to enter, do not extend to breach of covenant, and that clause 14 requires written notice to be given before entry. The proper answer of the mortgagee apparently would be, that the effect of the conveyance is to give him the immediate estate and right to possession; that such effect is controlled solely by clause 17, which allows the mortgagor possession only till breach of covenant; that there is no other clause giving possession to the mortgagor, and consequently the general effect of the conveyance must govern; and so far as regards clauses 7 and 14, that they do not expressly negative any right the mortgagee otherwise has, nor do they positively confer any right to possession on the mortgagor; that clause 7 operates only as a covenant for quiet enjoyment against interruption, not to come into operation on default of the covenant to insure (to which it does not extend), but only on default in payment of the mortgage moneys, taxes or statute labour, and "in the meanwhile, though the mortgagee is equally to have power to enter and enjoy the land, yet he must content himself with his own title against interruption by strangers, there being no covenant by the mortgagor to protect him during that period; whereas if he be disturbed after default in the covenant to insure he may have

recourse to his remedy on the covenant" (*j*). Clause 14 is capable, perhaps, of a somewhat similar construction; at any rate it would seem that on breach of the covenant the mortgagee might eject, though no default were made in the payment of the mortgage moneys, taxes or statute labour.

14. *Further Assurance.*

Clause 9 of the statutory form, being the covenant for further assurance, is made to operate only after default; in this respect it is "objectionable, as it might well happen that some act for further assurance might be required to be done before default" (*k*). It need hardly be mentioned that, so long at least as the equity of redemption subsists, the mortgagor cannot under this covenant be required to convey except subject to the proviso for redemption; nor can he be required after default to release his equity of redemption.

15. *Production of Title Deeds.*

Clause 10, that the mortgagor will produce title deeds, is a clause which, without some explanation, might strengthen a practice unfortunately once too prevalent, viz., that the title deeds may be left in the hands of the mortgagor. This should never be permitted, if only (apart from other reasons) on the ground of the frequent impossibility of ever afterwards obtaining any production of the title deeds, and the consequent depreciation in the value of the property, and difficulty in carrying out a sale. When the mortgagor makes default, and the mortgagee proceeds to enforce his claim by foreclosure or sale, an hostility frequently springs up, and the mortgagor, so far from producing the title deeds, does all in his power to thwart the mortgagee. The remedy on the covenant will frequently be found useless, and when a foreclosure or sale has to be resorted to, the mortgagor is generally in such circumstances that, on a sale, any proceedings on the covenant to produce only entail expense on the mortgagee, and on a foreclosure any order for delivery up of the title deeds might be of no avail (*l*). The

(*j*) *Doe d. Roylance* v. *Lightfoot*, 8 M. & W. 553, in which case there was no right to possession given to the mortgagor, but the covenant for possession was that *after default* the mortgagee might enter, possess, etc.; the question was whether the mortgagee had right immediately on execution of the deed, or only after the default.

(*k*) Davidson Conv. 3 ed., vol. 2, 659.

(*l*) Where the statutory power of sale is being exercised, the mortgagee, when the power has become exercisable, may demand the title deeds: R.S.O. c. 112, s. 25. But the same objection prevails in this case.

form may be of service where the title deeds cover other property to be retained by the mortgagor and not included in the mortgage; or where the mortgagor has sold part of the property covered by the title deeds, and has himself given his vendee a covenant to produce. Even in these cases a prudent mortgagee will obtain possession of the title deeds to himself, or at least to some trustee for both parties. When the mortgagor objects on the ground that the deeds cover other property, the mortgagee may himself offer to covenant to produce; and when the objection is that the mortgagor has covenanted to produce to a former purchaser, the mortgagee may urge that the covenant would also be binding on him during the continuance of his estate as running with the land (*m*).

16. *Insurance.*

Clause 12, the covenant for insurance, is defective in that it provides that the mortgagor will insure, "unless already insured." If he is already insured the covenant does not apply. Though the mortgagee should insist upon an assignment of the policy, the covenant operates as an equitable assignment of a policy effected under it, entitling the mortgagee to sue for a loss (*n*).

If a policy be assigned, the covenant to keep it up so long as any moneys remain due should contain a stipulation to pay the annual premium requisite so to do, two or three days at least before the policy would expire, and produce the receipt on demand; this gives time to the mortgagee after default to pay, or insure himself before the policy expires. It should provide also that the mortgagor will do or suffer nothing whereby the policy may be vitiated, and that thereon or on any default by the mortgagor in keeping up the policy, the mortgagee may keep up the insurance or otherwise insure, and that the premiums so paid shall be charged on the land. Where, how-

(*m*) Sugden Vendors, 14 ed., 453. It must not be supposed that the fact of a vendor having given a covenant to produce on sale of part of the property, entitles him, on sale of the residue, to retain the title deeds to answer his covenant; in the absence of any contract on the subject, it would seem he will have to deliver them over to the purchaser of the residue; he can neither retain them nor deliver them to the first purchaser. The vendor would, however, in such a case be entitled to have the covenant recited in the conveyance of the residue, or endorsed on it, so as to create notice, and might fairly require a covenant from the purchaser to perform it: Sugden Vendors, 14 Ed. 434.

(*n*) *Greet* v. *Citizens Ins. Co.*, 27 Gr. 121; 5 App. R. 596.

ever, no power to insure is given to the mortgagee by the mortgage, then on default for a certain time the mortgagee may insure and add the premium to the principal money at the same rate of interest (*o*).

Both the mortgagor and mortgagee have insurable interests. And if the mortgagee should insure at his own expense, without having any right under the mortgage deed or otherwise to recover the premium from the mortgagor, then he is considered as having insured for his own benefit, and not for that of the mortgagor, or of the estate, and could retain the insurance money upon a loss happening and also recover the mortgage money without any deduction; and in this respect he stands on much the same footing as a lessor insuring under like circumstances (*p*).

It is a practice, now almost universal, for the mortgagee to procure from the insurance office what is commonly known as a mortgage clause. This clause is inserted in the policy and usually provides that the interest of the mortgagee in the policy shall not be invalidated by any act or neglect of the mortgagor, nor by the occupation of the premises for purposes more hazardous than are permitted by the policy. And it also provides that if a loss shall happen which the insurance office shall pay, and the office shall claim that there is no liability to the mortgagor, it shall be subrogated to all the rights of the mortgagee under all the securities held for the debt to the extent of the payment; or that the office may pay the whole mortgage off and take an assignment. This clause should always be obtained, as upon a mere assignment of the policy it continues to be voidable by the acts of the mortgagor (*q*). The effect of this arrangement upon the interest of the mortgagee is that as to all acts or negligence occurring after it is made the mortgagee is protected, but the policy may still be shown to be invalid for some reason existing at the time of the assignment (*r*). This clause covers the neglect of the mortgagor to make proofs of loss within the time required by the conditions of the policy, and enables the mortgagee to sue,

(*o*) R.S.O. c. 112, s. 19 (*b*).

(*p*) *Dobson* v. *Land*, 8 Ha. 216; *Russell* v. *Robertson*, 1 Ch. Ch. 72.

(*q*) *Mechanics' Bldg. & S. Society* v. *Gore District Ins. Co.*, 3 App. R. 151.

(*r*) *Omnium Securities Co.* v. *Canada Mutual Ins. Co.*, 1 Ont. R. 494; *Agricultural S. & L. Co.* v. *Liverpool & London & Globe Ins. Co.*, 32 Ont. R. 369; 3 O.L.R. 127; 33 S.C.R. 94.

notwithstanding the mortgagor's neglect (*s*). And the claim of the mortgagee may be good although the mortgagor himself could not recover (*t*). Where the insurance office claims to be subrogated to the rights of the mortgagee it must show that no liability exists to the mortgagor and that there is a good defence to any action brought by him on the policy (*u*).

The covenant for insurance does not provide for the application of the insurance money, in case a loss occurs and is paid. In the absence of any special contract, the rights of the parties are governed by the Mortgage Act (*v*), which enacts that "(1) All money payable to a mortgagor on an insurance of the mortgaged property, including effects, whether affixed to the freehold or not, being or forming part thereof, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received. (2) Without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance of the mortgaged property be applied in or towards the discharge of the money due under his mortgage." The first sub-section has been modified to include "effects whether affixed to the freehold or not," but in its original form is explained thus by Osler, J. A. (*w*): "Now the Act does not profess to interfere with any right the mortgagee had theretofore possessed to deal with the proceeds of the policy when the mortgage money was overdue. He was not compelled to apply it at all, or if he did apply it he might apply it in such a way as to preserve the full benefit of his contract. The new right or option which is given to him must, I think, be considered as one controlling any right which the mortgagor might otherwise have had, to direct the disposition of the insurance received by or paid into the hands of the mortgagee before the mortgage debt became due. In effect, the option given by the section is either to have the money applied in rebuilding or to have it at once applied in reducing the debt secured by the mortgage. If the latter option is not exercised the money remains in the mortgagee's hands (in those cases in which he has had, apart from the statute, the right to

(*s*) *Anderson* v. *Saugeen Mut. Ins. Co.*, 18 Ont. R. 355.

(*t*) *Howes* v. *Dominion F. & M. Ins. Co.*, 8 App. R. 644.

(*u*) *Anderson* v. *Saugeen Mut. Ins. Co.*, 18 Ont. R. 355; *Bull* v. *North British Co.*, 15 App. R. 421; 18 S.C.R. 697.

(*v*) R.S.O. c. 112, s. 6.

(*w*) *Edmonds* v. *Hamilton Prov. L. & S. Soc'y*, 18 App. R. 347, at p. 357.

receive it), as it would have done before the Act, and subject to whatever rights or interests the parties by law respectively had therein, and *inter alia* to the right of the mortgagee to make such application of it as he might deem proper to the payment either of principal or interest, or of both, overdue or to make no application of it if he should deem it more advisable for the security of his contract not to adopt that course, but to require the mortgagor to make his payments in accordance with his covenants." And per Maclennan, J.A. (*x*): "Every dollar of the insurance money is a security for every dollar of the debt, just as the whole mortgage debt is a charge upon every foot of the land. The mortgagee is not obliged to apply it to arrears either of principal or interest unless he pleases, any more than he is obliged, having a power of sale, to sell portions of the land from time to time for that purpose. He may keep the insurance money by him, and sue for arrears, or distrain for them, if he has that power, or he may at his option apply the whole or part of the insurance money to the arrears. It is part of his security, and whenever there is default he may resort to it, or he may resort to his personal or other remedies."

The first sub-section of the enactment will apply, although there may be no covenant to insure, for it is general in its terms, and applies to any money payable to a mortgagor (*y*).

17. *Power of Sale.*

Clause 14 conferring the power of sale and providing for application of moneys is one which varies much from the modern approved forms. It conflicts apparently as regards right to possession with clauses 7 and 17. It does not extend to breach of covenants as do those clauses. The power is given to the personal, as well as the real, representatives, although by the Devolution of Estates Act (*z*) it is enacted that in the interpretation of any act, or any instrument to which a deceased person was a party, his personal representatives while the estate remains in them, shall be deemed his heirs, unless a contrary intention appears. And though the administrator might sell under the power while the estate is vested in

(*x*) At p. 367.

(*y*) See *Stinson* v. *Pennock*, 14 Gr. 604; *Carr* v. *Fire Assurance Ass'n*, 14 Ont. R. 487; and *Edmonds* v. *Ham. Prov. L. & S. Soc'y*, 18 App. R. at p. 354, referring to above cases.

(*z*) R.S.O. c. 119, s. 7.

him, yet if it should shift into the heirs, the administrator might still sell. It should not, however, be dependent on notice, but the provision as to notice should be by a covenant by the mortgagee that notice shall be given; and the purchaser should be expressly relieved from any necessity as to seeing that notice was given. There is no power to the mortgagee to buy in at auction and re-sell without being responsible for loss or deficiency on re-sale; or to rescind or vary any contract of sale that may have been entered into; or to sell under special conditions of sale (though the latter may be permissible when the conditions are not of a depreciatory character). The application of insurance moneys is provided for. The surplus of sale moneys is to be held in trust to pay to the mortgagor. There is no clause relieving a purchaser from seeing that default was made, or notice given, or otherwise as to the validity of the sale; the importance and benefit of which to the mortgagee, and even to the mortgagor, will be presently alluded to. The provision that the giving of the power of sale shall not prejudice the right to foreclose is unnecessary, as it is an independent contractual right.

For the transfer of the legal estate of the mortgagee at law no power of sale is requisite, and the assignee or vendee will take subject to such rights as may be subsisting in the mortgagor, or those who claim under him, of possession, redemption, or otherwise; in other words, the mortgagee may always assign the mortgage debt and convey the land; and thus a sale and conveyance of the estate by the mortgagee to a vendee, though made professedly as in exercise of a power of sale in the mortgage, is valid to pass the legal estate of the mortgagee, even though no power of sale existed, or were improperly exercised; and when the mortgagor's right to possession is gone, the vendee can maintain ejectment; he occupies, in fact, the position of assignee of the mortgage (*a*). The chief object of the power is to enable the mortgagee or other party claiming through him to sell and convey the land free from the right of redemption of the mortgagor, and of all claiming through him subsequent to the mortgage, whether by express charge or by execution, or otherwise, and thus avoid the time and expense of proceedings required to foreclose or sell under the order of the court.

The power of sale is now commonly resorted to, and although

(*a*) See *Nesbitt* v. *Rice*, 14 C.P. 409.

at first sight its insertion may appear prejudicial to the interests of the mortgagor, yet in truth it is not so, if it is only to be exercised on reasonable notice after default and the sale take place at public auction. The absence of such a power may be very prejudicial to the interests of both mortgagor and mortgagee, where the equity of redemption becomes incumbered by executions or otherwise, as on a suit of foreclosure or sale the incumbrancers have to be made parties, sometimes at great expense. As regards any objection on the ground of possibility of improper exercise of the power by an individual, which could not happen on sale under direction of the court, it will be seen in the sequel that a court of equity will closely scrutinize the mortgagee's conduct, and, if improper, afford relief.

The word "assigns," as referable to the mortgagee, should never be omitted, for in its absence it has been said that an assignee of the mortgage could not exercise the power of sale (*b*), and that it may be doubtful whether a devisee could (*c*).

The power in the statutory form is made conditional on notice being given. It is preferable that notice should be provided for by a separate covenant by the mortgagee not to sell till after the specified notice (*d*). But where the statutory form is used the mortgagee cannot sell without notice. As it has been held that the statutory form cannot be modified by changing the provision for notice to one without notice (*e*), it is incumbent on the conveyancer to make an additional stipulation that after default for a longer period than that mentioned in the power, the mortgagee may sell without notice.

As regards the clause or covenant providing that notice be given before sale under the power, if assigns are to receive notice, ample scope should be given as to the mode of giving it, and it might be provided that the notice need not be personal, but may be left on the premises, and need not be addressed to any person by name or designation, or may be sent by post addressed to the party at the post office next his residence. Where the power required the notice to be served on the mortgagor, "his heirs, executors, or administrators," it was held

(*b*) Davidson Conv., 3 ed. vol. 2, 621; *Bradford* v. *Belfield*, 2 Sim. 264.

(*c*) *Cooke* v. *Crawford*, 13 Sim. 91; *Wilson* v. *Bennett*, 5 DeG. & Sm. 475; *Stevens* v. *Austen*, 7 Jur. N.S. 873; *Macdonald* v. *Walker*, 14 Beav. 556; see also *Ridout* v. *Howland*, 10 Gr. 547.

(*d*) *Forster* v. *Hoggard*, 15 Q.B. 155.

(*e*) *Re Gilchrist & Island*, 11 Ont. R. 537; *Clark* v. *Harvey*, 16 Ont. R. 159. See also R.S.O. c. 112, s. 27.

that a notice given after a mortgagor's death should have been served upon both the heir and administrator (*f*). And where the notice is to be served on the mortgagor, his heirs, or assigns, and the mortgagor has made a second mortgage, the notice must be served upon both the mortgagor and his assign, the second mortgagee (*g*). This may be provided against by stipulating that the notice may be served on all the persons named, "or some or one of them" (*h*).

Although personal service on the mortgagor is requisite, yet, where a notice of sale was served on an agent of the mortgagor who subsequently transmitted it to the mortgagor, who received it in time, it was held to be sufficient (*i*).

It is most inadvisable to omit a separate power for sale without notice; because if the mortgagor should die intestate and no letters of administration should be applied for the mortgagee cannot proceed as there is no one upon whom notice could be served.

An execution creditor whose writ is in the sheriff's hands at the time of giving the notice of sale has been said to be an "assign" entitled to notice (*j*), although the interest of the mortgagor is such that it could not be sold under the writ (*jj*).

It is important also to provide that any sale purporting to be made by the mortgagee shall be valid as regards the purchaser in all events of impropriety in the sale, leaving the former personally liable for improper conduct, if any; and that the purchaser shall not be bound to enquire as to whether notice has been given, or default made, or otherwise as to the validity of the sale. In the absence of such a clause the mortgagee selling may sometimes have difficulty in enforcing the sale against an unwilling purchaser (*k*). But such a clause will not protect a purchaser who has express notice that the notice of sale stipulated for has not been given (*l*).

Where the mortgagee proceeds under the statutory power

(*f*) *Bartlett* v. *Jull*, 28 Gr. 142.

(*g*) *Hoole* v. *Smith*, 17 Ch.D. 434.

(*h*) *Bartlett* v. *Jull*, *supra*.

(*i*) *Fenwick* v. *Whitwam*, 1 O.L.R. 24.

(*j*) *Re Abbott & Metcalfe*, 20 Ont. R. 299.

(*jj*) *Glover* v. *Southern Loan Co.*, 1 O.L.R. 590. But see *Ashburton (Lord)* v. *Norton*, (1914) 2 Ch. 211.

(*k*) See *Hobson* v. *Bell*, 2 Beav. 17; *Ford* v. *Heely*, 3 Jur. N.S. 1116; *Forster* v. *Hoggart*, 15 Q.B. 155; *Dicker* v. *Angerstein*, 3 Ch.D. 600.

(*l*) *Parkinson* v. *Hanbury*, 2 D.J. & S. at p. 452; *Selwyn* v. *Garfit*, *38* Ch.D. 273.

given by the Mortgage Act (*m*), and has made a conveyance to the purchaser, the latter's title cannot be impeached on the ground that no case had arisen for exercising the power of sale, or that the power had been improperly or irregularly exercised, or that notice had not been given, but the person damnified is to have his remedy against the person exercising the power (*n*).

The power usually authorizes a sale by private contract or at public auction, for cash or on credit, in one parcel or in lots, from time to time, under any special conditions of sale as to title or otherwise, with power at any sale at auction to buy in and re-sell, without being responsible for any loss or diminution of price occasioned thereby, and to rescind or vary any contract of sale that may have been entered into (*o*).

On any sale under the power, the vendor must be careful so to act that the interests of the mortgagor be not prejudiced by any negligence or misconduct. The duty of a mortgagee on a sale by him resembles that of a trustee for sale (*p*), though he is not a trustee but has a beneficial interest in realizing so as to recover his money (*pp*). A greater latitude may be allowed to a mortgagee than to a bare trustee not interested in the proceeds, and the court might restrain a sale by a trustee under circumstances in which they would not restrain a mortgagee (*q*). It is more advisable, of course, in order to avoid any ground of complaint of insufficiency of price or of unfair sale, that the property should be sold at public auction, instead of by private contract, even though the power authorize the latter. In one case where the mortgagee expressed a desire to get his debt only, and made no effort to sell, and never having advertised, sold at private sale at a great undervalue, the sale was set aside, though it did not appear that the purchaser was aware of the negligence of the mortgagee (*r*). Due notice by advertisement of the intended sale should be given, and perhaps as to this the practice which governs on sales by the direction of the court would be the safest guide. Unnecessary and too

(*m*) R.S.O. c. 112, s. 19.

(*n*) Ibid., s. 22.

(*o*) *Dudley* v. *Simpson*, 2 Ch. App. 102.

(*p*) *Richmond* v. *Evans*, 8 Gr. 508; *Latch* v. *Furlong*, 12 Gr. 306.

(*pp*) See *Kennedy* v. *DeTrafford*, (1897) A.C. 180, as to his duties.

(*q*) As to cases wherein the Court declined to interfere: *Matthie* v. *Edwards*, 11 Jur. 761; *Kershaw* v. *Kalow*, 1 Jur. N.S. 974; see also *Falkner* v. *Equitable Society*, 4 Drew. 352.

(*r*) *Latch* v. *Furlong*, 12 Gr. 303.

stringent conditions of sale as to title and production of title deeds or otherwise should be avoided as likely to prejudice the sale; and if in this, or other respects the conduct of the mortgagee be improper, not only will he be held responsible, but under circumstances the sale may be set aside (*s*); but the circumstances must be very strong to induce the court to set aside a sale as against a purchaser acting *bona fide*, and if the sale were set aside as against such purchaser, he might be allowed for his improvements (*t*).

A mortgagee cannot purchase at a sale under his power, and, notwithstanding any such purchase, he will still continue mortgagee, and liable to redemption. His duty as vendor is to obtain as much as possible for the property, his interest as purchaser is the reverse of this, viz., that the property shall sell for as low a price as possible. Courts of equity forbid a man placing himself in this position, wherein his interest may conflict with his duty. Neither can an agent of the mortgagee buy for him, nor his solicitor's clerk (*u*), nor his solicitor, either for himself or the mortgagee (*v*). Nor can the secretary or manager of a company (mortgagees) buy at a sale by the company (*w*). But a second mortgagee buying on a sale by the first mortgagee, under a power of sale in his mortgage, takes the estate as any stranger, free from the equity of redemption (*x*). And if the mortgage of the second mortgagee be *in trust* for sale on default, instead of with the usual power of sale, so that the mortgagee stands more in the position of a trustee, it is said (*y*) even then he can purchase from a prior mortgagee.

Whoever is entitled to the right to redeem is the person who is entitled to the residue of the property left unsold after satisfaction of the mortgage debt, and the surplus proceeds if all be

(*s*) *Richmond* v. *Evans*, 8 Gr. 508; *Jenkins* v. *Jones*, 2 L.T.N.S. 128; *Latch* v. *Furlong*, 12 Gr. 303; *McAlpine* v. *Young*, 2 Ch. Ch. 171. As to depreciatory conditions, see *Falkner* v. *Equitable Rev. Society*, 4 Drew. at p. 355.

(*t*) *Carroll* v. *Robertson*, 15 Gr. 173.

(*u*) *Ellis* v. *Dellabough*, 15 Gr. 583; *Nelthorpe* v. *Pennyman*, 14 Ves. 517; *Howard* v. *Harding*, 18 Gr. 181.

(*v*) *Downes* v. *Grazebrook*, 3 Mer. 200; *Whitcomb* v. *Minchin*, 5 Madd. 91.

(*w*) *Martinson* v. *Clowes*, 21 Ch.D. 857.

(*x*) *Shaw* v. *Bunny*, 2 D.J. & S. 468; *Parkinson* v. *Hanbury*, 2 D.J. & S. 450; *Watkins* v. *McKellar*, 7 Gr. 584; *Brown* v. *Woodhouse*, 14 Gr. 684.

(*y*) *Kirkwood* v. *Thompson*, 2 D.J. & S. 613; but see *Parkinson* v. *Hanbury*, 2 D.J. & S. 450.

sold. Before the Devolution of Estates Act, if the mortgagor of a freehold did not intend this, but intended a conversion in the event of a sale, and that the proceeds shall go as personal estate, then that should have been clearly expressed; for when there was a mere power and not an absolute trust for sale, and a sale took place *after* the death of the mortgagor, the surplus proceeds went to the heir, even though the trust of them should have been declared in favour of the personal representatives (*z*). But, since that Act, if the sale be made before the land shifts unto the heirs the surplus must go to the personal representative. But if the sale takes place after the land vests in the heirs, the former law will prevail. On a badly drawn mortgage, by inattention to the above, the mortgagee may frequently be misled into payment to the wrong party. Where a sale is had in the lifetime of the mortgagor, the surplus proceeds will go to personal representatives on his death before payment. The general principle is, that the property or its proceeds will, where there is a mere power of sale, go to real or personal representatives, according to the state in which it was on the death of the mortgagor.

The mortgagee, in distributing the surplus purchase money, is under an obligation to see that it is properly applied, and that collateral securities held by subsequent incumbrancers are saved for those entitled to them (*a*).

The effect of giving notice of exercising the power of sale is to stay all proceedings for the time (if any) mentioned in the notice for payment, even the proceedings under the notice itself (*b*). The original statute providing for this, declared that no further proceedings "at law or in equity" should be taken, and no suit or action should be brought, the purpose being to prevent the making of unnecessary costs. After the Judicature Act was passed, and the distinction between courts of law and equity was abolished, the words, "at law or in equity," were dropped out of the Act in the next revision of the statutes. The Act in that condition simply declares that no further proceeding and no action shall be taken, after a notice given, until the expiration of the time mentioned in the notice. Hence it was held that further proceedings for sale under the power itself were included in the enactment, and

(*z*) *Wright* v. *Rose*, 2 Sim. & Stu. 323; *Bourne* v. *Bourne*, 2 Ha. 35.

(*a*) *Glover* v. *Southern Loan Co.*, 1 O.L.R. 59; so held by the majority of the court.

(*b*) R.S.O. c. 112, s. 29.

notice to sell has therefore the effect of staying proceedings to sell (*c*). It is not necessary to demand the money in a notice of sale, or to fix or mention any time in the notice for doing anything required to be done, although the amounts claimed for principal, interest and costs, respectively, must be stated in the notice (*cc*). But if any time is mentioned, it should be forthwith, in order to prevent the notice from operating as a stay. The enactment in question authorizes an application to the court for leave to bring an action, notwithstanding the stay, and the motion may be made *ex parte*, and is never refused when the desire is to recover possession in anticipation of being obliged to deliver the land to a purchaser. But this section does not apply to proceedings to stay waste or other injury to the mortgaged property. The notice operates as a stay, whether the action is commenced before or after the notice is given (*d*).

Where a deed is absolute in form, but is, in reality, a security for money lent, no power of sale is implied in it, and the grantee cannot sell without the concurrence of the *cestui que trust* (*e*).

18. *Distress for Interest.*

It is not uncommon to add to the other clauses in a mortgage one constituting the relationship of landlord and tenant between the mortgagee and the mortgagor, at a rent equal to the interest, for additional security. When the rent so reserved is fair and reasonable, and the intention and object is not merely to give the mortgagee an undue advantage over other creditors, but in good faith to obtain an additional security, the arrangement is perfectly valid (*f*). But if the rent reserved is so unreasonable and excessive as to show that the parties could not have intended to create a tenancy, and that the arrangement is unreal and fictitious, then the clause will not have the effect of creating the relationship (*g*). The statutory clause allowing distress for arrears of interest does not of itself constitute the mortgagor tenant to the mortgagee, but is a mere licence to take the mortgagor's goods for the arrears; and an additional clause, that the mortgagor "doth attorn to and become tenant

(*c*) *Smith* v. *Brown*, 20 Ont. R. 165; *Lyon* v. *Ryerson*, 17 P.R. 516.
(*cc*) R.S.O. c. 112, s. 28.
(*d*) *Perry* v. *Perry*, 10 P.R. 275; *Lyon* v. *Ryerson*, 19 P.R. 516.
(*e*) *Hetherington* v. *Sinclair*, 34 O.L.R. 61; 23 D.L.R. 630.
(*f*) *Trust & Loan Co.* v. *Lawrason*, 6 App. R. 286; 10 S.C.R. 679.
(*g*) *Hobbs* v. *Ontario L. & D. Co.*, 18 S.C.R. 483.

at will to the mortgagee," does not aid it for want of a rent being reserved. In order to put the parties in the position desired, there should be an attornment at a fixed rent, and the arrangement must be a reasonable one, as already remarked. It is more to the interest of the mortgagee to constitute the mortgagor his tenant from year to year than at will, as the latter is defeasible by death of either party (*h*), or the alienation of either party with notice to the other; and consequently the rent is precarious. But a tenancy at will may be created at a fixed rent which gives the right to distrain (*i*). If a tenancy from year to year be created, care must be taken to introduce a clause enabling the mortgagee, at any time after default, to determine the tenancy, as otherwise, unless intent to the contrary were apparent on the mortgage, the ordinary right given to the mortgagee to enter might be overridden, and the mortgagor might, notwithstanding default by him, be entitled to the usual half-year's notice to quit, incident to a tenancy from year to year, before the tenancy could be determined (*j*). If an attornment clause be introduced, it will be unnecessary, perhaps, indeed, improper, to insert the usual clause authorizing the mortgagor to retain possession until default.

By the Mortgage Act (*k*) it is enacted that the right of a mortgagee to distrain for interest in arrear upon a mortgage shall be limited to the goods and chattels of the mortgagor, and, as to such goods and chattels, to such only as are not exempt from seizure under execution. It was said by Burton, J.A. (*l*), that this clause is confined to distresses of this kind, and merely declared what the law was before; and from the cases already referred to, it appears to be clear that it does not impose any new restriction upon the mortgagee. But Osler, J.A., in the same case (*m*), thought that the section had the effect of limiting all rights of distress of the mortgagee even under an attornment clause. By the next clause of the Act, the mortgagee's right to distrain for "arrears of interest or for rent" is limited to one year's arrears of interest or rent, as against creditors of the mortgagor or person in possession under

(*h*) *Turner* v. *Barnes*, 2 B. & S. 435.

(*i*) *Pegg* v. *Supreme Court of I.O.F.*, 1 O.L.R. 97.

(*j*) *Metropolitan Society* v. *Brown*, 4 H. & N. 428; *Doe d. Boston* v. *Cox*, 11 Q.B. 122; *Re Stockton Iron Furnace Co.*, 10 Ch.D. 335.

(*k*) R.S.O. c. 112, s. 13.

(*l*) *Edmonds* v. *Ham. Prov. & L. Socy.*, 18 App. R. at p. 351.

(*m*) At p. 358.

the mortgagor, if one of such creditors is an execution creditor, or if there shall be an assignee for creditors appointed before lawful sale of the goods distrained, and the officer executing the writ of execution or the assignee claims the benefit of the restriction in the manner pointed out in the section. The mention of "rent" in this clause, while interest only is mentioned in the fifteenth section, would appear to indicate that the legislature intended to draw a distinction between the two, and that the prior clause is therefore simply declaratory of what was already the law, viz., that the statutory distress clause is merely a licence to take the mortgagor's goods, and was in fact unnecessary.

19. *Modification of Short Form.*

When the statutory short form is used great care should be taken in making alterations. The short form is merely symbolic, not possessing any meaning in its own words when reference is made to the statute, but being merely a collection of symbols to express in short form the meaning of the extended words used in the long form. Any question of interpretation must therefore be determined by a perusal and consideration of the words used in the long form. The statute permits the parties to introduce into the form any "express exceptions" or "express qualifications," and the corresponding exceptions or qualifications are deemed to be made in the long form, where only, indeed, they appear for the purpose of interpretation. If the form or symbol is altered in a manner not authorized by the Act, it is no longer symbolic, but the very words, as they appear, must then be taken in their ordinary signification, which is very limited. The mortgagor and mortgagee alone being named in the short form, if, by reason of the mortgage's not referring to the Act, or by reason of an unauthorized variation of the form it derives no benefit from the Act, they alone will be affected, and the power of sale will be confined to the mortgagee (*n*). The alteration of the power of sale upon notice, to one without notice, is not a qualification allowed by the Act (*o*). Changing "months" into "one month" in the former statutory power of sale was a permissible variation (*p*). Reducing the time to one day was doubtful, the judges disagreeing (*q*); but according

(*n*) *Re Gilchrist & Island*, 11 Ont. R. 537.
(*o*) *Re Gilchrist & Island, supra.*
(*p*) *Re Green & Artkin*, 14 Ont. R. 697.
(*q*) *Clark* v. *Harvey*, 16 Ont. R. 159.

to the majority of the Court of Appeal, giving ten days' notice was a variation allowed by the statute (*r*). The statutory form does not now mention any period of time, but leaves it open to the parties to fix it. But it is still a power exercisable on notice, and cannot be altered to one without notice without losing the benefit of the long form.

If any special covenant be added to the short form care should be taken to make it binding upon the representatives and assigns of the parties, as well as upon the mortgagor and mortgagee, unless there is a general clause in the deed that all covenants are to bind representatives and assigns. The opening words of covenant in the short form, "The said mortgagor covenants with the said mortgagee," are sufficient for all the covenants in the short form, and would probably be sufficient for any covenant inserted immediately after them. But following the covenants are a realease, a power of sale, distress clause, acceleration clause, and proviso for possession until default; and if a covenant be added at this place, the opening words of covenant would not affect it, and if it is not precise in mentioning representatives and assigns it will bind only the parties (*s*).

20. *Release of Equity of Redemption—Merger.*

The mortgagee may, if the transaction is a fair one and no pressure used, receive from the mortgagor at any time after the making of the mortgage a release of the equity of redemption (*t*), and the result will be a merger of the charge in the inheritance unless there is something in the deed to show the contrary, or it is shown from surrounding circumstances (*u*). Since the Judicature Act merger is a question of intention, unless affected in some way by statute. That Act declares that there shall not be any merger by operation of law only of any estate, the beneficial interests in which would not, prior to the Ontario Judicature Act, 1881, have been deemed merged or extinguished in equity (*v*). As between the parties to the deed, it will, therefore, always be a question of intention as to whether or not a merger was effected (*w*).

(*r*) *Barry* v. *Anderson*, 18 App. R. 247.

(*s*) *Emmett* v. *Quinn*, 7 App. R. 306

(*t*) *Ford* v. *Olden*, L.R. 3 Eq. 461.

(*u*) *North of Scotland Mtge. Co.* v. *German*, 31 C.P. 349; *North of Scotland* v. *Udell*, 46 U.C.R. 511.

(*v*) R.S.O. c. 109, s. 36.

(*w*) *Snow* v. *Boycott*, (1893) 3 Ch. 110.

And where there is no expressed intention, the benefit or interest of the person in whom the estates meet is looked at, and merger will not be presumed against such interest (*x*).

Where there is a subsequent mortgagee, or person having a charge on the same land, the mortgagee may take a release of the equity of redemption from the mortgagor, or may purchase the same under any judgment, decree or execution, without thereby merging the mortgage debt as against such subsequent mortgagee or chargee (*y*). And no such subsequent mortgagee can foreclose or sell without redeeming, or selling subject to the rights of such prior mortgagee (*z*).

This enactment is not to be extended beyond its letter, and will only apply to a mortgagee at the time of the release, and not to one who became so afterwards (*a*). Nor does it apply to an assignee of a vendor's lien who subsequently takes a conveyance of the land; in order to make the enactment applicable there must be two mortgages on the same property (*b*).

21. *Sale of Equity of Redemption under Process.*

By the Mortgage Act (*c*), any mortgagee of freehold or leasehold property, or any person deriving title under the original mortgagee, may purchase the same under any judgment or decree or execution without thereby merging the mortgage debt as against any subsequent mortgagee or person having a charge on the property. In case the prior mortgagee or his assignee acquires the equity of redemption of the mortgagor in the manner aforesaid, no subsequent mortgagee or his assignees shall be entitled to foreclose or sell such property without redeeming or selling subject to the rights of such prior mortgagee or his assignee, in the same manner as if such prior mortgagee or his assignee had not acquired such equity of redemption.

By the Execution Act (*d*), however, if the mortgagee becomes the purchaser of the equity of redemption at a sale under execution (whether the mortgagee is or is not the execu-

(*x*) *Ingle* v. *Vaughan Jenkins*, (1900) 2 Ch. 368; see also *Heney* v. *Low*, 9 Gr. 265; *Bowles' Case*, Tud. Lg. Ca. 4th ed. 115.

(*y*) R.S.O. c. 112, s. 9.

(*z*) Ibid., s.-s. 2.

(*a*) *Bank of Montreal* v. *Thompson*, 9 Gr. 51.

(*b*) *Finlayson* v. *Mills*, 11 Gr. 218; *Armstrong* v. *Lye*, 27 App. R. 287.

(*c*) R.S.O. c. 112, s. 9.

(*d*) R.S.O. c. 80, s. 33.

tion creditor) the mortgage debt is considered as satisfied, and the mortgagee must give to the mortgagor a release of the mortgage debt (*e*). If another person than the mortgagee becomes the purchaser of the equity of redemption at such a sale, and the mortgagee enforces payment against the mortgagor, then the purchaser must repay the mortgagor the debt and interest, and in default of payment within one month after demand, the mortgagor may recover it from the purchaser, and will have a charge therefor on the lands (*f*).

22. *Mortgagee Buying at Tax Sale.*

The right of a mortgagee to buy in the mortgaged estate at a sale for taxes, and hold it free from redemption, is doubtful. In two early cases he was treated as still being mortgagee (*g*); but in a later case (*h*), Spragge, V.C., said: "A mortgagee may purchase as any stranger may; and may say that his being a mortgagee shall not place him in a worse position than he would be in if he were not mortgagee, because he is not a trustee for and owes no duty to the mortgagor; but if he purchases as mortgagee, makes his interest in the land a ground for being allowed to purchase, can he afterwards set up his right to hold as if he had purchased as a stranger?" It is difficult to see the distinction. A mortgagee cannot gain any other advantages which he is not bound to give the benefit of to the mortgagor (*i*), although in fact he is not a trustee for the mortgagor but has a beneficial interest in the land; and there is no reason why he should be at liberty in this single instance to do so. The general inclination of opinion is against the right of the mortgagee to hold free from redemption on a purchase for taxes.

23. *Assignment of Mortgage.*

To every assignment of a mortgage, the mortgagor, if possible, should be a party; if not a party, he should at least recognize the existence of the mortgage debt, and if the mortgagee be in possession, assent to the transfer. The object of making the mortgagor recognize the mortgage debt as subsisting, arises from the fact that the assignee takes subject to

(*e*) *Woodruff* v. *Mills*, 20 U.C.R. 51.
(*f*) R.S.O. c. 80, s. 33.
(*g*) *Smart* v. *Cottle*, 10 Gr. 59; *Scholfield* v. *Dickenson*, Ibid. 226.
(*h*) *Kelly* v. *Macklem*, 14 Gr. at p. 30.
(*i*) See *Keech* v. *Sandford*, 2 Wh. & T.L.C. notes at p. 702, 7th ed.

all the equities and settlement of accounts between the mortgagor and mortgagee. Thus, if nothing were ever due on the mortgage, or it were obtained by fraud and without consideration, or if it has been paid off, an assignee, though for value and without notice, would stand in no better position than the mortgagee (*j*). A mortgagee in receipt of the rents and profits of the mortgaged lands may however agree with the mortgagor to apply them upon other accounts than the mortgage, and a subsequent incumbrancer cannot insist that they should be applied in reduction of the mortgage debt (*k*). All just claims as a deduction from the mortgage debt, by reason of payment or set-off, will be allowed as against the assignee, who can stand in no better position than the mortgagee. This rule will continue to apply, even after transfer, until the mortgagor have notice of the assignment; and any payments made to the mortgagee (*l*), or, it would seem, even set-off accrued against him (*m*), though after transfer, without notice thereof, and under the impression that he still held the mortgage, would be allowed against the assignee. Nor would it make any difference that payments were made, and were unindorsed as such on the mortgage, and that the mortgage moneys were not then payable. Hence the necessity of enquiry at least, prior to assignment, and of notice to the mortgagor of any transfer, in case he does not become a party to the assignment. Under the Registry Act, registry of the assignment would not be notice to the mortgagor, as that Act only makes registration notice to those claiming an interest *subsequent* to such registry.

In order to entitle an assignee of the mortgagee to sue the mortgagor on the covenant to pay contained in the mortgage, it is necessary that he should give express notice in writing of the assignment, pursuant to the enactment respecting the Assignment of Choses in Action (*n*). There is no limit of time within which to give the notice, but it is essential that it should be given at some time before action, as such notice

(*j*) *McPherson* v. *Dougan*, 9 Gr. 258; *Elliot* v. *McConnell*, 21 Gr. 376; *Turner* v. *Smith*, 17 Times L.R. 143. As to defence of purchase in good faith of a mortgage, except as against the mortgagor, see R.S.O. c. 112, s. 12. See *Smart* v. *McEwen*, 18 Gr. 623; *Totten* v. *Douglas*, 15 Gr. 126; 16 Gr. 353.

(*k*) *Mitchell* v. *Saylor*, 1 O.L.R. 458.

(*l*) *McDonough* v. *Dougherty*, 10 Gr. 42; *Engerson* v. *Smith*, 9 Gr. 16.

(*m*) *Galbraith* v. *Morrison*, 8 Gr. 289.

(*n*) R.S.O. c. 109, s. 49.

is necessary to perfect the title of the assignee to the mortgage debt (*o*).

On an assignment of a mortgage, or on sale under a power of sale, the only covenant for title to the land that the mortgagee can be required to give is that against his own incumbrances and acts preventing a valid conveyance.

A covenant, frequently appearing in assignments of mortgage, that the mortgage is a good and valid security, is not a guarantee that the mortgage is a sufficient security for the debt, but merely that it is a valid mortgage (*p*).

24. *Discharges of Mortgages.*

The provisions of the Registry Act (*q*) as regards releases of mortgages, are to the effect that in the case of a registered mortgage the registrar, on receiving a certificate executed by the mortgagee, his executors, administrators or assigns, in the form given by the Act, shall register the same, and the certificate so registered shall be as valid and effectual in law as a release of the mortgage or of the lands, and as a conveyance to the mortgagor, his heirs or assigns, of the original estate of the mortgagor. The previous Act (*r*) provided that the certificate might be in the form given by the Act, "or to the like effect." Although these words have been omitted in the present revision, it is provided by the Interpretation Act (*s*) that "where forms are prescribed, deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them."

Where the mortgage is paid off by any person advancing money by way of a new loan on the property, the discharge must be registered within six months from the date thereof, unless the mortgagor in writing authorizes its retention for a longer period. But the registration is not to affect the right of a mortgagee or a purchaser who has paid off the loan to be subrogated to the right of the satisfied mortgagee (*t*). Where the person giving the discharge is not the original mortgagee,

(*o*) See *Bateman* v. *Hunt*, (1904) 2 K.B. 530.
(*p*) *Agricultural S. & L. Co.* v. *Webbe*, 15 O.L.R. 213.
(*q*) R.S.O. c. 124, ss. 62, 67.
(*r*) R.S.O. c. 136, s. 76.
(*s*) R.S.O. c. 1, s. 28 (*d*).
(*t*) R.S.O. c. 124, s. 64.

all intermediate documents through which he claims interest must be registered by him at his own expense (*u*). By s. 66, "where the holder of a mortgage desires to release or discharge part of the lands comprised in it, or to release or discharge part of the money secured by the mortgage, he may do so by deed or by certificate to be made, executed, proven, and registered in the same manner and with the like effect to the land or money released or discharged as when the whole land and mortgage are released and discharged. The deed or certificate shall contain as precise a description of the land released or discharged as is required in an instrument of conveyance for registration, and also a precise statement of the particular sum so released or discharged." By s. 68, provision is made for discharge by a sheriff, or Division Court bailiff, or other officer who, under execution, may have seized a mortgage and received the amount or part thereof.

It is to be observed that a release under the Act will not operate as a re-conveyance till registered; till then it is but evidence of payment (*v*); nor will it apparently so operate unless the mortgage be registered, and if assigned, unless the assignment be registered. The form of release given by the Act implies that such registration must precede the execution of the release.

It is also to be observed that s. 66 was unnecessary; the law was before this to the same effect as thus enacted as to a discharge under the Act of part of the lands (*w*); and it hardly required special legislation to enjoin in case of part payment that the amount paid should be specified; or to give ability "to release or discharge part of the *money*;" or when the intention was "to release or discharge part of the lands" to authorize the mortgagee to do so by *deed*.

The discharge under the Registry Act does not contain the ordinary covenant against incumbrances which is universal on re-conveyance by deed; it may be added to the form, but unless sealed it will only operate as a mere assertion and not as a covenant. An action would, however, lie against the releasor, on the assertion in the form given in the Act that he was entitled to receive the money, in case by his own act or wilful default he should not have been so entitled.

(*u*) Ibid. s. 65.

(*v*) *Lee* v. *Morrow*, 25 U.C.R. 604.

(*w*) *Re Ridout*, 2 C.P. 477.

The first part of R.S.O. c. 121, s. 26 (*x*), is framed to meet the rule in equity that if the trust be of such a nature that the person paying the trustees may reasonably be expected to see to the application of the money, he will be bound to do so. The rule and exceptions may be briefly illustrated by stating that if the trust be for payment of legacies, or specified scheduled debts, the purchaser has to see that the money is properly applied, but not so when the trust is for payment of debts generally, because that would compel the person paying the money to administer.

This section does not prevent the application of the rule requiring payment to trustees to be made to all jointly, or on their joint receipt, or to their attorney authorized by all to receive the money (*y*). Payment to one of several executors would suffice. Payment made *mala fide*, of course, will not suffice, as if made with knowledge of intention by the payees to misapply the money.

As to the payment to surviving mortgagees (*z*), there are two statutory provisions, viz., the one just referred to and a clause in the Mortgage Act (*a*). It will be noticed that in the first one, which appears in the Trustee Act, the payment is not expressly required to be made *bona fide*; and it is a good payment notwithstanding that the contrary may be expressly declared in the instrument creating the security. While in the enactment last cited, the payment must be made "in good faith," and it is not a discharge if the contrary is expressly de-

(*x*) This section and the cases thereon are treated of in Leith, Rl. Prop. Stats. p. 84. "The payment of any money to, and the receipt thereof by, any person to whom the same is payable upon any trust, or for any limited purpose, and such payment to and receipt by the survivor or survivors of two or more mortgagees or holders, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof." The original enactment affected only the *bona fide* payment. It also provided that it should not apply if the contrary was expressly declared by the instrument creating the trust or security.

(*y*) *Ewart* v. *Snyder*, 13 Gr. 57, *per* Mowat, V.C.

(*z*) See, as to this section, the well-known letter of Mr. Ker, given in Leith Rl. Prop. Stat. p. 84.

(*a*) R.S.O. c. 112, s. 11, which is as follows: "The payment in good faith of any money to and the receipt thereof by the survivor or survivors of two or more mortgagees, or the executors or administrators of such survivor, or their or his assigns, shall effectively discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary is expressly declared by the instrument creating the security."

clared by the instrument creating the security. It seems impossible to reconcile these provisions, and therefore it is apprehended that in a case where the conflict arises, the first one (in the Mortgage Act) must give way to the second which appears in the Trustee Act (*b*).

Mortgagees are tenants in common both of the lands and mortgage money, unless it is otherwise expressed on the face of the mortgage, and there is no right of survivorship, and, apart from the provisions of the Act, payment to a surviving mortgagee did not suffice, if he misapplied the money. The statute, in terms, only refers to payments of money. It does not expressly extend its protection to a mortgagor, who, instead of actually paying the debt, chooses to enter into some different arrangement for securing it. Therefore, purchasers from a mortgagor who bought and paid on an agreement by the mortgagor to indemnify against a mortgage to three mortgagees, were held as against the personal representatives of deceased mortgagees, not to be entitled to any benefit from a registered discharge of the mortgage given by the surviving mortgagee, to whom no money payment had been made, and who, instead thereof, had accepted securities which turned out worthless. But other purchasers who had bought other parts of the lands mortgaged after the registered discharge, and in reliance on it, were protected as purchasers for value without notice under the Registry Act (*c*).

The R.S.O. c. 112, s. 10 (*d*), remedied an inconvenience which frequently happened when a mortgagee died, and his personal representatives, or a legatee, became entitled to the mortgage moneys, whilst the legal estate descended to the heir-at-law in the absence of any disposition thereof by the

(*b*) See *Boston* v. *Lelièvre*, L.R. 3 P.C. at p. 162, where the Privy Council held that the Consolidated Statutes must be treated as one act.

(*c*) *Dilke* v. *Douglas*, 5 App. R. 77, per Moss, C.J.O.

(*d*) "Where a person entitled to any freehold land by way of mortgage has died, and his executor or administrator has become entitled to the money secured by the mortgage, or has assented to a bequest thereof, or has assigned the mortgage debt, such executor or administrator, if the mortgage money was paid to the testator, or intestate in his lifetime, or, on payment of the principal money and interest due on the mortgage, or on receipt of the consideration money for the assignment, may convey, assign, release or discharge the mortgage debt and the mortgagee's estate in the land; and such executor or administrator shall have the same power as to any part of the land on payment of some part of the mortgage debt, or on any arrangement for exonerating the whole or any part of the mortgage land without payment of money; and such conveyance, assignment, release or discharge, shall be as effectual as if the same had been made by the persons having the mortgagee's estate."

mortgagee. The heir-at-law thus became trustee for the person entitled to the moneys, and on payment thereof was the party to reconvey. But since the Devolution of Estates Act the mortgagee's estate in the land, as well as the mortgage debt, passes to the personal representative.

The power given by this section to release part of the land on payment of part of the debt in no way prevents the application of the rule that personal representatives, or others occupying a fiduciary position, must in any such transaction proceed with due caution at their peril, and see that the value of the security is not prejudiced by a release of part. It may be also, where part of the security is released for a manifestly inadequate amount, and the remainder is not sufficient to answer the mortgage debt, that the executor or administrator so releasing would not only be personally responsible, but the release avoided as against the releasee and all claiming under the release with notice as a breach of trust (*e*).

So also where the mortgagor has sold part of the property, and agreed with the vendee to pay off the mortgage, if the mortgagee release the residue or join with the mortgagor in an absolute sale of it as free from the mortgage, with notice of the prior sale and agreement, and without the assent of the first vendee, the part sold him will be released from the mortgage, even though the mortgagee and not the mortgagor has received the proceeds of the second sale; and this will equally be so if the sale be under a decree in a suit by the mortgagee to which the first vendee is no party (*f*). The principle is that, as between the mortgagor and the first vendee, the land unsold becomes principally and solely liable, and the mortgagee, having notice, can do nothing to prejudice the right of the owner of lands first sold to have assigned to him on payment of the mortgage debt the lands so principally liable to him. But the mortgagee can sell under a power of sale in his mortgage, for the power is paramount to any right of the vendee. So also where a mortgagor sells part with an agreement to pay off the mortgage, a release by the mortgagee to the vendee will not prejudice his security as against a purchaser of the mortgagor's interest who had notice of the prior sale (*g*).

One of several executors can release the lands mortgaged

(*e*) Davidson Convey. 3 ed., vol. 2, p. 835.

(*f*) *Gowland* v. *Garbutt*, 13 Gr. 578; see also *Guthrie* v. *Shields*, therein referred to.

(*g*) *Crawford* v. *Armour*, 13 Gr. 576.

on receipt of the mortgage debt (*h*). This would seem to rest on the ground that one of several executors can receive and discharge debts due the testator, and that tender to one is a good tender, and the discharge of mortgage is a mere receipt until registered, the registration having the effect of re-conveying the lands. But probably the power to release the security will not be extended to those cases where one executor never had power to act alone; as, for instance, the case of releasing part of the lands without payment, under the statute just alluded to (*i*).

25. *Mortgages of Leaseholds.*

A mortgage of leasehold property may be made either by way of assignment of the whole term, or by way of underlease to the mortgagee; or, which is preferable, by way of underlease, with a declaration of trust as to the reversion.

If the rent be of less amount than the annual value of the property, and the covenants binding on the assignees be not too onerous, it is an advantage to have the mortgage by way of assignment rather than by underlease. This is advisable, because if the mortgage be by way of underlease, which leaves a reversion in the mortgagor, he may perhaps, by non-observance of some covenant in the original lease giving a right of re-entry to the lessor, forfeit the lease; whereas if the mortgage be by way of assignment of the whole estate of the lessee, no such danger is incurred. It is manifest also that this danger considerably depreciates the value of the security to the mortgagee, as being, among other things, likely to affect the price on any sale under the power of sale in the mortgage.

If the rent be too large and the covenants binding on the assignees of a burdensome nature, or such as the mortgagee might not wish to assume, as, for instance, a covenant to repair from which destruction by fire is not excepted, then it is of advantage to take an underlease. But this method has the disadvantage that the right of renewal, if any, does not pass to the mortgagee. For if he take an assignment he would, during the continuance of his estate, be liable for the rent and the performance of such covenants, and that even though he should never enter (*j*), and it would seem even though he should not be entitled to enter; as where the mortgagee should

(*h*) *Ex parte Johnson*, 6 P.R. 225.

(*i*) See *McPhadden* v. *Bacon*, 13 Gr. 594.

(*j*) *Jones* v. *Todd*, 22 U.C.R. 37; *Cameron* v. *Todd*, ibid. 390; 2 E. & A. 434; *Jamieson* v. *London & Can. L. & A. Co.*, 27 S.C.R. 435.

give right to the mortgagor to remain in possession till default in payment of interest or principal, and the interest should be punctually paid; whereas, if he takes a sublease, he would not be liable on the covenants (*k*). Of course the head landlord could distrain on goods on the premises on nonpayment of his rent; but he might lie by, allowing arrears to accumulate, and ultimately sue the assignee for all arrears due during the time he was assignee; hence the necessity, if the mortgagor is to remain in possession, of providing in the mortgage that he pay the rent to the head landlord, and of ascertaining that it be paid (*l*).

A mortgage by way of sub-lease is usually made by demise of the land at a mere nominal rent, and for a period equal to the whole term unexpired, less the *last* day or the *last* few days; this prevents any privity of estate between the mortgagee and the original lessor, so that the former is not liable for rent or on covenants in the original lease. Care should be taken to reserve the *last* day and not simply "one day." A lease may be made to commence *in futuro*, and if there is any inconsistency arising between the reservation of the day and the other terms of the instrument, which can be reconciled by holding the day reserved to be some other than the last day, that will be done, and the instrument will be in reality an assignment (*m*).

The third method of mortgaging a leasehold mentioned above is the best, and the one now usually adopted, viz., taking a sub-lease with a declaration of trust as to the immediate reversion. The reversion left in the mortgagor exposes the mortgagee to the danger of forfeiture, and decreases the value of the security, as above explained; but this may be obviated by the declaration made by the mortgagor that he will stand possessed of the premises comprised in the head lease in trust for the mortgagee, etc., and to assign and dispose of the same as the mortgagee or his representatives or assigns shall direct, but subject to the same right of redemption as is reserved to the mortgagor with respect to the derivative term created by the sub-lease; with a power of attorney irrevocable to the mortgagee or his substitute or substitutes to assign the head term as the mortgagee or his representatives or assigns shall at any time direct, and in particular, upon any sale made by him to execute a deed or deeds for that purpose; with a power

(*k*) *South of England Dairies* v. *Baker*, (1906) 2 Ch. 631.
(*l*) See *Hand* v. *Blow*, (1901) 2 Ch. 721, at pp. 726, 736.
(*m*) See *Jamieson* v. *London and Can. L. & A. Co.*, 27 S.C.R. 435.

further to the mortgagee, or other person entitled to receive the mortgage money, to remove the mortgagor or other person from being the trustee, as aforesaid, and on his death or removal, or the death or removal of any other trustee, to appoint by deed a new trustee or trustees in his or their places (*n*). This enables the mortgagee to hold his security without any danger on his part of becoming liable on the covenants in the head lease, and at the same time enables him at any time to compel the mortgagor, as trustee, to assign the original term according to the directions of the mortgagee, to sell or foreclose, and convey or cause to be conveyed to a purchaser, not only the derivative term but also the head term, and, if necessary, to remove the mortgagor, appoint a new trustee, and, by a declaration in the appointment of such new trustee, to vest the head term in his appointee (*o*). After a sale and conveyance of the derivative term to a purchaser, the mortgagee need not under such a declaration obtain an assignment of the reversion or head term to such purchaser; because in that case, as the term and the reversion immediately expectant thereon would meet in the same person, the term would be merged in it as being a higher estate; and thus the purchaser would stand in the position of *assignee* of the original lessee, and so liable on covenants running with the land which it was originally intended to avoid by the mortgage being made by way of sub-lease. If, therefore, the purchaser is unwilling to assume the responsibility of the covenants, and at the same time wishes to avoid any danger of the mortgagor committing some act which would forfeit the lease, he might obtain an assignment to a trustee for him of the mortgagor's reversion.

The Short Forms of Mortgages Act does not apply to leasehold interests; the word "land" in the first clause being interpreted to mean freehold tenements and hereditaments. The whole frame of the statutory form is applicable to a freehold interest only, and there is the absence of any provision, as in the Act relating to Short Forms of Leases, that "where the premises are of freehold tenure the covenants shall be taken to be made with, and the proviso for re-entry apply to, the heirs and assigns of the lessor, and, where of a leasehold tenure, to his executors, administrators, and assigns." Till a decision to the contrary, it would be advisable not to attempt to apply the Act to mortgages of leaseholds.

(*n*) See a precedent, Prid. Conv. 17th ed., p. 527.

(*o*) R.S.O. c. 121, s. 5; *London & Co. Banking Co.* v. *Goddard*, (1897) 1 Ch. 642.

CHAPTER IX.

OF FUTURE ESTATES.

(1). *Estates in Possession, p. 220.*
(2). *Estates in Remainder, p. 221.*
(3). *Contingent Remainders, p. 227.*
(4). *Executory Devises, p. 232.*
(5). *Executory Interests Assignable, p. 233.*
(6). *Estates in Reversion, p. 233.*
(7). *Merger, p. 235.*

1. *Estates in Possession.*

HITHERTO we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view; with regard to the *time of their enjoyment*, when the actual pernancy of the profits (that is, the taking, perception, or receipt, of the rents and other advantages arising therefrom) begins. Estates, therefore, with respect to this consideration, may either be in *possession* or in *expectancy*; and of expectancies there are two sorts; one created by the acts of the parties, called a *remainder*; the other by an act of law, and called *reversion* (*a*).

Of estates in *possession* (which are sometimes called estates *executed*, whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstances or contingency as in the case of estates *executory*), there is little

(*a*) Sir Wm. Blackstone classes all remainders, contingent as well as vested, under the head of *estates*; and further on, speaks of a contingent remainder as an *estate*. A contingent remainder is, however, perhaps hardly entitled to be advanced to the dignity of an estate; it is a mere possibility which, when the person is fixed and ascertained, is coupled with an interest; it gives no estate in the land, and would appear to be more properly defined as an *interest* in the land. See 1 Preston Estates, pp. 75, 62, 88. If a contingent remainder is to be considered an *estate* in expectancy, then every possibility coupled with an interest, or even a mere possibility (as on a limitation to the survivor of several), would seem to stand on the same footing. So little does the common law regard a contingent remainder as an estate, or in any other light than as a mere right, that it refused to recognize the validity of its alienation to a stranger. See also Wms. Rl. Prop. 18th ed., 344: "A contingent remainder is no estate, it is merely a chance of having one." See postea, p. 228, note.

or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. These will therefore require a minute discussion, and demand some degree of attention.

2. *Estates in Remainder.*

An estate, then, in remainder may be defined to be an estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee-simple granteth lands to A. for twenty years, and, after the determination of the said term, then to B. and his heirs forever; here A. is tenant for years, remainder to B. in fee. In the first place, an estate for years is created and carved out of the fee, and given to A.; and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee. They are indeed different *parts*, but they constitute only one *whole*; they are carved out of one and the same inheritance; they are both created, and may both subsist, together; the one in possession, the other in expectancy. So, if land be granted to A. for twenty years, and after the determination of the said term to B. for life; and after the determination of B.'s estate for life, it be limited to C. and his heirs forever; this makes A. tenant for years, with remainder to B. for life, remainder over to C. in fee. Now, here the estate of inheritance undergoes a division into three portions. There is first A.'s estate for years carved out of it; and after that B.'s estate for life; and then the whole that remains is limited to C. and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance; and if there were a hundred remainders, it would still be the same thing; upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, that no remainder can, by common law conveyance, be limited after the grant of an estate in fee-simple; because a fee-simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the estate; a remainder, therefore, which is only a portion, or residuary

part, of the estate, cannot be reserved after the whole is disposed of (*b*). A particular estate, with all the remainders expectant thereon, is only one fee-simple; as £40 is part of £100, and £60 is the remainder of it; wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than after the whole £100 is appropriated there can be any residue subsisting.

It must be borne in mind that the above statement that no remainder can be limited on a fee-simple, and the following remarks apply to estates created by conveyance operating only as at common law, and not to estates arising under the Statute of Uses, nor to those created by will. By will a fee-simple may be limited to take effect after a prior fee-simple which is determinable on a condition; and the same result may be arrived at by a conveyance operating under the Statute of Uses. But such future interests are not remainders. They are executory devises or conditional limitations, or limitations over to take effect in defeasance of a prior estate on the happening of a condition. A remainder never defeats the prior estate, but awaits its determination, and such prior, or particular, estate must always be something less than the fee. Thus much premised we shall be the better enabled to comprehend the rules that are laid down by the common law to be observed in the creation of remainders, and the reasons upon which those rules are founded.

And, first, there must necessarily be some particular estate, precedent to the estate in remainder. As, an estate for years to A., remainder to B. for life; or, an estate for life to A., remainder to B. in tail. This precedent estate is called the *particular* estate, as being only a small part, or *particula*, of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason: that *remainder* is a relative expression, and implies that some part of the thing is previously disposed of; for where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder; it is the whole of the gift, and not a residuary part.

(*b*) *Musgrave* v. *Brooke*, 2 Ch.D. 792.

And such future estates could at common law only be made of chattel interests, which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree; but an estate of freehold must, except by way of remainder, or executory devise, or by conveyance under the Statute of Uses, have been created to commence immediately. For it is an ancient rule of the common law that an estate of freehold cannot be created to commence *in futuro* (*c*), but it ought to take effect presently, either in possession or remainder; because at common law (before 14 & 15 V. c. 7, now R.S.O. c. 109, s. 3), no freehold in lands could pass without livery of seisin; which must operate either immediately, or not at all. It would therefore have been contradictory, if an estate which was not to commence till thereafter, could have been granted by a conveyance which imported an immediate possession. Another reason sometimes assigned, was, that the freehold should not be placed in abeyance, the doing of which, inasmuch as certain real actions had to be brought against the tenant of the freehold, would have led to the inconvenience, whilst the freehold is in abeyance, of there being no tenant of the freehold against whom to bring the action, and no feudal tenant to perform the feudal duties. Therefore, though a lease to A. for seven years, to commence from next Michaelmas, is good; yet a conveyance, not operating under the Statute of Uses, to B. of lands, to hold to him and his heirs forever from the end of three years next ensuing, is void as a present conveyance (*d*). So that when it

(*c*) *Savill Brothers* v. *Bethell*, (1902) 2 Ch. 523, at p. 540: The *dictum* of Maule, J., in *Doe* v. *Prince*, 20 L.J.C.P. 223, must not be taken as implying that since the R.S.O. c. 109, s. 3, by which the immediate freehold lies in grant as well as in livery, an estate of freehold not to take effect immediately can be granted by force of that Act. In that case (to put it shortly) the words were, "in consideration of love, etc., I grant to, etc., and that he is to take possession on Michaelmas Day next." It was contended that the deed was void, as being a grant of a freehold *in futuro*. In answer it might be said that the clauses as to possession, being repugnant to the premises, might be rejected; if not, that it might operate as a covenant to stand seised on Michaelmas Day, and then take effect. The circumstances were such that it was unnecessary to decide more than that the deed could operate as a covenant to stand seised, which was the judgment of the court. Maule, J., observed that if it were necessary to decide it he would be inclined to say that an immediate freehold did pass. By this must be understood that the clause as to possession might be rejected as repugnant to the premises, and so an immediate freehold passed.

(*d*) It was also before stated in the text that "at common law no freehold could pass without livery of seisin, which must operate either immediately or not at all." The editor has not presumed to qualify the statements in the text, as they have been retained in all editions. It is

is intended to grant an estate of freehold, independently of the Statute of Uses, or by way of remainder, whereof the enjoyment shall be deferrred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and (before the freehold in lands lay in grant as well as in livery, R.S.O. c. 109, s. 3), for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A. for three years, with remainder to B. in fee, and makes livery of seisin to A.; here, by the livery, the freehold is immediately created, and vested in B., during the continuance of A.'s term of years. The whole estate passes at once from the grantor to the grantee, and the remainder-man is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in præsenti*, though to be occupied and enjoyed *in futuro*.

And here the attention of the reader is directed to the fact that he may frequently observe herein that a particular state of the law still continues as law, although the grounds or reasons whereon it was originally founded have, by legislative enactment, or otherwise, ceased to exist, and that the maxim *cessante ratione cessat et ipsa lex*, does not apply. Thus the principle on which it was first established that no freehold estate could be created by deed, to take effect *in futuro*, viz., that there was a necessity for immediate delivery of seisin, no longer holds good, since by R.S.O. c. 109, s. 3, corporeal hereditaments, so far as regards the immediate freehold thereof, lie in grant as well as in livery; and, independently even of the aid of the Statute of Uses, which will presently be alluded to, lands can be conveyed without actual possession accompanying the conveyance; still

submitted, however, on the authorities hereinafter referred to, that some qualification is requisite. Thus, in *Nolan* v. *Fox*, 15 C.P. 575, it was held that a deed of feoffment, dated the 27th to hold from the 30th day of March, "might, if executed on the day of date, and livery of seisin given on that day, be void; yet, if it was not executed until after the day whereon it was to begin to operate, *or if livery was not delivered till after that day*, then it would be good," referring to the Touchstone, 219-251. See also Co. Litt. 48b, n. 1, to the same effect. See also Co. Litt. 49a, n. 1, that if A. makes a lease for years to B., and afterwards a charter of feoffment to him, being in possession, with letter of attorney to deliver seisin; before livery he may use the deed as a confirmation in fee, and after livery as a feoffment." And see *Savill Brothers* v. *Bethell*, (1902) 2 Ch. 523, at p. 540.

the rule of law holds good as first established that no immediate freehold estate can be created by deed to commence *in futuro*. This, however, must be understood as referring to a deed operating as *a common law conveyance*, by transmutation of possession, as a feoffment, or release, because it will be seen hereafter that by the aid of the Statute of Uses an immediate estate of freehold can be created by deed, to take effect *in futuro*. Thus A., for sufficient consideration, can bargain and sell to B., to hold to him and his heirs after the expiry of three years, or on the happening of a future event; and so also covenant to stand seised to the use of B. and his heirs on such event or expiry. In these instances, however, the estate limited to B. and his heirs is granted and created as a *future estate*, by way of future or springing use, to take effect on the happening of the future event, the freehold in the meantime remaining in A.; and when the event happens, the bargainor or covenantor holds for the benefit or use of the bargainee or covenantee, and on this the statute immediately *executes the use*, and transfers to the latter the legal estate in possession in fee-simple. Such an estate is *not* limited or created *by way of remainder*, and therefore its creation or existence does not conflict with the rules herein laid down as affecting remainders; for the freehold is at no time in abeyance; no estate even passes from the conveying party till the given event happens; and when it does happen, what has been called the *magic* effect of the Statute of Uses supplies the place of livery of seisin, and the bargainee or covenantee is assumed to be in possession.

But it may be added, also, that though a mere common law conveyance of a future freehold estate, without any precedent estate to support it, would be void at common law as a present conveyance, it would at the present day be held good on equitable grounds as a contract to convey the future estate, if made on consideration, so as to hold the grantor bound to allow the grantee to enter upon the day fixed for the taking effect of the deed (*f*).

As no remainder can be created without such a precedent

(*f*) The statement in the text is retained as the opinion of previous commentators, the equitable rule being that if the circumstances are such that the court would grant specific performance of a contract to convey, the person entitled to the conveyance may, as against the vendor, be treated as the owner. But it has been held that an undelivered purchase deed is not sufficient in form to satisfy the requirements of the Statute of Frauds: *McClung* v. *McCracken*, 2 Ont. R. 609; 3 Ont. R. 596; though an unsealed lease, which in law requires a seal, is held to be a good lease in equity for the period for which it calls: ante, p. 126.

particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder over. For an estate at will is of a nature so slender and precarious that it is not looked upon as a portion of the inheritance, and a portion must first be taken out of it in order to constitute a remainder. Besides, if it be a freehold remainder, livery of seisin must, at common law, have been given at the time of its creation; and the entry of the grantor to do this determines the estate at will in the very instant in which it is made; or if the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract* if the tenant for years be a party to it, yet it is void by way of *remainder*; for it is a separate independent contract, distinct from the precedent estate at will, and every remainder must be part of one and the same estate out of which the preceding particular estate is taken. And hence it is generally true that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also; as, when the particular estate is an estate for the life of a person not in *esse*, or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate; in either of these cases the remainder over is void.

A second rule to be observed is this, that the remainder must commence, or pass out of the grantor, at the time of the creation of the particular estate. As, where there is an estate to A. for life, with remainder to B. in fee; here B.'s remainder in fee passes from the grantor at the same time that seisin is delivered, or conveyance made, to A. of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin being made of the particular estate whenever a *freehold* remainder is created; for, if it be limited even on an estate for years, it was necessary that the lessee for years should have livery of seisin in order to convey the freehold from and out of the grantor, otherwise the remainder was void. Not that the livery was necessary to strengthen the estate for years, but as livery of the land was, at common law, requisite to convey the freehold, and yet could not be given to him in remainder without infringing the possession of the lessee for years, therefore the law allowed such livery, made to the tenant of the particular estate, to relate and enure to him in remainder, as both are but one estate in law.

Subject to the statute as to contingent remainders, to be presently mentioned, a third rule respecting remainders is this, that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. As, if A. be tenant for life, remainder to B. in tail; here B.'s remainder is vested in him at the creation of the particular estate to A. for life. Or if A. and B. be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor; wherefore both these are good remainders. But if an estate be limited to A. for life, remainder to the eldest son of B. in tail, and A. dies before B. hath any son, here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination of the particular estate; and even supposing that B. should afterwards have a son, he shall not take this by remainder, for as it did not vest at or before the end of the particular estate, it never can vest at all but is gone forever. And this depends upon the principle before laid down that the precedent particular estate and the remainder are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate and the remainder supported thereby; the thing supported must fall to the ground if once its support be severed from it.

An estate in remainder cannot, as already remarked (*g*), by conveyance at common law be limited to take effect in defeasance of the prior estate. Thus on a feoffment to A. for life with remainder to B. on his return from Rome, the remainder is void. Neither can such an estate infringe on the rule against perpetuities (to be hereafter explained), as by a limitation in favour of a child of an unborn child.

3. *Contingent Remainders.*

It is upon these rules, but principally the third, that the doctrine of *contingent* remainders depends. For remainders are either *vested* or *contingent*. *Vested* remainders (or remainders *executed*, whereby a present interest passes to the

(*g*) Ante p. 222; and see *Musgrave* v. *Brooke*, 2 Ch.D. 792.

party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As if A. be tenant for twenty years, remainder to B. in fee; here B.'s is a vested remainder, which nothing can defeat or set aside.

Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder (*h*) is limited to take effect either to a dubious and uncertain *person* or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect.

First, they may be limited to a dubious and uncertain *person*. As if A. be tenant for life, with remainder to B.'s eldest son (then unborn) in tail; this is a contingent remainder; for it is uncertain whether B. will have a son or not; but the instant that a son is born in A.'s lifetime the remainder is no longer contingent, but vested. Though, if A. had died before the contingency happened, that is, before B.'s son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A. were tenant for life, remainder to his own eldest son in tail, and A. died without issue born, but leaving his wife *enceinte*, or big with child, and after his death a posthumous son was born, this son could not take the land, by virtue of this remainder; for the particular estate determined before there was any person *in esse*, in whom the remainder could vest. But, to remedy this hardship, it is enacted by statute R.S.O. c. 109, s. 41, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime, that is the remainder is allowed to vest in them while yet in their mother's womb.

A remainder may also be contingent, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. As, where land is given to A. for life, and in case B. survives him, then with remainder to B. in fee; here B. is a certain person, but

(*h*) Mr. Preston, in Vol. 1 on Abstracts, p. 92, says: "Strictly speaking there cannot be a contingent *estate*; there may be a contingent *interest*; but no interest except such as is vested is accurately termed an *estate*." R.S.O. c. 109, s. 10, which authorizes assignment of contingent remainders, etc., speaks of them only as contingent *interests*. In this point of view, where the word *estate* occurs in the text, *interest* should be substituted. See *ante*, p. 220, note.

the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A. and B. it is contingent; and if B. dies first, it never can vest in his heirs, but is forever gone; but if A. dies first, the remainder to B. becomes vested.

It is to be observed, however, that if there be no uncertainty in the person or event on which the remainder is limited, the mere uncertainty, whether it will ever take effect *in possession* is not sufficient to give it the character of a contingent remainder. Thus in the case of a lease to A. for life remainder to B. for life, the limitation of the remainder is to a person in being, and ascertained, and the event on which it is limited is certain, viz., the death of A.; it is therefore a vested, not a contingent, remainder; and yet it may never take effect in possession, because B. may die before A. Nor would it make any difference if the estate granted to A. were in tail instead of for life, for such estate is still a *particular* estate, and the law will not assume that it will not come to an end in B.'s lifetime; and on the determination of that particular estate, B. is predetermined on as the person to whom the estate shall go.

There are two rules to be observed in the creation of contingent remainders, the first of which is that the seisin or feudal possession must never be without an owner. And, therefore, contingent remainders of either kind, if they amount to a *freehold*, cannot be limited on an estate for years, or any other particular estate less than a freehold. Thus if land be granted to A. for ten years, with remainder in fee to the right heirs of B., a living person, this remainder is void; but if granted to A. for life, with a like remainder it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void; it cannot pass out of him, without vesting somewhere, and in the case of a contingent remainder it must vest in the particular tenant, else it can vest nowhere. Unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

The second of such rules is that an estate cannot be given to the unborn child of an unborn person; the ultimate limitation being void (*i*). This rule was said to depend on the doctrine that there cannot be a possibility on a possibility, a

(i) *Monypenny* v. *Dering*, 2 D.M. & G. 145, at p. 170. See further, as to this, p. 242, et seq.

phrase which is now condemned (*j*), but which is correct if understood to mean that there cannot be a contingent remainder upon a contingent remainder, and must not be confounded with the rule against perpetuities which forbids the tying up of property for a longer period than a life or lives in being and twenty-one years afterwards. And so a limitation to the unborn children of the unborn person "provided that such children shall be born within a life or lives now in being and twenty-one years afterwards" is bad (*k*).

The second rule is, in effect, a corollary of the first. We have seen that a contingent remainder of freehold must have a particular estate to support it. Now, if a grant be made to A., a bachelor, for life, remainder for life to A.'s eldest son, the remainder to A.'s eldest son is a contingent remainder and is good as a contingent remainder while waiting for the event to happen upon which it is to vest, as it is supported by a particular estate of freehold. But if the grant goes further and gives a remainder in fee to the eldest son of A.'s eldest son, this is also a contingent remainder, and cannot be supported by the life estate of A.'s eldest son, for, at the time of the grant it does not exist. Consequently it is void. And the second rule may therefore be said to be a corollary of the first.

Contingent remainders might be *defeated* at common law by destroying or determining the particular estate upon which they depend, before the contingency happened whereby they became vested. Therefore, when there was a tenant for life, with divers remainders in contingency, he, at common law. might, not only by his death, but by surrender, merger or forfeiture, destroy and determine his own life estate, before any of those remainders vested; the consequence of which was that he utterly defeated them all. As, if tenant for life, with remainder to his eldest son unborn in tail, with remainder to A. in fee, before any son was born, surrendered this life estate to A., or took from A. a conveyance of the fee, he by that means defeated the remainder in tail to his son. For his son not being *in esse*, when the particular estate determined by merger in the fee, the remainder could not then vest; and, as it could not vest then, by the rules before laid down, it never could vest at all. In these cases, therefore, it was necessary to have trustees appointed to preserve the contingent remainders;

(*j*) *Re Nash*, (1910) 1 Ch. at p. 10.
(*k*) *Whitby* v. *Mitchell*, 42 Ch.D. 494; 44 Ch.D. 85.

in whom there was vested an estate in remainder for the life of the tenant for life, to commence when his estate determined. If, therefore, his estate for life determined otherwise than by his death, the estate of the trustees, for the residue of his natural life, would then take effect and become a particular estate in possession, sufficient to support the remainders depending in contingency.

A *strict settlement* is framed with regard to the above; thus, lands are limited to A. for life, with remainder to trustees, during the life of A., to take effect immediately on the determination, in A.'s lifetime, of that estate, by surrender or otherwise, with remainder after the death of A., to his first and other sons successively in tail male. When an estate is thus settled, the father cannot defeat his sons' estates, nor can any son, during the father's lifetime, even when of age, without the father's consent, do more than defeat his own issue. But the son first entitled in tail can, when of age, with the concurrence of the father, and after his death when tenant in tail in possession, defeat the whole settlement and convey in fee; the whole of which is hereafter explained in dealing with estates tail.

But now, by statute, if the destruction of the life estate takes place by forfeiture, surrender, or merger, it will not destroy the contingent remainder (*l*). And, therefore, where land was devised to A. for life, remainder to his first and other sons successively in tail male, remainder to B. and A. disclaims the life estate given to him, it was held that it did not accelerate the remainder to B. and defeat the limitation to A.'s sons. During the life of A., and awaiting the birth of sons to him, the land was undisposed of, until A.'s death or the birth of a son, and B.'s remainder could only take effect after the limitation to A.'s first and other sons, or after A.'s death without sons (*m*).

But as the statute does not extend to destruction by death, there is still a necessity for an estate to be limited to trustees to support contingent remainders in any case in which the particular estate might possibly be determined by the death of the owner of such estate prior to the vesting of the contingent remainder. Of this an instance is afforded by a grant to A. for

(*l*) The statute enacts that, "Every contingent remainder shall be capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold:" R.S.O. c. 109, s. 35.

(*m*) *Re Scott*, (1911) 2 Ch. 374.

life with remainder to such son of his as shall first attain 21, or with remainder to the eldest son of B., a bachelor, in fee; here, in either case, the death of A. before the majority of a son of his in the one case, or the birth of a son of B. (including a posthumous son) in the other, would defeat the son's interests unless a freehold estate to trustees intervened.

4. *Executory Devises.*

In devises by last will and testament (to which more latitude is given than to deeds, on the supposition that the testator may be *inops consilii*), remainders may be created in some measure contrary to the rules above laid down, though our lawyers will not allow such dispositions to be strictly remainders, but call them by another name, that of *executory devises*, or devises hereafter to be executed.

An executory devise of lands is such a disposition of them by will that thereby no estate vests at the death of the testator, but only on some future contingency. It differs from a remainder in three very material points: 1. That it needs not any particular estate to support it, but arises of itself at the time fixed for it. 2. That by it a fee-simple, or other less estate, may be limited after and in defeasance of a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same (*n*).

The first happens when a man devises a future estate to arise upon a contingency; and till that contingency happens, does not dispose of the fee simple, but leaves it to descend to his heir-at-law. As if one devises land to a feme sole and her heirs, upon her day of marriage; here is in effect a contingent remainder, without any particular estate to support it; a freehold commencing *in futuro*. This limitation, though it would be void in a deed operating only as at common law, yet is good in a will, by way of executory devise. For, since by a devise a freehold may pass without corporal tradition or livery of seisin (as it must do if it passes at all), therefore it may commence *in futuro*; because the principal reason why it cannot commence *in futuro* in other cases, is the necessity which existed at common law, of actual seisin, which always operates *in præsenti*. And since it may thus commence *in futuro*, there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the present estate, a present interest.

(*n*) For illustrations of contingent remainders and executory devises, see *White* v. *Summers*, (1908) 2 Ch. 256.

Secondly, by executory devise, a fee simple or other less estate may be limited after, and in defeasance of, a fee-simple; and this happens where a testator devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency, which defeats the first estate. As if a man devised land to A. and his heirs; but if he dies before the age of twenty-one, then to B. and his heirs; this remainder, though void in a deed operating only at common law, and not under the Statute of Uses by way of shifting use, is good by way of executory devise.

Thirdly, by executory devise, a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed; for by law the first grant of it to a man for life, was a total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term of years.

5. *Executory Interests Assignable.*

It may also be remarked before leaving the subject of contingent and executory interests, that in the time of Blackstone they were not assignable at law to strangers; but the right might be released to the terre-tenant or reversioner as tending to render unimpaired subsisting vested estates. Such interests were also devisable by will under the Statute of Wills of Henry VIII.; and they are now devisable under the R.S.O. c. 120, s. 9. An assignment on sufficient consideration was also enforced in equity; not, however, so much as a valid conveyance of the subject matter thereof, but rather as a *contract* to convey and make good the contract. But now these interests are by statute capable of being conveyed at law (*o*).

Thus much for such estates in expectancy as are created by the express words of the parties themselves; the most intricate title in the law. There is yet another species, which is created by the act and operation of the law itself, and this is called a reversion.

6. *Estates in Reversion.*

An estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. Sir Edward Coke

(*o*) R.S.O. c. 109, s. 10.

describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a grant in tail, the reversion of the fee remains, without any special reservation, vested in the donor by act of law; and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never therefore created by deed or writing, but arises from construction of law; a remainder can never be limited unless by either deed or devise.

The doctrine of reversions is plainly derived from the feudal constitution; for when a feud was granted to a man for life, or to him and his issue male, rendering either rent or other services, then on his death, or the failure of issue male, the feud was determined, and resulted back to the lord or proprietor, to be again disposed of at his pleasure. And hence the usual *incidents* to reversions are said to be *fealty* and *rent*. When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion. The rent may be granted away, reserving the reversion, and the assignee of the rent may distrain for it in his own name (*p*); and the reversion may be granted away, reserving the rent by *special* words; but by a *general* grant of the reversion the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *e converso*; for the maxim of law is, "*accessorium non ducit, sed sequitur, suum principale.*"

After the grant of an estate in fee-simple, no reversion is left in the grantor. But if the fee were granted subject to a condition of re-entry, there would always be the possibility of the grantor's recovering the land on the happening of that event which would give him the right of re-entry; and this right or interest is called a possibility of reverter.

A reversion is, of course, capable of alienation. At common law the attornment of the tenant to the grantee of the reversion was essential to the validity of the alienation; but

(*p*) *White* v. *Hope*, 19 C.P. 479.

the necessity for this was abolished by a statute of Queen Anne (*q*). By another statute (*r*), attornments made by tenants to strangers claiming title to the estate of their landlords are null and void, and their landlords' possession is not affected thereby, unless "made pursuant to and in consequence of some judgment or order of a court; or made with the privity and consent of the landlord, or to any mortgagee after the mortgage has become forfeited." So, where the defendant made a lease to a tenant of the plaintiff, and thus endeavoured to secure possession of land in dispute between them, it was held in an action to recover the land that the plaintiff was entitled to recover by reason of the defendant having so obtained possession from the plaintiff's tenant, the question of title as between plaintiff and defendant being left open (*s*).

7. *Merger.*

Before we conclude the doctrine of remainders and reversions, it may be proper to observe that whenever a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate, the less is immediately annihilated; or in law phrase is said to be *merged*, that is, sunk or drowned, in the greater. The requisites for merger are (1) two estates; (2) vesting in the same person at the same time; (3) the estates must be *immediately* expectant one on the other; (4) the expectant must be larger than the preceding (particular) estate. Thus, if there be tenant for years, and the reversion in fee-simple is acquired by him, or in case he surrender his term to the reversioner; in either case the term of years is merged in the inheritance, and shall never exist any more. And even where the reversion in fee is subject to an executory devise over, the merger takes effect. Thus, land was limited to A. for life with remainder to B., but in case B. should die unmarried in the lifetime of A. then to C. A. conveyed his life estate to B., who died unmarried in A.'s lifetime, whereby C. became entitled; and it was held that A.'s life estate merged in the reversion in fee by the conveyance to B., and that C. took an estate in fee-simple in possession notwithstanding that A. survived (*t*).

But the estates must come to one and the same person in

(*q*) Now R.S.O. c. 155, s. 61. See *Allcock* v. *Moorhouse*, 9 Q.B.D. 366.
(*r*) R.S.O. c. 155, s. 60.
(*s*) *Mulholland* v. *Harman*, 6 Ont. R. 546.
(*t*) *Re Atkins*, (1913) 2 Ch. 619.

one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en auter droit*) there is no merger (*u*). Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So also, if he who had the reversion in fee married the tenant for years, there was no merger at common law; for he had the inheritance in his own right, the lease in the right of his wife. But since the Married Women's Property Acts, the husband never takes in right of his wife, but the wife holds her property separate from him.

An interest which is not an estate, as an *interesse termini*, or a contingent or executory interest, will not merge in an estate. Thus where tenant for years, during his term, took another lease to commence from the expiration of his first term, and before its expiration the reversioner devised the land to the tenant for his own life, it was held that the future interest, being but an *interesse termini* and not an estate, did not merge in the life estate (*v*).

By the Judicature Act (*w*) it is enacted that "There shall not be any merger by operation of law only of any estate, the beneficial interest in which prior to the Ontario Judicature Act, 1881, would not have been deemed merged or extinguished in equity." The meaning of this section is said to be that "where there would not be a merger both at law and in equity, then the merger shall not follow, shall not be concluded, because it would operate at law; but that where there would be a merger both at law and in equity, then the merger is to exist notwithstanding the provisions of the Act" (*x*). If it were against interest or if it were the evident intention of the parties that there should be no merger, there was none in equity (*y*), which would always interfere to prevent beneficial interests from being destroyed by merger of estates; and that is now the rule (*z*). So, where an equitable tenant for 99 years built

(*u*) *Re Radcliffe*, (1892) 1 Ch. at p. 231.

(*v*) *Doe d. Rawlings* v. *Walker*, 5 B. & C. 111.

(*w*) Now R.S.O. c. 109, s. 36.

(*x*) Per Kekewich, J., in *Snow* v. *Boycott*, (1892) 3 Ch. at p. 116.

(*y*) See *Chambers* v. *Kingham*, 10 Ch.D. 743; *Capital & Counties Bank* v. *Rhodes*, 19 T.L.R. 280.

(*z*) As to merger of equitable estates, see *Thellusson* v. *Liddard*, (1900) 2 Ch. 635.

on the land demised, and subsequently became tenant for life, it was held that there was no merger because his interest was to keep the term outstanding (*a*).

An estate tail is an exception to the rule as to merger; for a man may have in his own right both an estate tail and a reversion in fee. For estates tail are protected and preserved from merger by the operation and construction, though not by the express words, of the statute *De donis*; which operation and construction have probably arisen upon this consideration, that in the common cases of *merger* of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate. But, in an estate tail, the case is otherwise; the tenant for a long time had no power at all over it, so as to bar or to destroy it; and now can only do it by certain modes. It would, therefore, have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue; and hence it has become a maxim that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee.

(*a*) *Ingle* v. *Vaughan Jenkins*, (1900) 2 Ch. 368. See also *Re Attkins*, (1913) 2 Ch. 619.

CHAPTER X.

OF PERPETUITY AND REMOTENESS.

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1. *General Remarks.*

THE law will not allow the right of alienation to be used to its own destruction, and therefore property, whether real or personal, cannot be limited in such a manner, or conveyed to or for such purposes (non-charitable) as to render it inalienable.

The rule is founded upon considerations of public policy, viz., to prevent the mischief of making property inalienable, unless for objects which are in some way useful or beneficial to the community (*a*).

(*a*) *Yeap Cheah Neo* v. *Ong Chong Neo*, L.R. 6 P.C. at p. 394; *Stanley* v. *Leigh*, 2 P. Wms. at p. 688.

The policy of the law as to perpetuity has been thus expressed by Farwell, L.J. (*b*): "Our courts have from the earliest times set their face against the suspense or abeyance of the inheritance, and have from time to time laid down various rules to prevent perpetuity. One of these is the rule that a preceding estate of freehold is indispensably necessary to support a contingent remainder: Co. Litt. 342 *b*, Butler's Note; another is the rule laid down in 1669 in *Purefoy* v. *Rogers* (*c*) that no limitation shall be construed as an executory devise or shifting use which can by possibility take effect by way of remainder; and another (and probably the oldest) was the rule in question forbidding the raising of successive estates by purchase to unborn children, i.e., to the unborn child of an unborn child. The most modern rule, arising out of the development of executory limitations and shifting uses, is what is now usually called the rule against perpetuities, namely, that all estates and interests must vest indefeasibly within a life in being and twenty-one years after. But this is an addition to, not a substitution for, the former rules."

The rule against perpetuities is treated by Mr. Lewis, in his book on Perpetuities, and also by Professor Gray, as being applicable only to the suspense of future executory interests. And Professor Gray thinks that the rule should have been called the Rule against Remoteness; and he deals with direct limitations restricting alienation as mere restraints on alienation (*d*). It is undoubtedly true, however, that the rule is directed against rendering property perpetually inalienable, or inalienable for an indefinite time; and whether that is attempted by direct limitation, or indirectly by creating future executory interests and holding them in suspense, is immaterial. It is the restraint on alienation, whether by some ingenious device, or directly, that would create a perpetuity.

The treatment of the limitation of remote interests, as constituting the whole law as to perpetuity, ignores the earlier attempts to create perpetually inalienable interests before future executory interests came into existence, as well as the application of the rule to perpetual trusts (non-charitable), and to such an interest as came into question in *Whitby* v. *Mitchell* (*e*), i.e., the limiting of successive life estates to a donee

(*b*) *Re Nash*, (1910) 1 Ch. at p. 7.
(*c*) Wm. Saund. (Ed. 1871) 768, 781-9.
(*d*) Gray on Perpetuities, 2nd ed., s. 201.
(*e*) 42 Ch.D. 494; 44 Ch.D. 85.

and his descendants. At this juncture, then, it will be found convenient and necessary to distinguish between perpetuity and remoteness.

A perpetuity is where a limitation of property, real or personal, by any means, directly or indirectly (except for charitable purposes), would render the property inalienable in perpetuity or for an indefinite period. This, if allowed, might be accomplished either by some direct limitation, such as an unbarrable entail, or a succession of life estates to a donee and his issue; or, indirectly, by creating a future executory interest, which, according to the limitation, would or might remain in suspense, and would not or might not vest until a remote period, and thus render the property inalienable for an indefinite time. Such future interests are consequently required to vest within a period fixed by law, otherwise they are too remote, and void. And the rule as to their vesting is the rule against remoteness.

2. *Interpretation of the Instrument.*

Before entering upon a consideration of the rule against perpetuity, it may be proper to point out that, in interpreting an instrument in which such limitations occur, it must first be construed as if no such rule existed (*f*), and then, if the result is that the disposition so read offends against the rule the gift fails, and the property passes as if the offending disposition had never been made (*g*).

And when a clause occurs which on one interpretation appears to offend against the rule, but on another interpretation of which it is fairly capable avoids the objection, the latter construction will be adopted (*h*).

Similarly, if the prior limitations are susceptible of two interpretations, one of which would make the gift under the ulterior limitations too remote, and the other of which would make it valid, the instrument will not be interpreted in the

(*f*) *Dungannon* (*Lord*) v. *Smith*, 12 Cl. & Fin. 546, 588, 599; *Pearkes* v. *Moseley*, 5 A.C. at p. 719, per Lord Selborne; *Heasman* v. *Pearse*, 7 Ch. App. at p. 283; *Re Hume*, (1912) 1 Ch. 693; *Edwards* v. *Edwards*, (1908) A.C. 275. Cf., the same principle applied in the interpretation of a will where there is a gift to a witness which is void: *Re Maybee*, 8 O.L.R. 601.

(*g*) See *Ferguson* v. *Ferguson*, 2 S.C.R. 497; *Re Daveron*, (1893) 3 Ch. 421; *Goodier* v. *Edmunds*, Ibid. 455. It is impossible to support the decision in *Kenrick* v. *Dempsey*, 5 Gr. 584, where the interest was held to be good for the perpetuity period.

(*h*) *Martelle* v. *Holloway*, L.R. 5 H.L. 532; *Re Mortimer*, (1905) 2 Ch. 502; *Re Stamford* (*Lord*), (1912) 1 Ch. 343; *Re Hume*, (1912) 1 Ch. 693.

former way solely for the purpose of rendering the gift under the ulterior limitation too remote (*i*).

3. *Direct Limitations.*

Having divided perpetuities into those attempted by direct and those attempted by indirect limitations, and pointed out that remoteness properly applies only to the vesting of future executory interests, perpetuities by direct limitation will now be considered.

i. *Unbarrable Entails.*

In *Corbet's Case* (*j*), Glanville, J., said that "Richill, who was a judge in the time of Rich. II., and Thirning, who was Chief Justice of the Common Pleas in the time of Hen. IV., intended to have made perpetuities, and, upon forfeiture of the estate-tail of one of their sons, to have given the remainder and entry to another, but such remainders were utterly void, and against the law." These were apparently attempts to create unbarrable entails by clauses of forfeiture for attempts to alienate.

In *Sir Anthony Mildmay's Case* (*k*), which Coke says "was *mutatis mutandis* all one with *Corbet's Case*," some points were resolved which were not moved in *Corbet's Case*, viz., "That all these perpetuities were against the reason and policy of the common law . . . But the true policy and rule of the common law in this point was in effect overthrown by the statute *de donis conditionalibus*, which established a general perpetuity by Act of Parliament . . . When the judges on consultation had among themselves resolved that an estate tail might be docked and barred by a common recovery." From this the inference is that perpetuities by means of unbarrable entails, that is, by means of direct limitations, were known, and were obnoxious to the policy and rule of the common law even before the statute *De Donis*; that that statute created legal perpetuities, by enabling parties to establish perpetual and inalienable entails; and that the judges in *Taltarum's Case* reasserted the policy of the common law, and frustrated the whole effect and purpose of the statute by allowing entails to be barred by a common recovery, and the land again to be made alienable.

(*i*) *Re Davey*, (1915) 1 Ch. 837.
(*j*) 1 Co. Rep. at p. 88*a*.
(*k*) 6 Co. Rep. 40*a*.

In *The Duke of Norfolk's Case* (*l*) a perpetuity was defined as "the settlement of an estate or an interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession to dock by any recovery or assignment" (*m*).

ii. *Revocation of Uses and Re-settlement.*

In *The Duke of Marlborough* v. *Earl Godolphin* (*n*) the limitations were to trustees to the use of several persons for life with remainder to their first and other sons in tail male successively. And the testator directed his trustees that, upon the birth of every son of each tenant for life, they should revoke the uses limited to their sons in tail male, and limit the premises to such sons for life, remainder to the sons of such sons in tail male. The attempt was to continue the settled lands in the testator's issue forever, without power of alienation for more than a life estate. This was held to be an attempt to create a perpetuity by the clause of revocation and re-settlement, and it was held that such clause of revocation and re-settlement was void. "It is agreed," said the Lord Keeper, "that the Duke of Marlborough could not have done this by limitation of estate; because, though by the rules of law an estate may be limited by way of contingent remainder to a person not in *esse* for life, or as an inheritance; yet a remainder to the issue of such contingent remainderman as a purchaser, is a limitation unheard of in law, nor ever attempted, as far as I have been able to discover" (*o*). And what could not be done directly could not be done by indirect means.

iii. *Successive Life Estates.*

Another device for rendering property inalienable was to limit the land to the donee for life, with remainder to his unborn son for life, remainder to the latter's son, and so on. It is manifest that, if this were allowable, the land could be locked up for an indefinite time. But it has been uniformly held for many years that no remainder after the first is valid as a remainder.

In *Humberston* v. *Humberston* (*p*) the testator devised his

(*l*) 3 Ch. Cas. 1, 31.

(*m*) See also, Third Rep. of the Real Prop. Com'rs. p. 29; *Marlborough (Duke of)* v. *Godolphin (Earl of)*, 1 Eden 404.

(*n*) 1 Eden 404.

(*o*) P. 415.

(*p*) 1 P. Wms. 332; 2 Vern. 738; Gilb. Eq. 128.

estate on trust to convey to his godson for life, with remainder to his first son for life, then to the first son of that son, and so on. In the report in Gilbert it is said: "Both court and counsel held that to be such an affectation and tendency to a perpetuity that nothing was said in support of it."

In *Hay* v. *Coventry* (*q*), Lord Kenyon said: "The law is now clearly settled that an estate for life may be limited to unborn issue, provided the devisor does not go farther and give an estate in succession to the children of such unborn issue." And in *Seaward* v. *Willock* (*r*), Lord Ellenborough said: "The law will not allow of a successive limitation of estates for life to persons unborn." And Lord St. Leonards, in *Cole* v. *Sewell* (*s*), though he said that the modern rule has rendered this one obsolete, stated that it rendered void "successive life estates to successive unborn classes of issue." The rule is not obsolete, as will presently be seen, and in *Monypenny* v. *Dering* (*t*) his Lordship said that "the rule against a limitation to an unborn son of an unborn son was unaffected by what" he laid down in *Cole* v. *Sewell* (*u*).

Many other authorities might be cited for the existence of the rule. It was for some time known as the rule against double possibilities or a possibility on a possibility. Thus, in *Chapman* v. *Brown* (*v*), Lord Mansfield, speaking of such a limitation, said: "A possibility cannot be devised upon a possibility." And Wilmot, J., said: "You cannot limit a non-entity upon a non-entity, a possibility upon a possibility." The meaning of the phrase, as used in this case, is that a contingent remainder cannot be limited upon a contingent remainder; and as a remainder to an unborn son is a contingent remainder, another contingent remainder to the son of the unborn son cannot exist; it is a non-entity. In *Re Nash* (*w*), Farwell, L.J., said that the phrase "possibility upon a possibility" should not be used. And, no doubt, it has been misapplied, and when used in a sense other than that in which it was used in *Chapman* v. *Brown* it is objectionable. But when

(*q*) 3 T.R. at p. 86.

(*r*) 5 East at p. 205.

(*s*) 4 De. & War. at p. 32; affirmed D.P. 2 H.L.C. 186.

(*t*) 2 D.M. & G. at p. 168.

(*u*) See also *Marlborough* (*Duke of*) v. *Earl Godolphin*, 1 Eden 404; Fearne, Cont. Rem. 10th ed. 502.

(*v*) 3 Burr. 1626, at p. 1634.

(*w*) (1910) 1 Ch. at p. 10.

restricted to mean that a contingent remainder cannot be limited after a contingent remainder, it is expressive of that rule and unobjectionable (*x*). That seems to have been the meaning attributed to the phrase in an opinion given by Mr. Yorke, where he said that a contingent remainder "cannot be made to wait or expect the vesting of another estate, prior in limitation, and equally contingent with itself. The law does not allow a contingency to depend upon a contingency, or one possibility to be thus raised upon another" (*y*).

The rule that a contingent remainder of freehold cannot be limited upon a contingent remainder, but must have a particular estate of freehold, to support it, is effectual to prevent a perpetuity by limiting an estate to a donee and his descendants for successive life interests. Whether the rule is merely a feudal one, or whether it was framed so as to prevent perpetuities (*z*), is immaterial, and whether the rule is called the rule against double possibilities, or a possibility on a possibility, or the rule against limiting an estate to issue of an unborn person after a life estate to the latter is also immaterial. "The rule," as Farwell, L.J., says, "is well established, whatever its reason may have been" (*a*).

In *Re Frost* (*b*), Kay, J., held that such a limitation, besides being void under the ancient rule now in discussion, was also within the rule as to remoteness (*c*); that is to say, the remainder to the second unborn person, not being limited to take effect within a life or lives, in being and twenty-one years afterwards, was too remote, and void for that reason. But the obvious criticism of this decision is that if the ultimate remainder is void under the ancient rule, it is a non-entity, and can neither be too remote, nor made valid by confining it to the perpetuity period.

In *Whitby* v. *Mitchell* (*d*), the point was expressly raised, and in that case the rule against limiting property to the issue

(*x*) See per Cotton, L.J., in *Whitby* v. *Mitchell*, 44 Ch.D. at p. 89, where he says, "to state the rule in a more convenient form, that you cannot have a limitation for the life of an unborn person with a limitation after his death to his unborn children to take as purchasers."

(*y*) 2 Cas. & Op. at p. 440.

(*z*) See per Farwell, L.J., *Re Nash*, (1910) 1 Ch. at p. 7; Mr. Wilbraham's opinion, 2 Cas. & Op. at p. 426.

(*a*) *Re Nash*, (1910) 1 Ch. at p. 10.

(*b*) 43 Ch.D. 246.

(*c*) See also, *Re Ashforth*, (1905) 1 Ch. 535.

(*d*) 42 Ch.D. 494; 44 Ch.D. 85.

of an unborn person following an estate for life to such unborn person was said to be an absolute rule of property, and independent of the rule against remoteness. In that case the limitations were (in effect) to unborn issue, with remainder to the issue of the latter provided that they were born within the perpetuity period for future interests. It is clear, therefore, that if the old rule were obsolete, or were superseded by the more modern rule against remoteness, such a limitation would be valid, because the second remainder was limited to vest within the perpetuity period. But the court held that it was a void remainder under the old rule, and could not be made good by limiting it to vest within a life in being and twenty-one years afterwards (*e*).

The rule against limiting an estate to the issue of an unborn person after a life estate to the latter applies to equitable as well as legal estates (*f*).

Where the limitations are to a bachelor for life, remainder to his wife, remainder to his children, there seems to be some difference of opinion as to whether the ultimate remainder is valid.

In *Re Park's Settlement* (*g*) the limitation was to A., a bachelor, for life, remainder to his wife if he should marry, remainder to his children. It was held that the remainder to children was void, because A. might marry a woman who was not born at the time of the settlement; and the rule against limiting to issue of an unborn person was applied.

In *Re Bullock's Will Trusts* (*h*), a similar limitation was held to be valid, on the ground that the children would be born in the lifetime of the tenant for life, and the life of the potential spouse might be disregarded.

If the right of the children depended solely on the time when they might be born, that might be so. But, in interpreting an instrument it is obligatory to ascertain what estates are given in order to determine whether a future estate is valid. There is no doubt that a limitation to a potential husband or wife for life, after a life estate granted by the same instrument, is valid, and is a contingent remainder. The estate must vest if the event happens, and its existence cannot be ignored.

(*e*) See articles on this decision in 14 L.Q.R. 133, 234; 15 L.Q.R. 71; 25 L.Q.R. 385; 27 L.Q.R. 168; 12 Columbia L. Rev. 179.

(*f*) *Re Nash*, (1910) 1 Ch. 1.

(*g*) (1914) 1 Ch. 595.

(*h*) (1915) 1 Ch. 493.

That being so, the ultimate remainder to the children, being also contingent, has no estate of freehold to support and must therefore fail; and it is impossible to ignore or eliminate the estate of the potential spouse in interpreting the instrument. To apply the rule—that a remainder cannot be limited to the child of an unborn person after a life estate to such unborn person, as was done in *Re Park's Settlement*—to a case like the present, is to extend it beyond its words, and to make it mean that a remainder cannot be limited to the child of a person who *may be unborn* after a life estate to the latter—for which there is no justification.

Indeed, it is submitted that the rule against limiting successive life estates to unborn descendants is not an independent rule of property, but is a single application of the rule that a contingent remainder of freehold cannot be limited after a contingent remainder.

If what is above submitted as the true rule be kept in mind, then a limitation to a bachelor for life, with remainder to any wife whom he may marry, with remainder to his issue, must fail as to the ultimate remainder, because it is an attempt to limit a contingent remainder after a contingent remainder.

iv. *Cy près.*

Where successive life estates were limited by will to a devisee and his descendants, it was at first held that all limitations after that to the first unborn person were void; and they are still held void, as remainders, so that the remainder-men cannot take as purchasers. But, in order to carry out the intention of the testator, as nearly as possible, in a legal form, though he had desired it to take effect in an illegal form, it was subsequently held, and is now the law, that where an estate tail would carry the land to the same persons as were mentioned in the illegal limitations, such an estate tail might be allowed. Thus, in *Humberston* v. *Humberston* (*i*), where there was a life estate to a living person, followed by a life estate to his first son, and a life estate to the first son of the latter, and so on, Lord Cowper said: "Though an attempt to make a perpetuity for successive lives be vain, yet so far as is consistent with the rules of law, it ought to be complied with; and therefore let all the sons of these several Humberstons that are already born take estates for their lives; but where the limitation is to the

(*i*) 1 P. Wms. 332.

first son unborn, there the limitation to such unborn son shall be in tail male." Thus an alienable estate is given to the unborn issue of the life tenant, and the land would remain inalienable only during the life of the tenant for life, and the possible minority of his son (*j*).

v. *Trusts for Purposes (Non-charitable) which Render Property Inalienable.*

In later times, the conveyance of property to trustees, upon trusts for such purposes (not charitable) as would require the trustees to hold it in perpetuity, has been held to be illegal, as tending to a perpetuity.

Thus, a bequest of a sum of money to trustees of a museum at Shakspear's house, to be maintained as a memorial forever, and a devise of rent-charge to be applied to the wages of a custodian, were held to make the property perpetually inalienable, or to create a perpetuity, and were void. "This is a perpetuity, and, not being a charity, it is void" (*k*).

So, also, a devise of freehold land to the trustees of a library kept on foot by voluntary subscriptions, to hold to them and their successors forever for the use of the library, was held by Lord Campbell to be void, his objection to it being "that it tends to a perpetuity." "If the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity" (*l*).

A bequest of a fund upon trust to provide annually forever a cup to be given to the most successful yacht of the season, was held not to be charitable, and therefore void (*m*).

A gift to trustees of a friendly society, not charitable, upon trust to apply the income in aid of the funds of the society, was similarly held to be void (*n*); and the Privy Council held that the following devises were void, as in each case there was an attempt made to create a perpetuity: Devises to executors, upon trust, as to four houses, that they should continue to be the family house and residence of the family, and that they

(*j*) See further, as to Cy près, Lewis on Perpetuities, pp. 430, et seq.
(*k*) *Thomson* v. *Shakspear*, 1 D.F. & J. 399, at p. 407.
(*l*) *Carne* v. *Long*, 2 D.F. & J. 75, at p. 79.
(*m*) *Re Nottage*, (1895) 2 Ch. 649.
(*n*) *Re Clark's Trust*, 1 Ch.D. 497.

should neither be mortgaged nor sold; as to two plantations, to be reserved as the family burying place, and not to be mortgaged or sold; and as to a house which was directed to be erected on part of the land occupied by the four houses, that the same should be dedicated for performing religious ceremonies to the testatrix' husband and herself (*o*).

In all these cases the bequests or devises were to trustees, who could accept the burdens of the trusts only on the terms thereof, if at all, and who were directed by the testators to hold the property in perpetuity. On the other hand, a devise or bequest to an individual in his own right upon condition that he should never alienate it, would be a good gift and the condition void.

Bequests upon trust to keep in repair tombs, not being within a church, are treated in the same manner. There is nothing illegal in keeping up a tomb (*p*). And gifts to individuals for their own benefit on condition that the legatees should keep tombs in repair out of the money bequeathed to them, have been upheld (*q*). But it is illegal to vest property in trustees in perpetuity for such a purpose (*r*). And so, where a testator bequeathes a sum of money to trustees upon trust to invest the same, and apply the income in keeping up a tomb not within a church, the bequest is void (*s*).

While, as we have seen, it is illegal to dispose of property for purposes or upon trusts (not charitable) which require that it shall be perpetually held as given, there is nothing illegal in conveying property to a club or corporation which may last forever, and which may never alienate it, provided that there is no attempt to make the subject matter of the gift inalienable. And so a bequest "to the committee for the time being of the Corps of Commissionaires in London, to aid in the purchase of their barracks, or in any other way beneficial to that corps," was upheld, because it could be dealt with by the governing body of the corps in any way they might think best for the benefit of the corps (*t*), and was continually alienable while in their hands.

(*o*) *Yeap Cheah Neo* v. *Ong Chong Neo*, L.R. 6 P.C. 381, at p. 394.

(*p*) *Re Tyler*, (1891) 3 Ch. at p. 258, and see *Re Dean*, 41 Ch.D. at p. 557.

(*q*) *Re Tyler*, *supra*; *Lloyd* v. *Lloyd*, 2 Sim. N.S. 255.

(*r*) *Lloyd* v. *Lloyd*, *supra*, at p. 264.

(*s*) *Rickard* v. *Robson*, 31 Beav. 244. See also *Re Vaughan*, 33 Ch. D. 187; *Hoare* v. *Osborne*, L.R. 1 Eq. 585.

(*t*) *Re Clarke*, (1901) 2 Ch. 110; *Re Bowman*, (1915) 2 Ch. at p. 451.

4. *Rule Against Remoteness.*

i. *Indirect Limitations—Future Executory Interests.*

Attempts to create perpetuities, by limiting future executory interests and holding them in suspense for an indefinite time, have now to be considered. It is this part of the rule against perpetuities which is dealt with exclusively by Mr. Lewis and Professor Gray, and the only part which they recognize as the rule against perpetuities.

It can easily be seen that the creation of a remote interest indestructible by the present owner, would, if allowed, hinder his right of alienation of the property, and thus tend to a perpetuity; for, such an interest existing, the present owner could not dispose of the property discharged from the possibilities attending the limitation of the remote interest; and, therefore, to be valid, the limitation must be so framed that it requires the executory interest to vest in interest within a certain time, viz., a life or lives in being, at the time when the instrument takes effect, and twenty-one years afterwards (*u*). And if the person entitled to the executory interest, when it takes effect, is *en ventre sa mere*, and is afterwards born alive, he is considered as *in esse* for the purpose of the vesting of the interest.

There have been several definitions of a perpetuity of this class. Mr. Lewis, whose definition has been accepted in several cases (*v*), thus defines it: "A perpetuity is a future limitation, whether executory or by way of remainder (*w*), and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the consent of the individual interested under the limitation" (*x*).

Professor Gray thus expresses the rule: "No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." This is on the

(*u*) The reason for fixing upon this period will be found postea, p. 254.

(*v*) *London & S.W.R. Co.* v. *Gomm*, 20 Ch.D. at p. 581; *Dunn* v. *Flood*, 25 Ch.D. at p. 633; *Re Ashforth*, (1905) 1 Ch. at p. 541.

(*w*) Quære, as to remainders. See postea, p. 260.

(*x*) Lewis on Perpetuities, 164.

assumption that "condition" includes all uncertain, and also all certain, future acts and events, with the exception of the termination of preceding estates. If "condition" is confined to uncertain future acts and events, then he formulates the rule thus: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest" (*y*). If a criticism might be passed upon so great an authority, it would be to make the definition read as follows: "No interest is good, unless it [is so limited that it] must vest [under the limitation], if at all, not later than, etc." The reason for this is that it is always the validity of the limitation which is in question, and not the fact as to whether the interest actually vests within the prescribed period. An interest may be indefinitely limited, and the contingent event may actually happen within the perpetuity period; but that fact does not render it a valid gift if the limitation does not provide that it shall so vest, if at all.

Both Mr. Lewis' and Professor Gray's definitions include remainders, the first expressly, and the latter impliedly, and both authors are of opinion that contingent remainders are within the rule. The great weight of authority is against this, and if credit is to be given to the very able opinions thereupon the definitions should except remainders.

For an analytical definition, see Halsbury's Laws of England (*z*).

Remoteness in the limitation of a future executory interest may exist, either where there is no antecedent interest created, or where there is an antecedent interest created, and in the first case, the gift is to take effect, and, in the second case, the property is to shift or a new future interest arise, upon a contingency which is not so limited that it must happen, if at all, within the perpetuity period.

The first class is illustrated by *Re Stratheden (Lord)* (*a*), where there was a bequest of an annuity to a volunteer corps "on the appointment of the next lieutenant-colonel." It was held that the gift was too remote, and void, because the next lieutenant-colonel might not be appointed within the legal period after the death or retirement of the then commanding officer.

(*y*) Gray on Perpetuities, 2nd ed. s. 201.
(*z*) Perpetuities, p. 302.
(*a*) (1894) 3 Ch. 265.

The cases which fall within the second class are very numerous, and upon these the rule, as stated by Mr. Lewis and Professor Gray, has been largely built up, but the following are illustrations of the principle.

Where there was a bequest to trustees, upon trust to establish schools in certain parishes, and to continue the same forever, followed by a direction that, if the Government at any time thereafter should establish a general system of education, the trusts should cease, and the moneys bequeathed should follow the residue of the personal estate, it was held that the gift over was void as being too remote, as the limitation did not require the event, viz., the establishment of government schools, to happen within the legal period (*b*).

A direction that executors should continue the testator's business by working out gravel pits on his freehold land, and that the land should then be sold and the proceeds distributed, was held to make the direction to sell too remote, as the limitation did not require that the gravel pits should be worked out within the perpetuity period (*c*).

Where a testator devised a house to his son, and, after giving certain legacies, gave all the residue of his estate to his executors to be used by them in their discretion for keeping up the house, and directed that if, for any reason, it should become necessary to sell the house, the residuary estate then remaining should be divided amongst the several pecuniary legatees named in his will, it was held that the latter disposition was too remote, and therefore void, because the event upon which the residue was to become distributable, namely, the possible sale of the house, was not limited to happen, if at all, within the legal period (*d*).

It is essential that the limitation of the executory interest should be so framed in the will or settlement that it shall expressly require that the interest shall vest within the legal period (*e*). But it is a good limitation of a trust for sale "at the expiration of [a] term of 21 years" from the date of the settlement, because the term ends and the trust arises at the same moment, and while it is impossible to say that the trust

(*b*) *Re Bowen*, (1893) 2 Ch. 491.

(*c*) *Re Wood*, (1894) 3 Ch. 381. See also *Edwards* v. *Edwards*, (1909) A.C. 275.

(*d*) *Kennedy* v. *Kennedy*, 24 O.L.R. 183; *Foxwell* v. *Kennedy*, Ibid. 189.

(*e*) *Kennedy* v. *Kennedy*, 28 O.L.R. 1; (1914) A.C. 215; 11 D.L.R. 328; 13 D.L.R. 707.

arises within the period of 21 years, it is just as impossible to say that it arises without that period (*f*).

It is not sufficient (i.) that the interest may possibly vest, or (ii.) that the occurrence of the contingent event does actually take place within the perpetuity period. In other words, if the limitation is bad in its wording or expression, subsequent events cannot make it good.

(i.) Thus, in the cases cited below (*g*), where the direction (in the first) was to continue working gravel pits until they were worked out, and then to sell the freehold and distribute the proceeds, and (in the second) to pay an annuity to a volunteer corps on the appointment of the next lieutenant-colonel, the event in each case might have happened within the legal period; but the limitations were not so framed as to require the events to happen, if at all, within that period, and therefore the limitations were bad (*h*). Again, after a devise to trustees to pay the income to children, the testator directed that, if any child should marry and have issue, and any child and his or her issue should die in the lifetime of any husband or wife with whom such child should have married, then the gift should go over; and it was held that the gift over was remote, because any one of the children might have married a man not born until after the death of the testator (*i*). And in *Edwards* v. *Edwards* (*j*), a testator directed that when a coal mine should be worked, a royalty on the coal won should be paid to certain persons, and it was held that, as the mine might not be worked for a period beyond the perpetuity limit, the gift was too remote.

(ii.) Though the contingent event, not only may happen, but actually does happen, within the period, so as to enable the executory interest to vest if it were well created, yet if the limitation does not require it so to happen, it remains bad, and the remote interest is void. Thus, in *Re Wood* (*k*) the gravel pits were in fact worked out in six years after the testator's death; yet, the limitation being indefinite as to the time of

(*f*) *English* v. *Cliff*, (1914) 2 Ch. 376.

(*g*) *Re Wood*, (1894) 2 Ch. 310; (1894) 3 Ch. 381; *Re Stratheden (Lord)*, (1894) 3 Ch. 265.

(*h*) And see per Harrison, C.J., *Ferguson* v. *Ferguson*, 39 U.C.R. at p. 239.

(*i*) *Hodson* v. *Ball*, 14 Sim. 558, at p. 574; see also *Lett* v. *Randall*, 2 Sm. & G. 83; *Re Harvey*, 39 Ch.D. 239.

(*j*) (1909) A.C. 275.

(*k*) Supra.

working them out, the direction to sell was held to be too remote and void. In another case (*l*) it was said: "The single question . . . is, not whether the limitation is good in the events which have happened, but whether it was good in its creation; and if it were not, I cannot make it so."

So also, though the person to take under the remote limitation is ascertained, and is alive, and could either release to the present owner or join with him in conveying, at the time when the instrument comes into operation, yet that will not make the limitation good. Thus in *Gray* v. *Montagu* (*m*) there was a bequest to trustees upon trust for A., but if he died without issue, to pay the fund to persons who were living at the testator's death. It was held that, as the limitation did not provide for a failure of issue at a definite time within the perpetuity period, but for a failure of issue indefinitely, the gift over was void for remoteness, though the persons to take were ascertained and alive at the death of the testatrix. And in *London & S.W. R. Co.* v. *Gomm* (*n*), a railway company took a covenant from P. for himself, his heirs and assigns, that he would convey certain lands to them at any time on being paid a certain sum. It was held that the covenant created an executory interest in land to take effect after an indefinite time upon the election of the railway company, and was therefore invalid, and the fact that the railway company might have released at any time did not make it good (*o*).

ii. *The Perpetuity Period for Executory Interests.*

The period during which the suspense is allowed is a life or lives in being at the time when the limitation becomes operative and twenty-one years afterwards; and if there is a child *en ventre sa mere* at the time when the future interest is ready to vest, who becomes entitled thereto, and is afterwards born alive, he is deemed to be a person in being. Such a child may be also taken for the purpose of a life forming the period of suspense (*p*).

(*l*) *Jee* v. *Audley*, 1 Cox at p. 324, per Sir L. Kenyon, M.R.; see also *Dungannon (Lord)* v. *Smith*, 12 Cl. & F. at p. 563.

(*m*) 3 B.P.C. (Toml.) 314.

(*n*) 20 Ch.D. 562; see also *Manchester Ship Canal Co.* v. *Manchester Race Course Co.*, (1900) 2 Ch. 352; (1901) 2 Ch. 37.

(*o*) See also Theob. on Wills, 7th ed. 598.

(*p*) Halsbury's Laws of England, Perpetuity, p. 302; *Dungannon (Lord)* v. *Smith*, 12 Cl. & Fin. at p. 629; *Re Wilmer's Trusts*, (1903) 1 Ch. 874; 2 Ch. 411.

The term of twenty-one years added after the dropping of the lives is a period in years, unconnected with the minority of any one (*q*), though a minority may be selected for the period. It arose, said Lord Brougham, from a mistake. "The law never meant to say that there should be twenty-one years added to the life or lives in being, and that within those limits you may entail the estate, but what the law meant was this: until the heir of the last of the lives in being attains twenty-one, by law a recovery cannot be suffered, and consequently the discontinuance of the estate cannot be effected, and for that reason, says the law, you shall have the twenty-one years added, because that is the fact and not the law, namely, that till a person reached the age of twenty-one he could not cut off the entail. For that reason and in that way it has crept in by degrees; *communis error facit jus*" (*r*).

In other words, where an estate was limited to one for life, remainder to his son in tail, directly or by implication, the estate remained inalienable for the life of the life tenant, but became alienable immediately upon accession by his son, unless the latter were under age; in which case the property remained inalienable on account of the disability until the heir arrived at his majority. But, as a life in being and twenty-one years afterwards was the extreme period during which property could thus remain inalienable when settled by direct limitation, the same full period was adopted during which it might be rendered inalienable by indirect limitation, i.e., the holding in suspense of a future executory interest.

In *Long* v. *Blackall* (*s*), Lord Kenyon said, "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the courts have said that the estate shall not be inalienable by executory devise for a longer term than is allowed by the limitations of a common law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail, and until the person to whom the last remainder is limited is of age the estate is inalienable. In conformity to this rule the courts have said, so far we will allow executory devises to be good" (*t*).

(*q*) *Cadell* v. *Palmer*, 1 Cl. & Fin. 372.

(*r*) *Cole* v. *Sewell*, 2 H.L. Ca. at p. 233.

(*s*) 7 T.R. at p. 102.

(*t*) And see *Marlborough* (*Duke of*) v. *Godolphin* (*Earl*), 1 Eden at p. 418.

In the case of a future executory interest, there may be no lives connected with the settlement, and the lives chosen for the perpetuity period may be taken arbitrarily, and need have no connection with, or interest in, the property settled (*u*); and any number of them may be selected, as there is only one life to determine the period, namely, that of the survivor of them. But the number must be such that the termination of the life of the survivor may be reasonably capable of proof (*v*). Thus, a bequest to take effect at the expiration of twenty-one years after the death of all persons living at the testator's death, though technically good, was held to be void for uncertainty, as it would have been impossible to prove when the death of the survivor happened (*w*); and thus a perpetuity might have been indirectly created. Where no lives are taken to indicate the period, then the term of twenty-one years is the legal period (*x*).

The point of time from which the period is to be reckoned is the time when the instrument comes into operation, i.e., in the case of a deed, from the time of its execution; in the case of a will, from the testator's death. In the case of a power of appointment, the period begins at the coming into operation of the instrument creating the power.

Where a settlement provided that the trustees should stand possessed of the trust premises for twenty-one years for certain trusts, and "at the expiration of the said term of twenty-one years" should sell the trust property, it was held that the trust for sale was not void for remoteness, because it arose coincidentally with the termination of the twenty-one years. And it was also held that the twenty-one years should be reckoned so as to include the day of the date of the settlement (*y*).

iii. *Property and Interests Subject to the Rule.*

(a). *Powers and Trusts.*

The donee of a power must be some person who must necessarily be ascertained within the perpetuity period reckoned from the time of the creation of the power (*z*).

A power capable of being exercised beyond lives in being and

(*u*) *Cadell* v. *Palmer*, 1 Cl. & F. 372.

(*v*) *Thellusson* v. *Woodford*, 7 Ves. at p. 146.

(*w*) *Re Moore*, (1901) 1 Ch. 936.

(*x*) Marsden on Perp. 32; *Baker* v. *Stuart*, 28 O.R. 439; *Palmer* v. *Holford*, 4 Russ. 403; *Speakman* v. *Speakman*, 8 Ha. 180.

(*y*) *English* v. *Cliff*, (1914) 2 Ch. 376.

(*z*) *Re Hargreaves*, 43 Ch.D. 401; see also *Re Phillips*, 28 O.L.R. 94; 11 D.L.R. 500.

twenty-one years afterwards is absolutely void. But, if it can only be exercised within the period allowed by the rule against perpetuities, it is a good power even though some particular exercise of it might be void under the rule.

If a power be given to a person alive at the date of the instrument creating it, it must of course be exercised during his life, and is therefore valid; and if a power can be exercised only in favour of a person living at the date of the instrument creating it, it must be exercised during his lifetime, and is therefore good (*a*).

The contingent event upon which the power is to be exercised must also be one which must necessarily happen according to the limitation within the period (*b*).

A trust for sale is also within the rule. In *Goodier* v. *Edmunds* (*c*), Stirling, J., said: "There is, however, no substantial difference, for the purpose of the rule against perpetuities, between a trust for sale and a power of sale, where the sale is intended to be completed by a conveyance to the purchaser of the legal estate in the trustees. A testator or settlor cannot (as I think) impose an obligation to sell when he cannot lawfully confer a power to do so; or escape from the rule against perpetuities by vesting in his trustees an imperative instead of a discretionary power of sale."

And so, where a testator devised land to his son, and directed that the same should be sold, but not during his son's life, and not after his death until his son's youngest child should be twenty-one, and then only within three years thereafter, the proceeds to be divided between his son's children at the time of sale, it was held that the direction was void as being too remote (*d*).

Similarly a trust of the surplus rents and profits of mortgaged lands, for the purpose of paying off a mortgage thereof made by the testator, as the instalments fell due, the dates of maturity of the instalments being many years after the testator's death, was held void, as it did not appear that the surplus rents and profits would be sufficient to pay off the mortgage within the perpetuity period (*e*).

(*a*) *Re De Sommery*, (1912) 2 Ch. 622.

(*b*) *Blight* v. *Hartnoll*, 19 Ch.D. 294; *Goodier* v. *Edmunds*, (1893) 3 Ch. at p. 460.

(*c*) (1893) 3 Ch. at p. 461.

(*d*) *Meyers* v. *Ham. P. & L. Co.*, 19 O.R. 358; and see *Re Hume*, (1912) 1 Ch. 693.

(*e*) *Re Bewick*, (1911) 1 Ch. 116.

But where the trust for sale is merely a means of dividing the property amongst persons for whom the property is given, they will be held to be equitably entitled to the property; and, if the vesting in them of the equitable interests is within the prescribed period, the equitable interests will not fail by reason of the invalidity of the trust for sale (*f*).

(b). *Rights of Entry for Condition Broken.*

For the present, rights of entry for condition broken must be included in those interests which are subject to the rule against remoteness. But there are very strong opinions against this view, and it is perhaps more than doubtful if it is correct.

In *Dunn* v. *Flood* (*g*), a condition of re-entry for breach of a covenant, unlimited as to time, was held to be void, as there was "no limit to prevent its being a claim in perpetuity."

In *Re Hollis' Hospital & Hague* (*h*), a conveyance of property for use as a hospital contained a provsio that if, at any time thereafter, the land should be employed for, or converted to, any other use than the purposes therein mentioned, then it should revert to the heirs of the donor. On an application under the Vendor and Purchaser Act, it was held that the condition was void for remoteness, but the court refused to force the title on the purchaser. This case was followed in Ontario by *Re St. Patrick's Market* (*i*), where there was a conveyance of land to the City of Toronto for use as a market, with the proviso that, if the corporation should at any time thereafter alienate the land, or use or apply it to any other purpose than for a public market, then the deed should be void, and the property should revert to the heirs of the donor, and it was held that the proviso for re-entry was too remote and void (*j*).

Messrs. Sanders (*k*), Lewis (*kk*), and Gray (*kkk*) are all in

(*f*) *Goodier* v. *Edmunds*, (1893) 3 Ch. 455; *Re Daveron*, (1893) 3 Ch. 21; *Re Appleby*, (1903) 1 Ch. 565.

(*g*) 25 Ch.D. 629; 28 Ch.D. 586.

(*h*) (1899) 2 Ch. 540.

(*i*) 14 O.W.R. 794.

(*j*) See also *Re Macleay*, L.R. 20 Eq. 186; *Cooper* v. *Macdonald*, 26 W.R. at p. 379; *Re Winstanley*, 6 O.R. at p. 320. In these cases the conditions were against alienation, and *quære* whether they were not to be treated as repugnant to the estate. In *Re Melville*, 11 O.R. 626, the point was not raised. The only question was whether heirs or devisees should take on breach of the condition.

(*k*) On Uses, Vol. I., p. 19.

(*kk*) On Perpetuities, p. 618.

(*kkk*) On Perpetuities, 2nd ed., s. 300*a*.

favour of the application of the rule; while Messrs Challis and Sweet take the opposite view (*l*).

In an Irish case, Palles, C.B., in a well-reasoned judgment, disagreed with the opinion expressed in *Re Hollis' Hospital & Hague*, and showed that when a grant is made on condition, and the condition is broken or performed as the case may be, the donor does not take by way of new limitation, but by the determination of the estate given (*m*). In other words, when a grant is made on condition, it will endure, and is intended to endure, only as long as the condition is observed, and on breach of the condition it merely comes to an end.

Against the view that common law conditions are within the rule is the very weighty authority of the Real Property Commissioners, amongst whom were some of the most eminent conveyancers of the day. In their third Report (*n*) they point out that conditions are co-eval with real property law, and existed unaffected by any restriction as to time before the rule against remoteness came into existence.

They also point out that, to every exchange of lands, the common law annexed the implied condition, that, if either of the parties to the exchange should be afterwards evicted from the estate taken in exchange, owing to a failure in the title of the other party, the party so evicted might re-enter on the estate which he originally gave in exchange for the one of which he had been deprived, and that no time was fixed within which such re-entry was to be made (*o*); and there may be added the case of a grant to a corporation aggregate, where upon dissolution at any time of the corporation the land reverts (*p*). This argument seems to be unanswerable; for the law would not imply a condition unrestricted as to time which it would declare to be invalid if agreed to expressly by the parties. This implied condition existed in cases of exchange until abolished by 12 Vict. c. 71, s. 6, now R.S.O. c. 109, s. 11.

Indeed, Mr. Butler, in a note to Coke upon Littleton (*q*), states that the doctrine of conditions was derived from the feudal law, and that a condition was annexed to every fief that the feudatory would render the services upon which his

(*l*) Challis, R.P., 3rd ed., 187, 207; Jarm. on Wills, 6th ed., 374-376.
(*m*) *Atty-Gen.* v. *Cummins*, (1906) 1 Ir. at p. 409.
(*n*) At p. 37.
(*o*) And see *Bustard's Case*, 4 Rep. 121*a*.
(*p*) *Re Woking* (1914) 1 Ch. at p. 310.
(*q*) 201*a*.

fief was held, and that the lord might re-enter if the feudatory neglected to perform the services. As time went on other conditions were introduced and annexed to estates by the agreement of the parties, and so grants upon conditions arose. And although grants of land were originally for life only, yet when inheritances came into existence, the condition as to the performance of services would endure as long as the estate endured. And we have already seen (*r*) that gifts to a man and the heirs of his body were treated as gifts on condition that on failure of heirs the land should revert to the donor, until the statute *De donis Conditionalibus* was passed which by its very words speaks of such gifts as gifts on condition. It being, then, of the essence of a feudal grant that it was a grant on condition, and that the right of re-entry could be reserved to the grantor and his heirs, without any restriction as to time, it is of the essence of the law that a condition unrestricted as to time, with a right of re-entry for breach, could not offend against the rule as to remoteness which did not come into existence for some centuries afterwards. And it is inconceivable that, in all the learning to be found in Coke upon Littleton (*s*) and Sheppard's Touchstone (*t*) on the law of conditions, no reference should have been made to their invalidity if not limited to take effect within a prescribed limit of time if such were the law.

It may also be worthy of observation that a mortgage is a grant on condition that the mortgagee will re-convey on the performance of the condition, and is treated as a grant on condition by Blackstone.

(c). *Options to Purchase.*

In *London & S.W. R. Co.* v. *Gomm* (*u*), the plaintiff company conveyed land to P., and the latter covenanted with the company that he, his heirs or assigns, would at any time, on receipt of a certain sum, re-convey the land to the company. It was held that this covenant created an interest in land, and as it was not restricted within due limits in point of time, it was void.

Similarly, an instrument under seal giving to the plaintiff "the first right or option of leasing the last-mentioned lands for

(*r*) Ante pp. 94 to 96.
(*s*) 201*a*, et seq.
(*t*) Chap. VI.
(*u*) 20 Ch.D. 562.

oil and gas purposes," was held to create a remote interest in the land, and to infringe the rule against remoteness (*v*).

An option in a lease for ninety-nine years that the lessee, his heirs or assigns, might, at any time during the term, purchase the fee, was held to be too remote, and void (*w*). And a similar option in a lease for thirty years was held to be void (*x*).

These decisions are not entirely satisfactory. Where the option is not absolute, but depends upon something to be done by the person to whom it is given, it would seem clear that as the interest would not arise and vest until the promisee should exercise his election by doing the act, it should be limited to take effect within the perpetuity period. But where the option given is absolute, and creates an immediate equitable interest in the property, not depending upon anything that the promisee might do, it would appear to create an immediate vested interest, and not to be within the rule.

iv. *Property not Subject to the Rule.*

(a). *Remainders.*

As the rule against remoteness deals with vesting in interest, reversions and vested remainders are not within it.

With regard to legal contingent remainders, Messrs. Lewis and Gray are both of opinion that they are, or ought to be, subject to the rule (*y*), while the great weight of judicial and conveyancing opinion is opposed to this view (*z*). Historically considered, it is absurd to suppose that the rule against remoteness, which arose only after future executory interests came into existence, and was applied to such interests only, should by retrospective operation affect contingent remainders, as to which the law had been settled long before. Nor is it within the spirit of our law that the settled rules of property, such as the rules respecting the vesting of remainders, should be altered except by Act of Parliament.

One branch of the enquiry has already been dealt with, viz., the impossibility of limiting successive life estates to a man and his unborn descendants, which would be nothing but

(*v*) *United Fuel Supply Co.* v. *Volcanic Oil & Gas Co.*, 3 O.W.N. 93.
(*w*) *Woodall* v. *Clifton*, (1905) 2 Ch. 257.
(*x*) *Worthing Corporation* v. *Heather*, (1906) 2 Ch. 532.
(*y*) Lewis on Perp. 408; Gray on Perp. 2nd ed., ss. 284, et seq.
(*z*) See a collection of opinions cited in Jarm. on Wills, 6th ed., by Sweet, at p. 369.

a succession of contingent remainders after a life estate (*a*). The fact that a contingent remainder cannot be limited after a contingent remainder, and that all such remainders are void as remainders, is a sufficient protection against the danger of a perpetuity being created by such means, and absolves us from the necessity of considering them from the point of view of remoteness. In fact, as has been said, it is historically impossible to consider them from this point of view, because such a thing as remoteness was unknown when the rules as to contingent remainders were settled. But reference to the rules as to the vesting of contingent remainders may usefully be made.

The two rules respecting contingent remainders are, (1) that a contingent remainder of freehold must have a particular estate of freehold to support it; and (2) that every contingent remainder must vest either during the continuance of the particular estate or *eo instanti* that it determines. The second rule is merely the corollary of the first, because, if the particular estate comes to an end before the happening of the event upon which the remainder is to vest, there will be no estate to support the remainder.

These rules were well settled and rigid rules of property law before the rule against remoteness came into existence; and as the rule against remoteness is merely a rule as to vesting, and as contingent remainders have their own rules as to vesting, it is impossible, without legislative authority, to alter the present rules and apply the rule against remoteness to them. Two learned conveyancers have thus expressed themselves upon the subject: "No remainder can, in point of expression, be too remote; since the necessity that the remainder should vest during the particular estate or *eo instanti* that the particular estate determines, and the liability of a contingent remainder to be defeated by the merger, etc., of the particular estate, are a protection against the inconvenience of perpetuities" (*b*). "No question of perpetuity could arise at the common law or under the statute *De Donis*. It has been shown that, after the statute *De Donis*, and before the introduction of executory uses, future estates could only be created by way of remainder. The remoteness of a remainder, however great, was no objection to it on its creation. If the event upon which it was to vest took place during the continuance of the preceding estate, or

(*a*) Ante, p. 242.
(*b*) Prest. Abstr. ii., p. 114.

at the instant of its determination, the remainder would vest in possession immeditely on the determination of the preceding estate; if the event did not take place . . . the remainder would wholly fail of effect; during this period, therefore, of the law, all inquiry restricting perpetuity was out of question" (*c*). To the like effect is the reasoning of Lord St. Leonards (*d*) and Lord Brougham (*e*).

The rule as to the vesting of a contingent remainder, therefore, controls it in such a way that it can never be too remote, for it must vest within a life in being; and it is therefore clear that an application of the modern rule against remoteness to it would, in some cases, extend, and not restrict, the time for vesting; and if such period were to be extended beyond the duration of the preceding life estate there would be no particular estate to support the remainder, and thus a rigid rule of property law would be abrogated without legislative authority.

This difficulty is seen by Mr. Lewis in the case of a limitation to a living person for life, remainder to his unborn son for life, remainder to the latter's son, and so on. The first remainder is contingent but has the life estate to support it. The second remainder is also contingent, but has only a contingent remainder to support it, viz., the first remainder to the unborn son of the tenant for life. He argues that, if a son is born during the lifetime of the tenant for life, the first remainder will vest in him, and then there will be an estate of freehold to support the second remainder (*f*). But the objection to this reasoning (apart from the fact that Mr. Lewis ignores the long line of decisions holding that the second remainder is void, and a non-entity) is that at the time when the limitation is made there is no freehold to support the second remainder, and the latter is therefore void in its origin, and subsequent favourable events cannot make it good (*g*).

In practice, any attempt to limit a contingent remainder so that it shall vest within the perpetuity period for executory interests will necessarily fail, because it must always to be valid be controlled by its own rule as to vesting during the continuance of the particular estate or the moment it comes to an end.

(*c*) Fearne, Cont. Rem., Butler's Note, p. 565.

(*d*) *Cole* v. *Sewell*, 4 Dr. & War. 28.

(*e*) Ibid., 2 H.L.C. 230.

(*f*) Lewis on Perp. 411.

(*g*) See *Jee* v. *Audley*, 1 Cox at p. 324; and *Dungannon* (*Lord*) v. *Smith*, 12 Cl. & F. at p. 563.

Many instances of this might readily be given, but two will suffice for the purpose of illustration. Thus, assume a limitation to A., a living person, for life, remainder to the first grandson of B., a living person, who shall be born during the lifetime of B., or within twenty-one years afterwards. This is a good contingent remainder, and the limitation is free from any objection as to remoteness, if the rule against remoteness applies. Yet the limitation cannot control the rule that the remainder must vest, if at all, during A.'s lifetime. Thus, if A. should die before B.'s grandson should be born, there would be no particular estate to support the contingent remainder to the latter, even if he were afterwards born during the prescribed period. In other words, the avoidance of remoteness in the limitation will not make a good remainder if it does not conform to the rule as to the vesting of contingent remainders.

On the other hand, assume a limitation to A., a living person, for life, remainder to such son of B., a living person, as shall be born during the lifetime of the eldest son of C., a living person who is unmarried. This limitation would be void for remoteness, if the rule against remoteness applied, because it requires the event to happen during the lifetime of a person not *in esse* when the limitation is made, and yet it is a good contingent remainder. But the estate must vest, if at all, within A.'s lifetime. Thus, a remote limitation, which would be void if the rule against remoteness applied, will not render invalid a remainder which conforms to the rules respecting contingent remainders.

The conclusions are, that the rules respecting contingent remainders are so adjusted that they afford a protection against, if they were not so adjusted as to prevent, perpetuities; that, in the case of a limitation in remainder to the issue of an unborn person, after a life estate to the latter, the ultimate remainder is void, and therefore never can be subject to any rule except the one which makes it void; that these rules were established before the rule against remoteness was formulated; that the latter rule was formulated for, and is applicable only to, future executory interests; and that to apply it to legal contingent remainders, if practicable, would be to abrogate, in whole or in part, the settled rules respecting the vesting of contingent remainders (*h*).

(*h*) And see Lord Justice Farwell's remark that the rule against remoteness was in addition to, and not a substitution for, the rule as to successive life estates to unborn descendants: *Re Nash*, (1910) 1 Ch. at p. 7.

Contingent remainders of equitable estates are not subject to the rigid rules for vesting that legal estates are subject to, but they must still vest within the legal period. It was sometimes said that the legal estate in the trustees was sufficient to support the contingent remainder of the equitable estate. But a better way of putting it is that as the legal estate in the trustees fulfilled all feudal necessities, there being persons who could render the services, and the equitable estate being unknown to the feudal system, there was no reason why the limitation in remainder of the equitable estate should vest during the preceding life estate (*i*). But the danger arose from this, that an equitable remainder might therefore be limited to take effect on the happening of a remote event. Consequently, to avoid such remoteness, contingent remainders of equitable interests are required to take effect within the perpetuity period. Therefore, where an estate is devised to trustees upon trusts (*j*), or where the legal estate is in a mortgagee at the time of the testator's death (*k*), or where he devises his lands to trustees and directs them to pay debts (*l*), and he devises the equitable estate upon contingent remainders, the legal estate in each case will suffice for feudal requirements, in case the life tenant should die before the happening of the event upon which the contingent remainder is to take effect; but the equitable interest in remainder must be so limited that it will vest in interest within the perpetuity period.

(b). *Remainders After Estate Tail.*

A vested remainder after an estate tail is, of course, not within the rule.

Nor is any future estate or interest which is to take effect, if at all, during the continuance of the estate tail, or instantly when it determines. Because the tenant in tail has power to bar the entail and so destroy all remainders (*m*).

In Nova Scotia estates tail are abolished, and every estate which would have been adjudged an estate tail is to be adjudged a fee-simple. Consequently, an executory devise over "in default of lawful heirs" (meaning heirs of the body) of the

(*i*) *Abbs* v. *Burney*, 17 Ch.D. at p. 229.

(*j*) *Hopkins* v. *Hopkins*, 1 Atk.

(*k*) *Astley* v. *Micklethwait*, 15 Ch.D. 59.

(*l*) *Marshall* v. *Gingell*, 21 Ch.D. 790; *Re Brooke*, (1894) 1 Ch. 43.

(*m*) Lewis on Perpetuities, 664, et seq.; *Heasman* v. *Pearse*, 7 Ch. App. 275; *Re Haygarth*, (1912) 1 Ch. 510.

first taker, was held to be too remote as being limited upon a failure of issue at an indefinite time (*n*).

(c). *Personal Contracts.*

The rule against perpetuities has no application to personal contracts, and, therefore, a covenant to pay a sum of money on the happening of a remote event is valid (*o*). And a provision in a company's articles of association whereby a shareholder was compelled, at any time during the continuance of the company, to transfer his shares to particular persons at a particular price, was held not to be within the rule (*p*). A covenant by a railway company with a land owner, from whom it had purchased land, that the land owner, or his heirs or assigns, might at any time after the purchase make a tunnel under the railway line, to connect the severed portions of the land, was held to be a personal covenant, and not to be within the rule (*q*).

And it has been said that a covenant to pay a sum of money in case one should die without issue is a good covenant (*r*).

Where a covenant or agreement creates an executory interest in land of too remote a nature the interest is void (*s*), but the covenantee may have an action of damages for breach of the covenant (*t*).

(d). *Crown Property.*

The question, whether the Crown in general is bound by the rule against perpetuity, cannot be said to be settled.

In *Cooper* v. *Stuart* (*u*) a grant of Crown land in New South Wales was made in fee, "reserving to His Majesty, his heirs and successors . . . such parts of the land as are now or shall hereafter be required by the proper officer of His Majesty's

(*n*) *Ernst* v. *Zwicker*, 27 S.C.R. at p. 626. See and cf. *Gray* v. *Montagu*, 3 B.P.C. 314.

(*o*) *Walsh* v. *Secretary of State for India*, 10 H.L. Cas. 376. See also *Witham* v. *Vane*, Challis on Real Property, 3rd ed., App. p. 440.

(*p*) *Borland's Trustee* v. *Steel Bros. & Co. Ltd.*, (1901) 1 Ch. 279.

(*q*) *S.E.R. Co.* v. *Associated Portland Cement Mfrs. Ltd.*, (1910) 1 Ch. 12.

(*r*) *Pinbury* v. *Elkin*, 1 P. Wms. at p. 566; *Pleydell* v. *Pleydell*, 1 P.Wms. at p. 750.

(*s*) *London & S.W. R. Co.* v. *Gomm*, 20 Ch.D. 562; *Woodall* v. *Clifton*, (1905) 2 Ch. 257.

(*t*) *Worthing Corporation* v. *Heather*, (1906) 2 Ch. 532.

(*u*) 14 A.C. 286.

Government for a highway or highways; and, further, any quantity of water, and any quantity of land, not exceeding ten acres, in any part of the said grant, as may be required for public purposes." This reservation was held not to be an exception from the grant, but, when put in force, to operate as a defeasance of the estate previously granted. As the provision might not be put into operation until a remote period, the question as to its validity was directly in issue. The Privy Council decided that, assuming the Crown to be bound in England by the rule, it was nevertheless "inapplicable, in the year 1823, to Crown grants of land in the Colony of New South Wales, or to reservations or defeasances in such grants to take effect on some contingency, more or less remote, and only when necessary for the public good."

This decision does not advance the matter in Ontario, where the rule is in force, and where, in all controversies respecting property and civil rights, resort is to be had to the laws of England as the rule for the decision of the same (*v*).

In England the only decision is not conclusive. In *Flower* v. *Hartopp* (*w*), a proviso for re-entry for want of repair in a grant of Crown property in fee reserving a fee-farm rent, was assumed to be valid for the purpose of holding that it could not be enforced on account of the fee-farm rent having been assigned.

It is said in general terms that the King cannot make a grant in derogation of the common law (*x*); and the instances given are that he cannot alter the course of descent. Nor can the King make a grant of a peerage (which obeys the laws of the descent of land) to descend in a manner unknown, and therefore contrary, to the common law (*y*); nor to shift to persons not entitled in course of descent upon the happening of certain events (*z*). In the latter case no question was raised as to the invalidity of the grant on account of the remoteness of the contingent event, but the whole limitation was held to be void as unknown to law.

The generality of the statement that the King cannot make a grant in derogation of the law must be qualified, however, for

(*v*) R.S.O. c. 101, s. 7.
(*w*) 6 Beav. 476.
(*x*) Chitty on Prerogative, 386.
(*y*) *Wiltes Claim of Peerage*, L.R. 4 H.L. 126.
(*z*) *Buckhurst Peerage Case*, 2 A.C. 1.

it is stated in an old authority (*a*), that the King can annex a condition against alienation to his grant, and in this respect he differs from a common person. And in *Fowler* v. *Fowler*(*b*) such a condition was held to be valid as an exercise of the royal prerogative. But in that case the grant was for the life of the grantee, and the right to restrain alienation was the point at issue, and the rule against perpetuities could not come into question.

In *Atty-Gen.* v. *Cummins* (*c*). where there was a grant of rents in fee until the grantee, his heirs or assigns, should receive £5,000, the court held that the grant was of the nature of a common law condition. But they were also of opinion that the rule against perpetuities never applied to common law conditions. As this has been departed from in the English decisions (*d*), it is still an open question as to whether the Crown would be bound. The utmost that can be said, in the present state of the authorities, is that the generality of the statement that the Crown cannot make a grant in derogation of the common law has been qualified by the statement that the Crown can restrain the alienation of the subject matter of the grant by the terms of the grant. But, if full effect be given to this authority, it means that the Crown has the prerogative right to make a grant of an inalienable estate, which is a perpetuity.

(e). *Covenants for Renewal of Leases.*

A covenant in a lease for perpetual renewal is not within the rule, but no very satisfactory reason for this has been given. A covenant to renew a lease once, if the lessee should give notice of desiring a renewal, would be just as objectionable as a covenant to renew perpetually, if the term extended beyond the perpetuity period for the vesting of executory interests; for it would create an interest to vest at a time beyond the period, upon an event (the giving of notice) which might or might not take place.

In Ireland, leases for lives renewable forever have been assumed to be valid. And though in *Calvert* v. *Gason* (*e*) the court said that such leases had always been considered as per-

(*a*) Bro. Abr. Prerogative, 102; Chitty, Prerog. 388.

(*b*) 16 Ir. Ch.R. 507.

(*c*) (1906) 1 Ir. R. 406.

(*d*) *Re Hollis' Hospital & Hague*, (1899) 2 Ch. 540; *Dunn* v. *Flood*, 25 Ch.D. 629; 28 Ch.D. 586.

(*e*) 2 Sch. & Lef. 561.

petuities, the word was there used to indicate that the fee had been practically exhausted, and that nothing was left in the reversioner but the right to enforce the terms of the lease (*f*), and specific performance of covenants to renew has been decreed without opening the question (*g*).

In *Hare* v. *Burges* (*h*), it was merely said, that the notion of a covenant for perpetual renewal being objectionable on the ground of tending to a perpetuity is out of the question.

In *Moore* v. *Church* (*i*), the reason given is that the covenant to renew "creates an equitable estate in the land from the time of its execution." And in *Muller* v. *Trafford* (*j*), the reason given is that where the covenant runs with the land "it is annexed to the land," and is so "free from any taint of perpetuity." "It must bind the property from its inception, because it would otherwise be an executory interest in land arising *in futuro*, and therefore obnoxious to the rule against perpetuities." But the objection to this explanation is that, in the case of an option to buy land, it is just because such a covenant does create a future executory interest in land that it is obnoxious to the rule (*k*).

It is when the results upon a covenant to renew a lease, and a covenant to convey the fee, in each case upon notice to be given by the covenantee, are compared, that the illogicality of the position is revealed. An option to the lessee in a long lease to buy the fee at any time during the term is void for remoteness; but an option to the lessee, in the same lease, to take a renewal, or renewals, forever, is valid.

Whatever the reason may be, the rule is settled that a covenant for perpetual renewal of a lease when it runs with the land, is not subject to the rule—"an anomaly which it is too late now to question, though it is difficult to justify" (*l*).

(f). *Charities.*

It has been seen that a perpetual trust, non-charitable, which renders the property inalienable, is void. But, where

(*f*) See also *Copping* v. *Gubbins*, 3 Jo. & La. 411.

(*g*) *Ross* v. *Worsop*, 1 B.P.C. 281; *Sweet* v. *Anderson*, 2 B.P.C. 256. And see *Buckland* v. *Papillon*, L.R. 1 Eq. 477; 2 Ch. App. 67.

(*h*) 4 K. & J. 57.

(*i*) 1 Ch.D. 452.

(*j*) (1901) 1 Ch. at p. 61.

(*k*) *London & S.W. R. Co.* v. *Gomm*, 20 Ch.D. 562. And see discussion in *Woodall* v. *Clifton*, (1905) 2 Ch. 260, et seq.

(*l*) Per Romer, L.J., *Woodall* v. *Clifton*, (1905) 2 Ch. at p. 279.

property is once effectually given to charity the rule against perpetuities is not applicable (*m*).

A gift may therefore be made to a charity, either in perpetuity, or for any shorter period, however long (*n*).

Where, however, a gift is made on trust, for a charity, conditional upon the happening of a future and uncertain event, it is subject to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent.

If the condition is too remote the gift is void *ab initio* (*o*). But if there is a prior limitation in favour of a charity, a gift over to another charity on the happening of a remote contingent event, or on the breach of a condition at an indefinite time, is not invalid, because the property is neither more nor less inalienable on that account (*p*). Or, if there is a declaration of intention in favour of charity absolutely, and an immediate constitution of a charitable trust, or an immediate gift to charitable uses, the gift is valid though the particular form or mode of charity to which the property is to be applied may depend for its execution upon future and uncertain events (*q*).

In *Re Mountain* (*r*) there was a gift to the Synod of the Diocese of Ottawa of property "to be held in trust by said Synod for an endowment of the bishopric of Cornwall whenever the Bishop of Cornwall is being appointed, whether as an independent bishop or as a suffragan to the Bishop of Ottawa;" with a provision that if the appointment of the bishop should not take place within twenty-five years after the testator's death, the property should pass to Bishop's College, Lennoxville. It was held, following *Chamberlayne* v. *Brockett*, that there was an immediate trust constituted, and only the particular application of the fund was postponed, and that the gift was valid.

A gift over (non-charitable) on the happening of an uncertain event, after a gift to a charity in perpetuity, is void as

(*m*) *Chamberlayne* v. *Brockett*, 8 Ch. App. 206, at p. 211; *Goodman* v. *Saltash Corporation*, 7 A.C. 633, at p. 650; *Commissioners of Income Tax* v. *Pemsel*, (1891) A.C. at p. 581.

(*n*) *Re Bowen*, (1893) 2 Ch. at p. 494.

(*o*) *Chamberlayne* v. *Brockett*, 8 Ch. App. at p. 211.

(*p*) *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 464; *Re Tyler*, (1891) 3 Ch. 252.

(*q*) *Chamberlayne* v. *Brockett*, 8 Ch. App. at p. 206.

(*r*) 26 O.L.R. 163; 4 D.L.R. 737.

being too remote (*s*). But a direction that a fund shall fall into the residue when a prior charitable gift comes to an end is valid, because the fund would in any event go by law into the residue (*t*).

5. *Effect of Failure of Gift.*

Where a limitation fails on account of remoteness, and there are limitations over, it will in each case be a question of construction as to whether the limitations subsequent to the void limitation are dependent upon the latter, i.e., are to take effect provided that the void limitation takes effect (*u*). "It is settled that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid. The reason appears to be that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted; and as the prior limitation which is void for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation" (*v*). And this is so although the ultimate limitation may be to a person *in esse* at the date of the making of the settlement (*w*).

And where both the prior and subsequent limitations depend on the same event, and the prior limitation is void, the subsequent limitation is necessarily void also (*x*).

But if the subsequent limitation is not dependent upon the prior one, but is an alternative independent limitation, it might take effect notwithstanding that the prior limitation is void (*y*).

Where the limitation is void, the instrument takes effect as if the void limitation and all limitations dependent on it were omitted (*z*). Where there is a residuary disposition, the property falls into the residue as undisposed of (*a*). And if

(*s*) *Re Bowen*, (1893) 2 Ch. at p. 494.

(*t*) *Re Randell*, 8 Ch.D. 213; *Re Blunt's Trusts*, (1904) 2 Ch. 767.

(*u*) *Brudenell* v. *Evans*, 1 East at p. 454.

(*v*) *Re Abbott*, (1893) 1 Ch. at p. 57; *Routledge* v. *Dorrel*, 2 Ves. 357; *Beard* v. *Westcott*, 5 B. & Ald. 801.

(*w*) *Re Hewett's Settlement*, (1915) 1 Ch. 810.

(*x*) *Proctor* v. *Bath & Wells (Bishop of)*, 2 H. Bl. 358.

(*y*) *Robinson* v. *Hardcastle*, 2 T.R. at p. 251; *Re Davey*, (1915) 1 Ch. 837.

(*z*) Lewis on Perpetuity, 657.

(*a*) *Leake* v. *Robinson*, 2 Mer. at p. 392; *Bentinck* v. *Portland (Duke of)*, 7 Ch.D. 693, at p. 700.

there is no residuary disposition, or if the will fails entirely, the property passes to those entitled on intestacy (*b*).

Limitations in default of appointment under a power which is void on account of remoteness are not necessarily void, unless they are themselves too remote; as, where they are intended to take effect unless displaced by a valid exercise of the power of appointment (*c*).

Where there is a trust for sale, and the trusts of the proceeds of the sale are too remote, the devise is good, but the gift of the proceeds fails, and the trustee holds on trust for the heir-at-law if there is no other disposition (*d*).

But where the trust for sale is itself too remote, and the objects of the trust cannot be ascertained within the legal period, then both the trust and the disposition of the proceeds fail (*e*).

Where the trust for sale is too remote, but the trusts of the proceeds are valid, or where the trust for sale, although too remote, is merely the machinery for carrying out a valid disposition of the proceeds of the intended sale, the trust fails, but the disposition of the proceeds is effectual (*f*).

Where there is a gift over, after a prior valid limitation, and the gift over is void for remoteness, the prior limitation, which was intended to be made defeasible by it, becomes free from the effect of the gift over and indefeasible (*g*); and the person entitled to the prior gift is entitled to a conveyance of the property absolutely (*h*).

(*b*) *Ferguson* v. *Ferguson*, 2 S.C.R. 497.

(*c*) *Webb* v. *Sadler*, L.R. 8 Ch. App. 419; *Re Abbott*, (1893) 1 Ch. 54.

(*d*) *Newman* v. *Newman*, 10 Sim. 51, at p. 58; *Hale* v. *Pew*, 25 Beav. 335, at p. 338.

(*e*) *Re Wood*, (1894) 2 Ch. 310; 3 Ch. 381.

(*f*) *Re Daveron*, (1893) 3 Ch. 421; *Goodier* v. *Edmunds*, Ibid. 455; *Re Appleby*, (1903) 1 Ch. 565.

(*g*) *Taylor* v. *Frobisher*, 5 DeG. & Sm. 191; *Courtier* v. *Oram*, 21 Beav. 91, at pp. 94, 96; *Webster* v. *Parr*, 26 Beav. 236, at p. 238; *Goodier* v. *Johnson*, 18 Ch.D. at pp. 446, 448.

(*h*) *Re Da Costa*, (1912) 1 Ch. 337.

CHAPTER XI.

OF JOINT ESTATES.

(1). *Estates in Severalty, p. 272.*
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1. *Estates in Severalty.*

We now come to treat of estates, with respect to the number and connections of their owners, the tenants who occupy and hold them. And, considered in this veiw, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways: in severalty, in joint-tenancy, in coparcenary, and in common; though estates in coparcenary are probably superseded by the effect of the Devolution of Estates Act, to be presently mentioned.

He that holds lands or tenements in *severalty*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest during his estate therein. This is the most common and usual way of holding an estate; and therefore we may make the same observations here, that we did upon estates in possession, as contradistinguished from those in expectancy in the previous chapter; that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. We shall, therefore, proceed to consider the other three species of estates, in which there is always a plurality of tenants.

2. *Estates in Joint-tenancy.*

An estate in *joint-tenancy* is where lands or tenements are granted to two or more persons with intent apparent on the face of the instrument that they shall take as joint-tenants, to hold in fee-simple, fee-tail, for life, for years, or at will. At common law, where an estate was conveyed to two or more persons, without expressing how they were to hold as between themselves, they took as joint-tenants. But in consequence of a statute, now part of the Conveyancing Act (*a*), such a conveyance constitutes the grantees tenants in common, and therefore, if it is now desired to constitute them joint-tenants, it must be so expressed in the conveyance.

Where trustees or executors are concerned, the common law rule prevails, that they hold in joint-tenancy, as they are excepted from the above enactment, and therefore it is not necessary to express that they are to hold as joint-tenants. The reason why they are excluded from the operation of the statute is because it is more convenient for the purposes of a trust that the holders of land subject thereto should be joint-tenants, one of the properties of a joint-tenancy being that when any one of the joint-tenants dies, his interest, instead of descending to his heirs, or representatives, survives to his co-tenants, as we shall presently see. Thus, the trust property is always kept in the hands of the trustees or one of them, though one or more may drop off; and if the last surviving trustee should die, his heir or representative alone has to be dealt with in obtaining a conveyance of the trust estate to new trustees.

An attempt is sometimes made to create a joint-tenancy in fee, especially when conveying to trustees, by limiting the estate to the grantees and the survivors and survivor of them and the heirs of the survivor; this gives the grantees only life interests with a contingent remainder in fee to the survivor. This is not a joint-tenancy in fee carrying with it as an incident the right of any grantee, to destroy the right of survivorship and convert the joint-tenancy into a tenancy in common with its incidents. The proper mode of creating a joint-tenancy is simply to add to the names of the grantees, and words of limitation (if any) the words "as joint-tenants"; though even this is unnecessary in the case of a grant to trustees or executors as such.

(*a*) R.S.O. c. 109, s. 13.

The enactment above referred to applies only to land assured by "letters patent, assurance, or will;" and consequently if two or more persons disseised the owner of land, and occupied it together for the statutory period so as to extinguish the title of the owner, they held thenceforward at common law, as joint-tenants (*b*). But, since the 1 Geo. V. c. 25, s. 14 (*c*), when two or more persons acquire land by length of possession they shall be considered to hold as tenants in common and not as joint-tenants.

3. *Incidents of a Joint-tenancy.*

The *properties* of a joint-estate are derived from its unity, which is fourfold; unity of *interest*, unity of *title*, unity of *time*, and unity of *possession*; or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

First, they have one and the same *interest*. One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life and the other for years; one cannot be tenant in fee, and the other in tail. But if lands are limited to A. and B. as joint-tenants for their lives, this makes them joint-tenants of the freehold; if to A. and B. and their heirs, joint-tenants of the inheritance. If lands are granted to A. and B. as joint-tenants for their lives, and to the heirs of A., here A. and B. are joint-tenants of the freehold during their respective lives, and A. has the remainder of the fee in severalty. Or, if lands are given to A. and B. as joint-tenants and the heirs of the body of A., here both have a joint estate for life, and A. a several remainder in tail.

Secondly, joint-tenants must also have a unity of *title*; their estate must be created by one and the same act; as by one and the same grant. Joint-tenancy cannot arise by descent or act of law; but merely by purchase, or acquisition by the act of the party; and, unless that act be one and the same, the two tenants would have different titles; and if they had differ-

(*b*) Co. Litt. 180*b*; see also 181*a*; *Ward* v. *Ward*, 6 Ch. App. 789; *Re Livingstone*, 2 O.L.R. 381; *Brock* v. *Benness*, 29 O.R. 468, contra, cannot be supported. In *Myers* v. *Ruport*, 8 O.L.R. 668, a widow was in possession of an undivided share, and subsequently married. Her possession was sufficient to extinguish the title of the owner of the undivided share, and it was held that notwithstanding the marriage it was her possession thereafter, and not that of her and her husband.

(*c*) Now R.S.O. c. 109, s. 14.

ent titles, one might prove good and the other bad, which would absolutely destroy the jointure.

Thirdly, there must also be an unity of *time*; their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A. and B.; or a remainder in fee to A. and B. after a particular estate; in either case A. and B. are joint-tenants of this present estate, or this vested remainder. But if, at common law, after a lease for life, the remainder be limited to the heirs of A. and B.; and during the continuance of the particular estate A. dies, which vests the remainder of one moiety in his heirs; and then B. dies, whereby the other moiety becomes vested in the heir of B.; now, A.'s heir and B.'s heir are not joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other moiety vested at another. Yet, where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for the term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-estate, though vested at different times; because the *use* of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation. The doctrine as to unity of time seems to be confined to limitations at common law, for under the Statute of Uses, as in the last case mentioned, and under wills, by analogy to the decisions under the Statute of Uses, persons may take as joint-tenants, though at different times (*d*).

Lastly, in joint-tenancy there must be a unity of *possession*. Joint-tenants are said to be seised *per my et per tout*, by the *half* or *moiety*, and by *all*; that is, they each of them have the entire possession, as well of every *parcel* as of the whole (*e*). they have not, one of them, a seisin of one-half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety.

Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-

(*d*) *Morley* v. *Bird*, Tud. Lg. Ca. 4th ed. notes, p. 269.

(*e*) There seems to be a doubt whether the word *my* is correctly translated *moiety*. In Blackstone's note to this passage, he cites from Bracton as follows: *Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se.* Each is seised of the whole in common, and *nothing* separately.

tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint reversion. If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity, or relation of their estate. For the same reason, livery of seisin, made to one joint-tenant, shall enure to both of them. But if four joint-tenants make a lease from year to year, and three of them give notice to quit, those three may recover their several shares. Each having a right to demise his share, each has consequently a right to put an end to the demise (*f*). And where three out of five joint-tenants conveyed their portions, it severed the tenancy and the purchaser recovered their shares in ejectment (*g*).

In all actions also relating to their joint-estate, one joint-tenant cannot sue or be sued without joining the other. Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land; for each has an equal right to enter on any part of it (*h*). But one joint-tenant is not capable by himself to do any act which may tend to defeat or injure the estate of the other, unless it be such an act as severs the joint-tenancy; thus he may lease his share, such a lease being *pro tanto* a severance of the tenancy (*i*). And one joint-tenant may demise his share to the other, with the usual result, a reversion in the lessor and a right of distress (*j*). So, too, though at common law no action of account lay by one joint-tenant against another, unless he had constituted him his bailiff or receiver, yet now by statute (*k*) joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenancy (*l*); and a court of equity also has jurisdiction to compel an account. Again, in cases of ouster by one joint-tenant of the other, the tenant ousted may bring ejectment; and the same in cases equivalent to ouster, as by denial of right of entry (*m*).

(*f*) *Doe d. Whayman* v. *Chaplin*, 3 Taunt. 120.

(*g*) *Denne d. Bowyer* v. *Judge*, 11 East. 288.

(*h*) *Sed aliter* in cases of actual expulsion of one of the tenants by the other: *Murray* v. *Hall*, 7 C.B. 441.

(*i*) Co. Litt. 185 *a*.

(*j*) *Cowper* v. *Fletcher*, 6 B. & S. 464; *Leigh* v. *Dickeson*, 12 Q.B.D. at p. 195.

(*k*) R.S.O. c. 56, s. 131.

(*l*) *Gregory* v. *Connolly*, 7 U.C.R. 500; *Thomas* v. *Thomas*, 19 L.J. Ex. 175.

(*m*) *Murray* v. *Hall*, 7 C.B. 454.

4. *Jus Accrescendi.*

From the same principle also arises the remaining grand incident of joint-estates, *viz.*, the doctrine of *survivorship*; by which, when two or more persons are seised of a joint-estate of inheritance for their own lives, or *pur auter vie*, or are jointly possessed of any chattel interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate. This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint-tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy instantly ceases. But while it continues, each of the two joint-tenants has a concurrent interest in the whole, and therefore on the death of his companion the sole interest in the whole remains to the survivor. For the interest which the survivor originally had is clearly not divested by the death of his companion; and no other person can now claim to have a *joint* estate with him, for no one can now have an interest in the whole, accruing by the same title and taking effect at the same time with his own; neither can any one claim a *separate* interest in any part of the tenements, for that would be to deprive the survivor of the right which he has in all and in every part. As therefore the survivor's original interest in the whole still remains, and as no one can now be admitted, either jointly or severally, to any share with him therein, it follows that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

This right of survivorship is called by our ancient authors the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors. And this *jus accrescendi* ought to be mutual, which, it is apprehended, is one reason why neither the King nor any corporation can be a joint-tenant with a private person. For, first, here is no mutuality; the private person has not even the remotest chance of being seised of the entirety by benefit of survivorship, for the King and the corporation can never die; and secondly, the grant to the corporation is a grant to the corporation and

its successors; the grant to an individual is a grant to him and his heirs; and these two estates cannot be blended in the manner necessary for the creation of a joint-tenancy; hence they become tenants in common (*n*).

5. *Severance of a Joint-tenancy.*

We are, lastly, to inquire how an estate in joint-tenancy may be *severed* and *destroyed*; and this may be done by destroying any of its constituent unities. That of *time*, which respects only the original commencement of the joint estate, cannot indeed (being now past) be affected by any subsequent transactions.

But the joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession*; for joint-tenants being seised *per my et per tout*, everything that tends to narrow that interest, so that they shall not be seised throughout the whole and throughout every part, is a severance or destruction of the jointure. And therefore, if two joint-tenants part their lands and hold them in severalty, they are no longer joint-tenants, for they have now no joint interest in the whole but only a several interest respectively in the several parts; and for that reason, also, the right of survivorship is by such separation destroyed. By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do; for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But partition can now either be enforced by proceeding in the Supreme Court or by proceeding under the Partition Act (*o*).

The jointure may be destroyed by destroying the unity of *title*. As if one joint-tenant alienes and conveys his estate to a third person; here the joint-tenancy is severed and turned into tenancy in common; for the grantee and the remaining joint-tenant hold by different titles (one derived from the original, the other from the subsequent grantor), though, till partition made, the unity of possession continues. But a devise of one's share by will is no severance of the jointure, for no

(*n*) *Law Guarantee & Trust Society* v. *Bank of England*, 24 Q.B.D. at p. 411.

(*o*) R.S.O. c. 114, s. 4.

testament takes effect till after the death of the testator, and by such death the right of the survivor, which accrued at the original creation of the estate, and has therefore a priority to the other, is already vested. Where, however, there was an agreement between two joint-tenants to make mutual wills, under which the survivor was to take the whole for life, with remainder to certain other persons, and in pursuance of the agreement the wills were made, and then one of the joint-tenants died, it was held that the joint-tenancy had been severed (*p*).

A covenant or agreement to sell an undivided share does not actually sever the tenancy, but it would be enforced in equity if the agreement were capable of specific performance (*q*); but there must be either an actual alienation or an enforceable agreement to create a severance (*r*), and a lease of his share by one joint-tenant to another would probably effect a severance (*s*). Where three persons were devisees in trust, and therefore joint-tenants, with a power to lease to one of them, and in pursuance of the power the three joint-tenants leased to one of them, C.R., it was held that the demise by himself to himself could have no effect; the other two could make an effectual demise of two-thirds of the estate, but by doing so the joint-tenancy was severed during the term (*t*).

It may also be destroyed by destroying the unity of *interest*. And, therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure; though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to be a merger) but branches of one entire estate. In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure, for it destroys the unity both of title and of interest. And whenever or by whatever means the jointure ceases or is severed, the right of survivorship or *jus accrescendi* the same instant ceases with it.

Yet, if one of three joint-tenants alienes his share, the two

(*p*) *Re Wilford's Estate*, 11 Ch.D. 269; and see *Re Heys*, (1914) P. 192.
(*q*) *Brown* v. *Raindle*, 3 Ves. at p. 257.
(*r*) *Partriche* v. *Powlet*, 2 Atk. 54.
(*s*) *Cowper* v. *Fletcher*, 6 B. & S. at p. 472, per Blackburn, J.
(*t*) *Napier* v. *Williams*, (1911) 1 Ch. 361.

remaining tenants still hold their parts by joint-tenancy and survivorship; and if one of three joint-tenants releases his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure, for they still preserve their original constituent unities. But when, by any act or event, different interests are created in the several parts of the estate or they are held by different titles, or if merely the possession is separated, so that the tenants have no longer these four indispensable properties, a sameness of interest and an undivided possession, a title vesting at one and the same time and by one and the same act or grant, the jointure is instantly dissolved.

In general, it is advantageous for the joint-tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint-estate; as, if there be joint-tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety.

6. *Coparcenary.*

An estate held in *coparcenary* was where lands of inheritance descended at common law from the ancestor to two or more females or heirs of females. It arose either by common law, or particular custom; the latter of which never existed in Ontario. At common law, where a person seised in fee-simple, or fee-tail, died, and his next heirs were two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they would all inherit; and these co-heirs were then called *coparceners*; or, for brevity, *parceners* only.

Now, by the Devolution of Estates Act (*tt*), where real property is inherited by two or more persons, they hold as tenants in common.

7. *Estates in Common.*

Tenants in *common* are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously.

(*tt*) R.S.O. c. 119, s. 18.

This tenancy happens, therefore, where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no necessary unity of interest; one may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B.; so that there is no unity of title; one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own; otherwise even this would be soon destroyed.

Tenancy in common may be created, either by the destruction of an estate in joint-tenancy, or by the limitations in a deed, or by two or more persons wrongfuliy acquiring land by possession as against the true owner. By the destruction of the estate, is meant such destruction as does not sever the unity of possession, but only the unity of title or interest; as, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenants are tenants in common; for they have now several titles, the other joint-tenant by the original grant, the alienee by the new alienation; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to A. in tail, and the other gives his to B. in tail, the donees are tenants in common, as holding by different titles and conveyances. In short, whenever an estate in joint-tenancy is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

It is possible, however, by express words to create a tenancy in common with the right of survivorship amongst the several tenants, which will not be a joint-tenancy. Thus, where a testator devised land to three persons "for and during their joint natural lives and the natural life of the survivor of them, to take as tenants in common and not as joint-tenants," with a gift over after the death of the survivor, the court gave effect to the intention by holding the devisees to be tenants in common (*u*). The right of survivorship is not the only incident of a joint-tenancy which distinguishes it from a tenancy in

(*u*) *Doe d. Borwell* v. *Abbey*, 1 M. & S. 428.

common. The incidents of the two estates, apart from the right of survivorship, are distinct, and therefore a tenancy in common may be created, with the addition of a limitation to the survivor of the share of each tenant upon death (*v*).

8. *Incidents of Estates in Common.*

As to the incidents attending a tenancy in common. Prior to the statute 4 Wm. IV. c. 1, which abolished the old writ of partition, tenants in common, like joint-tenants, were compellable, by statute of Henry VIII. and Wm. III., to make partition of their lands; which they were not obliged to do at common law, as parceners were. Partition may now be compelled under R.S.O. c. 114, s. 4. If a voluntary partition is made between the tenants, it must be by deed (*w*). The right of partition also existed, and might have been enforced in equity, and may be enforced under the rules of court instead of proceeding under the Partition Act. Singular questions sometimes arose under proceedings for partition, from the impartible nature of the property. Difficulties, however, arising from the nature of the property, can now be overcome by the court directing a sale under the Acts and rules before mentioned (*x*).

Tenants in common properly take by distinct moieties, and have no entirety of interest, and therefore there is no survivorship between them; their other incidents are such as arise merely from the unity of possession, and are, therefore, the same as appertain to joint-tenants merely on that account; they are liable to receiprocal actions of account by the statute 4 Anne c. 16, s. 27 (*y*); for by the common law, no tenant in common was liable to account with his companion for embezzling the profits of the estate. If one tenant in common actually turns the other out of possession, however, an action of ejectment will lie against him, and trespass also will lie (*z*). Ejectment and trespass will also lie under circumstances equivalent to actual ouster, as by denial of the right of entry to the co-tenant, and adverse continuance in possession of the

(*v*) *Haddesley* v. *Adams*, 22 Beav. 275.

(*w*) R.S.O. c. 109, s. 9.

(*x*) *Re Dennie*, 10 U.C.R. 104.

(*y*) Now R.S.O. c. 56, s. 131; *Gregory* v. *Connolly*, 7 U.C.R. 500; *Thomas* v. *Thomas*, 19 L.J. Ex. 175; and see *Sandford* v. *Baillard*, 33 Beav. 401; 30 Beav. 109; *Henderson* v. *Eason*, 2 Phill. 308.

(*z*) *Murray* v. *Hall*, 7 C.B. 441.

others. If one tenant in common has been in possession of the whole without excluding his co-tenant, he will not be chargeable with occupation rent, but it is otherwise in case of exclusion, or what is tantamount to it.

There is no fiduciary relationship between tenants in common as such, and one of them cannot, by leaving the management of the property in the hands of the other, impose upon him any obligation of a fiduciary character (*a*). And one tenant in common who voluntarily expends money on the property for ordinary repairs has no right of action against his co-tenant for contribution (*b*). But an account will be taken of them in partition, or on an accounting of rents; thus, where one tenant in common held possession and managed the whole estate, it was held in a proceeding to administer the estate of the co-tenant, deceased, that advances made by the tenant in possession for repairs and improvements were allowable (*c*).

On receipt of rent from tenants a tenant in common would have to account. Where there has been mere possession, without exclusion or its equivalent, it would seem he need not account for timber cut and sold; but if willing to account for his beneficial enjoyment, he may be allowed in certain cases, as on partition, for improvements made by him, but not otherwise (*d*).

And where a stranger enters upon the land a tenant in common may recover from him only the undivided share to which he is entitled and not the whole (*e*).

But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest, (such as joining or being joined in actions, unless in the case where some entire or indivisible thing is to be recovered), these are not applicable to tenants in common whose interests are distinct, and whose titles are not joint but several.

Where two tenants in common make a joint lease, reserving an entire rent, the two may join in an action to recover it; but if there be a separate reservation to each, then each must bring his separate action. Where a lease was made by two tenants in common reserving rent, and the rent was for some

(*a*) *Kennedy* v. *de Trafford*, (1897) A.C. 180.
(*b*) *Leigh* v. *Dickeson*, 12 Q.B.D. 194; 15 Q.B.D. 60.
(*c*) *Re Curry*, 25 App. R. 267.
(*d*) *Rice* v. *George*, 20 Gr. 221.
(*e*) *Barnier* v. *Barnier*, 23 Ont. R. 280.

time paid to an agent of both lessors, but afterwards notice was given to the lessee to pay a moiety of the rent to each of the lessors, it was held to be a question of fact whether the parties meant to enter into a new contract with a separate reservation of rent to each, or a continuation of the old reservation of rent (*f*).

Estates in common can only be *dissolved* in two ways: 1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty. 2. By making partition between the several tenants which gives them all respective severalties. For, indeed, tenancies in common differ in nothing from sole estates, but merely in the blending and unity of possession.

9. *Estates by Entireties.*

Tenancy by *entireties* was an estate held by husband and wife at common law. If an estate were given to a man and his wife, they were neither properly joint-tenants, nor tenants in common; for husband and wife being considered as one person in law, they could not take the estate by moieties, but both were seised of the entirety *per tout et non per my*. The consequence of which was that neither the husband nor the wife could dispose in fee of any part without the assent of the other; and the whole estate remained to the survivor on the death of either (*g*). This estate was called an estate by entireties, and the husband and wife were called tenants by entireties. But the grant must have been made during the coverture, and perhaps also, without any words to expressly define the estate to be taken by them. It is said by Preston that lands might at common law have been granted to husband and wife to hold as tenants in common, or as joint-tenants, and they would in that case hold by moieties as other persons would do (*h*), and he cites Coke upon Littleton for this (*i*). But this is not stated at the passage cited. In Cruise's Digest (*j*) it is stated that "as there can be no moieties between husband and wife, they cannot be joint-tenants." In *Edye* v.

(*f*) *Powis* v. *Smith*, 5 B. & Ald. 850.

(*g*) *Green d. Crew* v. *King*, 2 W. Bl. 1211; *Doe d. Freestone* v. *Parratt*, 5 T.R. 652.

(*h*) 1 Prest. Est. 132; 2 Prest. Abst. 41.

(*i*) Co. Litt. 187*b*; see also Edwards' Law of Prop. in land, 3rd ed., p. 169; and Challis on R.P., citing Preston's opinion.

(*j*) Tit. 18, c. 1, s. 45.

Addison (*k*), a devise of real and personal estate to husband and wife expressly as joint-tenants, was treated as giving them an estate by entireties. And in an Irish case (*l*), where a grant was made to husband and wife "to hold the same unto the said [husband and wife] forever as joint-tenants thereof," it was held that they took by entireties (*m*). The question is perhaps of no importance since the Married Women's Property Acts, as we shall presently see.

But if lands were limited to a man and a woman as joint-tenants, or tenants in common, and they afterwards intermarried, they did not become tenants by entireties, but remained joint-tenants, or tenants in common (*n*). And where lands were granted to husband and wife and a third person, the husband and wife took one moiety by entireties, and the third person the other moiety.

Neither the husband nor the wife could alien the land without the consent of the other; but, if the husband aliened in the lifetime of his wife and survived her, it was good to pass the whole (*o*). But if she survived him it passed nothing (*p*). As husband and wife could not sue each other at common law, they could not have compelled each other to make partition.

Where husband and wife held as joint-tenants, or tenants in common, the husband might alien his share (*q*).

The Married Women's Property Acts have been said to effect a complete change in this interest. The enactment declaring that where a conveyance is made to two persons, they shall take as tenants in common, was held not to affect the case, because its purport was only to create a tenancy in common where before that Act there would have been a joint-tenancy (*r*). But the Married Women's Property Acts by declaring that a married woman shall be able to acquire, hold and dispose of her real property separate from her husband, have enabled her to convey separately from her husband that which she has acquired. Consequently, if a grant now be made to husband and wife during coverture, the wife may convey her

(*k*) 1 H. & M. 781.
(*l*) *Pollok* v. *Kelly*, 6 Ir. C.L.R. 367 (1856).
(*m*) See also *Re Wylde*, 2 D.M. & G. 724.
(*n*) 1 Prest. Est. 134.
(*o*) 1 Prest. Est. 134.
(*p*) *Doe d. Freestone* v. *Parratt*, 5 T.R. 652.
(*q*) 2 Prest. Abstr. 43.
(*r*) *Re Shaver* v. *Hart*, 31 U.C.R. 603.

share separately from her husband, and being thus able to sever the joint estate, it is not an estate by entireties, which was incapable of severance (*s*).

This reasoning is open to the objection, however, that though the wife is enabled to dispose of her portion of the estate, nothing is said in the statutes as to the husband's interests. In one case (*t*) it was said: "This enactment, however, is silent as to any correlative rights of the husband, and has no application to a claim by the husband upon the wife's separate estate. It is urged that the Act must have meant to give the husband correlative rights in respect of the separate property of the wife. I answer, I do not see why. I take the Act to mean exactly what it says—no more and no less. It is said that it destroys the doctrine of the common law, by which there was what has been called a unity of person between husband and wife. Again I answer, I do not see why. It confers, in certain specified cases, new powers upon the wife, and in others, new powers upon the husband, and gives them, in certain specified cases, new remedies against one another. But I see no reason for supposing that the Act does anything more than it professes to do, or either abrogates or infringes upon any existing principles or rules of law in cases to which its provisions do not apply." It is difficult in the face of this doctrine to assert that the husband should, as a corollary to the proposition respecting the wife's powers, be able to dispose of his share as if the parties were tenants in common or joint tenants. And it would, perhaps, have been better had these Acts been held not to apply to this extraordinary and unique estate (as in the case of the enactment as to taking in common) which was probably not in contemplation when the Married Women's Property Acts were passed. Nevertheless, it was at first suggested (*u*) and afterwards decided (*v*) that husband and wife now take as tenants in common. And in England, where a conveyance to two persons makes them joint-tenants unless it is otherwise expressed, it has been held that a conveyance to husband and wife since the Married Women's Property Act, makes them joint-tenants; and as to property held by them in entireties

(*s*) See *Re March*, 24 Ch.D. 222; 27 Ch.D. 161; *Re Jupp*, 39 Ch.D. 148; *Re Dixon*, 42 Ch.D. 306.

(*t*) *Butler* v. *Butler*, 14 Q.B.D. at p. 835, cited with approval in *Re Jupp*, 39 Ch.D. at p. 152.

(*u*) *Griffin* v. *Patterson*, 45 U.C.R. at p. 554, per Armour, J.

(*v*) *Re Wilson & Tor. Inc. El. Co.*, 20 Ont. R. 397.

before that Act, they became joint-tenants upon being divorced (*w*). And so, also, on dissolution of a voidable marriage (*x*).

The Ontario decision has an effect which was probably overlooked at the time, viz., it destroys the right of survivorship which was incident to the estate by entireties. It has been held that the Married Women's Property Acts do not deprive the husband of his estate by the curtesy if the wife dies before him without having disposed of her separate estate (*y*); and it is therefore difficult to see why a husband should by the same statutes be deprived of his right of survivorship, if his wife should not exercise her right of disposing of her share during her lifetime. This necessarily results from holding them to take as tenants in common. If these statutes affect this peculiar estate at all, it would be more in accordance with the relative rights of husband and wife to hold that on account of the common law right of survivorship, they would now take as joint-tenants.

(*w*) *Thornley* v. *Thornley*, (1893) 2 Ch. 229.
(*x*) *Dunbar* v. *Dunbar*, (1909) 2 Ch. 639.
(*y*) *Cooper* v. *Macdonald*, 7 Ch.D. 288; *Hope* v. *Hope*, (1892) 2 Ch. 336.

CHAPTER XII.

SEISIN.

(1). *Bare Seisin, p. 288.*
(2). *Seisin is Transmissible, p. 289.*
(3). *Right to Possession, p. 290.*

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1. *Bare Seisin.*

We come now to consider, lastly, the *title* to things real with the manner of acquiring and losing it.

There were formerly several stages or degrees requisite to form a complete title to lands and tenements. We will consider them in a progressive order.

The lowest and most imperfect degree of title consists in the mere *naked possession*, or actual occupation of the estate; without any apparent right, or shadow or pretence of right, to hold and continue such possession. This may happen when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a *disseisin*, being a deprivation of the actual seisin, or corporeal freehold of the lands, which the tenant before enjoyed. Or it may happen, that after the death of the ancestor and before the entry of the heir, or after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. So again if a stranger take possession of vacant land in the lifetime of him entitled to possession. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner could put an end to, formerly, by a variety of legal remedies. But in the meantime, till some act be done by the rightful owner to divest this possession and assert his title, such actual possession is, *prima facie*, evidence of a legal title in fee in the possessor against all the world but the true owner. It may also, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. It is clearly established that mere possession of land is good against all the

world, except the person who can show a good title; and if a trespasser should be ousted by another trespasser, he may recover possession on showing the ouster and his prior seisin merely, which was good to protect him against any invasion of the land by any person other than the true owner (*a*).

Seisin has reference to the legal estate in the land only; and so where the owner makes a mortgage in fee, although he remains in possession, the mortgagee is the person seised (*b*).

2. *Seisin is Transmissible.*

And such title by seisin or possession only is capable of being transmitted by will (*c*), or by deed (*d*), and the person claiming under such will or deed will not be allowed to dispute its validity as against any other person also claiming under it, though, as against the true owner, they may both do so (*e*); and the seisin may also be transmitted by inheritance to the heir-at-law, who may unite his seisin to that of his ancestor as against the true owner, and thus ultimately extinguish his title.

It may also be observed here that the original Devolution of Estates Act, which cast the land of a deceased person upon his personal representative to the exclusion of the heirs-at-law, applied, as regards freehold interests, only to estates of inheritance in fee-simple, or limited to the heir as special occupant (*f*). And the present statute (*g*) does not include wrongful seisin, but only "real . . . property which is vested in any person;" and land which is in the corporal occupation of a trespasser is not vested in him, but in the true owner, until the title of the latter is extinguished. Consequently, it is apprehended that if a disseisor die intestate, while seised of the land, and before the statutory period has run to give him a title in fee-simple, the seisin would pass to his heir-at-law, and not to the personal representative. And where two or more persons wrongfully enter upon land jointly, they entered and were at common law seised as joint-tenants, and would acquire

(*a*) *Asher* v. *Whitlock*, L.R. 1 Q.B. 1.

(*b*) *Copestake* v. *Hoper*, (1908) 2 Ch. 10.

(*c*) *Board* v. *Board*, L.R. 9 Q.B. 48; *Anstee* v. *Nelms*, 1 H. & N. at p. 232; *Calder* v. *Alexander*, 16 Times L.R. 294.

(*d*) *Dalton* v. *Fitzgerald*, (1897) 1 Ch. 440; (1897) 2 Ch. 86.

(*e*) Ibid.

(*f*) R.S.O., (1897) c. 127, s. 3 (*a*).

(*g*) R.S.O. c. 119, s. 3.

title as such (*h*); and the seisin of one dying would survive to his joint-disseisor. But now by statute such persons would take as tenants in common, and the seisin of one would pass on death to his heir.

The nature of such wrongful possession is such that it cannot be measured as to quantity or quality, being wholly wrongful, and the disseisor can only have a *quasi-fee*. The reason is given by Hobart—"because wrong is unlimited, and ravens all that can be gotten, and is not governed by terms of the estates, because it is not contained within rules" (*i*).

3. *Right to Possession.*

The next step to a good and perfect title is the *right of possession*, which may reside in one man, while the actual possession is not in himself but in another. For if a man be disseised, or otherwise kept out of possession by any of the means before mentioned, though the *actual* possession be lost, yet he has still remaining in him the *right* of possession; and may exert it whenever he thinks proper, till barred by lapse of time, by entering upon the disseisor and turning him out of that occupancy which he has so illegally gained, or by action to recover the land.

(*h*) *Ward* v. *Ward*, 7 Ch. App. 789.
(*i*) *Elvis* v. *Archbishop of York*, Hob. at p. 323.

CHAPTER XIII.

OF TITLE BY PURCHASE, AND OF ESCHEAT.

(1). *Purchase, p. 291.*
(2). *Rule in Shelley's Case, p. 291.*
(3). *Difference between Descent and Purchase, p. 293.*
(4). *Escheat, p. 294.*
(5). *Dissolution of Corporation, p. 299.*

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1. *Purchase.*

PURCHASE, *perquisitio*, taken in its largest and most extensive sense, is thus defined by Littleton: The possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance, wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law.

Purchase, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land as are obtained by way of bargain and sale, for money, or some other valuable consideration. But this falls far short of the legal idea of purchase; for if I *give* land freely to another he is in the eye of the law a purchaser; and falls within Littleton's definition, for he comes to the estate by his own agreement, that is, he consents to the gift. A man who has his father's estate settled upon him in tail, before he was born, is also a purchaser; for he takes quite another estate than the law of descents would have given him. Nay, even if the ancestor devised his estate to his heir-at-law by will such heir took as a devisee, and so a purchaser, and not by descent (*a*).

2. *Rule in Shelley's Case.*

If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but if he dies during the continuance of the particular estate, his heirs shall take as

(*a*) R.S.O. (1897) c. 127, s. 26.

purchasers. But if an estate be made to A. for life, remainder to his right heirs in fee, his heirs shall take by descent; for it is an ancient rule of law, that wherever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by *purchase*, but only by *descent*. And, if A. dies before entry, still his heir shall take by descent, and not by purchase; for, where the heir takes anything that might have vested in the ancestor, he takes by way of descent. The ancestor, during his life, beareth in himself all his heirs; and therefore, when once he is or might have been seised of the lands, the inheritance so limited to his heirs vests in the ancestor himself; and the word "heirs" in this case is not esteemed a word of *purchase*, but a word of *limitation*, enuring so as to increase the estate of the ancestor from a tenancy for life to a fee-simple. And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchaser originally nominated in the deed, as must have been the case if the remainder had been expressly limited to Matthew or Thomas by name, then, in the times of strict feudal tenure, the lord would have been defrauded by such a limitation of the fruits of his seigniory, arising from a descent to the heir.

The effect of such a limitation in a conveyance or will as above, viz., to A. for life with remainder to his right heirs in fee, is in fact to give to A. an immediate estate in fee, with the power of alienation and all other incidents attached to such an estate. This is under the well-known rule in *Shelley's Case* (*b*), which rule is thus expressed, viz., that where the ancestor by any gift or conveyance takes an estate of *freehold*, and in the *same* gift or conveyance (a will and codicil being for this purpose considered as the same instrument) an estate is limited either mediately or immediately to his heirs in fee or in tail, in such case "the heirs" are words of limitation and not words of purchase; that is to say, in the first case an estate in fee, in the second case an estate tail, will vest in the ancestor, and on his death his heirs will take, not as purchasers under the gift or conveyance, but as heirs of their ancestor by descent. In other words, a grant, devise or gift to A. for life, and after his death to his heirs, or the heirs of his body, is equivalent to a gift to A. and his heirs, or to A. and the heirs of his body (*c*).

(*b*) 1 Co. 93 b.; Tud. Lg. Ca. 4th ed. 332.

(*c*) For a very amusing and instructive essay on the origin, history and application of the rule, see Lord MacNaghten's speech in *Van Grutten* v. *Foxwell*, (1897) A.C. 658, at p. 667. See also *Perrin* v. *Blake*, Har. L.T. 498, et seq.

If the estate limited to the heirs be not immediate but mediate, as to A. for life, remainder to B. for life, remainder to the heirs of A. in fee, still the rule will apply. It will be observed that the limitations must be by the *same* instrument; for if a person by deed give an estate to his son for life, and by his will devise the same estate to the heirs male of his (the son's) body, the son will only take an estate for life, and the heirs male of his body take a remainder in tail by purchase. The rule is not confined to cases in which the word "heirs" is made use of, but is frequently applied in cases of wills where the word "issue," "son," or "child" is used; if it can be gathered that such word is used as synonymous with "heirs," as *nomen collectivum*, and not as *designatio personæ*. On this latter point the cases are somewhat abstruse and difficult, and it will therefore be sufficient to call attention to the fact that the rule is not confined to cases where the ordinary strict word of limitation as "heirs" is made use of. It should also be mentioned that it does not necessarily follow in all cases where the words "heirs" or "heirs of the body" are used, that the rule will apply; for the context of the instrument may interpret and limit the ordinary signification of the words; and if it can be clearly gathered that they are not used as words of limitation, but as words of purchase, they will be construed in the latter sense (*d*).

3. *Difference Between Descent and Purchase.*

The difference in effect between the acquisition of an estate by descent and by purchase, consisted at common law principally in these two points: 1. That by purchase the estate acquired a new inheritable quality, and descended to the owner's blood in general without preference to the blood of a particular ancestor. For, when a man took an estate by purchase, he took it not *ut feudum paternum* or *maternum*, which would descend, by the common law, only to the heirs by the father's or the mother's side; but he took it *ut feudum antiquum*, as a feud of indefinite antiquity; whereby it became inheritable to heirs general. 2. An estate taken by purchase would not make the heir answerable for the acts of the ancestor, as an estate by descent would; for, if the ancestor by any deed, obligation,

(*d*) Tud. Lg. Ca. 4th ed. 332. This subject is not further pursued here because it is incidentally introduced to illustrate the meaning of the word "purchase," and because the question so frequently arises in the interpretation of wills, and so seldom elsewhere, that it is chiefly dealt with in the books on construction of wills.

covenant, or the like, bound himself, and his heirs, and died, this deed, obligation, or covenant, was binding upon the heir, so far forth as he had estate sufficient to answer the charge from that ancestor, which sufficient estate is in the law called *assets*, from the French word *assez*, enough. Therefore, if a man covenanted, for himself and his heirs, to keep my house in repair, I could then (and then only) compel his heir to answer this covenant, when he had an estate sufficient for this purpose, or *assets*, by descent from the covenantor; for though the covenant descended to the heir, whether he inherited any estate or no, it could not be enforced against him, until he had assets by descent. Modern statutes have so qualified the law as to inheritance and payment of debts that the distinction is now to a great extent historical only.

This is the legal signification of the word *perquisitio*, or purchase; and in this sense it includes the five following methods of acquiring a title to estates: 1. Escheat; 2. Occupancy; 3. Forfeiture; 4. Alienation; 5. Prescription. All of these in their order.

4. *Escheat.*

Escheat (*e*), we may remember, was one of the fruits and consequences of feudal tenure. The word itself is originally French or Norman, in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee, who in Canada is the Sovereign; and in England may also be a private individual, if his ancestor had granted the tenure prior to the statute *Quia emptores*, to hold of him and his heirs, thus by a process of subinfeudation creating a manorial estate.

Escheats, therefore, arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the law as to descent and the several cases wherein hereditary blood may be deficient, than by any other method whatsoever.

The law of escheats was founded upon this single principle, that the blood of the person last seised or entitled in fee-simple was, by some means or other, utterly extinct and gone; and,

(*e*) See *Atty.-Gen.* v. *Mercer*, 26 Gr. 126; 6 App. R. 576; 5 S.C.R. 538; 8 App. Cas. 767.

since none could inherit his estate but such as were of his blood and consanguinity, it followed as a regular consequence that when such blood was extinct, the inheritance itself must have failed; the land must have become what the feudal writers denominated *feudum apertum*, and must have resulted back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*; the one sort, if the tenant dies without heirs; the other, if his blood be attainted by crime. But both these species might formerly well have been comprehended under the first denomination only; for he that was attainted for felony or treason suffered an extinction of his blood, as well as he that died without relations. The inheritable quality was expunged in one instance, and expired in the other. Inasmuch as the criminal law is entirely within the jurisdiction of the Parliament of Canada, while property and civil rights are solely within the provincial jurisdiction, and as the Act respecting Escheat does not affect to deal with forfeiture for crime, no further reference will be made upon that phase of the subject in dealing with escheat.

The law of escheats, being of feudal origin, applied to legal estates only. And consequently, if land were held in trust for another, and the *cestui que trust* died intestate and without heirs, the trustee, being legally seised, retained the land discharged of the trust, the same being absolutely determined (*f*). So also, if a mortgagor died without heirs and intestate, having but an equity of redemption, there was no escheat, and the mortgagee held the land, subject only to payment of the mortgagor's debts (*g*).

Escheat and forfeiture for any cause other than crime, *e.g.*, for breach of a condition in letters patent entitling the Crown to re-enter, are now regulated by statute.

It might be thought, at first glance, that, as land now devolves upon the personal representative under the Devolution of Estates Act, the failure of heirs would enable the administrator to hold the land free from any claim as in the case of a trustee or mortgagee at common law. In England, it has been held that the Land Transfer Act, 1897, under which land de-

(*f*) *Burgess* v. *Wheate*, 1 Eden 177. And see *Re Lashmar*, (1891) 1 Ch. 258.

(*g*) *Beale* v. *Symonds*, 16 Beav. 406. And see *Simpson* v. *Cobbett*, 10 App. R. 32. See now, however, R.S.O. c. 73.

volves upon the personal representative, does not bind the Crown, and that the Crown takes by escheat on the intestacy of a person without heirs, and consequently that administration should be granted of the personal estate only (*h*). But in a subsequent case (*In bonis Hartley* being cited), Gorell Barnes, J., refused to decide the point, and granted administration of all the estate which by law devolved upon and became vested in the personal representative (*i*).

In a case from Australia, where administration was granted to a public official, and the Crown waived its rights, the title was forced upon a purchaser, who objected that the administration could not make a good title (*j*). The question cannot, therefore, be said to be settled by authority.

If an opinion might be ventured, it would be that the law of escheat is not affected by the Devolution of Estates Act. Bearing in mind the nature of the grant from its original feudal character, the property in the land ceases altogether on failure of heirs, for the purpose and extent of the grant is thereupon exhausted. It thus resembles a life estate which comes to an end with the dropping of the life, or a grant to a corporation which ceases upon dissolution of the corporation without first disposing of the land (*k*). If the property thus comes to an end upon death without heirs, it is plain that there is nothing to devolve upon the personal representative.

If this was not the view adopted by the legislature, still it has acted upon that hypothesis; for, by the Escheats Act (*l*), it is provided that, where land has escheated to the Crown by reason of the owner's having died intestate and without lawful heirs, the Attorney-General may cause possession to be taken, or an action to be brought for recovery thereof, without inquisition; and the Lieutenant-Governor may grant the land to any person, and may waive any right which the Crown has.

By the Crown Administration of Estates Act (*m*), the Crown may also take administration of the estates of persons dying intestate, in whole or in part, "without any known relative living within Ontario, or any known relative who can be readily

(*h*) *In bonis Hartley*, (1899) P. 40.

(*i*) *In bonis Ball*, (1902) W.N. 226.

(*j*) *Wentworth* v. *Humphrey*, 11 A.C. 619.

(*k*) *Hastings Corporation* v. *Letton*, (1908) 1 K.B. 578; *Re Woking Urban Dis. C'l*, (1914) 1 Ch. 300.

(*l*) R.S.O. c. 104.

(*m*) R.S.O. c. 73.

communicated with," and the estate may be sold. And the Attorney-General is also empowered, without letters of administration, to bring action to recover the land. This enactment must not be confounded with the Escheats Act, because it provides, not for the case of failure of heirs, though such a state of facts may eventuate, but for the administration of estates which might go to waste or be appropriated for want of attention by relatives who may exist but are unknown.

A monster which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage; but, although it hath deformity in any part of its body, yet, if it hath human shape, it may be heir. This is a very ancient rule in the law of England, and its reason is too obvious and too shocking to bear a minute discussion. The Roman law agrees with our own in excluding such births from succession; yet, accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby (as the *jus trium liberorum*, and the like), esteeming them the misfortune, rather than the fault of that parent. By our law if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

Bastards are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determination. Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is *qui ex damnato coitu nascuntur, inter liberos non computantur*. Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the Crown. The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father; and also, if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance; and a bastard was likewise capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not. But our law in favour of marriage is much less indulgent to bastards.

As bastards cannot be heirs themselves, so neither can

they have any heirs but those of their own bodies. For, as all collateral kindred consist in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And therefore if a bastard purchases land, and dies seised thereof without issue, and intestate, the land shall escheat to the Crown. Nevertheless, in limiting land in fee-simple to a bastard, it is limited to him and his heirs, and not to the heirs of his body, although he can have none other, for by the use of the word "heirs" a fee-simple is created, without regard to the subsequent events.

By the Devolution of Estates Act, children and relatives who are illegitimate are excluded from inheriting, which is in affirmance of the prior law, and the subsequent marriage of the parent does not legitimize them (*n*).

Aliens also were at common law incapable of taking by descent or inheriting; for they were not allowed to have any inheritable blood in them; rather, indeed, upon a principle of national or civil policy, than upon reasons strictly feudal. Though, if lands had been suffered to fall into their hands who owe no allegiance to the Crown of England, the design of introducing our feuds, the defence of the kingdom, would have been defeated. Wherefore, if a man left no other relations but aliens, his land escheated to the lord.

As aliens could not inherit, so far they were on a level with bastards; but as, excepting leaseholds for trading purposes, they were also disabled to hold by purchase as against the Crown, they were under still greater disabilities. And they could have no heirs because they had not in them any inheritable blood.

An alien is described as one born in a strange country, under the obedience of a strange prince or country, or out of the ligeance of the King (*o*).

The disabilities of aliens as to holding and transmitting lands have, however, now been wholly removed. The following is the provision of our present statute (*p*), as to the capacity of aliens in relation to realty (*q*):—

(*n*) R.S.O. c. 119, s. 27.

(*o*) Co. Litt. 129*a*. See now as to the Law of Allegiance, 1 C.L.T. 1.

(*p*) R.S.O. c. 108.

(*q*) See *Rumrell* v. *Henderson*, 22 C.P. 180, as to bearing of the Act.

"On and from the 23rd day of November, 1849, every alien shall be deemed to have had and shall hereafter have the same capacity to take by gift, conveyance, descent, devise, or otherwise, and to hold, possess, enjoy, claim, recover, convey, devise, impart and transmit real estate in Ontario as a natural born or a naturalized subject of His Majesty."

"The real estate in Ontario of an alien dying intestate shall descend and be transmitted as if the same had been the real estate of a natural born or naturalized subject of His Majesty."

By *attainder*, also, for treason or other felony, the blood of the person attainted was so corrupted as to be rendered no longer inheritable; but, by the Criminal Code (*r*) "no confession, verdict, inquest, conviction or judgment of or for any treason or indictable offence or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat."

5. *Dissolution of Corporation.*

Before concluding this head of escheats there must be mentioned one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation; for if that comes by any accident to be dissolved, whilst holding the lands and before alienation (*s*), the donor or his heirs shall have the land again in reversion, and not the lord by escheat; which is, perhaps, the only instance where a reversion can be expectant on a grant in fee-simple absolute (*t*). The law doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant faileth (*u*). This is, indeed, founded upon the self-same principle as the law of escheat; the heirs of the donor

(*r*) R.S.C. c. 146, s. 1033.

(*s*) Preston Est., vol. 2, p. 50. See *Lindsay Petroleum Co.* v. *Pardee*, 22 Gr. 18.

(*t*) Such an interest is not perhaps in strictness a reversion in the nature of a vested estate, but rather a possibility of reverter: 1 Preston Est. p. 115. On a grant of the whole fee, especially since subinfeudation was abolished by the statute *Quia emptores*, there can be no portion of seisin or ownership left in the grantor in the nature of a vested estate. Such an interest is probably "a possibility coupled with an interest where the object is ascertained" within R.S.O. c. 109, s. 10.

(*u*) See also Co. Litt. 13*b*; *Re Woking Urban District Council*, (1914) 1 Ch. 300.

being only substituted instead of the chief lord of the fee; which was formerly very frequently the case in subinfeudations, or alienations of lands by a vassal to be holden as of himself, till that practice was restrained by the statute of *Quia emptores*, 18 Edw. I. st. 1, to which this very singular instance still, in some degree, remains an exception.

On this principle, also, if a corporation possessed of a term of years dissolves without having disposed of the term, the lease terminates and the land reverts to the lessor (*v*).

(*v*) *Hastings Corporation* v. *Letton*, (1908) 1 K.B. 378.

CHAPTER XIV.

OF TITLE BY FORFEITURE.

(1). *Mortmain, p. 301.*
(2). *Alienation by Particular Tenants, p. 308*
(3). *Disclaimer, p. 309.*
(4). *Breach of Condition, p. 312.*
(5). *Waste, p. 312.*

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1. *Mortmain.*

FORFEITURE is a punishment annexed by law to some illegal act or negligence, in the owner of lands, tenements, or hereditaments; whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with him, hath sustained, or to the Crown.

Lands, tenements and hereditaments may be forfeited in various degrees, and by various means; among others by alienation contrary to law; and by non-performance of conditions.

Formerly, lands were forfeited for crime, but as we have seen such forfeiture is now abolished.

Lands and tenements may be forfeited by *alienation*, or conveying them to another contrary to law. This is either alienation in *mortmain*, or formerly alienation by *particular tenants*; in the former of which cases the forfeiture arises from the incapacity of the alienor to grant.

Alienation in *mortmain, in mortuo manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the Statutes of Mortmain; in deducing the history of which statutes, it will be matter of curiosity to observe the great address and subtle contrivance of the ecclesiastics in eluding from time to time the laws in

being, and the zeal with which successive parliaments have pursued them through all their finesses; how new remedies were still the parents of new evasions; till the legislature at last, though with difficulty, hath obtained a decisive victory.

By the common law, any man might dispose of his lands to any other private man at his own discretion, when the feudal restraints of alienation were worn away. Yet, in consequence of these it was always, and is still necessary, unless authority is given by the legislature in the Act of incorporation, for corporations to have a licence in mortmain from the Crown to enable them to purchase lands; for as the King is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits, by the vesting of lands in tenants that can never die. And such licences of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest. But besides this general licence from the King, as lord paramount of the kindgom, it was also requisite, whenever there was a mesne or intermediate lord between the King and the alienor, to obtain his licence also (upon the same feudal principles), for the alienation of the specific land. And if no such licence was obtained, the King or other lord might respectively enter on the land so aliened in mortmain as a forfeiture. The necessity of this licence from the Crown was acknowledged by the constitutions of Clarendon, in respect of advowsons, which the monks always greatly coveted, as being the groundwork of subsequent appropriations. Yet, such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) we find that the largest and most considerable donations of religious houses happened within less than two centuries after the conquest. And (when a licence could not be obtained), their contrivance seems to have been this; that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate first conveyed his lands to the religious house, and instantly took them back again, to hold as tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture; and then by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands in right of such their newly acquired seigniory, as immediate lords of the fee. But, when these dotations began to grow numerous, it was observed that the feudal services, ordained for the defence of the kingdom, were every day visibly

withdrawn; that the circulation of landed property from man to man began to stagnate; and that the lords were curtailed of the fruits of their seigniories, their escheats, wardships, reliefs, and the like; and, therefore, in order to prevent this, it was ordained by the Second of King Henry III.'s Great Charters, and afterwards by that printed in our common statute books, that all such attempts should be void, and the land forfeited to the lord of the fee.

But, as this prohibition extended only to religious houses, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies (who, Sir Edward Coke observes, in this were to be commended, that they ever had of their counsel the best learned men that they could get), found many means to creep out of this statute, by buying in lands that were *bona fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which are now so frequent in conveyances. This produced the statute *De religiosis*, 7 Edw. I.; which provided that *no person*, religious or other whatsoever, should buy, or sell, or receive under pretence of a gift, or term of years, or any other title whatsoever, nor should, by any art or ingenuity, appropriate to himself any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or, on his default for one year, the lord paramount, and, in default of all of them, the King, might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in mortmain; but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an action to recover it against the tenant; who, by fraud and collusion, made no defence; and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. And thus they had the honour of inventing those fictitious adjudications of right, which afterwards became the great assurances of the kingdom under the name of *common recoveries*. But upon this the Statute of Westminster the Second, 13 Edw. I. c. 32, enacted, that in such cases a jury shall try the true right of the demandants or bailiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited

to the immediate lord of the fee, or else to the next lord, and finally to the *King*, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter, in case the tenants set up crosses upon their lands (the badges of knights templars and hospitallers), in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this provident prince to prevent any future evasions, that when the statute of *Quia emptores*, 18 Edw. I., abolished all subinfeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord, a proviso was inserted that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the King's licence by writ of *ad quod damnum* was marked out, by the statute 27 Edw. I. st. 2, it was further provided by statute 34 Edw. I. st. 3, that no such licence should be effectual without the consent of the mesne or immediate lords.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees *to the use of* the religious houses; thus distinguishing between the *possession* and the *use*, and receiving the actual profits, while the seisin of the lands remained in the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestui que use* for the rents and emoluments of the estate. And it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device; for the statute 15 Rich. II. c. 5, enacts that the lands which had been so purchased to uses should be amortised by licence from the Crown, or else be sold to private persons; and that, for the future, uses shall be subject to the statute of mortmain, and forfeitable like the lands themselves. And whereas the statute had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of churchyards, such subtle imagination is also declared to be within the compass of the statute of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And lastly, as during the times of popery,

lands were frequently given to *superstitious uses*, though not to any corporate bodies; or were made liable in the hands of heirs or devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore, at the dawn of the Reformation, the statute 23 Hen. VIII. c. 10, declared that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

The definition adopted of a gift to *superstitious* uses is "one which has for its object the propagation of a religion not tolerated by law." Inasmuch as by our law all bodies of Christians enjoy equal toleration, it has been held in Ontario that a bequest of money to pay for masses for the repose of the testator's soul is not invalid as a superstitious use (*a*).

It was in the power of the Crown, by granting a licence of mortmain, to remit the forfeiture so far as related to its own rights, and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative is declared and confirmed by the statute 18 Edw. III. st. 3, c. 3. But, as doubts were conceived at the time of the Revolution how far such licence was valid, since the King had no power to dispense with the statutes of Mortmain by a clause of *non obstante*, and as by the gradual declension of mesne seigniories through the long operation of the statute of *Quia emptores*, the rights of intermediate lords were reduced to a very small compass, it was therefore provided by the statute 7 & 8 Wm. III. c. 37, that the Crown for the future, at its own discretion, may grant licences to aliene to take in mortmain of whomsoever the tenements may be holden.

It hath also been held that the statute 23 Hen. VIII., before mentioned, did not extend to anything but *superstitious* uses, and that therefore a man may give lands for the maintenance of a school, an hospital, or any other *charitable* uses. But as it was apprehended, from recent experience, that persons on their death-beds might make large and improvident dispositions even for these good purposes, and defeat the political ends of the statutes of mortmain, it was therefore enacted by

(*a*) *Elmsley* v. *Madden*, 18 Gr. 386. The statute R.S.O. c. 306, s. 1 (not consolidated in the Revised Statutes of 1914), enacted that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, provided the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the province, is by the constitution and laws of this province assured to all Her Majesty's subjects within the same."

the statute 9 Geo. II. c. 36, that no lands or tenements, or money to be laid out thereon, should be given for or charged with any *charitable* uses whatsoever, unless by deed indented, executed in the presence of two witnesses, twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six months after its execution (except stock in the public funds, which might be transferred within six months previous to the donor's death), and unless such gift should be made to take effect immediately and be without power of revocation; and that all other gifts should be void. There was an exception in favour of purchases and transfers "really *bona fide* for a full and valuable consideration, actually paid at or before the making such conveyance or transfer, without fraud or collusion."

A distinction will here be noticed between the capacity to receive and the ability to dispose of property. A bequest payable out of land to a corporation empowered by its charter "to take, receive, purchase, acquire, hold, possess, and enjoy" lands, was, nevertheless, held to be void because, though the corporation had power to acquire realty, the testator could not by will confer it, such a gift being within the statutes of mortmain (*b*). And where such an attempt is made to dispose of land, or an interest therein, by will, the devise is void and the intended gift falls into the general estate.

Grants made to a civil corporation precluded from acquiring lands, or to one which has exhausted its licence to hold in mortmain, are not actually void. Such alienations in mortmain are voidable only, and the lands so aliened can only be forfeited to the Crown (*c*). The conveyance is good against the grantor, and the grantee would hold till the Crown should claim.

All corporate bodies are affected by these statutes, and consequently a municipal corporation cannot acquire land without a licence or statutory authority (*d*). Nor can an agricultural society, incorporated and authorized to acquire and hold land, but not to take it by devise, accept a legacy payable out of land (*e*).

This statute of Geo. II. and the statutes of mortmain were held to be in force here (*f*), subject to the exception created

(*b*) *Ferguson* v. *Gibson*, 22 Gr. 36.

(*c*) *McDiarmid* v. *Hughes*, 16 Ont. R. 570.

(*d*) *Brown* v. *McNab*, 20 Gr. 179.

(*e*) *Kinsey* v. *Kinsey*, 26 Ont. R. 99.

(*f*) *Doe d. Anderson* v. *Todd*, 2 U.C.R. 82; *Mercer* v. *Hewston*, 9 C.P. 349; *Halleck* v. *Wilson*, 7 C.P. 28; *Macdonell* v. *Purcell*, 23 S.C.R. 101.

by the decision before referred to as to gifts to superstitious uses. Registry in the county registry office (if indeed, that can be deemed requisite), has been considered equivalent to the enrolment required by the statute. The effect, however, of the statutes has been much diminished by various provincial Acts relating to particular religious bodies. And by a general Act (*g*), any religious body of Christians may take conveyances for the site of a church, meeting-house, etc., or "other religious or congregational purpose," in the name of trustees, the deed of conveyance to be registered within twelve months after execution. Powers of mortgaging and leasing are granted; also power to any such body to take by gift or devise any lands if made six months before the death of the donor; the lands so given or devised not to exceed, however, one thousand dollars in annual value, nor are they to be held for more than seven years, and unless disposed of within that period, they are to revert to the person from whom the same were acquired, or his representatives. As to any special Act with reference to any religious body, the provisions of such Act are to continue unimpaired, but such body is to be entitled to all additional privileges conferred by the general Act. By 3 V. c. 74 (*h*), certain powers of acquisition of and dealing with lands are granted to the United Church of England and Ireland in Canada, and by 8 V. c. 82, to the Roman Catholic Church.

And in 1892, the whole policy of the law as to devises for charitable uses was altered by an Act passed in that year (*i*). By this statute, there is a general prohibition against alienating for the benefit of any corporation in mortmain, otherwise than under the authority of a licence from the Crown, under penalty of forfeiture.

Subject to the conditions of the Act, every assurance other than by will of land or personal estate to be laid out in the purchase of land for the benefit of any charitable use shall be void, unless made to take effect in immediate possession for such charitable use, without any power of revocation for the benefit of the assuror or any person claiming under him, at least six months before the death of the assuror; but the assurance may contain the grant or reservation of a peppercorn or other nominal rent, the grant or reservation of mines or minerals,

(*g*) R.S.O. c. 286.

(*h*) A will has been held to be a *conveyance* within the meaning of this Act: *Doe d. Baker* v. *Clark*, 7 U.C.R. 44.

(*i*) Now R.S.O. c. 103.

the grant or reservation of any easement, covenants for erection or repair of buildings, etc., a right of entry on non-payment of any rent or breach of covenant, or any stipulation of the like nature for the benefit of the assuror or of any person claiming under him. The land must, however, be sold within two years from the date of the assurance, or such further period as may be determined by a judge of the Supreme Court, otherwise it vests in the accountant of the Supreme Court to be sold with all reasonable speed. And the court may allow the retention of the land, if satisfied that it is required for actual occupation for the purposes of the charity and not as an investment.

Land may also be devised by will to charitable uses, but it must be sold within two years from the death of the testator or such extended period as may be determined by the court, otherwise it vests in the accountant for sale.

Any personal estate bequeathed to be laid out in the purchase of land for any charitable use shall be held for the benefit of the charitable use as though there had been no direction to lay it out in the purchase of land.

It will have been noticed that personal estate arising from or connected with land is excepted from the definition of land (*j*). And so it has been held that, where land was devised on trust for sale, and to pay the proceeds to a charity, the charity took only a "personal estate arising from land" after the sale, and was therefore within the exception; but, if it should appear that the trustee was holding the land unsold by express or tacit agreement with the charity, the Attorney-General might take action to have the land sold (*k*).

2. *Alienation by Particular Tenants.*

In cases of conveyance by fine or recovery, when such mode of conveyance was in force, or by feoffment when such a conveyance had a tortious effect, such alienations *by particular tenants*, when they were greater than the law entitled them to make, and divested the remainder or reversion, were also forfeitures to him whose right was attacked thereby. As, if tenant for his own life aliened by feoffment or fine for the life of another, or in tail, or in fee; these being estates, which either must or may last longer than his own, the creating of them is not only beyond his power, and inconsistent with the nature of

(*j*) R.S.O. c. 103, s. 2 (1) (*c*).
(*k*) *Re Sidebotham*, (1902) 2 Ch. 389; *Re Wilkinson*, (1902) 1 Ch. 841.

his interest, but was also a forfeiture of his own particular estate to him in remainder or reversion.

It should be observed that forfeiture as above explained would only take place on a conveyance by way of feoffment with livery of seisin, or by fine or recovery, and not where it was by what is termed an *innocent* conveyance, as one operating under the Statute of Uses. Thus a conveyance by way of bargain and sale, or covenant to stand seised, would not work a disseisin or a forfeiture. And as fines and recoveries are now abolished, and a feoffment no longer has a tortious operation (*l*), and is thus placed on the same footing as an *innocent* conveyance, it would seem that the consequences of conveyance by feoffment would be no more than on any other innocent conveyance, and so no forfeiture.

3. *Disclaimer.*

Equivalent, both in its nature and its consequences, to an illegal alienation by the particular tenant was the civil crime of *disclaimer*; as, where a tenant who held of any lord, neglected to render him the due services, and, upon an action brought to recover them, disclaimed to hold of his lord. Which disclaimer of tenure in any court of record was a forfeiture of the lands to the lord, upon reasons most apparently feudal. And so likewise, if in any court of record the particular tenant did any act which amounted to a virtual disclaimer; if he claimed any greater estate than was granted him at the first infeudation, or took upon himself those rights which belonged only to tenants of a superior class; if he affirmed the reversion to be in a stranger by attorning (*m*) as his tenant, collusive pleading, and the like, such behaviour amounted to a forfeiture of his particular estate.

As all estates except terms of years are now held by one tenure, free and common socage, of the Crown, the only case in which it is now important to notice the effect of a disclaimer is that of landlord and tenant; and even in that case the question must be subject to the effect of the enactment already referred to (*n*), which declares that the relationship of landlord and tenant shall not depend upon tenure.

Forfeiture occurs in consequence of "any act of the lessee, by which he disaffirms or impugns the title of his lessor."

(*l*) R.S.O. c. 109, s. 4.

(*m*) But attornment has no longer a tortious effect, by 11 Geo. II. c. 19, s. 11, now R.S.O. c. 155, s. 60.

(*n*) Ante, pp. 123. *et seq.*

"For, to every lease the law tacitly annexes a condition, that if the lessee do anything that may impair the interest of his lessor, the lease shall be void, and the lessor may re-enter. Indeed, every such act necessarily determines the relation of landlord and tenant; since to claim under another and at the same time to controvert his title, to hold under a lease, and at the same time to destroy the interest out of which the lease ariseth, would be the most palpable inconsistency. A lessee may thus incur a forfeiture of his estate by act *in pais*, or by matter of record. By matter of record—where he sues out a writ, or resorts to a remedy, which claims or supposes a right to the freehold; or, where in an action by his lessor grounded on the lease, he resists the demand under the grant of a higher interest in the land; or where he acknowledges the fee to be in a stranger; for having thus solemnly protested against the right of his lessor, he is estopped by the record from claiming an interest under him" (*o*). And formerly by act *in pais*, when a feoffment had a tortious operation, the tenant might, by making a feoffment in fee with livery of seisin, have forfeited his estate. As a feoffment is now an innocent conveyance, it seems that there is no forfeiture occasioned otherwise than by matter of record.

A mere verbal disclaimer by a tenant for a definite term, and refusal to pay the rent, claiming the fee as his own, is not sufficient to create a forfeiture (*p*). Where the tenancy is from year to year, the oral statements of the tenant in denial of the relationship are sufficient to put an end to it, not so much on the ground of disclaimer as on account of their furnishing evidence in answer to the disclaiming tenant's assertion that he has had no notice to quit; for it would be idle to prove such a notice where the tenant had asserted that there was no longer any tenancy (*q*). There must be a direct repudiation of the relation of landlord and tenant, or a distinct claim to hold possession upon a ground wholly inconsistent with the existence of that relation which by necessary implication is a repudiation of it (*r*). Therefore, where a tenant from year to year agreed

(*o*) Bac. Abr. Tit. Leases, T. 2.

(*p*) *Doe d. Graves* v. *Wells*, 10 Ad. & E. 427; *Doe d. Nugent* v. *Hessell*, 2 U.C.R. 194, *contra*, but the remarks were *obiter*, the case being one of sale, the purchase money payable by instalments.

(*q*) *Doe d. Graves* v. *Wells*, 10 Ad. & E. at p. 437, per Patteson, J.; *Doe d. Claus* v. *Stewart*, 1 U.C.R. 512.

(*r*) *Doe d. Gray* v. *Stanion*, 1 M. & W. 695.

to buy the fee, and remained in possession for several years without paying rent or interest, and on being applied to to give up possession answered "that he had bought the property, and would keep it, and had a friend who was ready to give him the money for it," it was held that this was no disclaimer (*s*). And where a tenant from week to week paid rent to certain persons to whom the land had been devised, but the devise being discovered to be void by reason of the Mortmain Act, the tenant, upon demand for rent made by the heir, said that he had received notice from the other party, and would not pay any more rent till he knew who was the right owner, it was held not to be a disclaimer (*t*).

In other cases, a disclaimer of title has operated as a forfeiture. Thus, where there was a lease by a tenant in tail which was not binding on the heir, and the tenant in tail died, and the next tenant in tail demanded the arrears and entered into negotiations for a lease which were ended by the tenant's denying the title of the tenant in tail, and asserting it to be in another, though still claiming to be tenant of the premises, it was held that his disclaimer entitled the tenant in tail to recover the land (*u*). So, where tenant for life demised the land to the defendant and died, and the owner in fee then demanded rent, but the defendant wrote a letter refusing to consider him as landlord, but still claiming to hold as tenant to the husband of the deceased tenant for life, it was held to be a disclaimer of the owner's title (*v*).

Again, the assignee of a mortgage upon which default had been made, agreed to sell it to the defendant, who was let into possession, and afterwards made default and refused payment and said he would stand a suit; and it was held that being tenant at will by possession under the agreement, he had become tenant at sufferance by the default, and his action amounted to a disclaimer of the plaintiff's title (*w*). So, on an agreement to purchase, the defendant, holding possession under the agreement, refused to pay certain instalments of purchase money, and said that he had as good a right to the place as the plaintiff, and that the plaintiff had no deed and

(*s*) *Doe d. Gray* v. *Stanion*, *supra*.
(*t*) *Jones* v. *Mills*, 10 C.B.N.S. 788.
(*u*) *Doe d. Phillips* v. *Rollings*, 4 C.B. 188.
(*v*) *Doe d. Calvert* v. *Frowd*, 4 Bing. 557.
(*w*) *Prince* v. *Moore*, 14 C.P. 349.

could not put him off; and it was held that this was a disclaimer entitling the plaintiff to recover the land (*x*).

Under a system of pleading in ejectment, by which the defendant was required to enter an appearance and file a notice denying the plaintiff's title and asserting title in himself, opinion differed as to the effect of this formal denial of the title (*y*). But under our present system it is not necessary for the defendant to deny the plaintiff's title in an action to recover the land; and, therefore, if he gratuitously denies it and puts the plaintiff to prove it, his conduct would no doubt amount to a disclaimer, and he probably would not be allowed to set up title under the plaintiff whose title he had denied.

It must be borne in mind, however, that the court has power to relieve against all forfeitures. It might be a nice question whether, when the defendant by his pleading occasions the forfeiture, he could abandon his pleading when it failed and claim relief from the consequences of having pleaded it. No doubt his conduct at the trial would largely determine whether relief should be granted in any case.

4. *Breach of Condition.*

The next kind of forfeitures are those by *breach* or non-performance of a *condition* annexed to the estate, either expressly by deed, at its original creation, or impliedly, by law, from a principle of natural reason. Both which we considered at large in a former chapter (*z*).

5. *Waste.*

Waste was formerly a ground of forfeiture. In favour of the owners of the inheritance, the Statutes of Marlbridge, of Henry III., and of Gloucester, of Edward I., provided that the Writ of Waste shall not only lie against tenants by the law of England (or curtesy), and those in dower, but against any farmer or other that holds in any manner for life or years. And the tenant suffered forfeiture if he committed waste. But the Writ of Waste was abolished by the Statute of 4 Wn. IV. c. 1, and the remedy now is for damages, and to restrain the committing of it by injunction.

(*x*) *Doe d. Nugent* v. *Hessell*, 2 U.C.R. 194.

(*y*) R.S.O. (1877), c. 51, s. 9; *Thompson* v. *Falconer*, 13 C.P. 78; *Cartwright* v. *McPherson*, 20 U.C.R. 251; *Houghton* v. *Thomson*, 25 U.C.R. 561.

(*z*) Chapter VII.

CHAPTER XV.

OF TITLE BY ALIENATION.

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1. *Ancient Restraints on Alienation.*

THE most usual and universal method of acquiring a title to real estates is that of alienation, conveyance or purchase in its limited sense; under which may be comprised any method wherein estates are voluntarily resigned by one man and accepted by another; whether that be effected by sale, gift, settlement, devise, or other transmission of property, by the mutual consent of the parties.

This means of taking estates by alienation, is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feudal law, a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts; for if he might, the feudal restraint of alienation would have been easily frustrated and evaded. And as he could not alien it in his lifetime, so neither could he by will defeat the succession, by devising his feud to another family; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own apparent or presumptive heir. And, therefore, it was

very usual in ancient feoffments to express that the alienation was made by consent of the heir of the feoffor; or sometimes for the heir-apparent himself to join with the feoffor in the grant. And, on the other hand, as the feudal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his seigniory without the consent of his vassal; for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprised of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seizing of his cattle by the lord of a neighbouring clan. This consent of the vassal was expressed by what was called *attorning*, or professing to become the tenant of the new lord; which doctrine of attornment was afterwards extended to all leases for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchaser and to become his tenant, the grant or contract was in most cases void, or at least incomplete; which was also an additional clog upon alienations.

But by degrees this feudal severity is worn off; and experience hath shown, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. The restrictions were in general removed by the statute of *Quia emptores*(*a*), whereby all persons, except the King's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion.

As to the power of *charging* lands with the debts of the owner, this was introduced as early as Stat. Westm. 2 (*b*), which subjected a *moiety* of the tenant's lands to executions for debts recovered by law; as the *whole* of them was likewise subjected to be pawned in a statute merchant by the statute *De mercatoribus*, made the same year, and in a statute staple by statute 27 Edw. III. c. 9, and in other similar recognisances by statute 23 Hen. VIII. c. 6. And now, in Ontario, the whole of them is subject to be sold for the debts of the owner. The restraint of *devising* lands by will, except in some places by particular custom, lasted longer; that not being totally removed

(*a*) 18 Edw. I. c. 1; R.S.O., Vol. III., p. vii.
(*b*) 13 Edw. I. c. 18.

till the abolition of the military tenures. The doctrine of *attornments* continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them; till at last, they were made no longer necessary to complete the grant or conveyance, by statute 4 & 5 Anne c. 16 (*c*), but notice to the tenant by the assignee of the reversioner is requisite to secure payment of rent from the tenant, as payments made in ignorance of the agreement are valid. And if the rent be paid in advance, and notice of the assignment given before the rent became payable, the payment to the assignee would be invalid (*d*); and by statute 11 Geo. II. c. 19 (*e*), the attornment of any tenant to a stranger claiming title to the estate of his landlord is absolutely null and void, and the possession of the landlord is not deemed to be changed, altered or affected by such attornment; attornments made pursuant to the judgment of a court, or with the privity and consent of the landlord, or to a mortgagee after the mortgage has become forfeited, are except. Consequently, where a tenant attorned to a stranger to the title, it was held that the landlord could recover possession in ejectment merely by reason of the defendant having thus obtained possession from the plaintiff's tenant (*f*).

In examining the nature of alienation, let us first inquire, briefly, *who* may aliene, and to *whom*; and then more largely, *how* a man may aliene, or the several modes of conveyance.

2. *Who May Aliene.*

Who may aliene and to whom; or, in other words, who is capable of conveying and who of purchasing. And herein we must consider rather the incapacity, than capacity, of the several parties; for all persons are *prima facie* capable of conveying, and all persons whatsoever of purchasing, unless the law has laid them under any particular disabilities. But at common law, if a man had only in him the *right* of either possession or property, he, whilst disseised, could not convey it to any other, lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed (*g*).

(*c*) R.S.O. c. 155, s. 61.
(*d*) *Doe d. Nichols* v. *Saunders*, L.R. 5 C.P. 589.
(*e*) R.S.O. c. 155, s. 60.
(*f*) *Mulholland* v. *Harman*, 6 Ont. R. 546.
(*g*) Co. Litt. 214; see *Marsh* v. *Webb*, 19 App. R. 564; 22 S.C.R. 437.

The statute of 32 Hen. VIII. c. 9, s. 2, prohibiting the sale of pretended titles is not repealed by R.S.O. c. 109, s. 10, by which rights of entry are made assignable; but a sale by a person who has a right of entry, but not possession, is not a sale of a pretended title within the meaning of the Statute of Hen. VIII. (*h*).

Yet reversions and vested remainders might have been granted; because the possession of the particular tenant is the possession of him in reversion or remainder; but *contingencies*, and mere *possibilities*, though they might be released, as thereby tending to render entire and unimpaired vested estates, or devised by will, or might pass to the heir or executor, yet could not before our statute (*i*) be assigned to a stranger, unless coupled with some present interest; but this doctrine only held good at law, and not in equity (*j*).

Persons attainted of treason, felony, and *præmunire*, were, at common law, incapable of conveying, from the time of the offence committed, provided that attainder followed. For such conveyance by them might have tended to defeat the King of his forfeiture, or the lord of his escheat. But they might *purchase* for the benefit of the Crown, or the lord of the fee, though they were disabled to *hold*; the lands so purchased, if after attainder, being subject to immediate forfeiture; if before, to escheat, as well as forfeiture, according to the nature of the crime. So also, corporations, religious or others, may purchase lands; yet, unless they have a licence to hold in mortmain, or have authority by statute, they cannot retain such purchase; but it shall be forfeited to the lord of the fee, being in Canada the Sovereign; though, if the charter of the corporation forbids their acquisition of lands, or some statute declares conveyances to it shall be void, it seems the grantor will be entitled.

Idiots and persons of nonsane memory, infants (*k*), and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only.

(*h*) *Jenkins* v. *Jones*, 9 Q.B.D. at p. 128.

(*i*) R.S.O. c. 109, s. 10.

(*j*) See *Re Lind*, (1915) 1 Ch. 744, on the question of assigning a possibility.

(*k*) *Mills* v. *Davis*, 9 C.P. 510; *Gilchrist* v. *Ramsay*, 27 U.C.R. 500; *Featherstone* v. *McDonell*, 15 C.P. 161, in which case *Grace* v. *Whitehead*, 9 Gr. 791, is not followed. In that case, the court considered a *mortgage* from an infant absolutely void, though given to secure the purchase money of lands conveyed to him, and for which, when he came of age, he brought ejectment, repudiating however the mortgage.

3. *Persons of Unsound Mind.*

With regard to persons of unsound mind, the rule is very clearly laid down in a modern case (*l*), an action on a promissory note, as follows: "When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about" (*m*). And again, "a contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties. A defendant who seeks to avoid a contract on the ground of his insanity must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed" (*n*).

But where a person of unsound mind, being in custody on a criminal charge, made a voluntary conveyance to avoid a forfeiture in case of conviction, and was acquittted on the ground of insanity, it was held that the conveyance was void and inoperative (*o*).

4. *Infants.*

The deed of an infant is voidable only, and not void (*p*). The rule as to the conduct of an infant with regard to such transactions is thus stated by Boyd, C. (*q*): "The policy of the law now is generally to allow the infant to suspend his ultimate decision upon questions of benefit or injury till he is of legal capacity to bind himself as an adult." Though he

(*l*) *Imperial Loan Co.* v. *Stone*, (1892) 1 Q.B. 599.

(*m*) Per Lord Esher, M.R., at p. 601.

(*n*) Per Lopes, L.J., at p. 602. See also *Beaven* v. *McDonell*, 9 Ex. 309; 10 Ex. 184; *Elliott* v. *Ince*, 7 D.M. & G. 475; *Molton* v. *Camroux*, 2 Ex. 487; 4 Ex. 18; *Robertson* v. *Kelly*, 2 Ont. R. 163.

(*o*) *Manning* v. *Gill*, L.R. 13 Eq. 485. See also *Re James*, 9 P.R. 88.

(*p*) *Mills* v. *Davis*, 9 C.P. 510; *Foley* v. *Can. Perm L. & S. Co.*, 4 Ont. R. 38. See *Brown* v. *Grady*, 31 Ont. R. 73, as to liability of an infant on a covenant.

(*q*) *Foley* v. *Can. Perm. L. & S. Co.*, 4 Ont. R. at p. 46.

may express his disaffirmance during infancy, he may also retract it (*r*), and his ultimate decision can only be given when he arrives at full age. If, however, he sues or defends during infancy, in an action in which the deed is called in question, he may affirm or disaffirm the deed, and the record will bind him (*s*). When the infant arrives at full age, it is clearly his duty to repudiate the deed within a reasonable time, unless he wishes to be bound by it (*t*). Consequently, where an infant made a deed of land to which he had no title, and afterwards acquired title by conveyance from a third person, and fifteen years after attaining majority, repudiated his deed by defending an action of ejectment to recover the land which he had got into possession of, it was held that by acquiescence he had affirmed his deed, and that it operated by estoppel to convey the land (*u*). Very slight acts of acquiescence after majority, with a knowledge of his position, will be taken as an affirmance of a deed. Thus, where an infant made a mortgage to the defendants, and after majority, executed another mortgage to another person, with the purpose of raising money to pay off the defendants' mortgage, and in conversation with the defendants' agent, admitted liability, it was held that he had affirmed the transaction (*v*). Where, however, the infant represents himself to a purchaser to be of full age, he will not be allowed afterwards to set up his infancy (*w*). And a subsequent voluntary grantee, who obtained a deed after the infant had attained full age, with notice of the prior deed which was registered, was held to be in no better position than the infant (*x*). An infant entitled to repudiate a deed, can only get relief upon making restoration of the benefit he has received (*y*).

But where an infant makes a bond with a penalty it is void and not voidable, and cannot be adopted or ratified by the obligor when he attains his majority (*z*).

(*r*) *Grace* v. *Whitehead*, 7 Gr. 591.

(*s*) See *Gilchrist* v. *Ramsay*, 27 U.C.R. 500; *Gallagher* v. *Gallagher*, 30 U.C.R. at p. 422.

(*t*) *Featherstone* v. *McDonell*, 15 C.P. 162, at p. 165.

(*u*) *Featherstone* v. *McDonell*, *supra*. See also *Re Shaver*, 3 Ch. Ch. 379.

(*v*) *Foley* v. *Can. Perm. L. & S. Co.*, 4 Ont. R. 38.

(*w*) *Bennetto* v. *Holden*, 21 Gr. 222.

(*x*) Ibid.

(*y*) *Whalls* v. *Learn*, 15 Ont. R. 481.

(*z*) *Beam* v. *Beatty*, 4 O.L.R. 554.

And though an infant cannot be compelled to complete a contract of purchase, yet when he has paid money under it he cannot recover it back unless he can show that fraud was practised on him (*a*).

It seems that an infant who makes a lease, reserving rent, which is for his benefit, cannot repudiate it during infancy (*b*).

An infant cannot make a will (*c*), and although "every married woman" was authorized by a statute to make a will, "as if she were sole and unmarried," this was held to refer only to the disability of coverture, and to remove it, but not to remove the disability of infancy (*d*).

On and since 5th May, 1894, any married woman who is under age has been enabled by statute to bar her dower by joining with her husband in a deed or conveyance containing a bar of dower to a purchaser for value, or to a mortgagee; and also to release her dower to any person to whom such lands have been previously conveyed (*e*).

Provision is also made by statute for the sale, lease, or other disposition of an infant's estate, when the court is of opinion that it is necessary or proper for the maintenance or education of the infant, or by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause (*f*). No sale, lease, or other disposition is to be made against the provisions of a will or conveyance by which the estate has been devised or granted to the infant, or for his use. The procedure is pointed out by the statute, and the conveyance is executed by the infant under the order of the court, unless the court deems it convenient that it should be executed by some other person.

5. *Married Women.*

A married woman, at common law, though able to acquire property, was unable to enjoy it or convey it alone. By the marriage all the freeholds of the wife came under the complete control of her husband. She was incapable of contracting during the coverture and therefore incapable of making a conveyance.

(*a*) *Short* v. *Field*, 32 O.L.R. 395. See also *Robinson* v. *Moffat*, 35 O.L.R. 9.

(*b*) *Lipsett* v. *Perdue*, 18 Ont. R. 575.

(*c*) R.S.O. c. 120, s. 11.

(*d*) *Re Murray Canal*, 6 Ont. R. 685.

(*e*) R.S.O. c. 150, s. 6.

(*f*) R.S.O. c. 153, s. 5.

As regards the chattels real of the wife held by her in her own right, either in possession or reversion, the husband at common law had during the coverture complete control and right of disposition thereof, so that though the wife survived she would have no right as against any sale, conveyance, or disposition made by the husband; unless by no possibility could they have vested in the wife during coverture (*g*). They were liable to execution for his debts, and became his if he survived his wife by his mere *marital* right (*h*); but if he made no disposition in his lifetime, and died before the wife, he could not dispose thereof by will, as they had not been transferred from the wife, and she would have become entitled.

Where the property was not in possession, and was of such a nature that the husband had to resort to a Court of Equity in order to recover possession of it, the court insisted upon the husband's doing equity, in consideration of obtaining relief, by making a settlement of the property on his wife and children. This was called *the wife's equity to a settlement.*

Though a married woman had at common law no power to convey, from a very early period provision was made by statute enabling her to convey under certain conditions. The conditions were that the husband should join in the conveyance, that she should be examined apart from her husband, respecting her free and volunatry consent to convey the land in the manner and for the purposes expressed in the deed, that she should execute the deed in presence of a judge or two justices of the peace, and that a certificate stating the facts of her consent and the execution should be endorsed on the deed by the judge or justices (*i*). The necessity for this separate examination remained until 1873, when an Act was passed (*j*) declaring that every conveyance theretofore executed by a married woman in which her husband had joined, should be taken to be valid and effectual to have passed the estate of the married woman professed to have been passed by the conveyance, notwithstanding the want of a certificate, and notwithstanding any irregularity, informality, or defect in the certificate, and notwithstanding that such conveyance might not have been executed, acknowledged or certified as required by any Act

(*g*) *Duberley* v. *Day*, 16 Beav. 33.
(*h*) *Re Lambert*, 39 Ch.D. 626; *Surman* v. *Wharton*, (1891) 1 Q.B. 491.
(*i*) C.S.U.C. c. 85.
(*j*) 36 V. c. 18, s. 12.

then or thereafter in force. Certain cases were excepted, viz.: 1. When a valid deed had been made after the void conveyance and before 29th March, 1873. In this case, the void deed was not cured unless the grantee in the void deed, or some one claiming under him, had been in the actual possession or enjoyment of the land continuously for three years subsequent to the deed and before the passing of the Act, and was on the latter date in possession. 2. When the void deed was not executed in good faith. 3. When the married woman, or those claiming under her, was or were in the actual possession or enjoyment of the land, contrary to the terms of such conveyance, on the day of the passing of the Act. The "actual possession and enjoyment contrary to the terms of such conveyance," required to answer the third exception, has been held by the Court of Appeal to be open acts of ownership in assertion of the right to possession under her legal title, and against her void deed, and not necessarily possession equivalent to that of a trespasser claiming under the Statute of Limitations (*k*).

From 1873 until 1884 a married woman might convey her land as a *feme sole*, or appoint an attorney to do so, provided that her husband was a party to and executed the deed. His concurrence was necessary for her protection, and therefore, by attempting to become his wife's grantee, he placed himself in a position adverse to her, and though he might execute such a conveyance, it was not within the terms of the enactment (*l*).

It was essential in all these cases that the husband, in addition to concurring in his wife's disposition of her interest, should also convey his own interest, or potential interest, as tenant by the curtesy (*m*). At this stage, if a husband was imprisoned for felony, his wife might convey as a *feme sole* (*n*).

In 1884 an Act was passed respecting the property of married women (*o*), and that part of the prior enactment which required the joinder of the husband, in order to validate his wife's conveyance, was repealed, and since that date every married woman may convey her land alone; but if the land is not separate estate, the husband must still convey his own interest, or potential interest, in order to make a good title.

(*k*) *Elliott* v. *Brown*, 2 Ont. R. 252; 11 App. R. 228. See remarks on this case, Armour on Titles, 320 *et seq.*

(*l*) *Ogden* v. *McArthur*, 36 U.C.R. 246.

(*m*) See *Allan* v. *Levesconte*, 15 U.C.R. 9; *Doran* v. *Reid*, 13 C.P. 393.

(*n*) *Crocker* v. *Sowden*, 33 U.C.R. 397.

(*o*) 47 V. c. 19, s. 22, latter part.

In 1887 another enactment was passed (*p*) declaring that every conveyance made since 29th March, 1873, or thereafter made by a married woman which her husband "signed or executed, or shall sign or execute," should be valid to pass the wife's property as professed by the deed. This was intended, probably, to cure cases in which the husband had executed the deed but was not a party to it. Considering, however, that by the Act of 1884 the husband's joinder was dispensed with, it is difficult to see why the Act was made prospective. This is of no practical importance, perhaps, because, as a matter of title, a husband would be required to join in order to convey his own interest.

In 1896 still another Act was passed (*q*), by which it was enacted that every conveyance executed before 29th March, 1873, by a married woman shall, notwithstanding that her husband did not join therein, be taken to have passed the estate which such conveyance professed to pass of the married woman in her land conveyed. But the husband's interest is not affected by this Act; it is made subject to the same exceptions as was the Act of 1873 (*r*).

And by an Act passed in 1900, it was declared that every conveyance before 1st July, 1884, executed by a married woman of her real estate, shall be deemed to have been valid to pass her interest in the land, though her husband may not have joined therein (*s*). Exception is made of cases similar to the exceptions in a previous enactment of a similar kind (*t*).

By the present enactment (*u*) every married woman of full age may execute a discharge of mortgage and may by deed convey her own land, and may release her dower, and may appoint an attorney for such purpose, or any of them, as fully and effectually as if she were a *feme sole*.

At common law husband and wife were unable to contract with each other, on account of the unity of person, and consequently they could not convey to each other. But now by statute (*v*), any property, real or personal, may be conveyed by a wife to her husband, or a husband to his wife.

(*p*) 50 V. c. 7, s. 23.
(*q*) 59 V. c. 41.
(*r*) Ante pp. 320, 321.
(*s*) 63 V. 17, s. 21.
(*t*) Ante pp. 320, 321.
(*u*) R.S.O. c. 150, s. 3.
(*v*) R.S.O. c. 109, s. 40.

6. *Equitable Separate Estate.*

In order to overcome the difficulties attending the legal incapacity of married women to deal with their property before the Married Women's Property Acts were passed, resort was had to settlements by which property was put in the hands of trustees to hold upon certain trusts. The general effect of such a settlement may be thus shortly stated: The trusts are, in effect, to hold the property for the sole and separate use of the married woman, to receive the rents and profits, or the income, and pay them to the married woman, taking her sole receipt therefor, which is to be a sufficient discharge to the trustees paying the same, and to hold the property in trust for such person as the married woman may designate by deed or will. The interest of the married woman being thus wholly equitable became cognizable in a court of equity which would enforce the trusts of the settlement. The trustees, observing the terms of the instrument creating the trust, were discharged from obligation by paying the married woman and taking her receipt alone, and they were furthermore bound to hold in trust for such person as the married woman might designate by deed or will, according to the terms of the settlement. She, on her part, being entitled to an equitable interest only, was able to make a disposition of it alone which was effective in equity. And the property was entirely free from the husband's control, and from liability for his debts. Thus, a married woman was enabled to hold and dispose of property held in trust for her free from her husband's control, and such property was, and still is called, equitable separate estate.

7. *Restraint on Anticipation.*

So far, however, the settlement is somewhat incomplete; for, while she had the power of alienation, she might be induced to dispose of the property or charge it with the payment of debts. And therefore, in order more effectually to carry out the intention of securing an income to her, an addition is often made to the settlement by imposing on her a restriction or restraint against alienation during the coverture, called restraint upon anticipation (*w*). Under this restraint she cannot anticipate, *i.e.*, spend, assign, or charge in advance, either principal or income. This enables her to receive the income

(*w*) *Re Ridley*, 11 Ch.D. 645, where general remarks are made; *Re Ellis*, L.R. 17 Eq. at p. 413.

from time to time, but renders her unable to assign, incumber or in any way charge the money before it actually reaches her hands.

If, then, property is held for her separate use, she has, during coverture, an alienable estate, independent of her husband; if for her separate use, without power of alienation, she has, during coverture, an inalienable estate, independent of her husband. In either case the common law rights of the husband are defeated during the coverture, and his rights by survivorship are in suspense during the same period. If the married woman does not exercise her right of alienation, and dies intestate, or being restrained from anticipating dies intestate, or without having made some other disposition to take effect on her death, then, if the husband survives her, his right revives, and he becomes tenant by the curtesy if the other necessary conditions are present (*x*).

Separate estate can only exist during coverture, though land may be so settled upon a *feme sole* as that upon marriage she shall hold it for her separate use. When a married woman becomes discovert, land held to her separate use ceases to be separate estate, and the limitations to that effect, and the restraint on alienation, if any, are suspended, and, if apt words are used in the settlement, will revive and become operative again on a subsequent marriage (*y*).

The restraint is effective only with respect to property settled, or declared to be, for the separate use of a married woman. The mere fact that such a restraint is attempted to be annexed to a gift to a married woman will not, of itself, induce a holding that the property is separate property (*z*).

Where the restraint is properly imposed, the married woman is powerless to alienate the property during coverture; and, therefore, if there is a provision for forfeiture upon anticipation, a conveyance, which would be effectual but for the restraint, is inoperative, and the forfeiture does not take place; though it would be otherwise if the condition were for forfeiture upon *attempting* to anticipate (*a*).

Before accepting a bequest which by its terms provides for

(*x*) *Appleton* v. *Rowley*, L.R. 8 Eq. 139; *Cooper* v. *Macdonald*, 7 Ch. D. 288.

(*y*) *Tullett* v. *Armstrong*, 1 Beav. 1; *Baggett* v. *Meux*, 1 Coll. 138; 1 Ph. 627.

(*z*) *Stogdon* v. *Lee*, (1891) 1 Q.B. 661.

(*a*) *Re Wormald*, 43 Ch.D. 630.

restraint on anticipation, a married woman may disclaim it, as the restraint does not become operative unless she accepts (*b*).

The restraint may be imposed upon property which, being vested in the married woman, is separate estate by reason of the Married Women's Property Act only (*c*). By the same statute (*d*) it is provided that, "notwithstanding that a married woman is restrained from anticipation, the court may, if it thinks fit, where it appears to the court to be for her benefit by judgment or order, with her consent, bind her interest in any property" (*e*).

8. *Statutory Separate Estate.*

Though settlements may still be resorted to for these purposes, a number of statutes have been passed enabling married women to acquire, hold, and dispose of land as separate property. This species of property may be called statutory separate estate.

The first statute, passed in 1859 (*f*), did not constitute a wife's property separate estate. It enabled a married woman to have, hold, and enjoy her real and personal property free from the debts and control of her husband, but did not enable her to dispose of it without her husband's consent (*g*). The law as to conveyances by married women remained as before, subject to the statutes which have been already referred to (*h*).

In 1872 the first Act was passed in Ontario which enabled a married woman to hold land in her own name as separate property (*i*), and from that date all land acquired by a married woman, whenever she might have been married, was held by her as separate estate, and she was able to enjoy and dispose of it without her husband's consent, in the same manner as if she were a *feme sole* (*j*). But if she did not exercise her right in this respect, but died intestate, the husband after her death became entitled to his estate by the curtesy (*k*). In 1877 the

(*b*) *Re Wimperis*, (1914) 1 Ch. 502.

(*c*) *Re Lumley*, (1896) 2 Ch. 690.

(*d*) R.S.O. *c.* 149, s. 10.

(*e*) See *Hodges* v. *Hodges*, 20 Ch.D. 749; *Re Little*, 40 Ch.D. 418; *Re Pollard*, (1896) 2 Ch. 552.

(*f*) C.S.U.C. c. 73.

(*g*) *Royal Can. Bank* v. *Mitchell*, 14 Gr. 412; *Chamberlain* v. *McDonald*, 14 Gr. 447.

(*h*) Ante pp. 320, et seq.

(*i*) 35 V. c. 16.

(*j*) *Furness* v. *Mitchell*, 3 App. R. 510.

(*k*) *Furness* v. *Mitchell*, supra.

revised Act made the Act of 1872 applicable only to women who were married after that Act was passed. Consequently, from that date, if property was acquired by a married woman, married after the date of the Act of 1872, it was separate estate, and capable of being conveyed by the married woman without regard to her husband; but if acquired by a married woman who was married before the date of the Act of 1872, it fell under the Act of 1859, and the married woman could not convey without her husband's joining.

In 1884 another Act was passed (*l*), which enabled a married woman to acquire, hold and dispose of property, without the intervention of trustees, as separate estate, and all property acquired after the date of that Act, 1st July, 1884, by a married woman, and all property of a woman married after the Act, became separate estate, and capable of enjoyment and disposition, as if the married woman were a *feme sole*. These enactments are now consolidated in one Act (*m*).

It being of the essence of separate estate that a married woman shall be able to convey the land without regard to her husband, it follows that she may make a disposition *inter vivos* in favour of her husband; and though, before the Act enabling husband and wife to convey to each other, there was the technical difficulty as to the operation of the conveyance, still, on equitable grounds, a married woman so attempting to convey was held to be a trustee for her husband, and equitably obliged to execute a proper conveyance (*n*).

Where a married woman was entitled to a remainder in fee-simple expectant on a life estate, before 1872, and had issue born capable of inheriting, it was held that she might convey alone in 1886, the life-tenant being still alive; for the Act of 1884 had dispensed with the necessity of a husband's joining to validate his wife's conveyance, and the wife not being seised, the husband had no estate by the curtesy (*o*).

9. *Free Grant Lands.*

Where Crown land is located under the Public Lands Act, R.S.O. c. 28, s. 44 (1), neither the locatee nor any one

(*l*) 47 V. c. 19.

(*m*) R.S.O. c. 149.

(*n*) *Sanders* v. *Malsburg*, 1 Ont. R. 178. See also *Kent* v. *Kent*, 20 Ont. R. 445; 19 App. R. 352; *Whitehead* v. *Whitehead*, 14 Ont. R. 621; *Jones* v. *Magrath*, 15 Ont. R. 189.

(*o*) *Re Gracey & Tor. R. E. Co.*, 16 Ont. R. 226.

claiming under him shall have power without the consent in writing of the Minister to alienate, otherwise than by devise, or to mortgage or charge any land located as a free grant or any right or interest therein, before the issue of the letters patent.

The prior Act did not contain the provision as to the consent of the Minister, and under that enactment it was held, with great difference of opinion, that a contract made, to be carried out after the issue of the patent, would be enforced by the court after the issue of the patent (*p*).

And (by s. 44 (2)) no alienation (otherwise than by devise), and no mortgage or charge of the land or of any right or interest therein by the locatee, after the issue of the patent, and within twenty years from the date of the location, and during the lifetime of the wife of the locatee, is valid, unless made by deed, in which the wife of the locatee is one of the grantors with her husband, and the deed is duly executed by her.

Provision is also made for applying to the court for leave to convey alone where the locatee's wife is a lunatic or of unsound mind, or when she has been living apart from her husband for two years under such circumstances as by law disentitle her to alimony; and where the wife of a locatee has not been heard of for seven years, under such circumstances as raise a presumption of death.

(*p*) *Meek* v. *Parsons*, 31 Ont. R. 54, 529.

CHAPTER XVI.

OF ALIENATION BY DEED.

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(23). *Cancellation, p. 361.*

We are next, but principally, to inquire, *how* a man may alien or convey; which will lead us to consider the several modes of conveyance.

In consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired; which, we have more than once observed, was that of occupancy or first possession. But this possession, when once gained, was also necessarily to be continued; or else, upon one man's dereliction

of the thing he had seized, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose, therefore, of continuing the possession, the municipal law has established *descents* and *alienations*; the former to continue the possession in the heirs of the proprietor, after his *involuntary* dereliction of it by his death; the latter to continue it in those persons to whom the proprietor, by his own *voluntary* act, should choose to relinquish it in his lifetime. A translation, or transfer, of property being thus admitted by law, it became necessary that this transfer should be properly evidenced; in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons, by whom and to whom it was transferred; or with regard to the subject matter, as what the thing transferred consisted of; or, lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the *common assurances* of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts and difficulties are either prevented or removed.

1. *Nature of a Deed.*

In treating of deeds we shall consider, first, their general nature; and, next, the several sorts or kinds of deeds, with their respective incidents. And, in explaining the former, we shall examine, first, what a deed is; secondly, its different parts and requisites; and thirdly, how it may be avoided.

First, then, a deed is a writing sealed and delivered by the parties. It is sometimes called a charter, *carta*, from its materials; but most usually, when applied to the transactions of private subjects, it is called a deed, in Latin *factum*, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties; and formerly each part was cut or indented (in early times in acute angles *instar dentium*, like the teeth of a saw, but later in a waving line), on the top or side, to tally or correspond with the other;

which deed, so made, was called an indenture. Formerly when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some words or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists; and with us *chirographa*, or hand-writings; the word *chirographum* or *cyrographum* being usually that which is divided in making the indenture. At length indenting only came into use without cutting through any letters at all; and the practice of indenting is obsolete at present. The name only is retained for this species of deed; and at present it suffices to style the deed an indenture, in the body thereof, in order to make it one. A deed made by one party only is not indented, but polled or shaved quite even; and therefore called a *deed poll*, or a single deed.

2. *Requisites of a Deed—External.*

We are in the next place to consider the different *parts* and *requisites* of a deed. The parts and requisites of an ordinary purchase deed have been, for the purposes of analysis well divided into those which are external or material, and those which are internal or intellectual (*a*). And this, being the most frequent form of deed in use, may serve as a model.

The external or material ingredients are, that the deed should be written or printed on parchment or paper; that it should be sealed and signed; and that it should be delivered.

The internal or intellectual ingredients are the premises, which include "all the fore parts before the habendum;" the habendum; the covenants; and the conclusion.

3. *Deed must be Written or Printed.*

The deed must be *written* or *printed*, for it may be in any character or any language. Where a deed or other instrument is written in any language other than English, and is presented for registry, it must be accompanied by a sworn English translation thereof, and the Registrar is to enter the translation in his books, and not the original (*b*). It must be upon paper or parchment; for if it be written on stone, board, linen, leather

(*a*) Cornish on Purchase Deeds, p. 27.
(*b*) R.S.O. c. 124, s. 46.

or the like, it is no deed. Wood or stone may be more durable, and linen less liable to erasures; but writing on paper or parchment unites in itself more perfectly than in any other way, both those desirable qualities; for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable.

Formerly many conveyances were made by parol, or word of mouth only, without writing; but this being a handle to a variety of frauds, the statute 29 Car. II. c. 3 (*c*), commonly called the Statute of Frauds, enacts that "every estate or interest of freehold, and every uncertain interest of, in, to or out of, any messuages, lands, tenements, or hereditaments, shall be made or created by writing signed by the parties making or creating the same, or their agents thereunto lawfully authorized in writing, and if not so made or created shall have the force and effect of an estate at will only, and shall not be deemed or taken to have any other or greater force or effect." And "all leases and terms of years of any messuages, lands, tenements or hereditaments shall be void at law unless made by deed." And by the 3rd section it is enacted, "no lease, estate, or interest, either of freehold or term of years, or any uncertain interest of, in, to, or out of, any messuages, etc., shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or his agent thereunto lawfully authorized by writing, or by act or operation of law." By the 4th section these two enactments "shall not apply to a lease, or an agreement for a lease, not exceeding the term of three years from the making thereof, the rent upon which reserved to the landlord during such term, amounts unto two-thirds at the least of the full improved value of the thing demised." And by the 5th section it is enacted "no action shall be brought whereby . . . to charge any person upon . . . any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized." The 2nd section appears to relate to cases where an estate or interest is created *de novo*, and actually

(*c*) Now R.S.O. c. 102, s. 2.

passes to the grantee or lessee; the 3rd section to cases where an estate or interest previously existing is transferred; and the 5th to the nature of the evidence in an action on an agreement, or in case where an agreement is made respecting the future creation or transfer of an estate or interest.

4. *Document Signed in Blank.*

The whole deed must be written before the sealing and delivery, for if a man seal and deliver an empty piece of parchment or paper, although with instructions to write in it an obligation or other matter, this is not a good deed (*d*). So, a document, designed to be a deed, and executed as such, but with a blank left for the name of the grantee, is void as a deed if the name of the grantee be filled in by another than the grantor after execution without authority under seal (*e*). But if the blank is filled in after execution, in the presence of the grantor with his assent, the deed is good (*f*). Or, if a blank be filled in which is immaterial to the party whose deed it is (*g*), or if the particulars are filled in which merely complete the provisions of the deed and do not otherwise affect it (*h*); or if particulars to be furnished by or for the grantor, such as the date, the names of the tenants in occupation of the land, the particulars of the proviso for redemption in a mortgage (*i*), are filled in, in these cases the deed is good, though it is done after execution.

5. *Sealing and Signing.*

Sealing.—It is requisite that the party whose deed it is should *seal*, and, now in most cases, should *sign* it also. The use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely ancient. We read of it among the Jews and Persians in the earliest and most sacred records of history (*j*); and in the book of Jeremiah there is a very remarkable instance, not only of an attestation by seal,

(*d*) Shepp. Touch. 54. See also per Patterson, J., *Regina* v. *Chesley*, 16 S.C.R. at p. 323.

(*e*) *Hibblewhite* v. *McMorine*, 6 M. & W. 200, approved in *Societe Generale de Paris* v. *Walker*, 11 App. Cas. 20.

(*f*) *Hudson* v. *Revett*, 5 Bing. 372.

(*g*) *Doe d. Lewis* v. *Bingham*, 4 B. & Ald. 672.

(*h*) *Hudson* v. *Revett*, 5 Bing. 368.

(*i*) *Adsetts* v. *Hives*, 33 Beav. 52.

(*j*) 1 Kings, ch. 21; Daniel, ch. 6; Esther, ch. 8.

but also of the other usual formalities attending a Jewish purchase (*k*). In the civil law also, seals were the evidence of truth, and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors, they were not much in use in England; for though Sir Edward Coke relies on an instance of King Edwin's making use of a seal about a hundred years before the Conquest, yet it does not follow that this was the usage among the whole nation; and perhaps the charter he mentions may be of doubtful authority, from this very circumstance of being sealed; since we are assured by all our ancient historians, that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write, or not, to affix the sign of the cross; which custom our illiterate vulgar do, for the most part, to this day keep up, by signing a cross for their mark, when unable to write their names. And indeed this inability to write, and therefore making a cross in its stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters. In like manner, and for the same insurmountable reason, the Normans, a brave but illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names; which custom continued, when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to Westminster Abbey, himself being brought up in Normandy, was witnessed only by his seal, and is thought to be the oldest sealed charter of any authenticity in England. At the Conquest the Norman lords brought over into this kingdom their own fashions, and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross. And in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals. The impressions of these seals were sometimes a knight on horseback, sometimes other devices; but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard I., who brought them from the Crusade in the Holy Land, where they were

(*k*) "And I bought the field of Hahameel, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence, and sealed it and took witnesses, and weighed him the money in the balances. And I took the evidence of the purchase, both that which was sealed according to the law and custom, and also that which was open."—Ch. 32.

first invented and painted on the shields of the knights, to distinguish the variety of persons of every Christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained.

This neglect of signing, and resting only on the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed; and so the former common form of attesting a deed, "sealed and delivered," continued, notwithstanding that the Statute of Frauds, before mentioned, revived the Saxon custom, and expressly directed the signing in all grants of land, and many other species of deeds; in which, therefore, signing seems to be now as necessary as sealing, though it has been sometimes held that the one includes the other, viz., that when sealing and delivery occur, signing is not requisite, notwithstanding the Statute of Frauds (*l*).

While some degree of strictness was in early days required as to sealing, the modern cases seem to show that if any impression be made with the intention of sealing, it will be sufficient, especially when the testimonium and attestation clauses state that the deed has been sealed. It is a question of fact in each case as to whether an impression has been made for the purpose of sealing (*m*). It is not necessary, therefore, that a waxen seal or a wafer should be used; if an impression is made on the parchment or paper with the intention of sealing, it is sufficient (*n*). Thus, an order of justices was held to be sufficiently sealed by an impression made in ink with a wooden block in the usual place of the seal, the document purporting to be under seal (*o*). And where slits were made in the parchment, and a ribbon was passed through, so as to appear at intervals on the face of the instrument, and the signature of each one of the parties was opposite one of the pieces of ribbon, the ends being fastened so that the whole remained permanently fixed, it was held a sufficient sealing (*p*). But in an exactly similar case, where the deed was found amongst the papers of an ab-

(*l*) *Cherry* v. *Heming*, 4 Ex. 631.

(*m*) *National Prov. Bank of England* v. *Jackson*, 33 Ch.D. at p. 11.

(*n*) Shepp. Touch. p. 57. *Clement* v. *Donaldson*, 9 U.C.R. 299, where it was held that a mark made with a poker after his name by a party who had just signed, was not a good sealing, is directly opposed to the passage in Touchstone, and cannot be supported.

(*o*) *Regina* v. *St. Paul*, 7 Q.B. 232.

(*p*) *Hamilton* v. *Deemis*, 12 Gr. 325. See also *Re Sandilands*, L.R. 6 C.P. 411.

sconder, and the circumstances were suspicious, it was held that there was no sealing (*q*). Where a party made a circle after his name with a pen, and wrote within it "seal," and the testimonium and attestation clauses stated that the deed was sealed, it was held a good sealing (*r*).

Plain wafers have been held good seals for corporate bodies, where the deed stated that the parties thereto had affixed their seals, there being no evidence that these were not the seals of the corporations (*s*).

With regard to the necessity for signing. At common law, before the Statute of Frauds, a deed was requisite (though it might have been without signature) to transfer incorporeal hereditaments, as of those livery could not be made; but where livery could be made nothing further was requisite; and though a deed of feoffment was usually drawn up and sealed and delivered, that was done for the purpose of preservation of the evidence of the land having been conveyed, and of the tenure on which it was to be held. The language of the deed, which some modern deeds still sometimes unnecessarily follow, shows this: it *witnesseth* that the feoffor *hath given*, etc., making use of the past tense. It is true that to the validity of certain conveyances, a deed was requisite, as bargain and sale, covenant to stand seised; but that was in consequence of the peculiar character of those modes of conveyance; but to the validity of certain other modes of conveyance, no instrument whatever was requisite. To remedy this the Statute of Frauds was passed, and as remarked by Mr. Baron Rolfe (*t*): "The object of the statute was to prevent matters of importance from resting on the frail testimony of memory alone. The statute was not intended to touch those instruments which were already authenticated by a ceremony of a higher nature than a signature or mark." In another case, as above referred to as against the necessity of signature (*u*), the point seems to have been given up without argument. As regards sections 2 and 3 of the statute, no violence is done to their language in holding that signing is not requisite when the transaction is authenticated

(*q*) *National Provincial Bank of England* v. *Jackson*, 33 Ch.D. 1.

(*r*) *Re Bell & Black*, 1 Ont. R. 125.

(*s*) *Ontario Salt Co.* v. *Merchant's Salt Co.*, 18 Gr. 551; Shepp. Touch. 57.

(*t*) *Cherry* v. *Heming*, 4 Ex. 631. See also *Tupper* v. *Foulkes*, 9 C.B. N.S. 799, *arguendo*; Shepp. Touch. 56.

(*u*) *Aveline* v. *Whisson*, 4 M. & G. 801.

by deed; thus, as to the transfer of existing estates under section 3, the word, "signed" may be referred to the words "note in writing" only (*v*). There are, however, decisions and statements of eminent writers that signature is requisite. For the purposes of registration it is essential that a deed should be signed, proof of signature being required before the registrar is bound to receive it.

Before proceeding to the question of delivery it may be remarked that reading is sometimes essential before execution. This is necessary whenever any of the parties desire it. If a man able to read does not do so, or if being blind or illiterate he does not require the deed to be read, yet the deed will be good, although contrary to what he would have agreed to. But if one who is blind or illiterate desires the deed to be read and it is not read, or is falsely read, then it is not a good deed (*w*).

Care must be taken to distinguish between cases of misrepresentations made to a person about to execute a deed, because all deeds procured by false reading or misrepresentations are not absolutely void.

If it is truly stated that a deed refers to particular property, so that the person knows that he is dealing with that property, then a misrepresentation made as to the contents of the deed, upon which execution of the deed is procured, renders the deed not void but voidable, and therefore it is good in the hands of an innocent transferee (*x*). But if the class or character of the deed is misrepresented then the deed is wholly void (*y*).

6. *Delivery.*

In order to constitute the document a deed it is requisite that it should be *delivered*. "Delivery is either actual, *i.e.*, by doing something and saying nothing, or else verbal, *i.e.*, by saying something and doing nothing, or it may be by both; and either of these may make a good delivery and a perfect deed. But by one or both of these it must be made; for otherwise, albeit it be never so well sealed and written,

(*v*) *Trust and Loan Co.* v. *Covert*, 32 U.C.R. 222.

(*w*) Shepp. Touch. p. 56; *Owens* v. *Thomas*, 6 C.P. 383; *Hatton* v. *Fish*, 8 U.C.R. 177; *Foster* v. *MacKinnon*, L.R. 4 C.P. 704. See the observations of Farwell, L.J., in *Howatson* v. *Webb*, (1908) 1 Ch. at p. 3, and of Buckley, L.J., in *Carlisle and Cumberland Banking Co.* v. *Bragg*, (1911) 1 K.B. at p. 496, as to blindness and illiteracy.

(*x*) *Howatson* v. *Webb*, (1907) 1 Ch. 537; (1908) 1 Ch. 1.

(*y*) *Foster* v. *MacKinnon*, L.R. 4 C.P. 704; *Bagot* v. *Chapman*, (1907) 2 Ch. 222; *Carlisle and Cumberland Banking Co.* v. *Bragg*, (1911) 1 K.B. 489.

yet is the deed of no force. And though the party to whom it is made take it to himself, or happen to get it into his hands, yet will it do him no good, nor him that made it any hurt, until it be delivered" (*z*). It may be delivered to the party himself, or to a stranger for him if delivered for the use of the party and the grantor parts with control over it (*a*); but if delivered to a stranger without any declaration or intention that it is for the party, then it is not a good delivery (*b*). Where an instrument is formally sealed and declared to be delivered, and there is nothing to qualify the delivery but the keeping of the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed; and the delivery to the party who is to take by it, or to any person for his use is not essential (*c*). So, where a deed was found amongst the papers of the deceased grantor, formally executed, attested, and stated to have been delivered, and the evidence showed that after execution the grantor put it in his pocket, that he subsequently made another deed of the same house, and the day after that made a will devising the house "subject to two life annuities charged thereon by me," there being no other annuities charged except by the first deed, it was held to have been delivered (*d*). A mortgage drawn by the mortgagee's solicitor and executed by the mortgagor and left with the solicitor with the request not to register it, was held to have been delivered (*e*). Where a deed is sealed by a stranger, yet if the party delivers it himself he adopts the sealing and makes it a good deed; and if it had been signed also by a stranger, the delivery by the party would no doubt be an adoption of the signature, and would make it a valid deed. In practice the seals are always put on before execution, and the signature is an adoption of the seal; and though the proper mode of execution is to place a finger on the seal after signing and say, "This is my act and deed," or some such words, this ceremony is not necessary.

Where a deed is made on condition that it shall become effectual on the death of the grantor, and is delivered, it is never-

(*z*) Shepp. Touch. p. 57.

(*a*) *Doe d. Garnons* v. *Knight*, 5 B. & C. 671.

(*b*) Shepp. Touch. p. 57.

(*c*) *Doe d. Garnons* v. *Knight*, 5 B. & C. 671; *Xenos* v. *Wickham*, L.R. 2 H.L. 296; *Zwicker* v. *Zwicker*, 29 S.C.R. 527.

(*d*) *Evans* v. *Gray*, 9 L.R. Ir. 539, (1882).

(*e*) *Mackechnie* v. *Mackechnie*, 7 Gr. 23.

theless a testamentary document, and is void unless executed as a will (*f*).

7. *Escrow.*

A delivery is absolute if made to the party to take it or any person for his use, with intent that it shall take effect immediately. But a document may be delivered to a stranger to hold until certain conditions are performed on the part of the grantee; in which case it is not delivered as a deed, but as an *escrow*, that is a mere scroll or writing, not to take effect as a deed till the conditions are performed. "In this case two cautions must be heeded: 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made" (*g*). In explanation of this passage it is said: "It will be found that it is not merely a technical question as to whether or not the deed is delivered into the hands of A.B., to be held conditionally; but when a delivery to a stranger is spoken of, what is meant is a delivery of a character negativing its being a delivery to the grantee, or to the party who is to have the benefit of the instrument. You cannot deliver the deed to the grantee himself, it is said, because that would be inconsistent with its preserving its character of an escrow. But, if upon the whole of the transaction it be clear that the delivery was not intended to be a delivery to the grantee at that time, but that it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the persons who executed the instrument" (*h*). So a delivery to the grantee's solicitor for a specific purpose, not to be effectual as a complete delivery, was upon evidence held to be a delivery as an escrow (*i*).

The deed of a corporation aggregate does not need any delivery; for the apposition of their common seal gives perfection to it without any further ceremony. But if the affixing of the seal be accompanied with a direction to the clerk or agent to retain the conveyance till accounts are adjusted it is not complete (*j*). So, where the agent of a life assurance company

(*f*) *Foundling Hospital* v. *Crane*, (1911) 2 K.B. 367.
(*g*) Shepp. Touch. p. 58.
(*h*) *Watkins* v. *Nash*, L.R. 20 Eq. at p. 266.
(*i*) Ibid. See also *Lloyd's Bank* v. *Bullock*, (1896) 2 Ch. 192.
(*j*) *Derby Canal Co.* v. *Wilmot*, 9 East 360.

(under instructions not to hand over a policy till the premium was paid) handed the policy to the assured for the purpose of reading the conditions, and it was found amongst his papers after his death, no premium having been paid, it was held that the policy was not complete (*k*). And a mortgage prepared by the mortgagee's solicitor, and executed, and remaining in his hands pending an investigation of title, upon the report of which the mortgagees were either to advance money or refuse the loan, according to the state of the title, was held to have become effective only from the final report on title and delivery of the document by the solicitors to the mortgagees (*l*).

When the conditions are performed upon which the deed was delivered as an escrow, then it should be delivered to the grantee, and it becomes effective as if it had been immediately delivered. So, it is said, that if either of the parties die before the conditions are performed, and the conditions are afterwards performed, the deed is good, because the initial delivery in escrow is good. But if an infant deliver a deed as an escrow to a stranger, and before the conditions are performed the infant comes of age, and the deed be then delivered by the stranger, yet it is not a good delivery (*m*).

A deed takes effect from delivery only; and it will be presumed to have been delivered on the day it bears date, if there is nothing against it, such as an impossible date, or its being registered before the day of its date. But the day or time of the delivery may always be shown as a matter of fact.

8. *Conditional Execution.*

The signing, sealing and delivery of a deed constitute its execution. The execution may be conditional. Thus, if two persons execute a deed on the faith that a third person will do so, and that is known to the other parties to the deed, the deed does not in equity bind the two if the third neglects or refuses to execute (*n*). And a person so executing is entitled to restrain proceedings upon such an instrument (*o*), and to

(*k*) *Confederation Life Ass'n* v. *O'Donnell*, 10 S.C.R. 92; 13 S.C.R. 218. See and cf. *Xenos* v. *Wickham*, L.R. 2 H.L. 296.

(*l*) *Trust & L. Co.* v. *Ruttan*, 1 S.C.R. 564.

(*m*) Shepp. Touch. 59.

(*n*) *Luke* v. *South Kensington Hotel Co.*, 11 Ch.D. at p. 125; *National Prov. Bank of Eng.* v. *Brackenbury*, 22 T.L.R. 797.

(*o*) *Evans* v. *Bremridge*, 8 D.M. & G. 100.

have it delivered up to be cancelled (*p*). So, where a surety to an administration bond executed it on the understanding that A. was to be his co-surety, and A. subsequently refused to become a surety, and B. signed the bond in his place, it was held that the bond was void as to the original signatory and was cancelled (*q*).

But where a deed of assignment for benefit of creditors was made, and certain creditors executed it and appended a note to the effect that the execution was only with respect to certain claims, it was held that the creditors so executing were bound by the deed, particularly as they had received payment under it (*r*).

A party to a deed taking the benefit of it is bound by the whole deed though he may not execute it (*s*). But apparently he is not bound by a covenant to do something *in futuro* not a condition of or connected with the grant, unless he executes the deed (*t*).

9. *Attestation.*

It is not necessary that there should be any attesting witnesses to a deed in order to constitute it a valid and effective deed. The facts of signing, sealing and delivery may be proved as any other matters of fact. And, even though there be an attesting witness it is not necessary to call him to prove the deed (*u*). But a deed should be attested for the purpose of registration, as the execution has to be proved by affidavit of the witness for that purpose (*v*). If there be no attesting witness, or the witness is dead, the judge of a County Court, on its being proved to his satisfaction that the deed was executed, may grant a certificate to that effect, upon which the deed may be registered (*w*). And where a deed in duplicate has been

(*p*) *Underhill* v. *Horwood*, 10 Ves. at p. 225. See also *Elliot* v. *Davis*, 2 B. & P. 338.

(*q*) *In bonis Cowardin*, 22 T.L.R. 220.

(*r*) *Exchange Bank of Yarmouth* v. *Blethen*, 10 App. Cas. 293.

(*s*) Co. Litt. 231*a*, Butler's note; *Rex* v. *Houghton-le-Spring*, 2 B. & Ald. 375; *Burnett* v. *Lynch*, 5 B. & C. 589; *Webb* v. *Spicer*, 13 Q.B. 886; *Willson* v. *Leonard*, 3 Beav. 373.

(*t*) *Witham* v. *Vane*, 44 L.T.N.S. 718; S.C. in H.L., Challis on Real Prop., 3rd ed. p. 440. But see *Jessup* v. *G.T.R. Co.*, 7 App. R. at pp. 130, 133; *Formby* v. *Barker*, (1903) 2 Ch. at p. 547; and *Provident Savings Life Ass'ce Soc'y* v. *Mowat*, 32 S.C.R. at p. 156.

(*u*) R.S.O. c. 70, s. 51.

(*v*) R.S.O. c. 124, s. 35.

(*w*) R.S.O. c. 124, s. 50.

registered, the certificate of the registrar endorsed thereon is *prima facie* evidence of the due execution as well as of the registration of the deed (*x*).

Where a deed is made in exercise of a power which requires attestation, then the terms of the power must be observed, and the deed attested; or the deed may be attested as provided by statute, in presence of two or more witnesses in the manner in which deeds are ordinarily executed and attested (*y*).

10. *Internal Parts of a Deed—Date—Short Form.*

Next as to the internal parts. The premises of a deed are "all the foreparts of the deed before the habendum" (*z*); and include the date, reference to any statute that it is desired to make applicable, the parties, recitals, consideration, receipt, operative words and description of parcels.

The date of a deed is, as we have seen, the day of delivery; and therefore, if possible, the date inserted in the deed should correspond with the day of the delivery.

As most of our deeds are made according to the form in the Short Forms Act, it may be important here to observe, that it is only when the deed refers to the statute, as showing an intention to adopt it, that the symbolical short form acquires the meaning given it in the long form by the statute.

Though the interpretation of deeds is not within the scope of this treatise, it may not be out of place (inasmuch as these forms are so largely used in this province) to mention that where the written parts of a deed, which are specially inserted, conflict with the printed part, the written parts are entitled to the greater weight in ascertaining the meaning of the deed (*a*).

11. *Parties.*

As to the *names and descriptions* of the parties, except in so far as the registry laws may affect the question, strict accuracy is not requisite, if there be sufficient to identify (*b*). So if a man be known by a different description than even his name

(*x*) R.S.O. c. 124, s. 63.

(*y*) R.S.O. c. 109, s. 24.

(*z*) Shepp. Touch. 75.

(*a*) *Meagher* v. *Ætna Ins. Co.*, 20 U.C.R. 607; *Meagher* v. *Home Ins. Co.*, 11 C.P. 328; *McKay* v. *Howard*, 6 Ont. R. 135; *St. Paul Fire, etc., Ins. Co.* v. *Morrice*, 22 T.L.R. 449. But see *Ottawa Elec. Co.* v. *St. Jacques*, 1 O.L.R. at p. 76, reversed in 31 S.C.R. 636, without expressing an opinion on this point.

(*b*) *Janes* v. *Whitbread*, 11 C.B. 406.

of baptism, it will do (*c*). The parties should include all those who are to convey any estate or interest in the property, those who are to give any consent or direction in relation to the conveyance, or to confirm the conveyance of any of the interests affected, or to give a receipt for the consideration, or to release any claim, incumbrance, or interest on or in the property, or to give any covenant; and all those who are to take any interest or benefit under the conveyance (*d*). It will be always advisable to *classify* the parties into various parts and priorities, according to their various estates and interests; thus, those conveying the legal estate are placed first, then those conveying any equitable estate or mere beneficial interest, those who release or confirm, those who enter into any covenants or other stipulations, and lastly, those who consent to or direct the exercise of any power. As to those who receive interests, first the parties receiving the immediate estate; then those who take equitable interests and those who take the benefit of any covenants. All persons whose interests are identical, and all persons having joint estates should be of one part; and so with trustees (*e*). A husband conveying, and a wife barring dower, should be distinct parties, by reason of their distinct interests, and the wife placed last, as having no present estate, but a mere possible right of action contingent on her surviving. Where advantage is to be taken of implied covenants, the parties who convey should be described as persons "who convey and are expressed to convey as beneficial owners" (*f*).

No person can, by or under an *indenture inter partes*, take an *immediate* interest or benefit, unless named as a party, at least if any other be named in the premises as grantee (*g*). This rule, however, does not extend to remainders, nor, it is said, to uses (*h*); and under a grant or feoffment from A. to B., *habendum* to the use of C., the latter may take, though not named as a party; so also if the grant had been to B. for life, with remainder to C. in fee. A person named as a party will not be bound by his covenant with one not a party, though a person covenanting and sealing the indenture will be bound by his covenant with one named as a party.

(*c*) *Williams* v. *Bryant*, 5 M. & W. 447.
(*d*) 5 Bythe. Conv. 117.
(*e*) 5 Bythe. Conv. 123.
(*f*) R.S.O. c. 109, s. 22.
(*g*) Co. Litt. 231*a*, 239*b*.
(*h*) Burton, Rl. Prop. 442, note.

12. *Recitals.*

Next the parties come the recitals if any. Their purpose is to narrate such facts as are necessary to explain the title of any party conveying, or the purpose of the conveyance; or they may serve the purpose of placing upon record some fact, such as the date of a birth, death or marriage or a particular relationship with a view to exhibiting a pedigree, which in time will furnish proof of the fact recited under the Vendor and Purchaser Act (*i*); or they may be used for the purpose of estopping parties as to the facts recited (*j*). But in general they are not necessary, and should be avoided if possible.

13. *Consideration.*

As to the consideration. A bargain and sale, as its name implies, imports the payment of a money consideration, and its peculiar operation depends upon it. Therefore, if it is desired to use the operative words "bargain and sell" a money consideration ought to be expressed.

A deed also, or other grant, made without any consideration, is, as it were, of no effect, for it is construed to enure, or to be effectual, only to the use of the grantor himself, and this is what is called a *resulting use*; thus, if A., without consideration, should, by some conveyance, not operating under the Statute of Uses, convey in fee simple to B. and his heirs, without any consideration or declaration of use expressed, it is said (*k*), inasmuch as there is no reason apparent why the conveyance should have been made for B.'s benefit, that, therefore, he will be considered as holding for the use and benefit of A.; in which case, as we shall presently see, the land will, by force of the Statute of Uses, be revested in A. But this doctrine of resulting use applies, it is said, only to conveyances *in fee simple* (*l*). If a use be *declared* in such a conveyance, then no use will be *presumed* in favour of the grantor, but the conveyance, though without consideration, will enure to the benefit of the person for whom the use is declared, *i.e.*, the *cestui que use*. Great latitude, however, is allowed in showing whether there has in fact been a consideration paid, and what it is; and though, by the bare interpretation of such a deed

(*i*) R.S.O. c. 122.
(*j*) 5 Bythe. Conv. 128, *et seq.*
(*k*) *Tyrrell's Case*, Tud. Lg. Ca. 4th ed. 296.
(*l*) Shepp. Touch. 513.

with no use declared, its effect will be as stated, yet it might appear on evidence that a consideration was in fact given, which would prevent the use from resulting. And a nominal consideration, if expressed, will prevent a resulting use.

The consideration may be either a *good* or a *valuable* one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relative; being founded on motives of generosity, prudence and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant; and is, therefore, founded on motives of justice. Deeds made upon good consideration only are considered as merely voluntary, and may be set aside in favour of creditors, and in some cases in favour of *bona fide* purchasers.

If a deed is made upon a fraudulent or collusive consideration, either to deceive, delay, or defeat creditors, it may be set aside at the instance of creditors. But it will nevertheless be good between the parties to this extent, that it will be effectual to pass the estate. As no person can set up his own fraud in order to obtain relief from a transaction tainted with the fraud; therefore the grantor in such a deed could not set it aside.

So if a conveyance be made upon an illegal or immoral consideration, or a consideration against public policy, it cannot be enforced if the party trying to enforce it has to set out the illegal purpose in order to succeed. And similarly if the deed does not disclose the illegal consideration, and the party trying to enforce it relies on the deed alone, the defendant cannot in opposition to the deed set up the illegality, if he has to rely upon it for relief (*m*).

When the consideration is a money payment the deed usually contains a receipt for it or an acknowledgment that it has been paid. As between the parties, this at law would have estopped the parties from denying the payment; but in equity, and now on equitable grounds, the actual facts as to payment or non-payment may be proved, notwithstanding the formal receipt. So that a vendor may show that the purchase money has not been paid and claim a lien on the land therefor. But if a subsequent purchaser, relying on a receipt in a deed without notice of the facts, were to acquire the land or any interest in it, he would be protected under the Registry

(*m*) *Clark* v. *Hagar*, 22 S.C.R. 510.

Act (*n*). But if he had notice of non-payment he would take subject thereto (*o*).

It is also enacted (*p*) that a receipt for consideration, money or securities in the body of a conveyance shall be a sufficient discharge to the person paying or delivering the same without any further receipt being endorsed on the conveyance. Endorsing a receipt was the common conveyancing practice in England, and the absence of an indorsed receipt was constructive notice that the money had not been paid. This enactment was passed to dispense with the necessity for such endorsement.

14. *Operative Words and Limitations.*

The *operative words* of the conveyance should be such as are apt and proper according to the mode in which the instrument is intended to operate, as by grant, demise, surrender, assignment, bargain and sale, or otherwise, the nature of which will presently be spoken of. Until recently a multiplicity of operative words was used, as "give, grant, bargain, sell," etc., etc.; this is useless, and proceeded from a fear that if one word alone were used, a wrong one might be adopted, and the right one omitted. As, however, lands now lie in grant, if the word "grant" be used it will suffice in every case. Moreover, as hereafter shown, if a word cannot operate in its own peculiar character, it may in another; thus, the word "release" may operate as a grant, and "grant" as a release. Still perhaps the neatest mode is to make use of the proper operative word which stamps the character of the instrument, and to this if thought proper the word *grant* can be added. The present tense alone should be used except in deeds of disclaimer and feoffment. Both that and the past tense were formerly used, which arose from the early conveyance by livery of seisin, which without deed or writing passed the estate; a charter or deed, however, usually accompanied the transaction, as evidence for the future, which stated, as the fact was, that the feoffor had enfeoffed, and then proceeded in the present tense to confirm it. In deeds of disclaimer also, the past tense is proper, as where a person to whom property is conveyed either beneficially or in trust, declines to accept the conveyance or the trust, it is proper to say that he always has disclaimed and still disclaims; for if he have once accepted he cannot *disclaim*. In such latter

(*n*) See also R.S.O. c. 109, s. 7, and *Jones* v. *McGrath*, 16 O.R. 617.
(*o*) *Forrester* v. *Campbell*, 17 Gr. 379; *Wigle* v. *Setterington*, 19 Gr. 512.
(*p*) R.S.O. c. 109, s. 6.

case, if allowable, he should *convey*, for the estate has vested in him. In this place also it is usual to limit the estate to be granted—for years, for life, in tail, or in fee-simple, by proper words of limitation. But by statute (*q*) it is not necessary to use the technical words "heirs," "heirs of the body," etc., to create a fee-simple or a fee tail, but it will be sufficient to use the expression "in fee-simple," "in fee tail," or, as the case may be. And if none are used, all the estate of the grantor which he has power to convey will pass.

15. *Description.*

Following the operative words, comes the *description* of the property, technically called the *parcels*. In describing the property it is very inadvisable, though sufficient (*r*), to describe it or its boundaries, by reference to another conveyance, as "heretofore conveyed by one A. to one B. by deed dated," etc., or "conveyed by the within indenture," or, "bounded on the north by property conveyed," etc. This is too frequently done, and leads to great difficulty in proving title, and may, perhaps, in registration of the instrument (*s*). It is far better to take certain named limits or fixed boundaries, or if there be none, then to make such. And it is prudent to follow a description by which a parcel of land has become known, for the purpose of maintaining its identity, even if a better one could be devised. We may here mention, however, that though lands are usually described as being a particular lot, or part of it, a general conveyance of *all the lands* of the grantor in a particular city or township, is a good conveyance of all such lands, and capable of registry.

There is a maxim that *falsa demonstratio non nocet*; thus if I convey lot 20 in concession 1 of the Township of York now occupied by A., and A. be not occupant, that false addition to what was before sufficiently certain will not affect the conveyance.

As soon as there is an adequate and sufficient definition with convenient certainty, or a leading description, of what is intended to pass by a deed, any erroneous or subordinate addition will not vitate it (*t*).

(*q*) R.S.O. c. 109, s. 5. See *ante*, p. 000.

(*r*) *Re Treleven & Horner*, 28 Gr. 624.

(*s*) *Regina* v. *Registrar of Middlesex*, 15 Q.B. 976.

(*t*) *Llewellyn* v. *Earl of Jersey*, 11 M. & W. at p. 189. See also *Morrell* v. *Fisher*, 4 Ex. at p. 604. And see *Re Brocket*, (1809) 1 Ch. 185; *Brantford El. & Op. Co.* v. *Brantford Starch Works*, 3 O.L.R. 118.

In order to make the maxim applicable there must be a description composed of several parts, of which one part is true and sufficient to identify the subject matter of the grant, and the other part is untrue; then the untrue part—*falsa demonstratio*—will not vitiate the grant, but will be rejected (*u*). So, where a parcel of land is known and granted by a specific name, the addition of a particular description, which does not correctly describe it, will not prevent the whole parcel from passing under its specific name (*v*). And, on the other hand, where land was sufficiently and certainly defined by reference to landmarks, the land so described was held to pass, though it was generally described as lot 4 when in fact it included also part of lot 3 (*w*); and land well described in the particular description was held to pass, though in the general description it was stated to be part of lot 42 instead of lot 45 (*x*). But where a whole lot was referred to by number, and the particular description, being, however, inaccurate in some respects, appeared to include only a portion of the lot, it was held that the whole lot passed, the inaccurate particular description being rejected (*y*). And in a description in a devise, where the testator used the expression "my two freehold cottages at T., known as 19 and 20 Castle street," and it appeared that there were freeholds of that description but the testator did not own them, but did own 19 and 20 Thomas street, it was held that "Castle street" might be rejected as *falsa demonstratio*, there being otherwise a sufficient description to identify the land (*z*). In each case the principle is the same, viz., that if the two parts of the description do not agree, that which is certain and definite governs, and a false addition will not vitiate it (*a*).

Where land is described by reference to a plan, the plan

(*u*) *Cowen* v. *Truefitt*, (1899) 2 Ch. 309. See *Barthel* v. *Scotten*, 24 S.C.R. 367; *Talbot* v. *Rossin*, 23 U.C.R. 170.

(*v*) *Attrill* v. *Platt*, 10 S.C.R. 425; *Re Finucane & Peterson Lake Mining Co.*, 32 O.L.R. 128.

(*w*) *Doe d. Murray* v. *Smith*, 5 U.C.R. 225.

(*x*) *Doe d. Notman* v. *McDonald*, 5 U.C.R. 321. See also *Hart* v. *Bown*, 10 Gr. 266.

(*y*) *Jamieson* v. *McCollum*, 18 U.C.R. 445.

(*z*) *Re Mayell*, (1913) 2 Ch. 488.

(*a*) "There is no rule for ascertaining which is the leading part of the description and which part should be rejected. It is rather the impression of the judge on reading the words knowing the facts than anything else:" per Jessel, M.R., in *Travers* v. *Blundell*, 6 Ch. D. at p. 446. And see *Eastwood* v. *Ashton*, (1915) A.C. at p. 912.

is considered as incorporated in the deed (*b*), and becomes just as much a part of the description as if it were drawn upon the face of the conveyance; and so, in determining the proper description the deed and plan alone are to be looked at (*c*).

A somewhat similar question to that of *falsa demonstratio*, if not in reality the same question, arises where a deed refers to a plan and the descriptions do not agree. Where a grant with specific boundaries referred to a plan or diagram "as will further appear by the diagram," it was held that, as a matter of construction, the diagram being repugnant to the terms of the deed, the latter should prevail (*d*). If there is in the words of the description a sufficiently certain definition of what is conveyed, inaccuracy of dimensions or of plans as delineated will not vitiate or affect that which is there sufficiently defined (*e*).

But where the descriptions in the letter press of the deed were so inaccurate (considering the surrounding circumstances properly admissible in evidence) that the court was unable to define the boundaries, and the deed referred to a map or plan which was accurate in exhibiting boundaries, it was held that the plan should govern though it included a strip of land to which there was no title, the grantor being held liable on his covenant for right to convey (*f*).

Where land is described as being bounded by the seashore (*g*), or as abutting on a street (*h*), the grantor, and those claiming under him, are precluded from denying that the land extends to such bounds (*i*).

Where the language of the description is ambiguous or obscure, acts of user before the grant may be given in evidence to identify the subject matter of the grant, and in fact all circumstances which can tend to show the intention of the parties, whether before or after the execution of the deed, may be rele-

(*b*) *Grasett* v. *Carter*, 10 S.C.R. at p. 114.

(*c*) *Smith* v. *Millions*, 16 App. R. 140.

(*d*) *Horne* v. *Struben*, (1902) A.C. 454.

(*e*) *Per* Vaughan Williams, L.J., in *Mellor* v. *Walmsley*, (1905) 2 Ch. at p. 174. And see *Bartlet* v. *Delaney*, 27 O.L.R. 594; 11 D.L.R. 584; 29 O.L.R. 426; 17 D.L.R. 500; affirmed in Supreme Court of Canada.

(*f*) *Eastwood* v. *Ashton*, (1915) A.C. 900.

(*g*) *Mellor* v. *Walmsley*, (1905) 2 Ch. 164.

(*h*) *Roberts* v. *Karr*, 1 Taunt. 495.

(*i*) See also *Adams* v. *Loughman*, 39 U.C.R. 247; *Cheney* v. *Cameron*, 6 Gr. 623; *O'Sullivan* v. *Claxton*, 26 Gr. 612.

vant (*j*). But where the words are plain and unambiguous, neither prior correspondence the effect of which would tend to enlarge the terms of the grant, nor actual exercise of rights claimed under the grant, will be allowed to control the plain words (*k*).

Easements and privileges legally appurtenant to the lands, as, for instance, a right of way, or of drainage of water *in alieno solo*, founded on prescriptive right, pass by conveyance of the lands simply; but there may be others used and enjoyed with the land, and still not legally appurtenant to it (*l*); and hence after the description sometimes follows a grant of all easements and privileges enjoyed with the lands or known as part thereof.

By s. 15 of the Conveyancing Act (*m*), every conveyance of land, unless an exception is specially made therein, shall include all easements and appurtenances belonging to the land or enjoyed therewith or taken or known as part or parcel thereof. Under a similar Imperial enactment, where a landlord allowed his tenant to use a certain way over adjoining premises, also belonging to the landlord, and afterwards conveyed the demised premises to the tenant, it was held that the right to use the way passed under the deed as being actually enjoyed with the property conveyed at the time of the conveyance (*n*).

Any intended *exception* out of the property conveyed is most properly made in the premises; it must not, however, be repugnant to the grant, so as to take away all benefit from it. Thus, if land be granted, except the profits, the exception is void. Nor can it be such as to render nugatory any part of an express specific grant of what is afterwards excepted; thus, if a grant be made of a house and shops, except the shops; or of twenty acres except ten, the exceptions are void. So if a person grants *all his horses* except his white horse, and he has three or more horses, and one is white, the exception is good; but if he has only *two* horses, the exception is void as conflicting with the grant, which was of more than one horse (*o*). But if lot 20 be granted, excepting the house on it, or the trees, or a particular field, these exceptions are good.

(*j*) *Van Diemen's Land Co.* v. *Table Cape Marine Board*, (1906) A.C. 92. See also *Polushie* v. *Zocklynski*, (1908) A.C. 65.

(*k*) *Wyatt* v. *Atty-Gen. of Quebec*, (1911) A.C. 489.

(*l*) *Pheysey* v. *Vickary*, 16 M. & W. 484.

(*m*) R.S.O. c. 109.

(*n*) *International Tea Stores Co.* v. *Hobbs*, (1903) 2 Ch. 165. And see *Winfield* v. *Fowlie*, 14 Ont. R. 102; *Hill* v. *Broadbent*, 25 App. R. 159.

(*o*) Shepp. Touch. 78.

An exception, logically speaking, is of something that would otherwise be included in the category from which it is excepted; but the form of expression may also be used, not to include something that would otherwise have passed, but to intimate that the excepted subject is not to be included (*p*).

Where there is uncertainty in the description of the excepted subject, it is a question whether it can be made good by election (*q*). Where minerals were excepted from a grant of land, and natural gas though known at the time had no commercial value, but subsequently became of value, it was held not to be excepted, though a mineral, because it was not in the contemplation of the parties at the time of the deed (*r*). A reservation is not properly an exception of something that otherwise would or might pass by the grant, but it must be of something new arising out of that which is granted (*s*). Thus, rent is reserved on a demise of lands, being, not a part of that which passed by the conveyance, but of something which did not exist before. And where a grant was made to a railway company of a piece of land, "reserving" to the grantor "one good and sufficient crossing," it was held to amount to a re-grant of a right of way, and not to be an exception of part of the land granted (*t*).

16. *Accretion and Erosion.*

Where land is described as, or is actually bounded by the seashore, or by the shore of one of the Great Lakes, which are regarded much as the sea is, the boundary may shift with the action of the water. If the water gradually and imperceptibly recedes or deposits alluvion, the boundary of the land shifts also, and the land so gained goes by accretion to the owner of the land adjacent to the accretion (*u*). The rule does not mean that the result is imperceptible, but that the progress of the receding or deposit is imperceptible (*v*).

(*p*) Per Lord Campbell, *Gurly* v. *Gurly*, 8 Cl. & F. at p. 764. See and consider the next two cases cited below.

(*q*) *Savill Bros.* v. *Bethell*, (1902) 2 Ch. 523.

(*r*) *Barnard-Argue-Roth-Stearns-Oil Co.* v. *Farquhar*, (1912) A.C. 864.

(*s*) *Savill Bros.* v. *Bethell*, (1902) 2 Ch. at p. 532.

(*t*) *South Eastern R. Co.* v. *Associated Port. Cem. Co.*, (1910) 1 Ch. 12.

(*u*) *Standly* v. *Perry*, 2 App. R. 195; 3 S.C.R. 356; *Throop* v. *Cobourg Pet. & Marm. R. Co.*, 5 C.P. 509; *Buck* v. *Cobourg Pet. & Marm. R. Co.*, 5 C.P. 552; *Scratton* v. *Brown*, 4 B. & C. 485; and see *Smart* v. *Suva Town Board*, (1893) A.C. 301; *Mellor* v. *Walmsley*, (1905) 2 Ch. at p. 173.

(*v*) *R.* v. *Yarborough (Lord)*, 3 B. & C. at p. 107.

Although the withdrawal of the water or the deposit of alluvion is caused, or aided, by human agency, as by the fair use of the land or by works in the water contiguous to the land, still the rule applies and the accretion belongs to the adjacent land (*w*); but it is otherwise where the artificial means are intended to produce the accretion (*x*). And where a riparian owner placed stakes and built works to prevent the erosion of the land by the tides and reclaimed part of the foreshore and used it for the purposes of his business, it was held that the foreshore still remained the property of the Crown, and did not pass to the riparian owner as an accretion to his land; but the riparian owner was still entitled to exercise all his rights as a riparian owner over the reclaimed portion of the foreshore (*y*).

The rule as to accretion applies where the land is *de facto* bounded by the water, although it is described in the conveyance by specific measurement or delineation or plan (*z*).

But it does not apply where the land, as originally granted, was not in fact bounded by the water, but was separated therefrom by other land (*a*).

Where the land was originally bounded by the water and accretions have occurred, then if the limits between the original shore and the accretion can be determined, and the exact space between the limits and the new water mark can be defined, the accretion does not belong to the riparian owner (*b*).

Similarly, where there is a sudden or perceptible recession of the water, the land so formed or uncovered belongs to the Crown, and not to the riparian owner (*c*).

As the riparian owner gets the benefit of accretions made imperceptibly, so he must suffer the loss from imperceptible encroachment, and therefore where such encroachment takes place the land so covered by the water belongs to the Crown (*d*); but where it suddenly overflows the land, and marks remain by which the original boundary can be recognized, the property in the submerged land remains in the owner.

(*w*) *Doe d. Subkristo* v. *East India Co.*, 10 Moo. P.C. at pp. 146, 158; A.-G. v. *Chambers*, 4 DeG. & J. 55.

(*x*) *A.-G.* v. *Chambers*, 4 DeG. & J. 55.

(*y*) *A.-G., N.S.W.* v. *Holt*, (1915) A.C. 599.

(*z*) *A.-G., N.S.W.* v. *Holt*, (1915) A.C. at pp. 611, 612.

(*a*) *Volcanic Oil & Gas Co.* v. *Chaplin*, 27 O.L.R. 34, 484; 6 D.L.R. 284; 10 D.L.R. 200.

(*b*) *A.-G.* v. *Chambers*, 4 DeG. & J. at p. 71.

(*c*) *Re Hull & Selby Ry.*, 5 M. & W. 327.

(*d*) *Re Hull & Selby Ry.*, 5 M. & W. 327.

In the case of a non-tidal river forming the boundary, if it insensibly gains on one side or the other, the boundary shifts with it (*e*); but where there is a sudden change in the course of the river, the title to the soil remains as before (*f*).

17. *Habendum.*

Next come the *habendum* and *tenendum*.

The office of the *habendum* originally was to mark out the estate of the grantee and declare the uses. That may be, however, and now almost universally is, done in the premises following the operative words. And where it is so done, it is unnecessary to repeat it in the *habendum*; but where uses are to be declared, the *habendum* is the most convenient place for it. If an *habendum* be used, it should be made to harmonize with the premises. If it contradicts or is repugnant to the premises, it is void, and must be rejected (*g*); but every effort will be made, in construing the deed, to make it agree with the rest of the deed before declaring it to be repugnant.

Though it may not be repugnant to the premises, it may lessen, explain, or qualify the premises, if the premises are not *definite* but give rise to a presumption or implication susceptible of qualification in the manner just spoken of; and it may enlarge the premises by adding another estate. The rule is thus clearly stated by Abbott, C.J. (*h*): "If no estate be mentioned in the premises, the grantee will take nothing under that part of the deed, except by implication and presumption of law, but if an *habendum* follow, the intention of the parties as to the estate to be conveyed will be found in the *habendum*, and consequently no implication or presumption of law can be made, and if the intention so expressed be contrary to the rules of law, the intention cannot take effect, and the deed will be void. On the other hand, if an estate and interest be mentioned in the premises, the intention of the parties is shown, and the deed may be effectual without any *habendum*, and if an *habendum* follow which is repugnant to the premises or contrary to the rules of law, and incapable of a construction consistent with either, the *habendum* shall be rejected and the deed stand good upon the

(*e*) *Ford* v. *Lacy*, 7 H. & N. 151.

(*f*) *Ibid.*; *Thakurain Ritraj Koer* v. *Thakurain Sarforaz Koer*, 21 T.L.R. 637.

(*g*) *Purcell* v. *Tully*, 12 O.L.R. 5.

(*h*) *Goodtitle* v. *Gibbs*, 5 B. & C. at p. 717. See also *Boddington* v. *Robinson*, L.R. 10 Ex. 270.

premises" (*i*). Thus, if at common law a grant were made to A. (by which he would, by implication, take an estate for life), *habendum* to A. for ten years, the implication or presumption arising in the premises is rebutted or qualified by the *habendum*, which is express, and A. would take an estate for ten years (*j*), for the grant taken altogether is no more than a grant to A. for ten years. But if a grant be made to A. for life, *habendum* to A. for ten years, the estate given in the premises is express and not implied, and the *habendum* is repugnant to it and void. So, if lands are granted to A. and his heirs, *habendum* to A. for his own life, this is repugnant and void, and A. takes a fee (*k*).

While the *habendum* may not retract the gift in the premises, it may construe and explain the sense in which the words in the premises should be taken, so that upon a view of the whole deed the intent of the parties may be ascertained. Thus, where there was a grant to A. in trust for B., his heirs and assigns, *habendum* to A. and his heirs, it was held that the want of limitation in the premises was supplied by the *habendum*, and that A. took a fee-simple (*l*).

But if a grant be made to A. and his heirs, *habendum* to him and his heirs for the life of B., there is no repugnancy, and A. takes an estate to himself and his heirs for the life of B. (*m*). This is simply an estate *pur auter vie* limited to the heir as special occupant. So if a grant be made to A. and his heirs, *habendum* to A. and the heirs of his body, this explains what heirs are meant in the premises, which, without that explanation, would mean heirs general, and A. takes an estate tail. But, if a grant be made to A. and the heirs of his body, *habendum* to A. and his heirs, A. will take a fee-tail with a fee-simple expectant thereon, for there is no inconsistency or repugnancy,

(*i*) See also *Jamieson* v. *Lond. & Can. L. & A. Co.*, 27 S.C.R. 435.

(*j*) Shepp. Touch. 75, note. This would apparently still be the effect notwithstanding the statute (R.S.O. c. 109, s. 5, s.-ss. 3 and 4), which declare that, where no words of limitation are used, the conveyance shall pass all the estate which the grantor has power to pass, unless a contrary intention appear from the conveyance. If there be nothing in the conveyance to qualify the grant, then the whole estate will pass, but if there be anything to qualify it (as an *habendum* for years, etc.), then the premises remain indefinite or general, and may be qualified or explained by the *habendum*, which shows the contrary intention of the statute.

(*k*) Ibid.; and see *Owston* v. *Williams*, 16 U.C.R. 405; *Doe d. Meyers* v. *Marsh*, 9 U.C.R. 242.

(*l*) *Spencer* v. *Registrar of Titles*, (1906) A.C. 503.

(*m*) *Owston* v. *Williams*, 16 U.C.R. 405; *Doe d. Meyers* v. *Marsh*, 9 U.C.R. 242.

and an estate-tail does not merge in a fee-simple. And a grant to A. for life, *habendum* to A. and his heirs, gives A. a fee-simple, for there is no inconsistency in a grantee's taking two estates by the same deed.

And so in every case where general words are used in the premises, and the deed then descends to special words in the *habendum*, if the special words agree with the general words they will govern. Where the estate in the premises is express, it may not be detracted from in the *habendum*, but may be added to or enlarged. So, if the estate in the premises is, by implication only, an estate larger than that expressed in the *habendum*, the latter may *lessen* it; if smaller, either expressly or by implication, the *habendum* may *enlarge it;* if indefinite *e.g.*, as to heirs, the *habendum* may *explain* or *qualify* it by showing what heirs.

So, also, if a grant be made to A. and B., *habendum* to A. for life, remainder to B. for life, the *habendum* explains how A. and B. are to take, and A. will take a life estate, followed by a life estate to B. in remainder (*n*).

The *tenendum* "and to hold," is now of no use, and is only kept in by custom. It was sometimes formerly used to signify the tenure by which the estate granted was to be holden, viz., *tenendum per servitum militare, in burgagio, in libero socagio, etc.* But, all these being now reduced to free and common socage, the tenure is never specified. Before the Statute of *Quia emptores*, 18 Edw. I., it was also sometimes used to denote the lord of whom the land should be holden; but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* has been also antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be holden *de capitalibus dominis feodi;* but as this expressed nothing more than the statute had already provided for, it gradually grew out of use.

18. *Stipulations.*

Next follow the terms of stipulation, if any, upon which the grant is made; the first of which is the *reddendum* or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted, as "rendering therefor yearly the sum of ten shillings, or a pepper corn, or two days' ploughing, or the like." Under the pure feudal

(*n*) See also *Doe d. Timmis* v. *Steele*, 4 Q.B. 663 for a curious case.

system, this tender, *reditus*, return or rent, consisted in chivalry principally of military services; in villenage of the most slavish offices; and in socage, it usually consisted of money, though it may still consist of services, or of any other certain profit. To make a *reddendum* good, if it be of anything newly created by the deed, the reservation must be to the grantors, or some or one of them, and not to any stranger to the deed.

Another of the terms upon which a grant may be made is *condition;* which is a clause of contingency, on the happening of which the estate granted may be defeated; as, "Provided always, that if the mortgagor shall pay the mortgagee £500 upon such a day, the whole estate granted shall determine;" and the like.

19. *Covenants.*

Next follow the *Covenants*, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something for, or to, the other. Thus, the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment; or the like. The grantee may covenant to pay his rent, or keep the premises in repair, etc. The covenants ordinarily used in the short form deed are limited to the acts and omissions of the grantor only and those claiming under him; while those which are set out in the short form of mortgage are unlimited and extend to the acts and omissions of all persons.

Where a conveyance other than a mortgage, made on or after the 1st July, 1886, is made for valuable consideration, by a person who conveys, and is expressed to convey, as beneficial owner, there are deemed to be included, and there shall be implied, covenants for right to convey, quiet enjoyment, freedom from encumbrances, and further assurance, according to the forms of such covenants contained in the Short Forms of Conveyances Act (*o*). It is to be noticed that there is no restriction in this enactment as to what conveyances are to be affected. The first part of the section would, by its own language, include a conveyance for life. And the covenants for right to convey and freedom from incumbrance in the Short Forms Act are also indefinite. But the covenants for quiet enjoyment and for further assurance are applicable only to an estate *in fee*, and there is nothing in either act to restrict their effect. For this reason it is more prudent to express the covenants in the deed than to leave the effect uncertain.

(*o*) R.S.O. c. 109, s. 22 (1) (*a*).

Similar provisions are made as to the conveyance of leaseholds, settlements, conveyances by trustees and mortgagees, and as to mortgages (*p*). It is also provided that where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, the person giving the direction, whether or not he conveys and is expressed to convey or beneficial owner, shall be deemed to convey and to be expressed to convey as beneficial owner, and the covenants on his part are to be implied as in the case of conveyance by the beneficial owner (*q*).

20. *Arrangement of Parts.*

Lastly, it may be observed that the matter written should be *legally* or *orderly* set forth; that is, there must be words sufficient to specify the agreement and bind the parties; which sufficiency must be left to the courts of law to determine. For it is not absolutely necessary in law to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity. It is very inadvisable, therefore, to depart either from the usual order, or from the well *settled precedents*. The usual order is important in enabling any particular part of a conveyance to be found at once without reading through a long deed, and is especially so in the hurry of *nisi prius* on the trial of a cause. And the importance of adhering to precedents, particularly as regards covenants, is manifest, for otherwise, on difficulty arising, the parties are all at sea without probably the aid of decisions to guide them, whereas the usual forms have by a series of decisions during centuries received judicial construction.

Punctuation in strictness is not observed in a legal instrument, nor is it recognized; and the settled forms of conveyances were, formerly at least, so drawn as to be independent of punctuation in their construction; for no one would like to have his title dependent on a comma (*r*).

(*p*) R.S.O. c. 112, s. 7.

(*q*) R.S.O. c. 109, s. 22. ss. (2).

(*r*) *Doe d. Willis* v. *Martin*, 4 T.R. 39 at p. 65; *Gascoigne* v. *Barker*, 3 Atk. 9; *Sandford* v. *Raikes*, 1 Mer. 651.

21. *Alteration of Deeds.*

We are next to consider how a deed may be *avoided* or rendered of no effect. And from what has been laid down, it will follow, that, if a deed wants any of the essential requisites before mentioned, it is a void deed *ab initio*.

It may also be avoided by matter *ex post facto*, as by erasure, interlineation, or other alteration of a material part. The early rule was that if a deed were altered in a material part by any person, even a stranger, except the maker of the deed, or in an immaterial part, even to the advantage of the other party by the owner of the deed, the deed became void. But if an alteration were made by the party bound by the deed in any part (*s*), or by a stranger in an immaterial part, the deed remained good (*t*). The principle upon which this was based was, "that a party who has the custody of the instrument made for his benefit is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part"(*u*).

The rule has been much varied by modern cases. In order to affect the deed the alteration must be in a material part (*v*). And so, where an alteration of a note (which by interpretation was payable on demand) was made (though by whom not shown) by adding the words "on demand" the legal effect not being thereby changed it was held that the validity of the note was not affected (*w*). And a deed executed by all the parties except one, in which was left a blank for the day and month but contained the year 1899, was held not to be affected by the alteration of the year 1900, the year in which it was executed by the only remaining party (*x*).

(*s*) An alteration made by the verbal direction of a party bound by a deed does not bind him; *Martin* v. *Hanning*, 26 U.C.R. 80.

(*t*) Shepp. Touch. 68, 69.

(*u*) *Davidson* v. *Cooper*, 13 M. & W. at p. 352.

(*v*) *Aldous* v. *Cornwell*, L.R. 3 Q.B. 573; *Re Howgate & Osborn's Contract*, (1902) 1 Ch. 451; *Bishop of Crediton* v. *Bishop of Exeter*, (1905) 2 Ch. 455.

(*w*) *Aldous* v. *Cornwell*, supra.

(*x*) *Bishop of Crediton* v. *Bishop of Exeter*, supra. It must be noted that in this case the intention was found to be that the deed should be dated as of the day of execution by the last party, and the insertion of the date did not constitute an alteration.

And where a deed made to "William Gray" was after execution altered by inserting "Edward Thomas Gray" the grantee's true name, instead of William Gray, it was held that the alteration did not avoid the deed (*y*).

And where a deed is altered by the parties thereto by consent, it will bind them in its altered shape. Thus, where leases were executed and the dates left blank, except the year 1903, which was written in, and in 1904 the parties inserted the day of the month and changed the year from 1903 to 1904, it was held that the lessor was estopped from denying that the leases were executed on the date assented to by him (*z*).

A material alteration in a deed made by, or on behalf of, a party holding the deed, or against the interest of a party bound by the deed, will vitiate it (*a*).

But an alteration made by the grantor for his own benefit after delivery of the deed, does not affect the validity of the deed, nor, of course, give any advantage to the grantor (*b*).

As a deed can only be materially altered after execution by fraud or wrong, and the law does not presume fraud, every alteration, or apparent alteration, made in a deed is presumed to have been made before execution, and the onus is cast upon the person asserting that it was made after execution, and that it therefore vitiates the deed, to prove it (*c*). But where this presumption is rebutted by proof that the alteration was made after execution, there is no presumption that the alteration was made with the assent of the grantor (*cc*).

But this must be understood only of obligations in the deed that might be sued on. For if an estate be granted by a deed, it will remain vested in the grantee, though an alteration in the deed may destroy the future obligations created thereby (*d*).

And so, when it is said that, by breaking off or defacing the

(*y*) *Re Howgate & Osborn's Contract*, supra.

(*z*) *Rudd* v. *Bowles*, (1912) 2 Ch. 60.

(*a*) *Croockewit* v. *Fletcher*, 1 H. & N. 893; *Ellesmere Brewery Co.* v. *Cooper*, (1896) 1 Q.B. 75; *Graystock* v. *Barnhart*, 26 App. R. 545; *Suffell* v. *Bank of England*, 9 Q.B.D. 555.

(*b*) *Owen* v. *Mercier*, 14 O.L.R. 491.

(*c*) Cru. Dig. Tit. 32, c. 27, s. 14; *Graystock* v. *Barnhart*, 26 App. R. 545; *Northwood* v. *Keating*, 18 Gr. 643, *Doe d. Tatum* v. *Catomore*, 16 Q.B. 745.

(*cc*) *Hedge* v. *Morrow*, 32 O.L.R. 218; 20 D.L.R. 561.

(*d*) *Doe d. Lewis* v. *Bingham*, 4 B. & Ald. 672; *West* v. *Steward*, 14 M. & W 47; *Suffell* v. *Bank of England*, 9 Q.B.D. at p. 568.

seal, and by delivering it up to be cancelled, a deed may be avoided, the absence of proper appreciation of the two latter instances of avoiding a *deed* has led to what may be sometimes a source of great difficulty—the supposition that the destruction of a *conveyance*, with the assent of the grantee, will have the effect of a *reconveyance* to the grantor in such conveyance, and revest in him the estate which had previously passed by its execution and delivery. This would be a singular way of defeating the Statute of Frauds. What is meant by the foregoing instances is, that the alteration, tearing off the seal, or cancelling the deed, will avoid the deed so far as regards executory *contracts or obligations* arising out of it. Such a covenant in an indenture, or a bond, could not be enforced after destruction with intent by the covenantee, or obligee, to cancel the obligation; but an estate once passed by the instrument will not revest, however the deed may be destroyed (*e*).

The question becomes of great importance in dealing with leases. Thus, where the plaintiff had by deed demised to the defendant for a term not expired, reserving rent, and he sued in debt on the demise (not on the *covenant*), for the rent, averring that the defendant had entered; the plea was that after the making of the deed and before suit, the deed was cancelled by mutual consent of both parties; the court considered that the estate which had passed by the lease was not divested, that the plaintiff was still reversioner and the defendant still lessee, and consequently liable for the rent reserved by reason of the *privity of estate* between the parties. "When a man demises land for a term of years, reserving to himself a rent, the effect of it is to create two estates, viz., the estate of the lessee, and the reversion of the lessor, and the rent is incident to the reversion. When the day of payment arrives, the rent still remains annexed to the reversion. Here the question is whether the simply cancelling a lease destroys the lessor's right of action for the recovery of the rent. I am of opinion that it does not, because the cancelling a lease does not destroy the estates already vested, or their incidents" (*f*). But an action on the covenant could not have been maintained.

Under our present Landlord and Tenant Act (*g*) the relationship of landlord and tenant does not depend upon tenure,

(*e*) *Fraser* v. *Fralick*, 21 U.C.R. 343.

(*f*) *Lord Ward* v. *Lumley*, 5 H. & N. 87, per Martin, B., at p. 93. See also *Doe dem. Burr* v. *Denison*, 8 U.C.R. 185; *Laur* v. *White*, 18 C.P. 99.

(*g*) R.S.O. c. 155, s. 3.

and, as has been already mentioned, it may be a question whether a tenant now takes an estate or term of years, and upon that will depend the question whether the destruction of a lease will now be attended with the same consequences as formerly.

The fact of cancellation, though not of itself sufficient to amount to surrender, is still a strong fact from which, if coupled with others, surrender may be *implied in law* (*h*).

22. *Disclaimer.*

A deed may be avoided by the *disagreement* of such whose concurrence is necessary, in order for the deed to stand; as an infant, or person under duress, when those disabilities are removed; and the like. Where a person is named as grantee or devisee, the grant or devise being for his benefit, the law, till the contrary appears, assumes that he assents (*i*); an assumption of the law certainly not unreasonable. But the law will not force an estate upon a man against his will (*j*). And so, either the grantee in a deed or the devisee under a will may refuse to take the estate, and may renounce or disclaim. It is essential, if he does not desire to take the estate, that he should execute a deed of disclaimer, before doing any act from which it could be inferred that he had previously accepted the benefit of the gift. And this is especially to be observed with respect to trustees and executors, who, if they *convey* the estate, instead of *disclaiming*, will, by the act of conveying, shew that they must first have accepted the trusts, from which they cannot be relieved by a mere conveyance. If they desire to refuse the trusts, they should renounce and disclaim, and thus by their disagreement the deed will not take effect. And so, also, of a grantee or devisee for his own benefit.

A married woman, to whom an annuity is bequeathed for her separate use without power of anticipation, may, before she does anything to show acceptance of the bequest, disclaim it, inasmuch as the restraint on anticipation could not become effective without acceptance of the bequest (*k*).

A disclaimer by a sole trustee of a settlement does not de-

(*h*) *Doe dem. Burr* v. *Denison*, 8 U.C.R. 185.

(*i*) *Re Dunham*, 29 Gr. 258; *Re Defoe*, 2 Ont. R. 623. See *Dods* v. *McDonald*, 36 S.C.R. 231.

(*j*) Per Abbott, C.J., *Townson* v. *Tickell*, 3 B. & Ald. 31, at p. 36.

(*k*) *Re Wimperis*, (1914) 1 Ch. 502.

stroy the trust, but the subject matter of the settlement remains vested in the settlor subject to the trust (*l*).

Where a devisee of land, subject to the condition that he should not lease it without the consent of another person, took possession and openly violated the condition of leasing the land, it was held that he had not accepted the devise, and that his possession for the statutory period extinguished the title of those entitled to take on breach of the condition (*m*).

23. *Cancellation.*

A deed may be avoided by the judgment or decree of a court of judicature. This was anciently the province of the court of star-chamber, then of the chancery, but now of any court having equitable jurisdiction; when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute forgery. Not but that such a deed may be often shown to be void at law, but except in case of forgery, the deed would be good in the hands of a purchaser under it for good consideration without notice (*n*). The danger, also, of an innocent purchaser becoming protected by the registry laws is so great that the advantage is incalculable of resorting to the court for a judgment that the deed be delivered up to be cancelled (*o*).

(*l*) *Mallott* v. *Wilson*, (1903) 2 Ch. 494.

(*m*) *Cobean* v. *Elliott*, 11 O.L.R. 395. But see as to this case postea, Chap. XXI., s. 21.

(*n*) *Matthewson* v. *Henderson*, 15 C.P. 99; *Scholefield* v. *Templer*, 4 DeG. & J. 429; *Stump* v. *Gaby*, 2 D.M. & G. at p. 630.

(*o*) *Harkin* v. *Rabidon*, 7 Gr. 243.

CHAPTER XVII.

OF THE DIFFERENT KINDS OF CONVEYANCES.

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(13). *Defeasance, p. 383.*

1. *Introduction.*

And, having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents. And herein we shall only examine the particulars of those which, from long practice and experience of their efficacy, are generally used in the alienation of *real* estate; for it would be tedious, nay infinite, to descant upon all the several instruments made use of in *personal* concerns, but which fall under our general definition of a deed; that is, a writing sealed and delivered. The former, being principally such as serve to *convey* the property of lands and tenements from man to man, and commonly denominated *conveyances;* which are either conveyances at *common law*, or of such as receive their force and efficacy by virute of the *Statute of Uses*.

It may be premised that the transfer of equitable interests is not governed by the strict rules hereafter referred to applicable to conveyances of legal estates; for strictly speaking when a man's equitable interest is transferred, it is not the case of conveyance of *land*, but of the *trust* in the land on which the trustee holds the same. Moreover, there never could have been livery of seisin, and the Statute of Uses cannot apply;

any instrument in writing within the Statute of Frauds and showing the intention suffices (*a*).

2. *Conveyances, Primary and Secondary.*

Of conveyances by the common law, not dependent for their effect on the Statute of Uses, or any other statute, some may be called *original* or *primary* conveyances; which are those by means whereof the benefit or estate is created or first arises. Others are *derivative* or *secondary;* whereby the benefit, or estate originally created is enlarged, restrained, transferred or extinguished.

Original conveyances operating at common law without the aid of the Statute of Uses, are the following:—1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition. *Derivative* are, 7. Release; 8. Confirmation; 9. Surrender; 10. Assignment; 11. Defeasance.

3. *Primary Conveyances—Feoffment.*

A feoffment, *feoffamentum*, is a substantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud; and therefore feoffment is properly *donatio feudi*. It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that so gives, or enfeoffs, is called a *feoffor* and the person enfeoffed is denominated the *feoffee*.

As the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the feoffee's estate was confined to his person, and subsisted only for his life; unless the feoffor, by express provision in the creation and constitution of the estate, gave it a longer continuance. These express provisions were generally made; for this was for ages the only conveyance, whereby our ancestors were wont to create an estate in fee-simple, by giving land to the feoffee, to hold to him and his heirs forever; though it serves equally well to convey any other estate of freehold.

But by the mere words of the deed the feoffment is by no means perfected; there remains a very material ceremony to be performed, called *livery of seisin;* without which the feoffee has but a mere estate at will. This livery of seisin is no other than the pure feudal investiture, or delivery of corporal possession

(*a*) Hayes' Convey, vol. 1, p. 96.

of the land or tenement, which was held absolutely necessary to complete the donation.

In descents of lands by the common law, which were cast on the heir by act of the law itself, the heir had not till 4 Wm. IV. c. 1, *plenum dominium*, or full and complete ownership, till he had made an actual corporal entry into the lands; for if he died before *entry* made, *his* heir formerly was not entitled to take possession, but the heir of the person who was last actually seised. It was formerly not therefore only a mere right to enter, but the actual entry that made a man complete owner; so as to transmit the inheritance to his own heirs—*non jus, sed seisina, facit stipitem.*

The corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed; by transferring something near at hand in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself (*b*)

Livery of seisin is either in *deed*, or in *law*. Livery in *deed* is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney (for this may as effectually be done by deputy or attorney, as by the principals themselves in person), come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect:—"I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But, if it be of a house, the feoffor must take the ring or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others. If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all; but, if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one

(*b*) See an illustration of the Jewish method of conveyance by symbolic delivery: Ruth, chap. iv., v. 7.

county are no judges of the notoriety of a fact in another. And thus much for livery in deed.

Livery in *law* is where the same is not made *on* the land, but *in sight of it* only; the feoffor saying to the feoffee, "I give you yonder land, enter and take possession." Here, if the feoffee entered during the life of the feoffor, it was a good livery, but not otherwise; unless he dared not enter, through fear of his life or bodily harm; and then before 4 Wm. IV. c. 1 (*c*), his continual claim, made yearly, in due form of law, as near as possible to the lands, would suffice without an entry to preserve his right from being barred by time. This livery in law cannot, however, be given or received by attorney, but only by the parties themselves.

Livery of seisin, by the common law, was necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made; for they are not the object of the senses; and in leases for years, or other chattel interests, it is not necessary. In leases for years, indeed, an actual *entry* is necessary to vest the right in the lessee; for the bare lease gives him only a right to enter, which is called his interest in the term, or *interesse termini;* and when he enters in pursuance of that right, he is then and not before in possession of his term, and complete tenant for years. This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin from the grantor could have done; which it would have been improper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence *in futuro*, because they could not (at the common law) be made but by livery of seisin; which livery, being an actual manual tradition of the land, must take effect *in præsenti*, or not at all.

A feoffment with livery of seisin was the most notorious method of transferring land, and the feoffee being openly seised of the lands was *prima facie* the feudal owner. Consequently, a feoffment with livery of seisin was said to be a conveyance of more power than any other. Contingent remainders were formerly barred or destroyed thereby; if made by a tenant in tail in possession, for a fee-simple absolute, it worked discontinuance, which tolled or took away the right of entry of the

(*c*) Now R.S.O. c. 75, s. 10.

remainderman or reversioner as well as that of the issue in tail, and left them only a right of action. When made by a person wrongfully in possession, it was said to have the effect of wrongfully passing an estate, and the feoffee was said to have a estate by wrong. Thus, a feoffment was said to have a tortious operation. But in reality no estate could so pass. The right of the true owner was not gone, but it was turned into a right of action, and the tortious feoffee had an estate only so long as the rightful owner did not bring his action. The effect on the right of the feoffor was to work a forfeiture of his estate, if he had one. Thus, if a tenant for life made a feoffment in fee, he forfeited his estate, and the remainderman or reversioner became immediately entitled to an estate in possession. A feoffment now has no tortious operation (*cc*), but will pass only such right or interest as the feoffor has.

These remarks on feoffment with livery of seisin are retained, because, although it is neither an ordinary nor convenient form of conveyance, at the present time, a conveyance which fails to take effect in some other way might be supported as a feoffment with livery if the facts are favourable.

4. *Gift.*

The conveyance by *gift, donatio,* is properly applied to the creation of an estate-tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. The strictly proper operative words of conveyance in this case are *do* or *dedi*. Of the nature of an estate-tail and its incidents, we have before spoken (*d*). The word "give," was said (*e*), implied a warranty of title on a gift in tail, or on a lease for life, rendering rent. But now the word "give" does not imply any covenant in law (*f*).

5. *Grant.*

Grants, concessiones. The regular method by the common law of transferring the property of *incorporeal* hereditaments, or such things whereof no livery can be had. For which reason all corporeal hereditaments, as lands and houses, are said to lie

(*cc*) R.S.O. c. 109, s. 4.

(*d*) Ante pp. 74 *et seq.* See also Chap. XXII. as to conveyances by tenants in tail.

(*e*) Davidson Concise Prec. 26. See also Bellenden Kerr's letter, p. 24 of Appx. to Leith R. P. Statutes.

(*f*) R.S.O. *c.* 109, s. 11.

in livery; and in others, as advowsons, commons, rents, reversions, remainders, &c., to lie *in grant.* These, therefore, pass merely by the delivery of the deed. And in seigniories, or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite) were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It, therefore, differs but little from a feoffment, except in its subject matter; for the operative word is *grant.*

By statute (*g*) "All corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery." The result of this is that this mode of conveyance supersedes the mode of conveyance formerly most generally adopted to pass fee-simple estates; viz., by way of bargain and sale, which has disadvantages not attendant on a conveyance by way of grant; so also has that by lease and release, as will be shewn in treating of those modes of conveyance.

The word *grant,* as an operative word, had always a most extensive signification; it might, as the circumstances of the case should require, operate as a feoffment, surrender, lease, release, bargain and sale, covenant to stand seised, or other assurance; and *vice versa.* But for the purposes of pleading, it is proper to determine in what way the instrument really does operate, and to set it out accordingly; thus, if a lessee should convey the residue of his term to his landlord by use of the words, "release, assign, bargain, sell, give," etc., the instrument should not be pleaded as operating in either of those modes of conveyance, but as a surrender; for as it can so operate (without use of the word surrender), such is its proper legal effect. And so in every case, in correct pleading, the instrument should be pleaded in the character in which it really operates in law, and not in the general words used in it. In some cases it must be so pleaded, as where the grantee may elect between two modes of operation; for though "where a deed may operate in two ways, he to whom it is made may elect in which way he will have it operate, the Court ought not to be left to make the election" (*h*).

There was, however, an objection to the use of the word "grant," from a supposition that it implied a covenant or

(*g*) R.S.O. c. 109, s. 3.
(*h*) *Roe* v. *Pranmar,* 1 Sm. L.C. 492.

warranty for title. But by statute it is declared that the word shall not imply a covenant (*i*).

Conveyances of remainders or reversions dependent on a life or other freehold estate, were always properly made by way of grant, as being in their nature incorporeal, whereof livery could not be made, for the seisin of the freehold was in the immediate freeholder. Such interests are not touched by the statute, and grants of them operate under the common law.

A grant of the immediate freehold will operate under the statute as at common law, that is, it will not *require* the aid of the Statute of Uses to give it effect. Thus, if A., tenant for life, or seised in fee, grant to B. for a consideration, the conveyance will operate as a feoffment or a common law conveyance. And if the conveyance had been to B., to the use of C., the first and only use raised would be in B., which (as presently explained in speaking of the Statute of Uses) would be executed by the statute, and C. thus takes the legal estate.

In cases of informal conveyancing, a question of some difficulty might arise as to whether the conveyance should operate as a common law conveyance, or under the Statute of Uses. Thus if A. seised in fee should, using the words "grant, bargain and sell," for a pecuniary consideration expressed to be paid, convey to B. and his heirs to the use of C. and his heirs, and no intention be apparent as to the party in whom the legal estate is to be vested, or who paid the money, the conveyance would, it seems, operate as at common law (*j*), and the fee, therefore, vest in C.; unless, indeed, an election were made that it should operate as a bargain and sale, for it would seem that in such case an election might be made (*k*).

But if it were manifest on the face of the instrument that B. should take the legal estate, and C. the equitable estate only; then as it can operate as a bargain and sale, it would appear that it will be so construed, to carry out the intention of the parties (*l*). In other words, the deed must be construed, with reference to all its parts, so as to carry out the intention of the parties as appearing from the whole deed, and a choice of

(*i*) R.S.O. c. 109, s. 11.

(*j*) *Haigh* v. *Jaggar*, 16 M. & W. 525.

(*k*) *Heyward's case*, 2 Rep. 35 a; *Fox's case*, 8 Rep. 93 b.; *Seaton* v. *Lunney*, 27 Gr. 176, per Proudfoot, V.C. See further *Ormes' case*, L.R. 8 C.P. 281.

(*l*) *Seaton* v. *Lunney* and cases, supra; *Mitchell* v. *Smellie*, 20 C.P. 389.

operative words, if there are several, will be made to harmonize with the general intention (*m*). The same questions might arise where the word "grant" or the words "bargain and sale" alone are used as the words of conveyance, which, as before mentioned, may operate respectively in various characters In any case of drafting wherein a doubt might possibly arise, the conveyancer might avoid it by declaring in the conveyance, how it should operate, as for instance, by adding to the operative words, "by way of conveyance as at common law," or as the case may require "by way of bargain and sale creating a use."

A singular mistake was made in the original Act of 9 V. 6, as to short forms of conveyance, in that only the word grant was used as the operative word, whereas the immediate freehold did not then, nor till some time afterwards, lie in grant and thus many conveyances drawn under the Act were open to the difficult questions before alluded to as to the placing of the legal estate (*n*). The use of the word "grant" in the short form might, however, have been interpreted as an authority by implication to use that word for the conveyance of the immediate freehold.

6. *Lease.*

A *lease* is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense), made for life, for years, or at will, but always, at common law, for a *less* time than the lessor hath in the premises; for if made for the *whole* interest, it was more properly an assignment than a lease (*o*). But since the passing of the enactment, referred to in the note (*p*), a "reversion in the lessor shall not be necessary in order to create the relation of landlord and tenant;" and a lease may now be made by agreement where the whole interest of the lessor passes to the lessee. The usual words of operation in a lease are "demise, lease, and to farm let." *Farm* or *feorme*, is an old Saxon word, signifying provisions; and it came to be used instead of rent or render, because anciently, the greater part of rents were reserved in provisions; in corn, in

(*m*) See and consider *Hartley* v. *Maddocks*, (1899) 2 Ch. 199.

(*n*) Leith Rl. Prop. Stats. 101.

(*o*) Thus A., tenant for 5 years, sub-let to B. for 7 years, reserving rent. Held, that this was an assignment as regards the superior landlord, who might therefore treat B. as his tenant; though as between A. and B. themselves, the contract to pay rent was valid, but A. having no reversion could not distrain; *Selby* v. *Robinson*, 15 C.P. 390.

(*p*) R.S.O. c. 155, s. 3.

poultry, and the like; till the use of money became more frequent. So, that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme;* though at present, by a gradual departure from the original sense, the word *farm* is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments.

Leases, like other conveyances, were good at common law by parol. But now they are regulated by Statute (*q*).

If the lessee execute a lease with covenants on his part, and the lessor do not execute, so that the lessee does not get, and has not enjoyed, the benefit stipulated for—that is, a lease for a term certain—then, though he have entered, he will not be bound by the lease as to the rent and matters relating to the land (*r*); unless there is an equitable obligation, enforceable against the lessor, to give a proper lease (*s*); but if by payment of rent or otherwise a tenancy from year to year be created, it would seem that the lessee would be liable under his agreements in the lease so far as they could be applied to a tenancy from year to year.

The relationship of landlord and tenant implies an understanding by the lessor that the tenant shall have quiet enjoyment of the demised premises (*t*). Consequently, whether the lessor uses the words or phrase, "demise," or "let" or "agrees to let" there is an implied promise by the landlord that the tenant's possession will not be disturbed by the landlord or anyone claiming title under him (*u*).

And a like covenant will be implied on a mere parol lease (*v*). But the implication of the covenant will endure only during the continuance of the original estate of the lessor; thus, where tenant for life demised for years and died, and before expiry of the lease, the tenant was evicted by the remainderman, it was held that no action lay against the executors of the life tenant on the implied covenant (*w*). It would seem also

(*q*) Ante pp. 123 et seq.

(*r*) *Swatman* v. *Ambler*, 8 Ex. 72; *Toler* v. *Slater*, L.R. 3 Q.B. 42; *Ecclesiastical Commissioners* v. *Merral*, L.R. 4 Ex. 162.

(*s*) *Manchester Brewery Co.* v. *Coombs*, (1901) 2 Ch. 608.

(*t*) *Budd-Scott* v. *Daniel*, (1902) 2 K.B. 351.

(*u*) Ibid; *Markham* v. *Paget*, (1908) 1 Ch. 697.

(*v*) *Bandy* v. *Cartwright*, 8 Ex. 913.

(*w*) *Adams* v. *Gibney*, 6 Bing. 656. See also *Penfold* v. *Abbott*, 23 L.J.N.S.Q.B. 67. It will be observed that in both these cases the lessee had notice of the nature of the estate of his lessor and its consequent liability to determine pending the lease.

that a demise raises an implied covenant to give possession (*x*); and that on an agreement to let, the party so agreeing impliedly promises that he has a good title (*y*). If, as is most usual, there be an express covenant on the subject, no covenant will arise by implication, even though the express covenant be limited to the acts of the lessor and those claiming under him, and is thus less extensive than the covenant the law would imply. In such cases the maxim "*expressum facit cessare tacitum*" applies.

We have before spoken of rents, of their nature, and of remedies therefor, and proceedings of the landlord. The subject of covenants, and the rights of the assignees of the lessor and lessee respectively, are reserved for future consideration.

7. *Exchange.*

An *exchange* is a mutual grant of equal interests, the one in consideration of the other. The word "exchange" is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocution. Separate grants by the parties, the one to the other, with covenants for title, had not the same effect (*a*). The estates exchanged must be equal in quantity; not of *value*, for that is immaterial, but of *interest;* as fee-simple for fee-simple, a lease for twenty years for a lease for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery. If, after an exchange of lands or other hereditaments, either party were evicted of those which were taken by him in exchange, through defect of the other's title, he, by the old law, might return back to the possession of his own, by virtue of the implied condition contained in all exchanges; but not if he had aliened the land taken in exchange (*b*). But now by statute (*c*) an exchange shall not imply any condition in law and every exchange must be made by deed (*d*).

8. *Partition.*

A *partition* is when two or more joint-tenants, or tenants in common, agree to divide the lands so held among them in

(*x*) *Saunders* v. *Roe*, 17 C.P. 344.
(*y*) *Franks* v. *St. John*, L.R. 2 C.P. 376.
(*a*) *Bartram* v. *Whichcote*, 6 Sim. at p. 92.
(*b*) Ibid.
(*c*) R.S.O. c. 109, s. 11.
(*d*) Ibid. s. 9.

severalty, each taking a distinct part. Here, as in some instances, there is a unity of interest, and in all, a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates, which they are to take and enjoy separately. By the common law, coparceners, being compellable to make partition, might have made it by parol only; but joint-tenants and tenants in common must have done it by deed; and in both cases the conveyance must have been perfected by livery of seisin. By statute (*e*) a deed in all cases is necessary.

These are the several species of *primary* or *original* conveyances. Those which remain are of the *secondary* or *derivative* sort which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance.

9. *Secondary Conveyances—Release.*

Releases are a discharge or conveyance of a man's right in lands or tenements to another that hath some former estate in possession. The words generally used therein are "remise, release, and for ever quit-claim."

And these releases may enure, in the following ways: 1. By way of *enlarging an estate;* as if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee. But, in this case, the relessee must be in *possession* of some *estate*, for the release to work upon; for if there be lessee for years, and, before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the relessee, for under a lease operating only at common law, the lessee, till entry, has no complete estate, but a mere *interesse termini*. But a *virtual* possession or possession in law, when the estate is vested and complete, will suffice for a release to operate on; as where the owner in fee for a money consideration should bargain and sell to the lessee for a term; here the lessee, as hereafter explained, will, by virtue of the Statute of Uses, be deemed in possession, at least sufficiently for the operation of a release. Or, perhaps, for the purposes of the question now under consideration, it may be said, that in such cases the estate granted is by force of the statute no longer incomplete as on a lease operating only at

(*e*) R.S.O. c. 109, s. 9.

common law, for want of entry; it is, in fact, by such a lease, and such a release, that the ordinary mode of conveyance by lease and release takes place without entry or livery of seisin. So also a *virtual* possession will suffice, if the relessee has an estate actually vested in him at the time of the release, which would be capable of enlargement by such release if he had the *actual* possession; thus, if a tenant for twenty years makes a lease to another for five years, who enters, a release to the first lessee by his lessor, the owner in fee, is good, for the possession of his lessee was his possession. So if a man makes a lease for years, remainder for years, and the first lessee enters, a release by the lessor to the person in remainder for years is good, to enlarge his estate (*f*). But it has been considered that there can be no release to one in possession as a tenant at sufferance, for though in possession, he has no *estate*. After some fluctuation of opinion (*g*) it has been held that a conveyance in which the only operative words are "remise, release, and quit-claim," is sufficient to pass the fee, and that a pecuniary condition will make it operate as a bargain and sale (*h*).

2. By way of *passing an estate*, or *mitter l'estate;* as when one of two joint-owners releases all his right to the other, that passeth the fee-simple of the whole. And in both cases there must be a privity of estate between the relessor and relessee; that is, their estates must be so related to each other, as to make but one and the same estate in law, as in the cases put above. But if A. lease to B. for life, and B. sublet for years, here a release to the sublessee from A. would be void, as there is no privity between them.

3. By way of *passing a right*, or *mitter le droit;* as if a man is disseised, and releaseth to his disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful.

4. By way of *extinguishment;* as, if my tenant for life make a lease to A. for life, remainder to B. and his heirs, and I release to A.; this extinguishes my right to the reversion, and shall enure to the advantage of B.'s remainder as well of A's particular estate.

(*f*) Co. Litt. 270a. n. 3, by Hargrave.

(*g*) *Doe d. Connor* v. *Connor*, 6 U.C.R. 298; *Doe d. Prince* v. *Girty*, 9 U.C.R. 46; *Nicholson* v. *Dillabough*, 21 U.C.R. 591; *Cameron* v. *Gun*, 25 U.C.R. 77; *Acre* v. *Livingstone*, 26 U.C.R. 282, Hagarty, J. *diss.*; *Collver* v. *Shaw*, 19 Gr. 599.

(*h*) *Pearson* v. *Mulholland*, 17 Ont. R. 502.

5. By way of *entry* and *feoffment;* as, if there be two joint disseisors and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee.

10. *Confirmation.*

A *confirmation* is of a nature allied nearly to a release. Sir Edward Coke defines it to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased; and the words of making it are these, "ratify, approve, and confirm." An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term; here the lease for years is voidable by him in reversion; yet if he hath confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure. The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release which operates by way of enlargement.

A confirmation must be by deed, but under certain circumstances a confirmation may be *implied* by law.

11. *Surrender.*

A *surrender*, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender is the yielding up of a less estate into a greater. It is defined as a yielding up of an estate for life or years to him that hath the immediate reversion or remainder wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words, "surrenders, and yields up." The surrenderor must be in possession; and the surrenderee must have a higher estate, in which the estate surrendered may merge; therefore, tenant for life cannot surrender to him in remainder for years.

At common law a surrender was good by parol (*i*) but by section 3 of the Statute of Frauds (R.S.O. c. 102) all surrenders must be by deed, or note in writing, signed by the party surrendering, or his agent thereunto lawfully authorized by writing; or by act or operation of law. And by the convey-

(*i*) Leith, R.P. Stat. 63.

ancing act (*ii*) "an assignment of a chattel interest in land, and a surrender in writing of land, not being an interest which might by law have been *created* without writing shall be void at law, unless made by deed." Thus a surrender of a parol lease, valid by parol as being excepted from the second section of the Statute of Frauds, will suffice, if in writing, as required by that statute, or if by operation of law, and need not be by deed; but if the interest surrendered were such as could not have been created without writing, as for instance for four years, then a surrender in writing must be by deed.

Before the revision of the Statutes in 1914, there was no exception of parol leases from the requirements that a surrender of a lease should lie by deed. A surrender of a parol lease, therefore, stood on the same footing as surrenders of other leases. But by the present statute (*j*) the provision as to surrenders being made by deed is not to apply to leases not exceeding the term of three years on which two-thirds of the full improved value is reserved as rent, which leases need not be in writing. Consequently the surrender of parol leases may be made as at common law, *i.e.*, by parol.

A surrender by act of law is expressly excepted out of the Statute of Frauds, and is not within the operation of the Revised Statute, which speaks only of surrenders *in writing* (*k*). A surrender in law, or implied surrender, as distinguished from a surrender in fact, may take place by the acts of the parties. Thus, when a lessee for years accepts a lease from his lessor for any term of which any part was included in the old lease, the latter shall be deemed surrendered, for otherwise the new lease could not be valid; moreover, by accepting the new lease, the lessee admits the lessor had power to make it, which could not be unless the first lease were surrendered (*l*). And even though under the second lease, the lessee will take for a less number of years than under the first, this principle will apply; thus, if a lessee for thirty years accept a new lease for ten years, part of such thirty, the first lease is surrendered in law. So also, though such second lease is to commence three years after its execution, the first lease will cease instantly on the execution. And again, where there is a tenancy from year to year determinable on a quarter's notice, and the lessor licenses the tenant to leave in

(*ii*) R.S.O. c. 109, s. 9.
(*j*) R.S.O. c. 102, s. 4.
(*k*) *Lewis* v. *Brooks*, 8 U.C.R. 576.
(*l*) See *Knight* v. *Williams*, (1901) 1 Ch. 256.

the middle of a quarter, and he leaves accordingly, and the lessor takes possession, this is a surrender in law; and the landlord could not recover any part of the current quarter's rent. But where the landlord by parol agrees that the tenant may leave, and the tenant leaves accordingly, but the landlord never takes possession or does anything equivalent to taking possession, there is no surrender, and the Statute of Frauds must govern, and the tenant pay rent accruing due subsequent to his leaving. But if the tenant should leave on such agreement and the landlord re-let to another, this is a taking of possession by the landlord and so equivalent to a surrender (*m*). But if the landlord make a new lease to a stranger, with the oral assent merely of the tenant in possession this does not operate as a surrender in law. It is necessary that the tenant in possession should give up possession to the new tenant at or about the time of the grant of the new lease (*n*).

So, where the tenant gives notice that he will leave the premises, and the landlord assents, and accounts are adjusted, but the tenant does not leave, this is not surrender in law (*o*). The acts relied on as shewing the acceptance by the landlord of a surrender, and as effecting a surrender by operation of law, must be such as are not consistent with the continuance of the tenancy. So that acts done for the preservation of the premises merely by the landlord are not sufficient to evidence a surrender (*p*). In each case the facts themselves determine the question. The mere cancelling of the lease is not sufficient, though a circumstance from which, if coupled with others, a surrender may be implied (*q*). If a lease containing a personal covenant for payment of rent be surrendered, the surrenderor still remains liable to pay the rent which fell due before the surrender, unless under special circumstances or agreement (*r*).

The effect of a surrender is of course that the estate thereby surrendered is gone, but the rights of strangers are, however, preserved. Thus, if lessee for years surrender to the lessor, or acquire from him the reversion, having prior thereto granted a sublease, the rights of the sublessee are not prejudiced.

(*m*) *Crozier* v. *Trevanion*, 13 O.L.R. 79.
(*n*) *Wallis* v. *Hands*, (1893) 2 Ch. 75.
(*o*) *Re Clancy* v. *Schermehorn*, 31 O.L.R. 435.
(*p*) *Ontario Industrial Loan Co.* v. *O'Dea*, 22 App. R. 349.
(*q*) *Doe d. Burr* v. *Denison*, 8 U.C.R. 185.
(*r*) *Bradfield* v. *Hopkins*, 16 C.P. 298.

12. *Assignment—Liability on Covenants.*

An *assignment* is properly a transfer, or making over to another, of the right one has in *any* estate (*s*); but it is usually applied to estates for life or years, and to equitable estates. And it differs from a lease only in this; that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor; subject, however, to an exception as regards both the burden of covenants entered into by the assignor, and the benefit of covenants made to him, in case such covenants do not run with the land. The frequent occurrence of the necessity for applying the law on this subject, induces us to consider it at some length.

There are, apart from express covenants by the patries, *covenants by implication* of law; thus a covenant would be implied after entry, from the words "yielding and paying," on the part of the lessee and his assigns to pay rent to the reversioner. So the word "demise," or "let," or the phrase "agrees to let"(*t*) will, in the absence of an express covenant, raise an implied covenant against the landlord for quiet enjoyment by the lessee and his assigns against all having lawful title. But his liability ceases when he assigns his estate in reversion, which destroys the privity of estate between him and his lessee; so also it ceases with the determination of his estate in reversion, as where a tenant for life should demise for a term, and die before its expiration, no action will lie against his executors on eviction of the tenant after the death (*u*).

Covenants implied by law are subservient to and controlled by express covenants between the parties on the same subject matter; or perhaps it may be stated thus, that no covenant will arise by implication of law on any matter as to which the parties have themselves expressly provided. The maxim applies, "*expressum facit cessare tacitum*"(*v*).

Implied covenants, or, as they are sometimes termed,

(*s*) *Watt* v. *Feader*, 12 C.P. 254.

(*t*) *Budd-Scott* v. *Daniel*, (1902) 2 K.B. 351; *Markham* v. *Paget*, (1908) 1 Ch. 697.

(*u*) *Penfold* v. *Abbott*, 32 L.J.N.S.Q.B. 67, per Wightman, J., and cases there referred to.

(*v*) But where there is a covenant against waste in a lease, it appears that the landlord may sue either on the covenant or in an action on the case in waste: *Defries* v. *Milne*, (1913) 1 Ch. at p. 108.

covenants in law, are binding between the parties by reason of the *privity of estate* between them, and are binding only as long as that privity of estate exists; thus, on the implied covenant to pay rent, to farm in a husband-like manner and use the premises in a tenant-like manner, which are covenants the law will imply (*vv*), the lessee will continue liable only so long as his privity of estate continues, that is, so long as he is lessee; for, if he assign, the privity of estate between him and his landlord ceases, and he is no longer liable for future breaches of implied covenants. The privity of estate after assignment exists between the landlord and the assignee, and the assignee becomes liable in his turn, during its continuance, to the landlord on the implied covenants. On his assigning he ceases to be liable, and so on through all assignments; in other words, his implied covenants always run with the land; and the party who takes the estate, takes, during the time he holds such estate, the burden and the benefit of the implied covenants, which go with the land. It must be here remarked that the original lessee cannot, by destroying the privity of estate between him and his landlord, escape liability on an implied covenant to pay rent, without his lessor's assent, which assent may be expressed or implied (*w*); receipt of rent from the assignee of the lessee by the lessor implies assent to the assignment. No assent of the lessor is requisite to any assignment by any *assignee*, unless the lease contains a covenant against assigning without leave binding on assigns, though such assignee should assign to a pauper.

From what has been said as to the cesser of the liability of the lessee with his estate on his assigning with the lessor's assent, it became important to the lessor to have express covenants under which the lessee should continue liable, notwithstanding and after assignment; and to these, as additional security, it is usual to add a clause of re-entry in the lessor and his assigns on breach; the benefit of which, being a condition subsequent, could not before the statute 32 Hen. VIII. c. 34 (*x*) be taken advantage of by the *assignee* of the lessor.

Express covenants are sometimes termed covenants in deed, as distinguished from covenants in law or implied covenants, and the liability on them arises out of privity of *contract*, as

(*vv*) On the implied obligation of a tenant under a farming lease, see *Williams* v. *Lewis*, (1915) 3 K.B. 493.

(*w*) *Thursby* v. *Plant*, 1 Wms. Saund. 277.

(*x*) Now R.S.O. c. 155, s. 4.

distinguished from the liability on implied covenants arising out of privity of estate.

There is sometimes great difficulty in determining how far, and in what particulars, an assignee of the estate of a covenantor is bound by, or entitled to the benefit of, a covenant; and how far covenants run with the land and reversion.

The subject may be considered under the following heads: 1. Where assigns are within the covenants, though not named; 2. Where they are so only because they are named; 3. Where they are not so, though named.

In considering the above, perhaps no better or more concise statement can be given than that of the Real Property Commissioners in their third report (*y*). Their deduction from the authorities is as follows:—"1st. That in order to make a covenant run strictly with the land, so as to bind the assignee or give him the benefit without his being named, it must relate directly to the land, or to a thing in existence, parcel of the demise (*z*). 2nd. That where it respects a thing not in existence at the time, but which when it comes into esixtence will be annexed to the land, the covenant may be made to bind the assigns by naming them, but will not bind them unless named. 3rd. That when it respects a thing not annexed, nor to be annexed to the land, or a thing collateral or in its nature merely personal, the covenant will not run, that is, it will not bind the assignee nor pass to him, even though he is named."

It may be as well to illustrate the above by cases. Covenants to pay rent, to keep *existing* buildings and fences in repair, to observe particular modes of cultivation on the lessee's part, and the covenant for quiet enjoyment on the lessor's part, are all instances under the first class, in which the covenants run with the land, and the assigns would be within the covenant, though not named; so that the assigns of the lessor or lessee may be liable on and entitled to the benefit of the covenants. Thus, on the covenant to keep in repair the dwelling-house demised, the assignee of the lessee would be liable. And where there was a demise to A., his executors, administrators and assigns, with liberty to A. and his executors, administrators and assigns to build, and A., for himself, his heirs, executors and administrators (not mentioning assigns), covenanted that he, his, etc., and assigns would pay the rent, and that he, his executors or

(*y*) 3rd Rep. p. 45.

(*z*) *Williams* v. *Earle*, L.R. 3 Q.B. at p. 749; and see *West* v. *Dobb*, L.R. 4 Q.B. 634; *Re Robert Stephenson & Co. Ltd.*, (1915) 1 Ch. 802.

administrators would repair both existing buildings and any buildings that might thereafter be erected, it was held that the covenant was a conditional one, viz., to repair new buildings if they were erected; and as they were erected they became part of the demised premises, and the assignee was bound to repair them, though not named in the covenant to repair (*a*). Pollock, C.B., said, "In the present case we think it sufficient to say that as the covenant is not a covenant absolutely to do a new thing, but to do something conditionally, viz., if there are new buildings, to repair them; as when built they will be part of *the thing demised, and consequently the covenant extends to its support*, and as the covenant clearly binds the assignee to repair things *in esse* at the time of the lease, so does it also those *in posse*, and consequently the assignee is bound. There is only one covenant to repair; if the assignee is included as to part why not as to all?"

So also on the covenant for quiet enjoyment the assignee of the lessor would be liable, in case he evicted the tenant without sufficient cause.

Covenants to erect buildings or to plant trees on the premises, are instances under the second class, in which assigns are bound if named, but not bound if not named (*b*). The covenant to erect a building must be distinguished from the covenant to repair buildings that may be erected on the premises demised. In the latter case the assigns are bound, as we have seen, though not named, but in the former case they must be named.

Covenants to repair or build a house *off* the premises demised are cases under the third class, in which the assigns will not be bound though named. An express covenant by the sublessee to repair houses not on the sublet premises does not run with the sublet premises (*c*).

Where the assignee's title is equitable only, he is not bound by the covenants. Thus, where under an agreement to buy a lease the assignee went into possession, it was held that the landlord could not sue in equity on the covenants in the lease. The court has no power, at the instance of the landlord, to extend the rights of the contracting parties beyond the point at

(*a*) *Minshull* v. *Oakes*, 2 H. & N. 793.

(*b*) *Ricketts* v. *Churchwardens of Enfield*, (1909) 1 Ch. 544; *Hubbard* v. *Waldon*, 25 T.L.R. 356.

(*c*) *Dewar* v. *Goodman*, (1907) 1 K.B. 612; (1908) 1 K.B. 94; (1909) A.C. 72.

which they have themselves left them (*d*). Nor can a landlord compel an equitable mortgagee of a lease to take a legal assignment, though the mortgagee has entered under his mortgage and paid rent and otherwise acted as owner of the term (*e*). And a *cestui que trust* of a term occupying the demised premises and paying rent is not equitably liable on the covenants in the lease entered into by the trustee (*f*). In one case B. agreed to demise a hotel to the defendant, and took a covenant from him that he would at all times during the tenancy buy of B. or his successors in business all beer, etc., consumed on the premises. This agreement was signed by the tenant, but not by B. B. afterwards conveyed the premises and all his business, goodwill, etc., to the plaintiff, who sued to restrain the tenant from buying beer elsewhere, and it was held that he was entitled to recover, because as between the tenant and B., and consequently B's. assignee, specific performance would have been adjudged (*g*).

As regards both the burden and benefit to *assignees* on these express covenants running with the land, they depend respectively on the *privity of estate* existing between the parties; and they continue only so long as such privity continues; though, of course, if a breach have happened during the existence of the privity of estate, its subsequent destruction will not destroy the liability for the breach.

As between lessor and lessee there is privity of estate by reason of the demise; and the covenants or agreements create privity of contract. Where the lessee has covenanted and assigned all his term, liability on his covenants will continue, notwithstanding the lessor should have accepted the assignee as his tenant (*h*). The privity of estate will thenceforth exist between the lessor and the assignee, and each will be liable to the other on the covenants in the lease, according to the principles above explained; thus, as regards rent, the lessee will continue liable on his covenant, notwithstanding the lessor may have accepted the assignee as tenant; and the assignee will also be liable for such rent as may fall due whilst (but only

(*d*) *Cox* v. *Bishop*, 8 D.M. & G. 815; *Walters* v. *Northern Coal Co.*, 5 D.M. & G. 629.

(*e*) *Moore* v. *Greg*, 2 De G. & Sm. 304.

(*f*) *Ramage* v. *Womack*, (1900) 1 Q.B. 116.

(*g*) *Manchester Brewery Co.* v. *Coombs*, (1901) 2 Ch. 608.

(*h*) *Montgomery* v. *Spence*, 23 U.C.R. 39, lessee held liable on covenant to repair; *Baynton* v. *Morgan*, 22 Q.B.D. 74.

whilst) assignee, by reason of the privity of estate between him and the lessor (*i*). It is said that as regards covenants contained in the original lease, the privity of contract, or right of action thereon, by or against assignees, is transferred with the privity of estate; and that as regards the right of an assignee of the reversion to sue on the original covenants of the lessee (though *relating* to the land), or to take the benefit of any condition of re-entry, that the statute 32 Hen. VIII. c. 34, s. 4, gave him the benefit of such right of re-entry, and transferred to him the privity of contract on such covenants of the lessee (*j*). Where privity of contract and right of action is thus transferred, it lasts only during the privity of estate, or continuance of the assignee's interest, and again passes with it as regards future breaches.

If the lessee *sublet*, then as the sub-lessee has not the whole estate which the lessee had, there will be no privity of estate between the original lessor and sub-lessee, and as there is also no privity of contract, neither can sue the other (*k*). There is, however, an exception to this, as far as regards the right of action given by the Landlord and Tenant Act (*l*), on merger of the reversion of the sub-lessor, which was before alluded to. By reason of the privity of estate between the parties, and aided sometimes by the operation of the statute 32 Hen. VIII. c. 34, the assignee in deed or in law of assignees *in infinitum* of the lessor can sue and be sued by the assignee in deed or in law of assignees *in infinitum* of the lessee, on any covenant running with the lands and reversion (*m*).

The statute 32 Hen. VIII. c. 34 (*n*) applies only to reversions on leases made by deed (*o*).

The reversion referred to by the statute is the reversion to which the covenantor was entitled at the time of the covenant and the covenant runs with this reversion (*p*).

The covenantor does not escape liability on his covenant,

(*i*) *Magrath* v. *Todd*, 26 U.C.R. 87.

(*j*) Sugden on Vendors, c. 15, s. 1, clauses 16, 17.

(*k*) *Wilson* v. *Twamley*, (1904) 2 K.B. 99.

(*l*) R.S.O. c. 155, s. 18.

(*m*) As to the law generally, see *Spencer's Case*, 1 Smith's Lg. Ca. 52; Sugden on Vendors, c. 15, s. 1. And see, now, R.S.O. c. 155, ss. 4 to 9, and ante, p. 39, *et seq.*

(*n*) Now R.S.O. c. 155, s. 4.

(*o*) *Crane* v. *Batten*, 23 L.T.O.S. 220.

(*p*) *Muller* v. *Trafford*, (1901) 1 Ch. 54.

however, by assigning his reversion, but remains expressly liable thereon after assignment (*q*). But where a purchaser of land covenanted "for himself, his executors, administrators and assigns" that he would erect buildings of a certain character only, etc., and then demised the land to lessees who broke the covenant, it was held that he was not liable for the breach to an assignee of the covenantor (*r*). A covenant by lessees of coal mines to compensate the owner of the surface for injury thereto occasioned by the working of the mines runs with the land, and may be sued on by an assignee of the surface (*s*).

But a contract by the lessor to give an option to the lessee to purchase the fee, does not concern the land regarded as the subject matter of the lease, and therefore is not within the statute (*t*).

13. *Defeasance.*

A *defeasance* is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law, and therefore only indulged; no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent (as rents, of which no seisin could be had till the time of payment); and so also annuities, conditions, warranties, and the like, were always liable to be recalled by defeasances made subsequent to the time of their creation.

(*q*) *Stuart* v. *Joy*, (1901) 1 K.B. 362.
(*r*) *Powell* v. *Hemsley*, (1909) 1 Ch. 80; 2 Ch. 252.
(*s*) *Forster* v. *Elvet Colliery Co.*, (1908) 1 K.B. 629; (1909) A.C. 98.
(*t*) *Woodall* v. *Clifton*, (1905) 2 Ch. 257.

CHAPTER XVIII.

CONVEYANCES UNDER THE STATUTE OF USES.

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(2). *The Statute of Uses, p. 387.*
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1. *Uses and Trusts before the Statute.*

THERE yet remain to be spoken of some few conveyances, which have their force and operation by virtue of the *Statute of Uses*.

Uses and *trusts* are, in their original, of a nature very similar, or rather exactly the same; answering more to the *fidei-commissum* than the *usus fructus* of the civil law; which latter was the temporary right of using a thing, without having the ultimate property, or full dominion of the substance. But the *fidei-commissum*, which usually was created by will, was the disposal of an inheritance to one, in confidence that he should convey it, or dispose of the profits, at the will of another. And it was the business of a particular magistrate, the *prætor fidei-commissarius*, instituted by Augustus, to enforce the observance of this confidence. So that the right thereby given was looked upon as a vested right, and entitled to a remedy from a court of justice; which occasioned that known division of rights by the Roman law, into *jus legitimum*, a legal right, which was remedied by the ordinary course of law; *jus fiduciarium*, a right in trust, for which there was a remedy in conscience; and *jus precarium*, a right in courtesy, for which the remedy was only by intreaty or request. In our law, a use might be ranked under the rights of the second kind; being

a confidence reposed in another who was tenant of the land, or *terre-tenant*, that he should dispose of the land according to the intentions of *cestui que use*, or him to whose use it was granted, and suffer him to take the profits. As, if a feoffment was made to A. and his heirs, to the use of (or in trust for) B. and his heirs; here, at the common law, A. the *terre-tenant* had the legal property and possession of the land, but B. the *cestui que use* was in conscience and equity to have the profits and disposal of it.

This notion was transplanted into England from the civil law, about the close of the reign of Edward III., by means of the foreign ecclesiastics; who introduced it to evade the Statutes of Mortmain, by obtaining grants, not to their religious houses directly, but to *the use of* the religious houses; which the clerical chancellors of those times held to be *fidei-commissa*, and binding in conscience; and therefore assumed the jurisdiction which Augustus had vested in his *prætor*, of compelling the execution of such trusts in the Court of Chancery. And, as it was most easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet, if a testator had enfeoffed another to his own use, and so was possessed of the use only, such was devisable by will. But we have seen how this evasion was crushed in its infancy, by statute 15 Ric. II. c. 5, with respect to the religious houses.

Yet, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes; particularly as it removed the restraint of alienations by will, and permitted the owner of lands in his lifetime to make various designations of their profits, as prudence, or justice, or family convenience, might from time to time require. Till at length, during our long wars in France, and the subsequent civil commotions between the Houses of York and Lancaster, uses grew almost universal; through the desire that men had (when their lives were continually in hazard), of providing for their children by will, and of securing their estates from forfeitures; when each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore, about the reign of Edward IV. (before whose time, Lord Bacon remarks, there are not six cases to be found relating to the doctrine of uses), the courts of equity began to reduce them to something of a regular system.

Originally it was held that the Chancery could give no relief, but against the very person himself intrusted for *cestui que use*, and not against his heir or alienee. This was altered in the reign of Henry VI. with respect to the heir; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use. But purchaser for valuable consideration, without notice, might hold the land discharged of any trust or confidence. And also it was held, that neither the king nor queen, on account of their dignity royal, nor any corporation aggregate, on account of its limited capacity, could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust.

On the other hand, the use itself, or the interest of *cestui que use*, was learnedly refined upon with many elaborate distinctions. And, (1) it was held that nothing could be granted to a use, whereof the use is inseparable from the possession; as annuities, ways, commons, etc.; or whereof the seisin could not be instantly given. (2) A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another, without any consideration, equity presumes that he meant it to the use of himself, unless he expressly declares it to be to the use of another, and then nothing shall be presumed contrary to his own expressions. But if either a good or a valuable consideration appears equity will immediately raise a use correspondent to such consideration. (3) Uses were descendible according to the rules of the common law, in the case of inheritances in possession; for in this and many other respects *æquitas sequitur legem*, and cannot establish a different rule of property from that which the law has established. (4) Uses might be assigned by secret deeds between the parties, or be devised by last will and testament; for as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary; and as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. (5) Furthermore, uses were not liable to any of the feudal burthens; and particularly did not escheat for felony or other defect of blood; for escheats, etc., are the consequence of *tenure*, and uses are *held* of nobody. But the *land* itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by defect; and the lord (as was before

observed) might hold it discharged of the use. (6) No wife could be endowed, or husband have his courtesy, of a use; for no trust was declared for their benefit, at the original grant of the estate. And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives; which was the original of modern jointures. (7) A use could not be extended by writ of *elegit* or other legal process, for the debts of *cestui que use*. For, being merely a creature of equity, the common law, which looked no farther than to the person actually seised of the land, could award no process against it.

It is impracticable, upon our present plan, to pursue the doctrine of uses through all the refinements and niceties which the ingenuity of the times (abounding in subtile disquisitions) deduced from this child of the imagination, when once a departure was permitted from the plain, simple rules of property established by the ancient law. These principal outlines will be fully sufficient to show the ground of Lord Bacon's complaint, that this course of proceeding "was turned to deceive many of their just and reasonable rights. A man that had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds; the husband of his courtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; and the poor tenant of his lease." To remedy these inconveniences abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestui que use*, allowed actions for the freehold to be brought against him, if in the actual pernancy or enjoyment of the profits; made him liable to actions of waste; established his conveyances and leases made without the concurrence of his feoffees; and gave the lord the wardship of his heir, with certain other feudal perquisites.

2. *The Statute of Uses.*

These provisions all tended to consider *cestui que use* as the real owner of the estate; and at length that idea was carried into full effect by the Stat. 27 Hen. VIII. c. 10 (*a*), which is usually called the *Statute of Uses*, or, in conveyances and pleadings, the statute *for transferring uses into possession*. The hint seems to have been derived from what was done at the accession of King Richard III.; who, having, when Duke

(*a*) R.S.O., App. A., p. viii.

of Gloucester, been frequently made a feoffee to uses, would upon the assumption of the Crown (as the law was then understood) have been entitled to hold the lands discharged of the use. But, to obviate so notorious an injustice, an Act of Parliament was immediately passed, which ordained, that where he had been so enfeoffed jointly with other persons, the land should vest in the other feoffees, as if he had never been named; and that, where he stood solely enfeoffed, the estate itself should vest in *cestui que use* in like manner as he had the use. And so the Statute of Henry VIII., after reciting the various inconveniences before mentioned, and many others, enacts, that, "where any person stands or is seised of and in lands, tenements, etc., to the use, confidence or trust, of any other person, or of any body politic . . . in every such case such person and body politic that shall have any such use, confidence or trust, in fee-simple, fee tail, for term of life, or for years, or otherwise, or any use, confidence or trust, in remainder or reversion, shall from thenceforth stand and be seised, deemed and adjudged in lawful seisin, estate and possession of and in the same lands . . . of and in such like estates as they had, or shall have in use, trust or confidence, of or in the same. And the estate, right, title and possession, that was in such person, that was, or shall be, hereafter seised of any lands, tenements or hereditaments, to the use, confidence or trust, of any such person, or of any body politic, shall be from henceforth deemed and adjudged to be in him that hath such use, confidence or trust, after such quality, manner, form and condition, as he had before in or to the use, confidence or trust that was in him." The statute thus *executes* the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession; thereby making *cestui que use* complete owner of the lands and tenements, as well at law as in equity.

The statute having thus not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of *cestui que use* into a legal instead of an equitable ownership, the courts of common law began to take cognizance of uses, instead of sending the party to seek his relief in Chancery. And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted with improvements by the judges of the common law. The same persons only were held capable of being seised to a use, the same considerations were necessary

for raising it, and it could only be raised of the same hereditaments as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in its fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchaser discharged of the use, nor be liable to dower or courtesy, on account of the seisin of such feoffee; because the legal estate never rests in him for a moment, but is instantaneously transferred to *cestui que use* as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, courtesy, and escheat, in consequence of the seisin of *cestui que use*, who was now become the *terre-tenant* also; and they likewise were no longer devisable by will.

3. *Springing Uses.*

The various necessities of mankind induced also the judges very soon to depart from the rigour and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses than upon others. Hence it was adjudged, that the use need not always be executed the instant the conveyance is made; but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time, namely, within such a period as not to transgress the rule against perpetuities; and in the meanwhile the ancient use shall *remain* in the original grantor; as, when lands are conveyed to the use of A. and B., after a marriage shall be had between them; in which case, if the conveyance were a common law conveyance or statutory grant, it would be to a grantee to uses and his heirs to the use of A. and B. after their marriage; or if it were a bargain and sale for money, it would be simply to A. and B. after their marriage. A further instance is afforded by the case of a bargain and sale or covenant to stand seised on the bargainee or covenantee doing any future named act (*b*). These, which are called *springing* uses, differ

(*b*) Shifting, secondary and springing uses, are frequently confounded with each other, and with future or contingent uses. They may, perhaps, be thus classed: 1st. *Shifting or secondary uses*, which take effect in derogation of some other estate, and are either limited expressly by the deed, or are authorized to be created by some person named in the deed. 2nd. *Springing uses*, confining this class to uses limited to arise on a future event, where no *preceding* use is limited, and which do not take effect in

from an executory devise, in that there must be a person seised to such uses at the time when the contingency happens, else they can never be executed by the statute; and therefore, if the estate of the grantee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed for ever; whereas, by an executory devise, the freehold itself is transferred to the future devisee. Therefore, if, in the case first above put, the grantee to uses had taken a mere life estate, and had died, or surrendered his estate to the grantor, the use in favour of A. and B. could not take effect.

4. *Shifting Uses.*

It was also held, that a use, though executed, may change from one to another by circumstances *ex post facto*; as, if A. makes a feoffment or grant to the use of his intended wife and her eldest son, for their lives, upon the marriage the wife takes the whole use in severalty; and, upon the birth of a son, the use is executed jointly in them both. This is sometimes called a *shifting* use. And by shifting use, as by executory devise, a fee may be limited to take effect after and annul a prior fee, so that it be to take effect within the time prescribed by the rule against perpetuities.

5. *Resulting Uses.*

And, whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration, or during such impossibility, and is styled a *resulting* use. As, if a man makes a feoffment or grant to the use of his intended wife for life, with remainder to the use of his first-born son in tail; here, till he marries, the use results back to himself; after marriage, it is executed in the wife for life; and, if she dies without issue, the whole results back to him in fee.

6. *Revocation of Uses.*

It was likewise held that the uses originally declared may be revoked at any future time, and new uses be declared of

derogation of any other interest than that which results to the grantor, or remains in him, in the meantime. 3rd. *Future or contingent uses*, are properly uses to take effect as remainders; for instance, a use to the unborn son of A., after a previous limitation to him for life, or for years, determinable on his life, is a future or contingent use; but yet does not answer the notion of either a shifting or springing use. Contingent uses naturally arose after the statute of 27 Hen. VIII., in imitation of contingent remainders.

the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would allow, was a deed of defeasance coeval with the grant itself, and therefore esteemed a part of it, upon events specifically mentioned. And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead. And this was permitted, partly to indulge the convenience, and partly the caprice, of mankind; who, as Lord Bacon observes, have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards.

7. *No Use upon a Use.*

By this equitable train of decisions in the courts of law, the power of the Court of Chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use," and that when a man bargains and sells his land for money, which raises a use by implication, to a bargainee, the limitation of a further use to another person is repugnant, and therefore void. And therefore, on a feoffment or grant to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity. They seemed not to consider that the instant the first use was executed in B., he became seised to the use of C., which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down through a hundred uses upon uses, till finally executed in the last *cestui que use*.

Again, as the statute mentions only such persons as were *seised* to the use of others, this was held not to extend to terms of years, or other chattel interests, whereof the termor is not *seised*, but only *possessed*; and therefore, if a term of one thousand years be limited to A., to the use of (or in trust for) B., the statute does not execute this use, but leaves it as at common law. And lastly (by more modern resolutions), where lands are given to one and his heirs in trust, to *receive and pay over* the profits to another, this use is not executed by the statute; for the land must remain in the trustee to enable him to perform the trust; and this will be the case, as a general rule, wherever the grantee has some active duty to perform, or control or dis-

cretion to exercise. But on a devise to one and his heirs on trust to *permit* another to receive the profits, it has been held that the latter takes the legal estate.

8. *Trusts.*

Of the two more ancient distinctions, the courts of equity quickly availed themselves. Thus, where there was a feoffment to A. and his heirs to the use of B. and his heirs, in trust for C. and his heirs, it was evident that B. was never intended by the parties to have any beneficial interest; and the *cestui que use* of the term was expressly driven into the Court of Chancery to seek his remedy; and, therefore, that court determined, that though these were not *uses*, which the statute could execute, yet still they were *trusts* in equity, which in conscience ought to be performed. To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of *trusts*; and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of conveyance.

Thus, if a conveyance of lands be made, operating as a common law conveyance, or as a grant, to A. and his heirs, to, the use of B. and his heirs, the first use raised will be in A. and the statute will execute it and give B. the legal estate. If the conveyance had gone on to declare a further use in favour of C. and his heirs, here would have been a use upon a use, which second use the statute cannot execute, being exhausted by the execution of the first; and such second use would be a trust; B. being trustee, and C. *cestui que trust.* If the conveyance had been worded thus: To A. and his heirs, to the use of A. and his heirs, to the use of B. and his heirs, here A. would retain the legal estate, becoming, however, by force of the second use declared, which is unexecuted, trustee for B. For it makes no difference that the first use declared is in favour of the grantee himself instead of in favour of some other; for all practical purposes as regards the person in whose favour the second use (or trust) is limited, it is as efficacious if declared in favour of the grantee, as of some other; and, indeed, the common mode of expression where B. is to take only a trust estate, is "*unto and to the use of* A. and his heirs in trust for B. and his heirs," which is tantamount to saying, "unto A. and his heirs, to the use of A. and his heirs in trust," etc.

The insertion of five monosyllables in a conveyance thus

defeats the great object of the statute, which was to prevent the separation of the beneficial right from the legal estate, and revert to the singleness and simplicity of the common law; and this it proposed to do by abolishing trusts or uses, declaring that the person "to the use, confidence, or trust" of whom any other should be seised, should have "the legal seisin, estate, and possession." If the courts of law had held (which as above mentioned by Sir W. Blackstone, they well might have held) that the second use was not a mere nullity, and that the statute might as well execute any second or subsequent use as the first, then the statute would have operated as intended (*c*).

The only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only ancient conveyance of corporeal freeholds; the security and notoriety of which public investiture abundantly overpaid the labour of going to the land, or of sending an attorney in one's stead.

The student will bear in mind that though the words *use* and *trust* usually convey quite distinct meanings as to the nature of the estates or interests, as may be seen from what is above stated; still for the purposes of execution into possession by force of the statute there may be no difference between them; that is, the use of the word *trust* instead of the word *use*, will not prevent the person in whose favour such trust may be declared from taking the legal estate instead of a trust or equit-

(*c*) The holding that the second use was not executed, Mr. Watkins says, must have surprised every one who was not sufficiently learned to have lost his common sense; and Chief Baron Pollock, in *Mallett* v. *Bateman*, 12 Jur. N.S. 122, says of the construction placed on the statute that it was "a mistake, the effect of which was to add three words to almost every conveyance, and to extend greatly the dominion of the Court of Chancery." When, therefore, common law lawyers, or men as eminent as Mr. Hayes, speak of "the all absorbing jurisdiction of equity, ever seeking to insinuate its jurisdiction" (Hayes' Convey. p. 163); they may be willing to overlook, among other things, the fact that it was the courts of *law* who expressly continued, if they did not create, the jurisdiction of equity in one of its widest fields; and *that*, by placing a construction on the statute, which Mr. Watkins speaks of as above, and to which Mr. Hayes himself (p. 54) alludes as "mocking the reason and spirit of the statute," "if indeed it did not militate against the plainest principles of interpretation." Trusts at the present day, however, must necessarily exist, and it is fortunate perhaps that the courts of law put the construction they did on the statute, thereby continuing the existence of trusts; how, otherwise, for instance, could a testator devising his lands benefit an improvident son, and at the same time secure him permanently against the results of his own improvidence?

able estate, by force of the statute, in a case where he would have taken it if the word *use* had been employed. Under a common law conveyance to A. and his heirs *in trust* for B. and his heirs, the statute will execute the use under the name of trust, and B. will take the legal estate (*d*); its language is, "where any person shall be seised of any lands, etc., to the use, confidence, or *trust* of any other," etc.; and *vice versa*, the employment of the word *use* will not *per se* prevent the person in whose favour it is declared taking more than a trust estate where the interpretation of the conveyance requires it; as on a bargain and sale to A. and his heirs to the use of B. and his heirs.

The attention of the student should also be called to the difference between limitations to uses by conveyances operating at common law by transmutation of possession, or by way of grant (which operates in the same way as a common law conveyance), and by conveyances operating under the Statute of Uses, of which we have yet to speak. The distinction is most important, because on the character in which the instrument operates will depend the placing of the legal and equitable estates. Thus, under a feoffment or grant to A. and his heirs to the use of B. and his heirs, the latter takes the legal estate, for the first and only use raised is in A. But had the conveyance been by bargain and sale, or covenant to stand seised, and could it only so operate, A. would take the legal, and B. merely the equitable estate; for, as we shall see presently, under such conveyances the first use raised is in the bargainor or covenantor, and consequently the use declared in favour of B. is unexecuted by the statute, and is a mere trust.

The courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. The Statute of Frauds having required that every declaration, assignment or grant, of any trust in lands or hereditaments (except such as arise from implication or construction of law), shall be made in writing signed by the party, or by his written will; the courts now consider a trust estate (either when expressly declared, or resulting by such implication), as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law; and, by a long series of uniform determinations, with some assistance from the legislature, they have raised a new system of rational jurisprudence,

(*d*) *Doe d. Snyder* v. *Masters*, 8 U.C.R. 55.

by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds. The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice; which, as *cestui que trust* is generally in possession of the land, and the trusts can be set out on registry, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments, recognizances (by the express provision of the Statute of Frauds), to forfeiture, to leases and other incumbrances, nay, even to the courtesy of the husband, and dower in equity, as if it was an estate at law. It hath also been held not liable to escheat to the lord, in consequence of attainder or want of heirs; because the trust could never be intended for his benefit. But let us now return to the Statute of Uses.

9. *Covenant to Stand Seised.*

Another species of conveyance, called a *covenant to stand seised to uses*, has its present operation under the statute. By this conveyance a man seised of lands, covenants in consideration of blood or marriage, that he will stand seised of the same to the use of his child, wife or kinsman; for life, in tail, or in fee. Here the covenantor, being seised to the use of the person indicated, the statute executes the use at once; and the party intended to be benefited, having thus acquired the use, the statute transfers the legal seisin and he is thereby put at once into corporal possession of the land, without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate when made upon such weighty and interesting considerations as those of blood or marriage.

A use will not arise on a covenant to stand seised to the use of a son-in-law, uncle-in-law, or brother-in-law, for there is no affinity of blood. Where a covenant to stand seised fails to take effect as such, it may yet operate as a bargain and sale, if there be a money consideration expressed. A man could not at common law covenant with his wife to stand seised to her use, for husband and wife are one in law, and a man cannot covenant with himself; the covenant should be with some third person, to stand seised to the use of the wife. This form is wholly out of use; it was always confined in its use by the consideration required, and had the disadvantage (which attends also a bargain and sale), that powers cannot be en-

grafted on it. A knowledge of its operation might be of service; as where a bargain and sale should fail to take effect as such, for want of a money consideration, it might yet operate as a covenant to stand seised, if on consideration of blood or marriage, of which parol evidence might be given; and operating thus, the legal estate would remain as intended, which would not be the case if it were to operate (as it might) as a grant.

10. *Bargain and Sale.*

The conveyance by way of *bargain and sale* also has its operation under the statute. In England for the passing of freehold estates in possession, it was in less general use than the conveyance by lease and release; or by grant, where estates in reversion or remainder were conveyed. The conveyance by grant is now used in every case where the conveyances by bargain and sale, and by lease and release were formerly used. The latter modes of conveyance have disadvantages which do not attend the conveyance by grant, and in many cases they fail to take effect where a grant will operate.

The following history of conveyance by way of bargain and sale, and the legislative enactments to remedy its inconveniences, will serve to show the disadvantages which were attendant upon it when first made use of in Canada; many of these have since been removed by statutes; some yet remain.

The bargain and sale was in fact what its name implies—a mere contract whereby the purchaser or bargainee paid a sum of money to the vendor or bargainor for the land. Prior to the Statute of Enrolments, hereafter referred to, no writing or deed was requisite to create, or rather, furnish evidence of, the raising of a use, but the mere verbal bargain and payment of the consideration were sufficient to raise a use in the bargainor, to hold for the use of the bargainee; that is to say, the bargainor remained seised of the land, but having received a money consideration for it, was seised to or for the use of the bargainee. Upon this the Court of Chancery fastened, and declared the bargainor a trustee for the bargainee, and that the bargainee was entitled to the *beneficial use* of the land, whilst the bargainor remained seised of the *legal estate*. And as the bargain, before the Statute of Uses, unless otherwise expressed, implied a bargain for a fee-simple, no words of inheritance were requisite to raise a use for a fee. The effect of the Statute of Uses was, as explained, to execute the use. That is to say,

the seisin of the bargainor was immediately upon payment of the money transferred by the Statute of Uses to him who had the use, *i.e.*, the bargainee. The result, of course, was that the bargainee took the legal estate without any deed or writing by the mere effect of the bargain, and of the payment of the consideration. This being a secret mode of conveyance, a mode which was repugnant to the principles of the common law, and to the ideas of our ancestors, accustomed as they were to the publicity of the conveyance by way of feoffment and livery of seisin, the Statute of 27 Hen. VIII. c. 16, called the Statute of Enrolments, was passed; which required every bargain and sale of an *inheritance or freehold* to be by *deed indented* and *enrolled* within six lunar months after its date in one of the courts at Westminster, or before justices and clerk of the peace in the county where the land lay.

In this province registration was substituted for enrolment, and it was necessary to pass the title that a bargain and sale should have been by indenture and registered. The requirement that the deed should be an indenture was disposed of by a statute which provided that where land was sold under "any deed of bargain and sale" and such deed was registered, it should be a good and valid conveyance, and a deed poll was held to be sufficient (*e*). And finally registration as a requisite to the validity of the deed was dispensed with (*f*).

By R.S.O. (1897) c. 119, s. 14, "no deed of bargain and sale . . . shall require enrolment or registration . . . for the mere purpose of rendering such bargain and sale a valid and effectual conveyance," etc. This section has not been repealed (*g*), though it has not been continued in the present revision. The implication arising from the use of the word "deed" in the section is that any deed will be sufficient, and therefore a deed poll will be effectual if it answers the other requirements of a bargain and sale.

There was a further difficulty attending the conveyance by bargain and sale, which also required legislative remedy, namely, that it was doubtful whether a corporation could convey by this mode of assurance. This was chiefly in consequence of the wording of the Statute of Uses being "that where any *person* shall stand seised to the use of another, or of

(*e*) *Rogers* v. *Barnum*, 5 O.S. 252.
(*f*) *Doe d. Loucks* v. *Fisher*, 2 U.C.R. 470.
(*g*) See 1 Geo. V. c. 25, s. 53.

a body politic or corporate," etc.; and it was held that the word "person" did not include corporations, so that the statute did not apply to a corporation, and the use raised in the corporation would not be executed by the statute, but left as at common law, a mere trust. This was remedied by statute (*h*), declaring that corporations aggregate might convey by bargain and sale; but the statute does not say, as the Statute of Uses says in effect, that a use raised shall be executed in favour of the *cestui que use*. There is in strictness no use executed; the Act simply empowers a corporation to convey in a particular mode. It is generally considered that a corporation cannot be seised to a use.

The chief objections at the present day to the bargain and sale, which do not apply to the conveyance by way of lease and release, or of grant, are: First, that it is essential to the conveyance by way of bargain and sale that a consideration be expressed, and it must be a money consideration, or money's worth, to raise the use. Secondly, as presently explained, no general powers, as powers of appointment, etc., etc., can be engrafted on the deed of bargain and sale.

The first objection, it is sometimes said, depends on the necessity of some consideration passing to the bargainor to raise a use, and make him stand seised to the use of the bargainee; and it must have been money, or money's worth; natural love and affection would not suffice; though in the latter case the deed might operate as a covenant to stand seised. But in fact if there is no consideration there can be no bargain and sale. What is meant is that if it be desired to make use of the conveyance known as the bargain and sale there must be a money consideration expressed. And in the absence of any consideration, the conveyance may take effect as a *grant*; but in such a case the *legal estate* may not vest in the same person if the instrument operated as intended, namely, as a bargain and sale. Thus if A. bargain and sell to B. and his heirs, to the use of C. and his heirs, and the conveyance operate in that way, B. will take the legal, and C. the equitable estate; for in a conveyance by bargain and sale every use declared is a use on a use, the first use being raised in the bargainor; but if it operate as a grant, C. will take the legal estate.

As to the second objection; general powers, as to grant leases, or of appointment, cannot be engrafted on a bargain

(*h*) R.S.O. c. 109, s. 20.

and sale, or covenant to stand seised, as they can on a grant, or release. Thus, a bargain and sale to A., to such uses as he, or any other should appoint, and till appointment to him in fee, would be ineffectual, as such, to convey the legal estate to A.'s appointee; for the uses which A. may appoint are uses upon a use already raised, and the statute will not execute them.

An incorporeal, as well as a corporeal, hereditament can be conveyed by bargain and sale, but it must be *in esse* at the time of the conveyance. Thus, if A., being the owner of lot one, with a right of way over lot two, bargains and sells lot one to B., the right of way over lot two will pass, because A. is seised of lot one and of the right of way as appurtenant thereto. But if A., being the owner of lots one and two, bargains and sells lot one to B. together with a right of way over lot two, no right of way will pass, because it does not exist when A. makes the bargain and sale, and therefore he cannot stand seised of what does not exist (*i*).

11. *Lease and Release.*

On passing the Statute of Enrolments clandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious, till about six years before; which also occasioned them to be overlooked in framing the Statute of Uses; and therefore bargains and sales of chattel interests are not directed to be enrolled. But how impossible it is to foresee, and provide against *all* the consequences of innovations! This omission gave rise to another species of conveyance, viz., by *lease and release*; first invented by Serjeant Moore, soon after the Statute of Uses, and in England the most common of any, till conveyance by grant came into vogue. It is thus contrived: a lease, or rather bargain and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee. Now, this, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the *use* of the term for a year; and the statute immediately annexes the *possession* and gives a vested interest. He, therefore, being thus in possession is capable of receiving a release of the freehold and reversion; which, we have seen before, must be made to a tenant in possession, or to one having a vested estate; and, accordingly, the next day, or immediately after the lease, a release is granted to him. This

(*i*) *Beaudely* v. *Brook*, Cro. Jac. 189.

is held to supply the place of livery of seisin; and so a conveyance by lease and release is said to amount to a feoffment.

Thus the transfer of land could be made in fee without the notoriety of livery, and without enrolment or public ceremony, and was in fact entirely secret.

12. *Operation of the Statute of Uses.*

In order that the statute may operate to annex the seisin to the use, several conditions must be present.

There must be a *person seised*; and therefore a corporation could not be a grantee to uses, nor (before the statute R.S.O. c. 109, s. 20) could it convey by bargain and sale. There must be a freehold estate limited to the grantee to uses, for a lessee for years is "possessed" of the term and is not within the words of the statute. A grant may be made to A. and his heirs to the use of B. for ten years, and the statute will execute this use, because A. is seised, and seised to the use of B. But, if a lease is made to A. for 1,000 years to the use of B. for ten years, the statute will not execute this use because A. is not seised, but is only possessed of a term, and this conveyance, therefore, remains as at common law.

There must be a *cestui que use* who is a different person from the grantee to uses. The words of the statute are: "Where any person . . . is seised . . . to the use, confidence or trust, of any other person, or of any body politic, etc." Therefore, where land is granted unto and to the use of A., his heirs and assigns, the conveyance derives no benefit from the Statute of Uses, but operates at common law (*j*). But, apart from the words of the statute, the effect of such a conveyance is to convey to A. the whole legal and beneficial interests in the land, and the declaration of a use in his favour can give him nothing more, and is therefore ineffective.

But, though the declaration is ineffective in the sense already explained, it has a preventive effect. Thus, where such a conveyance is made without consideration, the use being expressly declared in favour of A. prevents a resulting use to the grantor which would happen by implication if no use were declared. And where the conveyance is made with consideration, the declaration of a use in favour of the grantee to uses prevents the execution of a second use in favour of some other

(*j*) *Doe d. Lloyd* v. *Passingham*, 6 B. & C. 305; *Orme's Case*, L.R. 8 C.P. 281, and cases cited; *Savill Brothers* v. *Bethell*, (1902) 2 Ch. 523.

person. Thus, if a grant be made unto and to the use of A., his heirs and assigns, to the use of B., his heirs and assigns, the declaration of the use in favour of A. will prevent the execution of the second use in favour of B., and the latter will only take an equitable estate (*k*).

There must be a use created either by express words or by implication. It is indifferent which of the words, "use," "confidence," or "trust," is employed, for the statute mentions all three (*l*). But it is not essential that any one of them should be used, if the intention is clear that a use is to be created (*m*).

The property of which the use is declared must be the property of the person creating the use at the time, and a use cannot be created of property to be acquired after the declaration (*n*).

The extent of the use is controlled by the extent of the estate of the grantee to uses. Thus, if land is conveyed to the grantee to uses in fee-simple, uses may be declared thereon which will exhaust the fee. But if less than a fee-simple is conveyed to the grantee to uses, the uses to be declared must be restricted accordingly. Thus, on a grant to A. for life, the uses to be declared must be restricted to the duration of A.'s lifetime, because the operation of the statute is merely to pass on the legal seisin to the *cestui que use*.

Where the uses declared are for a particular estate with a vested remainder, they are executed at once; but where a contingent remainder is declared in the use, it cannot be executed at once, as there is no person ascertained to whom the seisin can pass. Yet all agree that such remainders will take effect as they arise. Many theories were therefore evolved to account for the operation of the statute; and amongst these was the theory that a possibility of seisin or *scintilla juris* remained in the feoffee to uses ready to serve the remainders as they arose. This is now regulated by statute (*o*), which provides that all uses shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person

(*k*) *Cooper* v. *Kynock*, 7 Ch. App. 398; *Re Nutt's Settlement*, (1915) 2 Ch. 431.

(*l*) See *Spencer* v. *Registrar of Titles*, (1906) A.C. 503.

(*m*) Sanders on Uses, 98.

(*n*) Sanders on Uses, 107.

(*o*) R.S.O. c. 109, s. 34.

seised to the uses, and the existence of a *scintilla juris* shall not be necessary to give effect to future or contingent or executory uses.

Where a conveyance is made to A. and his heirs, to such uses as B. may appoint, and until appointment to the use of A., his heirs and assigns, A. in this case is tenant in fee-simple in the absence of any declaration or appointment of uses; and a trespasser for the statutory period will extinguish his estate, and consequently prevent the further operation of the conveyance, and no uses can be subsequently declared, and the statute just cited does not apply to save the potential future estates (*p*).

(*p*) *Thuresson* v. *Thuresson*, 2 O.L.R. 637.

CHAPTER XIX.

OF INHERITANCE AND SUCCESSION.

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(4). *Interests within 15 Victoriæ, c. 6, p. 405.*
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1. *General Remarks.*

In treating of the law of descent four periods of time are to be observed. The first period is that prior to 1st July, 1834, during which the common law rules of descent were in force. The second period extended from 1st July, 1834, to 1st January, 1852, during which the same rules, as modified by statute, still governed.

The third period extended from the latter date to 1st July, 1886, during which the rules provided by the Inheritance Act regulated descent. It abolished primogeniture, and cast the

land on all the children equally. The fourth period is that covered by the Devolution of Estates Act, which came into force on 1st July, 1886. The two main features of this enactment are that inheritance is abolished and the personal representative succeeds to the realty; and the land is distributed as personalty is distributed amongst the next of kin.

The statutes of Wm. IV. and Victoria have not been repealed (*a*), but remain in force to be applied as the occasion may warrant.

2. *Descent under 4 Wm. IV. c. 1.*

Before considering the Inheritance Act of 1852, it may be well to point out the chief characteristics of the Statute of Wm. IV. (*b*), as they serve by way of contrast to render more striking the provisions of the Statute of Victoria. Descent was to be traced from the purchaser, instead of from the person last actually seised, as at common law; the heir taking from his ancestor by devise took as devisee and not as heir, as at common law; attainder was not to interrupt the course of descent; proof of entry by the heir after his ancestor's death was not necessary in order to prove title in such heir; no brother or sister should inherit immediately from his or her brother or sister, but descent was to be traced through the parent; lineal ancestors were made capable of inheriting from their issue; the male line was preferred to the female; the half-blood were rendered capable of inheriting after the whole blood of the same degree. The great lapse of time since this law was superseded is a sufficient excuse for not enlarging upon it.

3. *Interests within 4 Wm. IV. c. 1.*

It is important, however, to observe what interests are included within this statute as well as the more modern enactments, for where the old law is not superseded by the Inheritance Act, the former must still be in force, and where in turn the Inheritance Act has not been superseded by *The Devolution of Estates Act*, it must still govern. It is much to be lamented that each new enactment should not have been as comprehensive as its predecessors, so as to have covered the same ground. But such is not the case.

The statute of Wm. IV. defines "land" for its purposes as

(*a*) 10 Edw. VII. c. 56, s. 35.
(*b*) R.S.O. (1897) c. 127, ss. 22 to 36.

extending to "messuages, and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, title and interests, or any of them, are in possession, reversion, remainder, or contingency" (*c*).

4. *Interests within 15 Victoria, c. 6.*

The statute of Victoria includes, in the term "estate," "every interest and right, legal and equitable, held in fee-simple or for the life of another [except trust estates] in lands, tenements and hereditaments" (*d*).

The condition of this latter enactment seems to be that whatever the estate, right or interest may be, it should be capable of being held in fee-simple or for the life of another. This seems especially to refer to estates and other like interests in land, and not to rights of entry or action. There were many inheritable interests and rights at common law, not held in fee-simple, and though the statute of Wm. IV. recognizes this and provides for them, the statute of Victoria does not do so. And this became all the more noticeable when the two statutes were consolidated in one, for the provisions of each were thus brought into contrast. Thus the earlier statute included a right or title of entry or action which is never "held in fee-simple or for the life of another," although the land with respect to which the right of entry or action may exist may be so held. Similarly, a bare seisin, that of a trespasser, which at common law was inheritable, and which is included in the statute of Wm. IV. under the term "any other interest capable of being inherited," can hardly be said to answer the description in the later enactment of "an interest or right held in fee-simple."

With respect to rights of entry or action, there is perhaps no substantial difference. Thus, if a person having the right of entry or action on a disseisin died intestate before the statute of Victoria, the right of entry or action would, as such, descend

(*c*) R.S.O. (1897) c. 127, s. 22, s.-s. 1.
(*d*) Ibid. s. 38, s.-s. 1.

to his heir, under the statute of Wm. IV. But, under the statute of Victoria such rights are not *eo nomine* included; but the legal estate in the land would descend thereunder, and the heirs could bring their action to recover the land. The distinction is more in nomenclature of this right than in its substance.

But the case of a disseisor is more serious. If a disseisor of nine years' standing should die intestate, would his wrongful seisin pass to his eldest son or to all his children equally? It is true that when a disseisor gets possession of land he has by fiction of law "a freehold by wrong," so as to entitle him to defend his possession against the whole world except the true owner. And this tortious fee is also inheritable. But does it fall within the designation of a right or interest held in fee-simple or for the life of another? The conjunction by the statute of the two classes of interests indicates that rightful estates and interests only were affected. The estate, right or interest must be of such a nature that it may be held *either* in fee-simple *or* for the life of another. No wrongful interest can be held for the life of another. Therefore no tortious interest is referred to.

It was assumed in practice, rather than established by law, that all the children succeeded to such a seisin equally, and, by adding their own wrongful possession to that of their ancestor for the statutory period, extinguished the paper title and became joint tenants. It seems more than probable that if the statute received its strict construction the wrongful seisin would have been held to descend to the eldest son, and that his possession for the remainder of the statutory period would have given him the possessory title.

Rights of entry for condition broken were within the enactment of Wm. IV. (*e*), but there was no corresponding enactment in the statute of Victoria. The condition of the latter enactment, as already stated, seemed to be that the inheritable interest must be "held in fee-simple or for the life of another," plainly referring to estates, or other like interests in land. It was, therefore, a serious question whether, upon the death of an intestate, after the breach of a condition entitling him to re-enter, his right of entry would not still have descended, according to the common law as modified by the statute of Wm. IV.

(*e*) R.S.O. (1897) c. 127, s. 22, s.-s. 1; *Baldwin* v. *Wanzer*, 22 Ont. R. at p. 641.

The omission is rendered the more striking when we find that such rights of entry are especially made capable of being disposed of by will (*f*). And the same may be said of possibilities.

5. *From Whom Descent is Traced.*

It is first to be noticed that where descent is being traced, it must be traced from the person last seised. "Where any person dies *seised in fee-simple* or *for the life of another* of any real estate, etc." (*g*). At common law the descent was rigorously traced from the person last *actually* seised. A seisin in law was not sufficient, a seisin in deed being necessary. Thus, if A., an illegitimate person, died seised, leaving his wife and wife's brother, and B., his son and heir at law; and B., never having actually entered, died intestate; at common law the descent had to be traced from A., who was last actually seised, and consequently the land would escheat, for the wife and her relatives could not take by descent from A.

Again, if A., a purchaser, granted a life estate and died intestate seised of the reversion in fee, leaving his son, B., and his father, C., him surviving, the reversion would descend to the son, B.; but if B. died pending the life estate, not having had any actual seisin of the reversion, the descent would be traced again from A., who was the person last seised.

Under the statute of Victoria, if the word "seised" were to be interpreted in the same strict fashion, the same consequences would follow. But the statute provides for the inheritance of equitable as well as legal estates, and the word "seised" is not properly nor strictly applicable to such an estate. Therefore, the word "seised" must be taken in the sense of "entitled to."

In the cases above put, then, B., in the first place, being entitled by the death of his ancestor, would die seised, *i.e.*, entitled, within the meaning of the statute, and the estate, instead of escheating, would go to his mother. In the second case, B., being entitled in fee-simple to a hereditament, viz., a reversion in fee, would transmit it to his heirs, and descent would not be traced as at common law.

It will have been noticed, as already pointed out, that (to paraphrase the enactment) it is only where "any person dies entitled in fee simple . . . to any real estate," that this

(*f*) R.S.O. c. 120, s. 9.
(*g*) R.S.O. (1897) c. 127, s. 41.

Act applies. A disseisor is not entitled in fee-simple, although at common law his wrongful seisin is inheritable, and he is therefore not within the Act, but his seisin would pass at common law as affected by the statute of Wm. IV.

6. *Mode of Descent.*

Having ascertained the person from whom descent is to be traced, the next consideration is the method or scheme of descent. The statute declares that the estate shall descend, "firstly, to the lineal descendants of the intestate, and those claiming by or under them *per stirpes*; secondly, to his father; thirdly, to his mother; and fourthly, to his collateral relatives—subject in all cases to the rules and regulations hereinafter prescribed" (*h*).

7. *Where there are Descendants.*

It would appear from this clause that the scheme of the statute was to divide the land in all cases by roots or families, *per stirpes*. But, in fact, the next three clauses provide an entirely different mode. If all the descendants are related in equal degree to the intestate, they take *per capita*. If in unequal degree, then the inheritance descends to the living children, and the descendants of deceased children, so that each living child takes the share which he would have taken if all the children who had died leaving issue had been living, and so that the descendants of each deceased child take the share which their parent would have received if living. And so on, where the descendants are more remote than children and grandchildren.

Thus, A. dies leaving four daughters. They all take equally. If the four daughters died before A., leaving, the first, one child; the second, two; the third, three; and the fourth, four; the grandchildren of A. all being in equal degree would take *per capita*—each one-tenth (*i*). But if A. dies leaving two daughters him surviving, one grandson, son of a deceased daughter, and two grand-daughters, children of another deceased daughter; here the descendants being of unequal degrees of consanguinity to the intestate do not take *per capita*, but *per stirpes*, *i.e.*, the estate is divided into four parts, each surviving daughter taking one-fourth part, the

(*h*) S. 41.
(*i*) S. 42.

grandson one-fourth, and the two grand-daughters each one-eighth, or one-fourth divided between them (*j*). And the rule is the same with more remote descendants (*k*).

8. *Where there are no Descendants.*

Where there are no descendants of the intestate, but he leaves a father or mother, the estate, generally speaking, goes to the father or mother absolutely; but if there are brothers and sisters or their descendants, then to the father or mother for life, remainder to the brothers and sisters or their descendants (*l*).

Before entering further upon the consideration of these clauses, it will be necessary to consider the clause which defines what is meant by the expressions, "where the estate came to the intestate on the part of his father," or "mother" (*m*). They are defined as meaning when the estate came to the intestate by "devise, gift or descent from the parent referred to, or from any relative of the blood of such parent;" and thus is preserved a relic of the preference formerly given to the blood of the purchaser, as the inheritance is cast upon the paternal or maternal line from which it was originally derived, as the case may be, in preference to the other.

It will be observed that this scheme considerably alters and enlarges the mode, by which, under the Statute of Wm. IV., a person was considered as taking an estate *ex parte materna*, or *paterna*, as the case might be. He was before considered as so taking, in those cases *only* where he took by descent, tracing from the paternal or maternal ancestor as the purchaser; but if (at least after the Statute of Wm. IV.) he took by gift or devise from such ancestor, then the estate was not considered as descending to him at all, but he took as purchaser, and parties claiming on his death had to make themselves heirs to him as the purchaser, and to no one else, and if they could not, the estate would escheat.

The change effected by the Statute of Victoria is very great, as will be seen by considering one simple and common case. Suppose that the estate had been either devised or given to John Stiles, by his mother, or any relative of hers; here, under the Statute of Wm. IV., John Stiles would have

(*j*) S. 43.
(*k*) S. 44.
(*l*) Ss. 45, 46, 48.
(*m*) S. 40.

been considered not as taking *ex parte materna* at all, but as a purchaser; and the result was that all the paternal ancestors and their descendants, however remote, must have failed before any maternal ancestor, or any one claiming through such could have taken. Now, however, in such a case, the estate is to be considered as having descended *ex parte materna*, and the paternal line are excluded; except only that if the mother be dead, and there be any brothers or sisters of the intestate, or any of their descendants, the father will take a life estate; or if the mother be dead, and there be no brothers or sisters of the intestate, or their descendants, then the estate will go to the father; and paternal are postponed to maternal uncles and aunts.

Questions may arise as to the construction of section 40, in those cases where the intestate has taken from some person on the paternal or maternal side, who in turn has taken from the other side, and the question would be which side would have preference in distribution of the inheritance. Thus, assume the intestate has acquired the estate by devise, gift or descent, from his mother, who acquired it in either of those modes from her husband, the father of the intestate; the only relatives are brothers and sisters of the mother, and brothers and sisters of the father. In this case either side will take to the exclusion of the other, according to whether the inheritance is to be considered as having come to the intestate on the part of his father, or of his mother. Again, if in the case above supposed there were brothers of the half-blood of the intestate on his father's side would the half-blood be excluded under section 54, in which section however the word "ancestors" is made use of? Many other instances might be put under the various sections, but the above will serve to illustrate the question. It is apprehended, on the language and construction of the Act, that in such cases the person from whom the intestate immediately takes is the *propositus*, who alone will be regarded, and that you cannot change this by showing how the estate was acquired, as you can in cases of inheritance under section 4 of the statute of Wm. IV. For the estate came to the intestate "on the part of his mother," that is, "by devise from the parent referred to," within the exact words of the interpretation clause, s. 40.

A further question is, whether, where the intestate has acquired an ancestral estate by gift, devise or descent coming under section 40, alienation and reacquisition by him, which

under the old law would have made him a new stock of descent, and also a purchaser, and deprived the estate of its former hereditary qualities on the paternal or maternal side, will equally operate under this Act to cause all consideration of the estate being ancestral to be rejected. This question may arise in various shapes; thus, if the intestate had sold the estate, there can be no doubt that the proceeds, though earmarked, would go as personal estate under the Statute of Distributions. If the proceeds were laid out in other real estate, this would have no ancestral quality in it, and under no circumstances would there be a preference to the ancestral paternal or maternal side. It would seem to follow, especially on applying the former law, that the result would be the same if the intestate had conveyed to some one, and forthwith, or at any time afterwards, obtained a re-conveyance; and consequently, that there would be the same result if the estate revested through the medium of the Statute of Uses, as on conveyance by the intestate to a grantee to uses to his own use. If, however, the intestate should not have made disposition of his entire interest, but merely of a portion, leaving a reversion to come by act of law to himself and his heirs, it is apprehended that this reversion would be imbued with the former qualities of the estate.

If the intestate, then, die without descendants, but leaving a father and no mother, the inheritance shall go to the father for life, remainder to the brothers and sisters of the intestate and their descendants according to the law of inheritance by collateral relatives thereinafter provided. If there are no brothers or sisters or their descendants, than the father takes absolutely. If the intestate leaves no descendants, but leaves a father and mother, then the course of descent is the same, if the estate did not come to the intestate on the part of his mother, *i.e.*, by gift from his mother, or by devise, gift or descent from some relative of his mother (*n*).

If the intestate leaves no descendants, but leaves a mother, and no father (or leaves a father not entitled to take by reason of the estate having come to him on the part of his mother) then the inheritance goes to the mother for life, remainder to the brothers and sisters of the intestate and descendants. If there are no brothers or sisters or their descendants, then the mother takes absolutely (*o*).

(*n*) S. 45.
(*o*) S. 46.

These sections may be illustrated thus: Assume John Stiles to be actually a purchaser for money (*for money* is mentioned, because section 40 has altered the meaning and implication of the word *purchaser*, as formerly understood, by excluding from it the case of a man taking by gift or devise from some relative on the father's or mother's side). John Stiles leaves no descendants but leaves his father Geoffrey, and no brothers or sisters. In such case, on John's death without issue, the father would take absolutely under the first part of section 45. The case of the inheritance coming *ex parte materna*, and the mother being *living*, is provided for in the next section, and that therefore is passed for the present, and the next clause proceeded to. Thus, if John Stiles had also left brothers and sisters of the whole blood, Francis, Oliver, Bridget, and Alice; here the father would take a life estate, and the reversion would go equally among the brothers and sisters. If also at the time of death of John, his half-brothers *ex parte materna* had been alive, and also his half-brothers *ex parte paterna*, then under section 54 the half-blood *ex parte materna* would have been entitled equally *per capita* with the brothers and sisters of the whole blood. Descendants of any brothers or sisters deceased would have taken *per capita* and *per stirpes* as the case might be. And the same examples *mutatis mutandis*, may be applied in illustration of the next section. Where brothers and sisters and their descendants inherit, they take *per stirpes*, *i.e.*, the descendants of each brother or sister take equally between them the same share which their parent would have taken if living, each brother and sister taking the share which he or she would have taken if all the brothers and sisters who have died leaving issue had outlived the intestate (*p*); and so on to the remotest degree (*q*).

9. *Where No Descendants, Father or Mother.*

If there are no descendants, and no father or mother surviving, then the estate goes to the collateral relatives; and if they are of equal degree to the intestate they take *per capita*, however remote they may be (*r*). This section, if uncontrolled, would admit equally all collateral relatives of equal degrees of consanguinity to the intestate, and would therefore allow

(*p*) S. 48.
(*q*) S. 49.
(*r*) S. 47.

uncles and aunts to share with nephews and nieces, if these classes were the only relatives on the death of the intestate. Subsequent sections, however, control this section (*s*).

An illustration of the mode of descent under these sections may be made thus: Assume John Stiles to have died, leaving him surviving his brother Francis; James and George, two sons of his brother Oliver; and William and Frederick, two grandsons of Oliver by a deceased son of his. Here all the claimants are collateral relatives of unequal degrees of consanguinity to the intestate, being one brother, Francis, two nephews, James and George, and two grand-nephews, William and Frederick; and a mixed descent, *per stirpes* and *per capita* takes place; *per stirpes* in dividing between the unequal degrees, *per capita* between the equal degrees. Thus James and George between themselves shall take equally; so also shall William and Frederick; but taking James and George together as of *one class*, and William and Frederick together as of *another class*, they take unequally as being of unequal degrees of consanguinity to the intestate. The result of the above is that Francis takes one-half; the deceased brother Oliver's half, which he would have taken had he lived, is divided as follows, viz., into three parts (as he had three sons), and James and George his two surviving sons, each take one-third of one-half or one-sixth of the inheritance, and William and Frederick the other third of one-half between them, or one-twelfth of the inheritance each.

10. *No Descendants, Father or Mother or Brother or Sister or Their Descendants.*

If the intestate leave no descendants, no father or mother, and no brother or sisters, or descendants of brothers or sisters, then the estate (if it came to the intestate on the part of his father) descends,

"Firstly. To the brothers and sisters of the father of the intestate in equal shares, if all are living;

"Secondly. If one or more are living, and one or more have died leaving issue, then to such brothers and sisters as are living, and to the descendants of such of the said brothers and sisters as have died—in equal shares;

"Thirdly. If all such brothers and sisters have died, then to their descendants; and in all such cases the inheritance

(*s*) See s. 50.

shall descend in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate" (*t*).

It will be observed that there is an apparent contradiction in terms between the second and third clauses of this section. Where some of the brothers and sisters of the father are living, and others have died leaving issue, the second section expressly provides that they shall take *in equal shares*, as if they were related in the same degree to the intestate. While the third section declares that "in all such cases" the descent shall be the same as if the estate descended to the brothers and sisters of the intestate and their descendants, *i.e.*, *per stirpes*, the issue of deceased brothers and sisters taking the shares which their parents respectively would have taken if they had survived. That is, assuming that the phrase "in all such cases" refers only to all such cases under this section. If, however, it refers only to all such cases as may happen under the third clause of the section, then the estate will take different courses in the two different events. Thus, if there are brothers and sisters of the father, and descendants of deceased brothers and sisters, all would share equally under the second clause of the section. But if all the brothers and sisters of the father are dead, then the course of descent amongst their descendants would be the same as if they were descendants of the brothers and sisters of the intestate. Though there does not seem to be any reason for this, such an interpretation would give full effect to each clause in its natural sense. If this interpretation be not adopted, then the two clauses are in direct conflict, and the latter must prevail.

In such cases, if there are no brothers and sisters of the father, and no descendants of such brothers or sisters, in other words, if the relatives on the father's side fail, then the brothers and sisters of the mother, and their descendants, succeed to the estate, "in the same manner as if all such brothers and sisters had been the brothers and sisters of the father" (*u*).

And in such cases, where the estate came to the intestate on the part of the mother, the same course of descent prevails, giving the preference to the mother's relatives if any (*v*).

And again, in such cases, where the estate did not come to the intestate on the part of either the father or mother, it descends to the brothers and sisters of both the father and

(*t*) S. 50.
(*u*) S. 51.
(*v*) S. 52.

mother of the intestate without preference, and their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate (*w*).

11. *Half Blood.*

Relatives of the half blood inherit equally with those of the whole blood in the same degree. And the descendants of the half blood inherit in the same manner as the descendants of whole blood, unless the estate came to the intestate by descent, gift, or devise from some one of his ancestors. And in such case those who are not of the blood of such ancestor are excluded (*x*). And on failure of heirs under all the preceding rules, the estate goes to the remaining next of kin according to the Statutes of Distribution of personal estate (*y*).

12. *General Provisions.*

Where several persons take together by descent, they are to take as tenants in common (*z*).

Children *en ventre sa mere* inherit in the same manner as if they had been born in the lifetime of the intestate and had survived him (*a*).

Illegitimate children cannot inherit (*b*).

Dower and curtesy are not affected by the rule of descent prescribed (*c*).

Trust estates are to descend as if the Act had not been passed (*d*). The reason for this is that the Act was intended for the distribution of beneficial interests; and besides it would be highly inconvenient that the land vested in a trustee should be divided up among a number of heirs instead of being cast upon one person as his heir-at-law. The equitable or beneficial interest, however, descends in such a case under the statute.

Where there has been an advancement of any child, that child cannot share in the inheritance without bringing the amount of his advancement into hotchpot (*e*).

(*w*) S. 53.
(*x*) S. 54.
(*y*) S. 55.
(*z*) S. 56.
(*a*) S. 57.
(*b*) S. 58.
(*c*) S. 59.
(*d*) Ibid.
(*e*) Ss. 60 to 63.

Where the estate has descended to several, and partition is to be made, the person who but for this statute would have been the heir at law, has the first option to purchase the shares of all the others; and after that person, the next who would have been heir-at-law on the decease of the first, and so on in succession (*f*).

13. *Devolution of Estates Act.*

The Devolution of Estates Act covers the last period in the law of inheritance already referred to. Under this enactment the estate in the first place devolves upon the personal representative, and is either distributed amongst, or ultimately devolves upon, the next of kin, who, however, are still referred to as heirs.

14. *What Interests are Included.*

The present statute is a reproduction in a modified form of the Act passed in 1886.

The first enactment (*g*) applied only "to all estates of inheritance in fee-simple, or limited to the heir as special occupant, in any tenements or hereditaments in Ontario, whether corporeal or incorporeal" (*h*). This is even narrower than was the Statute of Victoria. Such interests as the following could not be included in the words of the Act: The benefit of a condition reserved; a right of entry for breach of a condition occurring in the intestate's lifetime; a right of entry on a disseisin, but as the estate of inheritance in the land passes, it is indifferent that the right of entry as such is not included; the wrongful seisin of a trespasser; possibilities; and all estates for the life of another, save those limited to the heir as special occupant which are specially mentioned in the Act. The equitable right of a purchaser to enforce a contract *in specie* is probably not an equitable estate in fee-simple until he has completed all that he is bound to do on his part (*i*), but a mere right which he may waive in favour of an action for damages, and so would not be within the words of the enactment.

(*f*) Ss. 64 *et seq.*

(*g*) See R.S.O. (1897) c. 127, s. 3, which is in the words of the original Act.

(*h*) In 1902, this was amended so as to apply to all estates held for the life of another. 2 Edw. VII. c. 1, s. 3.

(*i*) See *Lysaght* v. *Edwards*, 2 Ch. D. 449; *Re Flatt & Prescott*, 18 App. R. 1; *Howard* v. *Miller*, (1915) A. C. at p. 326.

Trust estates were apparently included in the general terms of the enactment, which applies to the estates of all persons dying on and after the 1st day of July, 1886. For, though section 59 of the Act of 1897 (a section of the Statute of Victoria) declared that trust estates should descend as if the Statute of Victoria had not been passed, this very section was declared to be subject to *The Devolution of Estates Act* as to the estates of persons dying on or after the 1st of July, 1886 (*j*). And though, at first sight, *The Devolution of Estates Act* appeared to relate only to beneficial estates, on account of the declaration that property devolving was to be subject to the payment of debts, and to be distributed as personal property was thereafter to be distributed, the same clause which directed such disposition also declared that it should be distributed as personal estate is to be distributed, "so far as the said property is not disposed of by deed, will, contract, or other effectual disposition" (*k*). And as a trust estate is already disposed of by deed or contract, the personal representative would take subject to such disposition.

In the revision of 1914 (*l*), the definition of the interests to which the enactment applied was repealed, and the following section enacted:—

"(1) All real and personal property which is vested in any person without a right in any other person to take by survivorship shall, on his death, whether testate or intestate, and notwithstanding any testamentary disposition, devolve to and become vested in his personal representative from time to time as trustee for the persons by law beneficially entitled thereto and, subject to the payment of his debts, and so far as such property is not disposed of by deed, will, contract, or other effectual disposition, the same shall be administered, dealt with and distributed as if it were personal property not so disposed of.

"(2) This section shall apply to property over which a person executes by will a general power of appointment as if it were personal property vested in him.

"(3) This section shall not apply to estates tail"—or to certain personalty (*m*).

The conditions necessary for the application of this enact-

(*j*) R.S.O. (1897), c. 127, s. 37.
(*k*) S. 4 (1).
(*l*) First passed in 10 Edw. VII. c. 56, s. 3.
(*m*) R.S.O. c. 119, s. 3.

ment are that the interest should be real property, should have been vested in the deceased, should be free from any right of survivorship, and should be capable of sale and of distribution. The personal representative then succeeds to the property as trustee for those beneficially entitled, and is to administer, deal with and distribute it as if it were personal property.

Estates in joint tenancy are excluded, and the right of survivorship vests the property in the survivors. But the interest of a tenant in common is within the Act.

Where a sole trustee dies intestate, the land would, under this section, pass to his personal representative, subject to the trusts declared respecting it by the deed, will, contract, or other effectual disposition which constitutes the trust; but trust estates are expressly provided for by s. 8.

Money to be laid out in the purchase of land to be conveyed to A., would be caught either as real property or as personal property on A.'s death before the purchase of the land, if s. 22 (1) of R.S.O. (1897) c. 127 does not pass it by its actual expression.

A right of entry on disseisin, though referred to as a separate interest in the Wills Act (*n*), and the Conveyancing Act (*o*), is inseparably connected with the land, and passes with it. Thus A., seised in fee, on being disseised, is still the owner of the land. It is still "vested in" him; and on his death it will pass to his personal representative and the right of entry, or, more properly speaking, the right to recover the land, will also pass as incident thereto.

There may, however, be a right of entry or action to set aside a conveyance which is good until it is set aside. Thus the right to set aside a deed of land irregularly sold for taxes has been said to be a "mere right of entry" (*p*). Other cases of a similar kind can easily be suggested. This could hardly be described as real property vested in the deceased.

Personal property transmissible to heirs. If not caught by the description of real property such interests would pass as personal property to the administrator, unless covered by R.S.O. (1897) c. 127, s. 22 (1). An annuity when granted with words of inheritance was descendible to heirs (*q*), and might

(*n*) R.S.O. c. 120, ss. 2 (*a*), 9.
(*o*) R.S.O. c. 109, s. 10.
(*p*) Per Osler, J.A., *Hyatt* v. *Mills*, 19 App. R. at p. 335.
(*q*) *Stafford* (*Earl of*) v. *Buckley*, 2 Ves. Sr. 170.

have been covered by the words "estate of inheritance" in the original Act, but can hardly be described as real "estate."

Where a purchaser of land dies intestate before completion of the contract, it is submitted that the administrator can proceed to enforce the contract, not because any property passed to him (the whole legal and beneficial interest being still vested in the vendor), but because the personal right to enforce the contract passed to the administrator. Specific performance is a *remedy* for breach of contract, and the administrator may resort to this remedy if he please. He may also be sued by the vendor as the person to furnish the money. But it is submitted that nothing but a right passes to him (*r*).

There are some interests, however, for which no express provision is made, and until judicial pronouncement is made thereon no definite statement can be made concerning them.

A vested remainder is within the Act, but a contingent remainder is not, because it is not real property "vested in" the deceased. It is noticeable that contingent remainders may be devised whether the testator is or is not ascertained as the person or one of the persons in whom the remainder may become vested (*s*).

Executory and future interests, not necessarily contingent, are apparently not within the Act. Thus, if land be granted to A and his heirs to the use of B. and his heirs from the 1st January next after the grant, here B. has nothing before the 1st of January. He has no remainder, for the existing estate is a fee-simple in A.; he has not a contingent remainder, because he is in being and ascertained and the event is certain to happen. He has no estate, but has the certainty of getting one. Is this real property vested in him? It is certainly not vested in him. Such an interest is devisable under the Wills Act.

Possibilities, which are clearly not vested property, but the chance or expectation that one may acquire or succeed to property, are not within the Act.

The wrongful seisin of a trespasser was an interest descendible at common law. But it seems abundantly clear that it could not fall within the description of real property vested in the disseisor. The whole legal and beneficial interest is still in the true owner. What the trespasser has is bare possession, and that a wrongful one. If we assume for a moment that the

(*r*) See Armour on Devolution, pp. 35, et seq.
(*s*) R.S.O. c. 120, s. 9.

administrator was intended to succeed to this interest, we must also assume that it was the intention that he should take possession, continue to do wrong by continuing the trespass, and finally sell or "distribute" land which did not belong to the intestate. Is it conceivable that if he refused to do this he would be held accountable for his default? The matter is of importance in computing the period of time under the Statute of Limitations. When a trespasser dies intestate in possession, it becomes necessary to determine the person in whom his wrongful seisin vests, if the period of his trespass is to be taken into account. It seems to be clear that the administrator is not the person. So also, the Statute of Victoria applied only to "estates of inheritance in fee-simple," and clearly the trespasser has not an estate in the land. There remains only a resort to the common law rule of descent as modified by the Statute of Wm. IV., which cast the land upon the eldest son.

Rights of entry for condition broken may exist where there is no reversion or where there is a reversion.

Where there is no reversion the right of entry is a mere right, the whole estate being vested in the person who for the time being is the owner of the land. Thus, where a grant in fee is made on condition, and the condition is broken, the grantor has a mere right of entry which he may waive. It is not real property vested in him, but a right to re-claim real property which is not vested in him. Or, where a grant is made in fee reserving a rent with a right of re-entry for non-payment, there is no reversion, but a possibility of re-entry only, and a right of entry if a breach occur (*t*). The owner of the rent may waive his right of re-entry and sue for non-payment instead, or he may distrain rather than re-take the property. If a grant on condition be interpreted as conferring an estate upon the grantee to endure only until the condition is broken, still it is in the election of the grantor to enter, and he has no more than a right unless he does enter. Such rights are devisable under the Wills Act.

Where a limited estate is granted leaving a reversion in the grantor with a right of entry for breach of covenant or conditions, the reversioner has two rights of entry; first, a right of entry for breach of a condition or covenant, and secondly, a right of entry at the termination of the estate granted. The latter is a right of entry as on a disseisin if the grantee remains

(*t*) *Doe d. Freeman* v. *Bateman*, 2 B. & Ald. 168.

in possession. The former is what is now to be dealt with. Such a right of entry must always be exercised by the person for the time being entitled to the reversion (*u*). But it does not follow that the person having the reversion can exercise a right of entry for breach. Thus, if a reversioner assign his reversion after a breach, the assignee cannot take advantage of the breach which occurred before he acquired the reversion. The right of entry was not assignable at common law, and is therefore not assignable without statutory enactment expressly authorizing or effecting an assignment. Such rights are devisable by the Wills Act. But there is no statute authorizing their assignment by deed *inter vivos*. Nor it there anything in the statute under review to cover such a right. It would seem, therefore, that a right of entry for condition broken before the death of the reversioner would not pass to the administrator.

The lands of a locatee of the Crown pass under the Public Lands Act by special enactment (*v*).

Partnership property, being treated as personal property, devolves upon the administrator *virtute officii*, and not under the Act (*w*).

15. *Purpose of the Enactment.*

The original purpose of the Act was to deprive the heirs of their right of succession (*x*), and vest the land in the administrator, from whom those ultimately entitled were obliged to take by conveyance if the land was not disposed of for the purpose of paying debts. And the intention also appears to be that heirs-at-law should no longer take as such, but that the persons who are beneficially entitled are the next of kin who take in course of distribution (*y*). The land is expressly made subject to the payment of debts and distribution in the same way as personalty. The ultimate destination of both realty and personalty was thus made the same by this express enactment.

16. *Operation of the Enactment.*

During the interval between the death of an intestate and the grant of letters of administration, there is no legal

(*u*) *Doe d. Marriott* v. *Edwards*, 5 B. & Ad. 1065.

(*v*) R.S.O. c. 28, s. 47.

(*w*) *Re Fulton & McIntyre*, 7 O.L.R. 445.

(*x*) *Re Pilling's Trusts*, 26 Ch. D. 432.

(*y*) See *Plomley* v. *Shepherd*, (1891) A.C. 244; *Re Reddan*, 12 Ont. R. 78. See also *Walker* v. *Allen*, 24 App. R. 336.

owner of the land. We have already referred to the question in dealing with title by occupancy (*z*). But the heirs-at-law or next of kin have a prospective or potential ownership—not in the land itself, but in the proceeds of the estate after the administrator has performed all his functions (*a*).

In *Re Pilling's Trusts* (*b*), in dealing with a cognate point, it was said by the court, "If the legal estate does not vest in the heir, where is it?" But no answer was given. In *Re Griggs* (*c*), Lord Cozens-Hardy said: "Until there is a personal representative the property vests in the heir. He could recover the rents and maintain trespass." With great respect for this opinion, it does not seem to be correct. In *Sudeley (Lord)* v. *Atty-Gen.* (*d*), the House of Lords expressly held that a residuary legatee had no title to any specific portion of the assets before administration had taken place; and the effect of this enactment is the same as that of a will (*e*). And an heir-at-law who interfered with the land of an intestate would run the same risk of being made accountable as an executor *de son tort*, as if he interfered with the personalty. And if we look at the provision of the statute which provides that after three years from the death of the intestate or testator, the land, if not previously sold or conveyed, shall vest in the persons beneficially entitled (*f*), it seems to lead to the conclusion that it was not vested in them before that time.

The fact is that there is no provision made for the residence of the legal estate during the period between death and the grant of letters of administration.

If the land is required for payment of debts, the heirs-at-law or next of kin get nothing; if partially required, they share in the residue of the proceeds after payment of debts. But they have no title to the land as such, any more than they have to the personalty (*g*). It all belongs to the administrator for the purpose of administration and distribution. Yet

(*z*) See p. 87.

(*a*) See *Sudeley (Lord)* v. *Atty.-Gen.*, (1897) A.C. 11; *Re Smyth*, (1898) 1 Ch. 89.

(*b*) 26 Ch. D. 432.

(*c*) (1914) 2 Ch. 552, and see *John* v. *John*, (1898) 2 Ch. at p. 576.

(*d*) (1897) A. C. 11.

(*e*) *Re Harris*, 33 O.L.R. 83; 22 D.L.R. 381.

(*f*) R.S.O. c. 119, s. 13.

(*g*) *Re Harris*, 33 O.L.R. 83; 22 D.L.R. 381, and see *Trusts & Guarantee Co.* v. *Smith*, 33 O.L.R. 155; 21 D.L.R. 711.

there is a *contingent* interest in the land itself. For, if the administrator does not require it for payment of debts, he may convey it to the heirs-at-law or next of kin within the three years, who thus get a good title, subject, however, to the rights of creditors (*h*). And so, no doubt, the persons who are ultimately beneficially interested would have a good title to appeal to the court for protecting the property until a personal representative had been appointed (*i*), but in such a proceeding the court would no doubt appoint a personal representative to avoid doubt and to represent the estate.

If the three years elapse, and the administrator does not retain the land by registering a caution, then the statute vests the land in the heirs-at-law or next of kin, without any conveyance (*j*). By this time a title to the land itself is acquired; but not an indefeasible one. For if the administrator should subsequently require the land, he may still register a caution upon procuring an order of a Supreme Court or County Court Judge, or a consent of adult heirs, or a certificate from the official guardian (*k*), and thereupon the land re-vests in him for purposes of administration (*l*), except as regards the rights of persons who in the meantime may have acquired rights for valuable consideration from or through the heirs (*m*). And he may from time to time register successive cautions so as to keep the land in his hands for successive periods of twelve months each (*n*).

Shortly after the enactment came into force, it became the practice to apply for and receive letters of administration limited to the personal estate only, on the assumption that the administrator would thus be quit of responsibility for the distribution of the land of the intestate. And by the Surrogate Courts Act (*o*) express provision is made for granting letters limited to the personal estate only. In spite of this section, however, it seems impossible to avoid the effect of the express words of the statute that the land should vest in the personal representative. It does not say in the person appointed to

(*h*) S. 21.
(*i*) See and cf. *Duggan* v. *Duggan*, 17 S.C.R. 343.
(*j*) S. 13.
(*k*) S. 15.
(*l*) *Ianson* v. *Clyde*, 31 Ont. R. at p. 584.
(*m*) S. 15 (3).
(*n*) S. 20.
(*o*) R.S.O. c. 62, s. 57.

administer the land, but in the "personal representative." Where there was a will and probate was granted to one of two executors, it was held that the land vested in both of them though both did not prove (*p*). And the fact that the personal representative is authorized to deal with personal property only does not prevent his being the "personal representative."

The matter is, to some extent, dealt with by section 21 (7) of the present statute, which provides that section 20 (giving power to deal with realty as if it were personalty) and section 21 (giving power to sell and convey) shall not apply where the letters of administration are limited to personalty, unless with the approval of the Supreme Court or a judge. Although this prevents administration of realty by an administrator of the personalty only, it does not do away with the effect of section 3, which vests the realty in the personal representative.

By s. 43 of *The Trustee Act* (*q*), where a testator devises or directs land to be sold by his executors, a sale may be made by such one or more of the executors to whom probate has been granted.

An administrator *ad litem* acquires no title to the land (*r*).

Where no administrator is appointed the land shifts into the beneficiaries at the end of three years from the intestate's death in the same manner as if an administrator had been appointed, subject to the right of the administrator, when appointed, to register a caution.

17. *The Widow's Share.*

The Act does not take away the right to dower. But a widow may elect to take her interest in her husband's undisposed of real estate in lieu of all claims for dower; and unless she so elects, she is not to share in the undisposed of realty under the Act (*s*). But by s. 9 (2) the personal representative may, by notice in writing, require the widow to elect, and if she fails to do so within six months after the serving of the notice, she shall be deemed to elect in favour of dower. Her share under the Act is one-half if her husband leaves no issue, and one-third if he does (*t*). But this share is a share in the

(*p*) *Re Pawley & Lond. v. Prov. Bank*, (1900) 1 Ch. 58. But see now R.S.O. c. 119, s. 21 (7).

(*q*) R.S.O. c. 121.

(*r*) *Rodgers* v. *Moran*, 28 Ont. R. 275.

(*s*) S. 9 (1).

(*t*) S. 30 of the Act.

proceeds of the estate after payment of debts and costs of administration, and therefore it may be to the advantage of the widow to take her dower, which is her own property and not liable to her husband's debts.

The election might formerly have been made at any time that the exigencies of administration permitted; and the widow was entitled to be informed of how the estate would turn out on administration, so as to compare the value of the share with the value of her dower, before she could be called upon to elect between them (*u*).

The election is required to be made by deed or instrument in writing, attested by at least one witness, and so an election by will is sufficient (*v*).

The distributive share of the widow in case of intestacy is one-third if the husband leaves issue, but one-half if he leaves none (*w*). But she has an additional benefit under s. 12. Where a man dies intestate, leaving a widow, but no issue, and the net value of his real and personal property does not exceed $1,000, it all belongs to the widow absolutely and exclusively. Where such net value exceeds $1,000, then the widow takes $1,000 out of the estate, absolutely and exclusively; and she has a charge therefor on the whole real and personal estate, with interest at four per cent. per annum until payment. The "net value" is the value of the whole estate after payment of the charges thereon, and the debts, funeral expenses, and expenses of administration and succession duty. The net value is to be ascertained at the death of the intestate. Therefore, where a husband died entitled to a contingent reversionary interest of no value at the time of his death, and the remainder of his estate amounted to £10, and subsequently the reversionary interest fell into possession and was then worth £3,500, it was held that the widow was entitled to the whole absolutely (*x*).

This provision is in addition to her share in the estate; and after payment of the $1,000, she is entitled to share in the residue of the estate as if it were the whole estate (*y*).

This enactment applies only to the case of a total intestacy, and not where a partial intestacy occurs (*z*). But where a

(*u*) *Baker* v. *Stuart*, 29 Ont. R. 388; 25 App. R. 445.

(*v*) *Re Ingolsby*, 19 Ont. R. 283.

(*w*) R.S.O. c. 119, s. 30.

(*x*) *Re Heath*, (1907) 2 Ch. 270.

(*y*) *Sinclair* v. *Brown*, 29 Ont. R. 370.

(*z*) *Re Twigg's Estate*, (1892) 1 Ch. 579; *Cowan* v. *Allen*, 26 S.C.R. at p. 314; *Re Harrison*, 2 O.L.R. 207.

will becomes wholly inoperative by reason of the death of all the beneficiaries thereunder and also the executor in the lifetime of the deceased, there is a total intestacy, and the widow is entitled to her preferment under this enactment (*a*). The widow may deprive herself of the right by a settlement (*b*).

Where the intestate leaves a widow and no next of kin, the widow takes her $1,000, then one-half of the remainder, and the other half goes to the Crown (*c*).

18. *The Husband's Share.*

While a widow's right to dower is not affected by the Act unless she elects to take a distributive share in lieu of it, the husband of an intestate is bound to take his distributive share unless he elects to take his estate by the courtesy (*d*). His election must be made within six months from his wife's death; and must be by deed or instrument in writing attested by at least one witness. If he takes his courtesy, he is entitled to nothing further under the Act.

If he does not elect to take his courtesy within the time limited, he takes one-third of the real and personal property of his deceased wife, whether separate or otherwise, if she leaves issue; and one-half if she leaves no issue (*e*).

The common law right of the husband to take his wife's choses in action was not affected by the Statute of Distributions, it being enacted by the Statute of Frauds (*f*) that "neither the said Act nor anything therein contained shall be construed to extend to the estates of feme coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act" (*g*). The husband could then retain the surplus of his wife's estate to his own use (*h*) until the present enactment, whereby he is limited to the proportion mentioned.

(*a*) *Re Cuffe*, 24 T.L.R. 781.

(*b*) *Toronto Gen. T. Co.* v. *Quin*, 25 Ont. R. 250; *Lord Buckinghamshire* v. *Drury*, 3 Bro. C.C. 492; 4 Bro. C.C. 506, note; and see *Eves* v. *Booth*, 29 App. R. 420.

(*c*) *Cave* v. *Roberts*, 8 Sim. 214.

(*d*) S. 29.

(*e*) Ibid.

(*f*) 29 Car. II. c. 3, s. 25.

(*g*) See *Re Lambert's Estate*, 39 Ch. D. 626, at p. 630.

(*h*) *Lamb* v. *Cleveland*, 19 S.C.R. 78.

19. *Children and Their Representatives.*

The Statute of Distribution (*i*) enacts that the surplusage of the estate shall be distributed as follows: "One-third to the wife of the intestate, and all the residue by equal portions among the children of the intestate, and such persons as legally represent such children in case any of them have died in his lifetime," with a provision that children who shall have been advanced shall have only such share as will, with the advancement, make their shares equal to the others(*j*). And in case there be no wife, then all the estate is to be distributed equally to and amongst the children (*k*). Children of the half blood share equally with those of the whole blood (*kk*).

The persons who "legally represent" deceased children are not their next of kin, or executors or administrators, but their descendants (*l*). So, if a son of an intestate be dead, leaving a widow and child, the widow takes nothing under the Statute of Distributions, but the whole goes to the child (*m*).

Where there are some children living, and some are dead leaving issue, the descendants of the deceased children take *per stirpes*. That is, the estate is divided into as many shares as there are living children and deceased children le ving descendants; and each living child takes one of these shares, and the children of each deceased child divide one of these shares between them (*n*).

Where all the children are dead and leave issue, there seemed to be a difference of opinion as to how they should take. But, as the descendants of children take, not in their own right, but as legally representing their parents, it would seem that they should take *per stirpes*, *i.e.*, each family would take the share which the parent (the deceased child) would have taken had he survived (*o*). This is entirely different from the Inheritance Act, the Statute of Victoria, under which, as we have seen, where the relatives were in equal degree they took *per capita*, where in unequal degree, *per stirpes*.

(*i*) Now ss. 30, 31.
(*j*) S. 28.
(*k*) S. 30.
(*kk*) *Re Wagner*, 6 O.L.R. 680; *Re Branton*, 20 O.L.R. at p. 645.
(*l*) *Bridge* v. *Abbott*, 2 Bro. C.C. at p. 226.
(*m*) *Price* v. *Strange*, 6 Madd. at p. 162.
(*n*) Wms. Exors. 9th ed. p. 1368.
(*o*) *Re Ross' Trusts*, L.R. 13. Eq 286; *Re Natt*, 39 Ch. D. 517.

20. *Advancement and Hotchpot.*

If any child of an intestate has been advanced by him by settlement or portion, and the same has been so expressed by the intestate in writing, or so acknowledged by the child in writing, the value of the advance is to be reckoned as if it were part of the estate to be distributed, and if equal to or greater than the share of such child, then he and his descendants are excluded from any share in the property of the intestate. If the advance is less than the share so ascertained, he is entitled to the difference between the advance and the share so as to make the shares of all the children equal (*p*).

In order to make this enactment applicable there must be a total intestacy. Where a will becomes inoperative by reason of the death of the universal legatee and the executor in the lifetime of the testator, there is a total intestacy, and the personal representative holds the estate on trust for the persons entitled under the Statute of Distribution (now incorporated in the present Act), who take in the proportions therein set out, and on the other conditions of the statute, and therefore, in that case, an advanced child must bring his advance into hotchpot (*q*).

Where the intestacy is partial, by reason of some part of the estate remaining undisposed of, there is no intestacy within the meaning of the Act, and therefore the Statute of Distribution does not apply. The legal estate in the undisposed of residue is in the executor or a trustee, and to that extent the deceased is testate and not intestate. At common law the executor was entitled to hold what was undisposed of. In equity, if there was any ground on the terms of the will for holding the executor to be a trustee, he would be so held; and as there were no beneficiaries named in the will, he was held to be a trustee (by analogy to the Statute of Distribution) for the persons who would take as on an intestacy. In other words, the executor was entitled to hold the undisposed residue unless it could be shown that he was a trustee and not intended to hold it beneficially. By the Trustee Act (*r*), "when a person dies having by will appointed an executor, such executor, in respect of any residue not expressly disposed of, shall be deemed to be a trustee for the person, if any, who would be

(*p*) R.S.O. c. 119, s. 28.
(*q*) *Re Ford*, (1902) 1 Ch. 218; 2 Ch. 605.
(*r*) R.S.O. c. 121, s. 58.

entitled to the estate under the Devolution of Estates Act in case of an intestacy, unless it appears by the will that the executor was intended to take such residue beneficially." It has been said that this merely shifts the *onus* of proof, and makes the executor a trustee unless he can show that he was intended to take beneficially. But it appears rather a question of construction of the will in each case as to whether he takes as a trustee or beneficially (*s*). The enactment does not apply to, or create, an intestacy, but applies only where there is a will which vests property in an executor. And the equitable rule as to distribution of the undisposed of residue still applies. In such case, therefore, the undisposed of residue is distributed amongst the persons who would have taken under the statute if there had been an intestacy, but not upon the conditions of the statute; and so an advanced child is not bound in such a case to bring his advance into hotchpot (*t*).

Where a will totally fails in its beneficial dispositions, but the executor survives the deceased and thus becomes invested with the whole estate under the will, it has never been decided whether there is an intestacy for the purposes under consideration. If the reasoning in the cases as to partial failure of the will is to apply it is submitted that there is not. It cannot be disputed that the executor takes under the will, and to that extent there is a testacy. And as the will declared trusts which have all failed, the executor was evidently not intended to hold beneficially, but as a trustee. The equitable rule would then seem to apply as in the case of a partial intestacy.

The object of the statute being to provide for equality amongst the children, the widow gets no advantage from it, and the value of the advancement is therefore not to be brought into hotchpot for her benefit (*u*).

If the intention to make an advancement is not expressed in writing by the parent, or not so acknowledged by the child, there is no advancement within the meaning of the Act and the benefit is a gift (*v*).

When a child has been advanced and dies before his father, his children or other descendants are precluded by this

(*s*) See *Re Howell*, (1915) 1 Ch. 241.

(*t*) *Re Roby*, (1907) 2 Ch. 84; (1908) 1 Ch. 71.

(*u*) *Kirkcudbright* v. *Kirkcudbright*, 8 Ves. at p. 64; *Re Lewis*, 29 Ont. R. 609.

(*v*) *Filman* v. *Filman*, 15 Gr. 643.

statute from sharing without bringing the advance into hotchpot (*w*).

21. *Next of Kin.*

If there be no children, nor any legal representatives of them, *i.e.*, descendants, then the estate is to be distributed, one-half to the wife and the residue "equally to every of the next of kindred of the intestate who are of equal degree, and those who legally represent them; and for the purpose of this section the father and the mother and the brothers and sisters of the intestate shall be deemed of equal degree" (*x*). And amongst collaterals, it is enacted that "there shall be no representations admitted among collaterals after brothers' and sisters' children" (*y*); *i.e.*, children of the brothers and sisters of the intestate. Where there are children of brothers and sisters and children of deceased children of brothers and sisters, the latter are excluded (*z*).

Where the intestate left a mother but no father, wife or child, the mother took the whole, which occasioned the passing of another statute (*a*), whereby it was enacted that, "if after the death of a father any of his children die intestate, without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her." The reason for the Act was that the mother, taking the whole of her child's estate as nearest of kin, might marry again, and her husband would have become entitled to the property (*b*). Since this enactment, then, the brothers and sisters of an intestate share equally with the mother under the above circumstances (*c*). And the representatives of brothers and sisters take the share which the deceased brothers or sisters would have taken if they had survived, *i.e.*, they take *per stirpes* (*d*). And as this Statute of James II. was *in pari materia* with the Statute of Charles II., it was affected by the enactment in the latter Act, that representation is not to be carried beyond brothers' and sisters' children (*e*). Brothers

(*w*) See also *Re Lewis*, 29 Ont. 609.
(*x*) S. 30.
(*y*) Ibid.
(*z*) *Crowther* v. *Cawthra*, 1 Ont. R. 128.
(*a*) 1 Jac. II. c. 17, s. 7, now R.S.O. c. 119, s. 31.
(*b*) *Blackborough* v. *Davis*, 1 P. Wms. at p. 49.
(*c*) *Keilway* v. *Keilway*, Gilb. Eq. Cas. 190.
(*d*) *Stanley* v. *Stanley*, 1 Atk. 455.
(*e*) Ibid.

and sisters of the half blood share with the mother of the intestate under the same circumstances (*f*).

But where there are no father, children, brothers or sisters, or representatives of brothers or sisters, then the mother takes the whole (*g*).

Where there was a grandfather or grandmother, and brothers and sisters, the grandparent was excluded (*h*); and by *The Devolution of Estates Act* (1897) s. 6, it was enacted that, a grandfather or grandmother should not share in competition with a surviving father, mother, brothers or sisters. Apparently this enactment made no change in the law; for if a father or mother survived, he or she took as nearest of kin, and a grandfather or grandmother would, in such a case, be too remote. And it had already been determined that where grandparents and brothers and sisters survived, the former were excluded.

But if grandparents are the nearest of kin, of course they will take; and, being related in the second degree, they will be preferred to uncles and aunts, who are related in the third degree (*i*). But great-grandparents being related in the third degree, will share with uncles and aunts (*j*).

Where the next of kin were cousins on both the father's and mother's sides, it was held that they took one share only as if they had been cousins on one side only (*k*).

Children of the sister of the intestate's father are nearer than grandchildren of the sister of the intestate's mother, and take to the exclusion of the latter (*l*).

Amongst collaterals, where the next of kin are of equal degree, they take *per capita*; where of unequal degree, they take *per stirpes*. Hence, if an intestate leave a deceased brother's only son, and ten children of a deceased sister, the ten children of the deceased sister take ten parts in eleven of the estate, and the son of the deceased brother, one part (*m*). But if the intestate leave one brother and ten children of a

(*f*) *Jessopp* v. *Watson*, 1 M. & K. 665; *Re Wagner*, 6 O.L.R. 680; *Re Branton*, 20 O.L.R. 643.

(*g*) Wms. Exors. 9th Ed. 1380.

(*h*) Wms. Exors. 9th ed. 1381.

(*i*) Wms. Exors. 9th Ed. 1382.

(*j*) *Lloyd* v. *Tench*, 2 Ves. Sr. 215.

(*k*) *Re Adams*, 6 O.L.R. 697.

(*l*) *Re McEachren*, 10 O.L.R. 499.

(*m*) *Bowers* v. *Littlewood*, 1 P. Wms. 594.

deceased sister, the brother takes one-half, and the other half is divided amongst the children of the deceased sister (*n*).

Relatives of the half blood are entitled equally with relatives of the whole blood in the distribution of the estate (*o*).

22. *Posthumous Children.*

The Statute of Distribution is to be construed by the rules of the civil law (*p*), and by the civil law posthumous children share in the distribution. There is no inconvenience in this; for, in the case of children of the intestate, they must be born within nine months of his death, and distribution of the estate does not take place until a year from his death (*q*). The rule extends to collaterals and to posthumous children of the half blood (*r*).

The clause of the Statute of Victoria (*s*), providing that posthumous relatives shall "inherit" in the same manner as if they had been born in the lifetime of the intestate and had survived him, was not repealed (*t*), but it might be a question whether the word "inherit" would apply to a case of distribution.

23. *Descent of Estate Tail.*

An estate tail very rarely occurs in this province, and perhaps still more rarely is it allowed to descend. It is not, therefore, proposed to deal at length with the mode of inheritance in such cases.

Necessarily the rules of the common law to some extent prevail, the statutes of Wm. IV. and Victoria not affecting such estates. Their descent is regulated *per formam doni*, by the form or terms of the gift in tail and by the statute *De donis*. This occasions two important exceptions to the common law rules of descent. The first is that the maxim *seisina facit stipitem*, or that the inheritance descends to the issue of the person who last died *actually seised*, does not apply. As the gift originally limited the estate to the issue of the first donee

(*n*) *Lloyd* v. *Tench*, 2 Ves. Sr. 215.

(*o*) *Smith* v. *Tracy*, 1 Mod 209; 2 Mod. 204; *Brooke* v. *Watt*, 2 Vern. 124; *Re Wagner*, 6 O.L.R. 680; *Re Branton*, 20, O.L.R. at p. 645.

(*p*) *Wallis* v. *Hodson*, 2 Atk. at p. 117.

(*q*) *See Wallis* v. *Hodson*, supra, and cases cited.

(*r*) *Burnett* v. *Mann*, 1 Ves. Sr. 156.

(*s*) R.S.O. (1897) c. 127, s. 57.

(*t*) See 10 Edw. VII. c. 56, s. 35.

in tail, descent must always be traced from him, that is, through and to his heirs in the direct line downwards. And the second is, that the half blood are not excluded, as in the case of a fee-simple. The reason for this is the same, viz., that descent must always be traced from the first donee to and through his *descendants*, and as all descendants claim, not from the person last seised, but from their ancestor, the original donee in tail, they must always be of his whole blood (*u*).

The rules of primogeniture and preference of males to females, however, do apply, if the entail is general.

If the gift in tail be special, as to heirs male of the body, or heirs female of the body, descent must be traced wholly to and through males or females, as the case may be.

And so also where the gift in tail is special as being limited to the issue by a certain wife or husband, the form of the gift must still be observed, and only those issue who answer the conditions of the gift will be admitted.

Upon failure of the issue in tail, if the entail is not barred, the land reverts to the original donor or his heirs.

(*u*) *Doe d. Gregory* v. *Whichelo*, 8 T.R. 213.

CHAPTER XX.

OF ALIENATION BY DEVISE.

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1. *Origin of Wills.*

It seems sufficiently clear that, before the Conquest, lands were devisable by will. But, upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feudal doctrine of non-alienation without the consent of the lord. And some have questioned whether this restraint (which we may trace even from the ancient Germans) was not founded upon truer principles of policy, than the power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers.

However this be, we find that, by the common law of England since the Conquest, no estate, greater than for term of years, could be disposed of by testament, except only in

Kent, and in some ancient burghs, and a few particular manors, where their Saxon immunities by special indulgence subsisted. And though the feudal restraint on alienations by deed vanished very early, yet this on wills continued for some centuries after; from an apprehension of infirmity and imposition on the testator *in extremis*, which made such devises suspicious. Besides, in devises there were wanting that general notoriety and public designation of the successor, which in descents is apparent to the neighbourhood, and which the simplicity of the common law always requires in every transfer and new acquisition of property.

But when ecclesiastical ingenuity had invented the doctrine of uses as a thing distinct from the land, uses began to be devised very frequently, and the devisee of the use could in Chancery compel its execution. For it is observed by Gilbert that, as the Popish clergy then generally sat in the Court of Chancery, they considered that men are most liberal when they can enjoy their possessions no longer, and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, would intercede for their happiness in another world. One mode adopted was to enfeoff another to such uses as the feoffor should by his last will appoint, and afterwards to exercise the power of appointment by devise to superstitious uses, tending to alienation in mortmain, a practice which by reason of the ingenuity of the religious bodies interested in upholding such devises, the legislature had great difficulty in preventing. But when the Statute of Uses had annexed the possession to the use, these uses, being the very land itself, became no longer devisable; which might have occasioned a great revolution in the law of devises, had not the Statute of Wills been made about five years after, viz., 32 Hen. VIII. c. 1, explained by 34 & 35 Hen. VIII. c. 5, which enacted that all persons being seised in fee-simple (except feme-coverts, infants, idiots, and persons of nonsane memory) might by will and testament in writing devise to any other *person*, except to bodies corporate, two-thirds of their lands, tenements and hereditaments, held in chivalry, and the whole of those held in socage; which, through the alteration of tenures into socage by the statute of Charles the Second, amounted to the whole of their landed property, except their copyhold tenements.

Corporations were excepted in these enabling statutes, to prevent the extension of *mortmain*; but by construction of the statute 43 Eliz. c. 4, it was held, that a devise to a corporation

for a charitable use was valid, as operating in the nature of an *appointment*, rather than of a *bequest*.

It has been explained that so far as regards devises of lands and tenements, and bequests of money, to be laid out thereon, the operation of the statute of Elizabeth was virtually repealed by the statute of 9 Geo. II. c. 36, and that, now, by provincial legislation devises of land for religious and other purposes may be made.

With regard to devises in general, experience soon showed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this Act by the courts of law, that bare notes in the handwriting of another person were allowed to be good wills within the statute.

2. *The Statute of Frauds.*

To remedy this the Statute of Frauds and Perjuries, 29 Car. II. c. 3, now repealed as to that portion of it relating to wills, directed that all devises of lands and tenements should not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed in his presence, by three or four credible witnesses.

3. *The Statute of Wm. IV.*

A provincial Statute of Wm. IV. declared that a will executed after 6th March, 1834, in the presence of and attested by two or more witnesses, should have the same validity as if executed in the presence of and attested by three witnesses (*a*).

Notwithstanding that the Provincial Act was silent as to the credibility of the witnesses, that qualification still continued to be requisite as under the Act of Charles (*b*). The Statute of Charles was not impliedly repealed by that of William (*c*). It seems clear, therefore, that a will invalid as not complying with the latter, was valid if it complied with the former. In

(*a*) C.S.U.C. c. 82, s. 13; R.S.O. (1897) c. 128, s. 5.
(*b*) *Ryan* v. *Devereux*, 26 U.C.R. 107.
(*c*) *Crawford* v. *Curragh*, 15 C.P. 55.

one case (*d*) the court went further, and held in effect that the statutes were cumulative, and might be read together; so that a will, invalid under either statute taken singly, might be supported on their joint authority. Thus, a will executed in the presence of two witnesses who subscribed in the presence of the testator, but not in the presence of each other, was held sufficient (*e*).

The Statute of Charles required that the witnesses should be credible, and though as to this the Provincial Statute was silent, yet it was held, as we have seen (*f*), that the requirements of the former statute continued. In one case, decided under the Statute of Charles, but afterwards over-ruled as to *creditors* as wrongly decided, the judges would not allow any legatee, nor by consequence, a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but for the personal assets. This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues (and these are the persons most likely to be present in the testator's last illness), and if, in such case, the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6, which restored both the competency and the credit of such *legatees*, by declaring void all beneficial legacies, devises, estates, interests, gifts, or appointments of or affecting any real or personal estate, given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of *creditors*, by directing the evidence of all such creditors to be admitted, but leaving their credit (like that of all other witnesses) to be considered, on a

(*d*) *Crawford* v. *Curragh*, supra.

(*e*) *Ryan* v. *Devereux*, 26 U.C.R. 107.

(*f*) Ibid.; and see *Little* v. *Aikman*, 28 U.C.R. 337; the case of a gift to an unnecessary *third* witness being void.

view of all the circumstances, by the court and jury before whom such will should be contested. As this Act did not extend to a devise or bequest to the husband or wife of an attesting witness, so as to avoid it, it was held that the witness was still not a credible witness as being interested indirectly in upholding the will and gift made by it. Thus, if the husband were a witness, and the will made provision for his wife, he was not a competent witness. This has been dealt with by subsequent legislation to be referred to presently.

Another inconvenience was found to attend this new method of conveyance by devise; in that creditors by bond and other specialties, which affected the *heir*, provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the *devisee* of their debtor. To obviate which, the statute 3 & 4 W. & M. c. 14 provided that all wills and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple, or having power to dispose by will, should (as against such creditors only), be deemed to be fraudulent and void; and that such creditors might maintain their actions jointly against both the heir and the devisee (*g*).

The subject of devisees by will is one which, to be fully treated of, would require very much more space than can be devoted to it in a work of this nature, which treats of so many subjects in the law of real property. We shall therefore treat briefly of the law under the present Wills Act (*h*), and confine our remarks to realty as distinct from personalty.

4. *Wills Before 1874.*

In 1873 an Act was passed to come into force on 1st January, 1874, which consolidated all previous enactments designed to be continued in force, and comprised a new enactment as to wills made after it came into force. We shall, therefore, treat of wills before 1st January, 1874, and after that date.

Before 1st January, 1874. The mode of execution and attestation of wills has already been adverted to. Every will was to be executed in the presence of two witnesses, who should subscribe their names in the presence of each other, though not necessarily in the presence of the testator (*i*). It

(*g*) See *Vankoughnet* v. *Ross*, 7 U.C.R. 248, commented on in *Rymal* v. *Ashberry*, 12 C.P. 339.

(*h*) R.S.O. c. 120.

(*i*) R.S.O. c. 120, s. 5.

was not necessary, however, before the Wills Act of 1873, that the testator should sign the will in any particular place; and accordingly a holograph will, *i.e.*, one written by the testator himself, was sufficiently signed if written as follows: "I, A.B., do hereby make, etc.," or "this is the will of me, A.B., etc."

5. *What Might be Devised.*

"Land" was defined to include to messuages, and all other hereditaments, whether corporeal or incorporeal, and other personal property transmissible to heirs, money to be laid out in the purchase of land, chattels, and any share of the same hereditaments and properties, and any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, were in possession, reversion, remainder or contingency (*j*).

Although this statute explicitly mentions "any estate of inheritance," estates tail being governed by a special statute, *De donis conditionalibus*, are necessarily excluded. It is also to be observed that a right of entry is devisable, so that a person disseised could devise his right of entry. The phrase "any other interest capable of being inherited" would also comprise the seisin of a trespasser, who might devise his wrongful seisin, and thus enable his devisee, if he entered, to add the testator's possession to his own and, if in possession long enough, to extinguish the title of the true owner under the Statute of Limitations.

6. *After-acquired Property.*

A will was in early days looked upon as a present conveyance, *i.e.*, a disposition of property which the testator owned at the time of making it; and property acquired after he made his will would not pass. To remedy this it was enacted that where a will made by any person dying after 6th March, 1834, contained a devise of all such land as the testator died seised or possessed of, it should be valid and effectual to pass land acquired after the making of the will (*k*).

7. *Words of Limitation.*

Words of limitation, or other words showing either expressly or by implication that the testator intended to pass the fee,

(*j*) S. 2. This section now applies to present conditions.
(*k*) S. 3. See postea, s. 16.

were essential, otherwise an estate for the life of the devisee only would pass. To remedy this it was enacted that wills of persons, dying after the above-mentioned date, should be taken as intended to pass all such estate as the testator had in the land, unless a contrary intention appeared in the will (*l*).

8. *Wills of Married Women.*

Any married woman after 4th May, 1859, and before 1st July, 1874, might by a will executed in the presence of two or more witnesses, neither of whom was her husband, make any devise of her separate property to or amongst her child or children issue of any marriage, and failing there being issue then to her husband, or as she might see fit (*m*). Any disposition attempted to be made by a married woman under this Act to her husband or other persons when she had children was consequently void, and intestacy was the consequence (*n*). And it was doubted whether she could devise her property to one to the exclusion of others of her children (*o*).

9. *The Present Act—Execution.*

The mode of execution of a will under the present Act is radically different from that under the previous law. Every will must be in writing, and for the first time it is required that a will shall be signed "at the foot or end thereof," which is defined to mean "if the signature is so placed, at, or after, or following, or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will; and no such will shall be affected by the circumstance that the signature does not follow or is not immediately after the foot or end of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature, or by the circumstance that the signature is placed among the words of the testimonium clause, or of the clause of attestation, or follows, or is after or under the clause of attestation either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance

(*l*) S. 4.
(*m*) S. 6.
(*n*) *Mitchell* v. *Weir*, 19 Gr. 568.
(*o*) *Munro* v. *Smart*, 26 Gr. 377.

that the signature is on a side, or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will is written above the signature, or by the circumstance that there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment" (*p*).

10. *Attestation.*

The attestation must be by two or more witnesses present at the same time when the signature took place, and they are to subscribe their names in the presence of the testator (*q*). It is the purpose of the Act that every disposition shall be authenticated after it is made by the signatures of both testator and witnesses in the foregoing manner; and consequently if any disposition or direction appears underneath the signature it is not operative, but another signature ought to follow (*r*); and "no obliteration, interlineation or other alteration made in any will after execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration are not apparent, unless such alteration is executed in like manner as hereinbefore is required for the execution of the will; but the will with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses are made in the margin or in some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or in some other part of the will" (*s*).

11. *Wills of Soldiers and Sailors.*

Though the general statutory rule is that wills must be in writing, an exception is made in favour of "any soldier being in actual military service," and any mariner or seaman "being at sea," who may dispose of their personal estate as they might have done before the passing of the present Act (*t*). A similar

(*p*) S. 12.
(*q*) Ibid.
(*r*) Sec. 12 (2) ad fin.
(*s*) S. 24.
(*t*) S. 14.

provision was made by the Statute of Frauds (*u*). Any such person may, under the circumstances mentioned, make a will of personalty by word of mouth or informal writing, called a nuncupative will.

And so a soldier or seaman, under the circumstances, may make a will although he is under age (*v*).

A soldier is "in actual military service" only when a state of war exists and some step has been taken towards joining the forces in the field (*w*).

When a soldier is in actual military service will necessarily be a question of fact in many cases. It has been held that where a volunteer had, under orders to do so, gone into barracks, and had been accepted and attested, he was in actual, military service thereafter while in barracks (*x*). And where a battalion was "warned" for service and two days later was ordered to mobilize, it was held that the mobilization was the commencement of the expedition, and although a soldier in the battalion had himself done nothing, the order for mobilization placed him in actual service (*y*). Receipt of orders by a regular soldier to report to the commanding officer of another corps and proceed with it to the field has also been held sufficient (*z*).

The following have been held to be testamentary documents and admissible to probate under this enactment: A will by a soldier under age (*a*); a letter written to the universal legatee (*b*); a letter written to a friend of the soldier's *fiancée*, stating that all his effects would be hers (*c*); a letter written by an officer to his solicitor leaving everything to his wife (*d*); an entry made in an orderly room roll, kept under orders, to show the next of kin or the person to whom soldiers' effects were to go in the event of death, as follows: "I desire all my effects to be credited to my sister" (*e*).

(*u*) 29 Car. II. c. 4, s. 23.
(*v*) *In bonis Hiscock*, (1901) P. 78.
(*w*) Ibid.
(*x*) Ibid.
(*y*) *Gattward* v. *Knee*, (1902) P. 99; followed in *May* v. *May*, Ibid., note, and 18 T.L.R. 184.
(*z*) *In bonis Gordon*, 21 T.L.R. 653.
(*a*) *In bonis Hiscock*, (1901) P. 78.
(*b*) *Gattward* v. *Knee*, (1902) P. 99.
(*c*) *May* v. *May*, 18 T.L.R. 653.
(*d*) *Stopford* v. *Stopford*, 19 T.L.R. 185.
(*e*) *In bonis Scott*, (1903) P. 243.

A seaman is "at sea" when he is on maritime service, including the period while he is returning from such service.

So, also, as long as a soldier continues in active service he is privileged to make a will under this section. Thus, an officer with an escort to a party engaged in delimiting a frontier after an engagement was held to be in active service (*f*).

And, although a soldier in active service may make a will with witnesses in the form prescribed by the Wills Act in general cases, it may still be a soldier's will and entitled to the privilege, and a legacy to an actual witness to the will is good (*g*).

12. *Competency of Witness.*

As to the competency of witnesses. Where real or personal estate is charged with debts, and any creditor, or the wife or husband of any creditor whose debt is so charged by the will, attests the execution, he or she is, notwithstanding such charge, admitted to prove the will (*h*). No executor, on that account, is incompetent as a witness (*i*). And any beneficial devisee or legatee, or the wife or husband of any such person, is competent to prove the will, but the devise or legacy in such case is made null and void, thus removing the interest of the witness (*j*).

This section applies only to such wills as are required by the Act to be attested, and therefore where the will of a soldier in actual service is unnecessarily witnessed, the witnesses are not merely supernumerary, but are not essential to the will, and a gift to one of them is not affected by this section but is valid (*k*).

Lastly, it is enacted that "if any person who attests the execution of a will is, at the time of the execution thereof, or becomes at any time afterwards, incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid" (*l*). It is not quite clear what is meant by this section. Executors, legatees, and creditors

(*f*) *Re Limond*, (1915) 2 Ch. 240.

(*g*) *Re Limond*, (1915) 2 Ch. 240.

(*h*) R.S.O. c. 120, s. 18.

(*i*) S. 19.

(*j*) S. 17. In interpreting a will, where a devise or bequest fails by reason of the devisee or legatee being a witness, the will must first be interpreted with the void devise or bequest, and then the devise or bequest held void: *Re Maybee*, 8 O.L.R. 601; *Freel* v. *Robinson*, 18 O.L.R. 651.

(*k*) *Re Limond*, (1915) 2 Ch. 240.

(*l*) S. 16.

whose debts are charged on the estate by the will, their wives and husbands, are all competent witnesses. And if any witness to a will should afterwards by a codicil be made an executor or legatee, or should become a creditor and have his debt charged on the estate by the will or codicil, he would still be a competent witness under the other sections. The Act contemplates that a witness shall be able to subscribe his name, and afterwards to prove the testator's signature; and it is difficult to conceive of a case where a witness would be incompetent, these qualifications being present. A person incompetent to comprehend what was being done, *i.e.*, one of unsound mind, would hardly be selected as a witness; but this is the only incompetency that suggests itself. And if a witness, sane at the time of attestation, should afterwards become insane, it could hardly be contended that the will would have become invalid thereby, even in the absence of this enactment, any more than if he had died after attestation.

13. *What May be Devised.*

Every person may devise or bequeath "all real and personal estate to which he may be entitled at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon his heirs or upon his executor or administrator; and the power hereby given shall extend to estates *pur autre vie*, whether there is or is not any special occupant thereof, and whether the same are corporeal or incorporeal hereditaments; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator is or is not ascertained as the person, or one of the persons, in whom the same may become vested, and whether he is entitled thereto under the instrument by which the same were created, or under any disposition thereof by deed or will, and also to all rights of entry for conditions broken and other rights of entry, and also to such of the same estates, interests and rights respectively, and other real estate and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will" (*m*).

It will be noticed that a right of entry for condition broken is made devisable by this enactment (*n*), whereas only rights of entry as on a disseisin were within the former enactment.

(*m*) S. 9.

(*n*) *Pemberton* v. *Barnes*, (1899) 1 Ch. 544.

14. *Infants and Married Women.*

An infant cannot make a will (*o*).

There is no specific provision for the wills of married women. But by the Interpretation Act (*p*), "words importing . . . the masculine gender only shall include . . . females as well as males." The word "person" in the Wills Act may not necessarily "import the masculine gender," but if not it must necessarily include females.

A married woman is specially authorized by the Married Women's Property Act (*q*) to devise or bequeath her separate estate.

A widow may bequeath the crop grown on her dower land (*r*).

15. *Revocation.*

A will might, before 1st January, 1869, have been revoked, either by implication or expressly. Before that date the will of a woman was impliedly revoked by marriage. The will of a man was not revoked by marriage only; nor was a will made after marriage and before birth of issue revoked by the birth of issue only. But marriage and birth of issue revoked a will made by a man before marriage, unless provision were made in the will for wife and children; on the principle that, where a man had made a will in favour of a stranger or remote relation, he could not intend it to be operative to the detriment of his wife and children upon such a change of circumstances. On and after 1st January, 1869, marriage was declared to be a revocation of the will of a testator, unless made in pursuance of a power of appointment under the circumstances mentioned in clause (c) of the section to be presently mentioned (*s*). The present Wills Act now provides that the will of every person dying on or after 13th day of April, 1897, shall be revoked by the marriage of the testator, except in the following cases:—

(a) Where it is declared in the will that the same is made in contemplation of such marriage;

(b) Where the wife or husband of the testator elects to take under the will, by an instrument in writing, signed by

(*o*) S. 11.
(*p*) R.S.O. c. 1, s. 28 (i).
(*q*) R.S.O. c. 149, s. 4 (1).
(*r*) R.S.O. c. 120, s. 10.
(*s*) R.S.O. (1897) c. 128, s. 20 (2); now R.S.O. c. 120, s. 21 (2).

the wife or husband, and filed within one year after the testator's death in the office of the surrogate clerk at Toronto;

(c) Where the will is made in the exercise of a power of appointment, and the real estate or personal estate thereby appointed would not, in default of such appointment, pass to the testator's heirs, executor or administrator, or the person entitled as the testator's next of kin under the Devolution of Estates Act (*t*).

It will be observed that marriage alone will now revoke a will, except in the cases removed from the operation of the enactment, and birth of issue will not now have any effect, having been disregarded by the legislature in defining how revocation shall take place, and the legislature having explicity declared (*u*) that "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

Where a man, whose domicil of origin was the Province of Quebec, made a will while domiciled there, and afterwards removed to Ontario and became domiciled in Ontario and married there, it was held that his will was revoked, and that he died intestate in Ontario, though the will, according to the law of Quebec, was not revoked by his marriage (*v*).

With regard to the class of cases comprised in clause (a), inasmuch as it is a statutory requirement that there shall be a declaration in the will that it is made in contemplation of marriage, it is conceived that no evidence would be admissible, either extraneous or by inference from the nature of the disposition contained in the will, to show such contemplation or intention if the declaration should not appear expressly in the will. At the common law, when marriage and birth of issue constituted an implied revocation, no evidence of intention was admissible (*w*); and so it would probably not have been admissible since the statute, even if the clause (a) had not been enacted. It was also the rule at common law that, if the wife and children were provided for in the will of a man unmarried when it was made, the subsequent marriage and birth of issue did not revoke the will (*x*). Bearing this in mind, the legis-

(*t*) R.S.O. c. 120, s. 21.

(*u*) Ibid. s. 22.

(*v*) *Seifert* v. *Seifert*, 32 O.L.R. 433; 23 D.L.R. 440.

(*w*) *Marston* v. *Roe d. Fox*, 8 Ad. & E. 14. In *Thompson* v. *Watts* 2 J. & H. at p. 299, it was said that "by the law as it now (1862) stands the mere fact of marriage renders a man intestate."

(*x*) *Marston* v. *Roe d. Fox*, supra.

lature has not thought fit to declare that a will shall not be revoked by marriage, if it provides for the event of marriage and its results, or if it appears from the will that the intention was that it should not be revoked by marriage; but has expressly enacted that it must contain a declaration that the will "is made in contemplation of *such* marriage." That is to say, bequests or devises to take effect in the event of marriage, or in case of marriage (as, "I leave my property to A., but in case I marry, then to my wife"), are apparently not sufficient; but there must be a formal declaration that the will is made in contemplation of marriage, and then "such marriage," *i.e.*, the marriage referred to in the declaration, will not revoke the will so made.

Clause (b) is no doubt intended to cover cases not within clause (a), and to provide for wills made *in the event*, though not in contemplation, of marriage. If the will contains the declaration required by clause (a), it will be sufficient to prevent revocation, and therefore clause (b) need not be resorted to. Where no formal declaration is contained in the will, then the election of the wife or husband to take under the will will prevent revocation. In order to make this clause operative, it is perhaps not too much to assume that there must be a bequest or devise to the wife or husband, otherwise the election could not be made. Thus, if a testator should say, "I leave my property to A., but in case I marry, then to my wife," the marriage would cause a dependent revocation of the will, there being no declaration that it is made in contemplation of marriage; but the wife might elect to take under it, and thus prevent complete revocation. If, however, there should be no bequest or devise to the wife or husband, but to children only (thus, "I leave my property to A., but in case I marry, then to my children"), so that wife or husband could not "elect to take under the will," the revocation could apparently be complete by marriage; and intestacy would follow.

The marriage must, of course, be a legal one. In England a form of marriage between persons within the prohibited degrees will, of course, not work a revocation (*y*).

Cases under clause (c). Where the testator appoints by will property which in default of appointment might go to his family, the will is revoked by his marriage, the policy of the Act being the same as in the case of a disposition of his own

(*y*) *Mette* v. *Mette*, 1 Sw. & Tr. 416.

property. But where the property, in default of appointment, would not go to his family, then there is no reason why marriage should revoke the will, and consequently that case is excepted from the general provisions of the statute. The only effect of annulling a will in the latter case would be, not to vest the property in the new family of the testator, who are under the protection of the Act, but to carry it to the person entitled in default of appointment.

A will may also be revoked expressly, either (1) by another testamentary document, or in the words of the statute, by "another will executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed," or (2) "by the burning, tearing or otherwise destroying the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same" (*z*).

As to revocation by a subsequent testamentary disposition, it must be borne in mind that no informal document is sufficient. Any revoking document must be of the same dignity as the will revoked, *i.e.*, it must be executed in the same manner as a will.

Although a subsequent testamentary document may contain a revocatory clause, it may be a question of fact as to whether such a clause was intended to be effectual to revoke a prior one, or whether it was inserted *per incuriam*; and if the latter, both documents will be admitted to probate, omitting the revoking clause from the subsequent document (*a*).

A will may be impliedly revoked by a subsequent inconsistent testamentary disposition of the property affected by it, or partially revoked by a disposition of part of the property (*b*). But if there be not an express revoking clause in the subsequent will, both may be read together, and if not entirely inconsistent with each other both may stand (*bb*). Further consideration of this branch of the subject is not within the scope of this chapter, and the reader is referred to the treatises on wills therefor.

Revocation by "obliteration" (*c*) is not to have any effect

(*z*) R.S.O. c. 120, s. 23.

(*a*) *In bonis Oswald*, L.R. 3 P. & D. 162; *Marklew* v. *Turner*, 17 T.L.R. 10.

(*b*) See *Kent* v. *Kent*, (1902) P. 108.

(*bb*) *Simpson* v. *Foxon*, 23 I.L.R. 150.

(*c*) S. 24.

unless the alteration executed in the manner prescribed for the execution of a will. The obliteration may have the effect of revoking part of the will, and so requires execution and attestation in as formal a manner as a new testamentary instrument. And so, where a testator drew his pen through the lines of some part of the will, leaving the words legible, and wrote on the back "all these are revoked," and threw it into a heap of waste papers on the floor, and it was afterwards found in his house, it was held that there was no revocation (*d*). And where a testator ran his pen through the several letters of his signature and wrote below, "I hereby revoke this will," which he signed with his initials, his wife signing her name as witness, it was held not to revoke the will (*e*).

The burning, tearing or otherwise destroying the will stand on a different footing, and though not required to be done in the presence of attesting witnesses, as obliteration is, yet they must be done *with the intention of revoking the will*. This intention may be shown by evidence, because burning, tearing or other destruction of the will might occur by accident, or be for a specific though mistaken purpose, as will be presently seen. There must be the destruction by the testator with the intention of revoking the will, or destruction by some one acting upon his direction *and* in his presence with the intention of revoking it.

Where a will has been torn up in the testator's presence, but without his authority, it is not revoked, and no act of ratification of the destruction can be made. The testator must in such a case execute a document revoking the will or dealing with his property on the footing that the torn will is still effective (*f*).

A destruction of part of a will with the intention of revoking the part destroyed may have the effect of revoking the whole will (*g*).

Where the act of destruction takes place with the intention of making another will, so that it may be inferred that its revocation depends upon the efficacy of the new testamentary disposition, and if the new will be defective or inoperative, so that the object of the testator is not attained, the revocation

(*d*) *Cheese* v. *Lovejoy*, 2 P.D. 251.

(*e*) *Re Mulholland & Van den Berg*, 34 O.L.R. 242; 24 D.L.R. 785.

(*f*) *Gill* v. *Gill*, (1909) P. 157.

(*g*) *Leonard* v. *Leonard*, (1902) P. 243.

by destruction fails (*h*). So also, if a will be destroyed on the assumption that an earlier will is thereby revived, and if this supposition turns out to be erroneous, the revocation fails. The intention to revoke in such cases is not absolute, but dependent upon the substitution of another testamentary disposition; and being thus conditional, and the condition not happening, the revocation does not take place. This is called dependent relative revocation (*i*).

But where a will was properly revoked by a subsequent testamentary document, the fact that the only legacies given by the latter failed because the husband of one legatee and the wife of another witnessed it, was held not to make the revocation a dependent relative one; the only effect being to disqualify the legatees from taking their legacies (*j*).

When it is proved that a will has been executed, and it is traced to the testator's possession, but cannot be found on his death, the presumption is that he destroyed it himself (*k*). But this presumption may of course be rebutted (*l*).

No will, which has been in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed as required by the Act, and showing an intention to revive the will; and where a will which has been partly revoked, and afterwards wholly revoked, is revived, the revival is not to extend to so much as was revoked before the revocation of the whole, unless a contrary intention is shown (*m*).

Under the old law, a conveyance, or attempted conveyance, which was ineffective or inoperative, was held to revoke a devise of the same property, on the principle that it was inconsistent with the disposition by will. But, by the present Act, "no conveyance, or other act made or done subsequently to the execution of a will, of or relating to any real estate or personal estate therein comprised, except an act by which such will is revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real estate

(*h*) *Dixon* v. *Solicitor to the Treasury*, (1905) P. 42; *Stamford* v. *White*, (1901) P. 46; *Re Irvin*, 25 T.L.R. 41.

(*i*) See *Cossey* v. *Cossey*, 16 T.L.R. 133.

(*j*) *Freel* v. *Robinson*, 18 O.L.R. 651.

(*k*) *Allan* v. *Morrison*, (1900) A.D. 604.

(*l*) *Sugden* v. *Lord St. Leonards*, 1 P.D. 154; *Re Sykes*, 22 T.L.R. 741; 23 T.L.R. 747.

(*m*) R.S.O. c. 120, s. 25.

or personal estate, as the testator had power to dispose of by will at the time of his death" (*n*).

A sale, of land devised by the testator, taking a mortgage back for the purchase money, is not within this section: the mortgage passes under a bequest of personalty (*o*).

16. *After-acquired Property.*

As to what will pass by a devise, we have to consider, what estate will pass and what property is included in the description. A will was originally considered, with regard to real property, as a present conveyance, and to pass, therefore, only such property as the testator owned at the time of making it; but after-acquired personal estate passed by a general bequest. In 1834 an Act was passed by which it was declared that when any will executed after the Act "contains a devise in any form of words of all such real estate as the testator dies seised or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land acquired by the devisor after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof" (*p*). The presumption under this Act remained the same as before, namely, that the testator intended to pass only such property as he had at the time of making his will. That presumption had to be removed by some form of words indicating a contrary intention, in order to make the enactment applicable (*q*).

But by the present Wills Act, since 1st January, 1874, "every will shall be construed *with reference to the real estate and personal estate comprised in it*, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will" (*r*). It is to be observed that it is not for all purposes that the will speaks from the death, but only as far as this enactment is concerned, for the purpose of determining what real and personal property is comprised in it. It is also to be observed that the enactment is not to be taken in its literal sense, as a mandate to construe the will as if made in point of time immediately before the death, but as intended to affect only the real and personal property at the time of the making of the will actually

(*n*) S. 26.
(*o*) *Re Dods*, 1 O.L.R. 7.
(*p*) R.S.O. c. 120, s. 3.
(*q*) *Plumb* v. *McGannon*, 32 U.C.R. at p. 15.
(*r*) R.S.O. c. 120, s. 27 (1).

comprised in it. The meaning is that the will is to be construed as if it had been executed immediately before the death, for the purpose of ascertaining what real and personal property is comprised in it, or affected by it (*s*). The object of the enactment was to render a will capable of carrying property acquired after it was executed, if its terms permitted it. *Prima facie* then the will is to be taken as if executed immediately before the death, the statutory presumption being that the testator intends to pass all his estate as he may have it at the time of his death (*t*). "In other words, in the absence of a contrary intention, you are to read a general gift of real estate as being equivalent to 'all the real estate which I shall be entitled to at the time of my death,' in the same way as you always read a general gift of personal estate" (*u*).

Thus a devise of "all my real estate being the S.E. part of lot 10" was held to be sufficient to pass the N. ½ of lot 10 subsequently acquired by the testator, the words "all my real estate" being a general description, and the enumeration of the S.E. part of lot 10 being rejected as an imperfect description (*v*).

But this presumption may be displaced by a contrary intention appearing in the will. Thus a contrary intention may appear in consequence of a reference in the will to its own date, as if the testator devise the land "I *now* occupy" (*w*), or if he contrasts the expressions in his will, by references to property "now" owned, and to other property which "shall be vested in me at the time of my death" (*x*). So where a testator devised to R. the "property on Hughson Street," having at the time only one house on that street, known as the Red Lion Hotel, and devised "all the rest and residue of my estate which I shall be entitled to at the time of my decease to A.," and after making his will acquired other property on Hughson Street, it was held that the after-acquired property did not pass to R., as the will indicated an intention that the after-acquired property should be disposed of differently from that which he had at the time of making the will (*y*).

(*s*) Per Turner, L.J., *Langdale* v. *Briggs*, 2 Jur. N.S. at pp. 995, 996.

(*t*) *Plumb* v. *McGannon*, 32 U.C.R. at p. 15.

(*u*) *Lysaght* v. *Edwards*, 2 Ch.D. at p. 505.

(*v*) *Re Smith*, 10 O.L.R. 449.

(*w*) *Hutchinson* v. *Barron*, 6 H. & N. 583. As to use and effect of the word "now," see *Re Holden*, 5 O.L.R. 156; *Re Willis*, (1911) 2 Ch. 503.

(*x*) *Cole* v. *Scott*, 1 Mac. & G. 518.

(*y*) *Morrison* v. *Morrison*, 9 Ont. R. 223; 10 Ont. R. 303.

So also a contrary intention may be shown by a specific description of property (*z*). What is a specific description has occasioned some doubt, where the land is not referred to by lot number or other particular designation. Thus a testator devised "the south eighty acres of lot number 12, excepting so much thereof as I may have sold and conveyed." At the time of making the will, he had sold portions of the south half, but after making his will and before his death he again acquired them. It was held by a majority of the judges that the portions sold were excluded from the devise (*a*).

17. *General Description of Lands.*

With regard to what may be included in a general description of "lands," it is enacted that a devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a *general* manner, and any other general devise which would describe a leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include his leasehold estates, or any of them to which such description will extend, as well as freehold estates, unless a contrary intention appears by the will (*b*). Leaseholds are chattel property and so not included in the expression "land" unless by express direction. Consequently a devise of a testator's "lands," or "lands at or in" a particular place would not pass leaseholds if there were freeholds to go by such a devise. If there were no freeholds to answer such a description, then the leaseholds necessarily passed under the description of lands. The statute now remedies this, and makes leaseholds pass under the designation of lands in the cases mentioned in the Act.

And so also, a general devise of the real estate of the testator, or of the real estate in any place, or in the occupation of any person mentioned, or otherwise described in a general manner, will include real estate over which the testator has a power to appoint (by will) (*c*) in any manner he may think proper, and will operate as an execution of such power unless a contrary intention appears by the will (*d*).

(*z*) *Crombie* v. *Cooper*, 22 Gr. 267; 24 Gr. 470; *Re Evans*, (1909) 1 Ch. 784.

(*a*) *Vansickle* v. *Vansickle*, 1 Ont. R. 107; 9 App. R. 352.

(*b*) R.S.O. c. 120, s. 29.

(*c*) *Phillips* v. *Cayley*, 43 Ch.D. 222, at p. 233.

(*d*) R.S.O. c. 120, s. 30.

18. *Words of Limitation.*

With regard to the estate which passes, it is not necessary to add limitations thereof. When no words of limitation are used a devise will pass the fee-simple or other the whole estate or interest which the testator has power to dispose of by will, unless a contrary intention appears by the will (*e*). Where the word "heir" or "heirs" is used, not as a word of limitation of an estate, but as the designation of a particular person or particular persons, then its signification is the person or persons who would answer that description at the time of the making of the will (*f*). Thus where a will was made of lands in Upper Canada before the Act which abolished primogeniture was passed, devising land to the testator's heir, and after the will was made that statute was passed, and afterwards the testator died without having altered his will, the devisee was held to mean the person whom he understood to be his heir when he made the will, viz., his eldest son (*g*). And where a testator made his will fifteen years after the passing of the Inheritance Act, which made all the children heirs, and devised land to one F., but in case of his death, to the heirs of F., it was held that the word "heirs" meant those who would in fact have been heirs to F.'s estate upon his intestacy (*h*). An erroneous idea as to this seems to have prevailed in the Legislature of Ontario, in consequence of which an Act was passed on 5th March, 1880 (*i*), whereby that method of interpretation is to be applied to the wills of all testators dying on or after that date. But this clause did not make any difference in the doctrine (*j*).

19. *Lapse.*

When a devise failed or became void by reason of the death of the devisee in the life time of the testator, or by reason of the devise being contrary to law, or by reason of its being other-

(*e*) S. 31.

(*f*) *Tylee* v. *Deal*, 19 Gr. 601; *Baldwin* v. *Kingstone*, 16 Ont. R. 341; 18 App. R. 63, and Appx.

(*g*) *Tylee* v. *Deal*, supra; *Baldwin* v. *Kingstone*, supra.

(*h*) *Sparks* v. *Wolff*, 25 App. R. 326; 29 S.C.R. 585.

(*i*) Now R.S.O. c. 120, s. 32.

(*j*) *Sparks* v. *Wolff*, supra. A misapprehension of the law by the Legislature has not the effect of making that the law which the Legislature had erroneously assumed it to be: *Shrewsbury (Earl of)* v. *Scott*, 29 L.J. C.P. 34.

wise incapable of taking effect (as by the devisee being a witness to the will) the lapsed devise passed to the heir, whose title by descent was not impaired by the void devise. But by the present Act (*k*), unless a contrary intention appears by the will, such a devise now falls into the residue (if there be a residuary devise) and passes to the residuary devisee. To make this section apply, the residue disposed of must be so disposed of by "a real residuary devise, that is to say, so worded as to apply to all land that is not otherwise disposed of" (*l*). So, where a testator devised his freehold shop at Wimbledon to his son, and then devised to the plaintiffs "all other my freehold messuages and tenements at Wimbledon and elsewhere," and the devise to the son failed by reason of his having attested the will, it was held that the shop passed to the plaintiffs (*m*).

Other cases of lapse are prevented by other sections. Thus, where *any person* to whom real estate is devised for an estate tail, or an estate in *quasi* entail, dies in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue are living at the time of the death of the testator, the devise does not lapse, but takes effect as if the death of the devisee had happened immediately after the death of the testator, unless a contrary intention appears by the will (*n*). It will be observed that, as to the subject matter of the devise, this clause applies only to land; as to the objects of the devise, to any person.

And where any person, being a *child or other issue* of the testator, to whom any *real estate or personal estate* is devised or bequeathed for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator, leaving issue, and any of the issue of such person are *living* at the time of the death of the testator, the devise or bequest does not lapse, but takes effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will (*o*). This clause, as regards the subject matter of the disposition, applies to personal, as well as real, estate; as regards the objects of the testator's bounty, to his children or other issue only.

(*k*) R.S.O. c. 120, s. 28.

(*l*) Per Mellish, L.J., *Springett* v. *Jenings*, 6 Ch. App. 333, at p. 338.

(*m*) *Re Mason*, (1901) 1 Ch. 619; (1903) A.C. 1; and see *Re Farrel*, 12 O.L.R. 580.

(*n*) R.S.O. c. 120, s. 36.

(*o*) S. 37.

The event of the death of a child is to be taken as if it actually happened after the death of the testator, so that a deceased daughter's husband, who with her children survived the testator, was held entitled to share (*p*). And a will made by a son of the testator, who died before the testator, leaving issue, was held to be effective to pass property devised to him by the testator (*q*).

The section applies to a child *en ventre sa mere*, who, though not born, is living within the meaning of the section (*r*).

It does not apply to collaterals, although the will uses expressions indicating that the testator intends it to apply (*s*).

Nor does it apply to gifts to classes (*t*).

The word "issue" in these two sections is not confined to the immediate issue or children of the devisee or legatee. "Issue" includes all descendants of any degree unless restrained by a context. In the latter of these two sections the expression "child or other issue" plainly by express intendment includes any direct descendant however remote. In the former section the expression is "issue who would be inheritable." And this would necessarily include any one in the direct line who could succeed to the entailed property.

21. *Die Without Issue.*

Before the enactment to be presently referred to, if a testator devised land to A., but if A. should die without issue, or die without leaving issue, or if A. should have no issue, then over to B., by this devise A. took an estate tail *by implication*. Although no estate was expressly limited to A., it was clear that B. should take, not at A.'s death in any event, but only upon failure of A.'s issue at an indefinite period. Consequently the implication was that A. and his issue were to take; or, in other words, A. took an estate tail by implication. In order that this rule should apply, it was necessary that there should be no precise time indicated at which B. should take upon failure of issue, *i.e.*, there must have been an indefinite failure of issue, or, more properly, a failure at an indefinite time. And consequently, if a devise were made to A., but in

(*p*) *Re Hunt*, 5 O.L.R. 197.

(*q*) *Re Scott*, (1901) 1 K.B. 228.

(*r*) *Re Griffiths' Settlement*, (1911) 1 Ch. 246.

(*s*) *Re Gresley's Settlement*, (1911) 1 Ch. 358.

(*t*) *Re Sinclair*, 2 O.L.R. 349; *Re Williams*, 5 O.L.R. 345; *Re Clark*, 8 O.L.R. 599; *Re Moir*, 14 O.L.R. 54.

case he should die without leaving issue at the time of his death, then to B.; here a definite period is fixed at which B. must take if he takes at all, viz., at A.'s death if A. leaves no issue at that time. A. in such case took an absolute estate, with an executory devise over to B. if he left no issue. If no issue, B. would take; if issue survived, then B. could never take, and A. had always had (in the event) a fee-simple (*u*). The rule has now been altered by statute (*v*). Since 1st January, 1874, when the enactment came into force, in any devise the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of issue, shall be construed to mean a failure in his lifetime or at the time of his death, and not an indefinite failure of issue. The exception under the old law is the rule under the statute. It is not necessary now that the words of the will should restrict the meaning of the expressions used to the failure at a particular period. The statute now does that; and the consequence is that since the statute the devisee in such a case will take, not a fee-tail by implication, but a fee-simple if he leaves issue surviving him at his death, with an executory devise over in case he leaves none.

This of course does not obtain if a contrary intention appears by the will, by reason of an estate tail being expressly given. And such contrary intention to give an estate tail must appear, not by *implication*, but by express limitation. Thus if, since the statute, there be a devise to A., but if he die without issue, then to B., A. takes a fee-simple, with an executory devise over to B. if he leave no issue surviving him. But if the devise be to A. and the heirs of his body, but if he die without issue, then to B., the contrary intention appears, A. taking an estate tail by express limitation.

The Act is confined to such expressions as are found in it. It was not intended to apply to such cases as occur upon the expression "issue dying under the age of twenty-one," which fixes a period for failure of issue, and does not leave it indefinite (*w*). Nor does it affect the meaning of the expression "die without heirs of the body" (*x*).

(*u*) *Nason* v. *Armstrong*, 22 Ont. R. 542; 21 App. R. 183; 25 S.C.R. 263.

(*v*) S. 33.

(*w*) *Morris* v. *Morris*, 17 Beav. 198.

(*x*) *Dawson* v. *Small*, 9 Ch. App. 651; *Harris* v. *Davis*, 1 Coll. 416.

CHAPTER XXI.

OF THE STATUTE OF LIMITATIONS, AND PRESCRIPTION.

(1). *Continual Claim, p. 459.*
(2). *Descent Cast, p. 459.*
(3). *Continual Claim, etc., Abolished, p. 460.*
(4). *Possessory Actions, p. 461.*
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(17). *Landlord and Tenant—Lease in Writing, p. 484.*
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(20). *Tenancy at Will, p. 486.*
(21). *Forfeiture, or Breach of Condition, p. 493.*
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(25). *Concealed Fraud, p. 508.*
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(28). *Prescription, p. 516.*
(29). *Disabilities—Easements, p. 529.*
(30). *Extinction of Easements, p. 530.*

At common law there were often different remedies for the recovery of land where unlawful possession had been taken. They may roughly be divided into possessory remedies, and remedies respecting the right of property. The former

did not determine the right of property at all, but merely the right to possession, the latter determined the right of property.

Apart from remedies by appeal to the courts, the person entitled to possession always had, and still has, the extra-judicial and summary remedy by entry upon the land and re-possessing himself of it, which of itself is no injury to the person wrongfully in possession; though the entry, if forcible, may infringe upon the criminal law, and, if accompanied by unnecessary acts of violence to the person of the trespasser, may subject the owner to an action of trespass to the person at the suit of the person injured. We have already discussed this (*a*).

Inasmuch as all the ancient forms of writ in real actions have been abolished (*b*), and as the law respecting entry upon lands with respect to the limitations of actions has been materially altered, we shall refer to these ancient remedies, and the old law respecting entry, only to a sufficient extent to render intelligible those parts of the Statute of Limitations which require it.

1. *Continual Claim.*

Formerly, if the claimant were deterred from entering upon the land by menaces or bodily fear, he might make *claim* as near to the estate as he could, with certain forms and solemnities; which claim remained in force for only a year and a day. And this claim, if it were repeated once in the space of every year and day (which was called *continual claim*), had the same effect as, and in all respects amounted to, a legal entry. Such an entry actually gave a man seisin, or put into immediate possession him that had the right of entry on the estate, and thereby made him complete owner, and capable of conveying it from himself by either descent or purchase, which otherwise, as regards conveyance to a purchaser, at least, was not allowed at common law; for a person who was considered as dispossessed and having but a right of entry could not transfer such right to another.

2. *Descent Cast.*

The right of entry, however, might have been *tolled*, that is, taken away, by descent. Descents, which took away entries, were when any one, seised *by any means whatsoever* of an inheritance in a corporeal hereditament, died, whereby

(*a*) Ante p. 154.

(*b*) See a curious list of them, R.S.O. (1877) c. 51, s. 75.

the same descended to his heir, and this was termed a *descent cast*. In such a case, however feeble the right of the ancestor might have been, the entry of any other person who claimed title to the freehold was taken away; and he could not recover possession against the heir by this summary method, but was driven to his action to gain a legal seisin of the estate. And this, among others, was for the curious reason that the heir came to the estate by act of law, and not by his own act; the law, therefore, having cast the land upon him by descent, protected his title, and would not suffer his possession to be divested, till the claimant had proved a better right (*c*).

In addition to the benefits derived from continual claim, there was a further advantage attendant thereon, viz., that it prevented the right of entry from being *tolled* or taken away by a descent cast or discontinuance, or, if an action were brought within a year from entry, from being barred by the Statute of Limitations.

And so also if a tenant in tail made a larger estate than he was by law entitled to, it occasioned what was called a *discontinuance*. As if tenant in tail made a feoffment in fee-simple, or in tail, or for the life of the feoffee, all which were originally beyond his right to make, as that extended no further than to convey for his own life; in such case the entry of the feoffee was lawful during the life of the feoffor; but, if after his death, possession was retained by the feoffee, it was an injury which was termed a discontinuance. Tenant in tail has now, however, a right to convert the estate into a fee-simple in certain cases. And the right of the issue in tail to recover the land is regulated by the statute.

3. *Continual Claim, etc., Abolished.*

The effects of descent cast and continual claim have been abolished by the Statute of Limitations, which enacts that "no person shall be deemed to have been in possession of any land within the meaning of this Act, merely by reason of having made an entry thereon" (*d*). The entry here referred to is an entry not equivalent to a re-taking of possession. Thus,

(*c*) The common law doctrine as to the effect of a descent cast was somewhat modified by Statute 31 Hen. VIII. c. 33, enacting that "the dying seised of any disseisor of, or in any lands, etc., having no title therein, shall not be deemed a descent to take away the entry of a person or his heir, who had lawful title of entry at the time of the descent, unless the disseisor has had peaceable possession for five years next after the disseisin, without entry or continual claim by the person entitled."

(*d*) R.S.O. c. 75, s. 9.

an entry by the owner on premises in the possession of a trespasser, his family being present, and removing a stone from the wall of the house, and a portion of the fence, and saying that he took possession, was held not to be re-taking of possession but a mere entry within the meaning of this section (*e*). But entering on the land and turning out the trespasser and his family and most of his furniture is a re-taking of possession, and not a mere entry, although the trespasser returned to he house the same day (*f*).

And "no continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action" (*g*). And again, "no descent cast, discontinuance or warranty, which has happened or been made since the first day of July, 1834, or which may hereafter happen or be made, shall toll or defeat any right of entry or action for the recovery of land" (*h*).

4. *Possessory Actions.*

Next to rights of entry followed another class, which were in use where the tenant or occupier had advanced one step nearer to perfection; so that he had in him not only a bare possession, which might be destroyed by a bare entry, but also an *apparent right of possession*, which could not be removed by mere entry, but only by orderly course of law; in the process of which it must have been shown that though he had possession and therefore the presumptive right, yet here was a right of possession superior to his, residing in him who brought the action.

These remedies were formerly either by a *writ of entry*, or an *assise*; which were actions merely *possessory*; serving only to regain that possession, whereof the demandant (that is, he who sued for the land), or his ancestor had been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claimed. They decided nothing with respect to the *right of property*; only restoring the demandant to that state or situation, in which he was (or by law ought to have

(*e*) *Doe d. Baker* v. *Coombes*, 9 C.B. 714; see also *Thorpe* v. *Facey*, 35 L.J.C.P. 349.

(*f*) *Randall* v. *Stevens*, 2 El. & B. 641, at p. 652; see also *Allen* v. *England*, 3 F. & F. 49; *Worssam* v. *Vandenbrande*, 17 W.R. 53; *Solling* v. *Broughton*, (1893) A.C. 556.

(*g*) S. 10.

(*h*) S. 11.

been) before the dispossession committed. But this was without any prejudice to the right of ownership; for, if the dispossessor had any legal claim, he might afterwards exert it, notwithstanding a recovery against him in these possessory actions.

At the present day, where an action to recover land is brought, the question of title to or property in the land is always determined, excepting in one peculiar case. By 11 Geo. II. c. 19, s. 11, now R.S.O. c. 155, s. 60, it is enacted that "every attornment of any tenant . . . to a stranger claiming title to the estate of his landlord shall be absolutely null and void; and the possession of his landlord shall not be deemed to be changed, altered or affected by any such attornment." And so where a tenant attorns to a stranger, the landlord may recover possession on this ground alone, without prejudice to the question of title which may afterwards be litigated (*i*).

It is true that when a person who is wrongfully in possession of land is ousted by another who has no title, the first can maintain an action to recover the land, and succeed on proof of his prior seisin and the ouster by the defendant. Neither one has a title to the land, and yet the action is not a possessory one. For the prior seisin of the first trespasser is merely accepted as *prima facie* evidence of seisin in fee, which is sufficient to entitle him to succeed, unless the defendant who ousted him can show a better title.

But the right of *possession* (though it carried with it a strong presumption) was not always conclusive evidence of the right of *property*, which might still subsist in another man. For, as one man might have the *possession*, and another the *right of possession*, which was recovered by these possessory actions; so one man might have the *right of possession*, and so not be liable to eviction by any possessory action, and another might have the *right of property*, which could not be otherwise asserted than by the great and final remedy of a writ of right, or such correspondent writs as were in the nature of a writ of right; and proceedings on them were termed real actions *droiturel*, as distinguished from those possessory.

So it appears that according to various circumstances, a person entitled to land had to assert his rights in various ways; either by entry, or by real action, mixed, possessory, or droiturel,

(*i*) *Mulholland* v. *Harman*, 6 Ont. R. 546.

as the case might be, and though he failed in an inferior remedy, he might yet resort, as a general rule, to one superior. There were, however, statutes in early times which imposed a limitation on the time within which rights should be asserted, and remedies applied, which time varied according to the circumstances of the case. Sixty years was the utmost period allowed even on the final remedy by writ of right, and this caused Blackstone to say, that "the possession of land in fee uninterruptedly for sixty years is a sufficient title against all the world, and cannot be impeached by any dormant claim whatever;" an observation admittedly incorrect, for as said, as to the old law, by Lord St. Leonards (*j*): "It was possible that an estate might be enjoyed adversely for hundreds of years, and yet at last be recovered by a remainder-man; for instance, suppose an estate to have been limited to one in tail, with remainder over to another in fee, and the tenant in tail to have been barred of his *remedy* by the Statutes of Limitation; it is evident that as his *estate* subsisted, the *remainderman's right* of entry could not take place till failure of issue of tenant in tail, which might not happen for an immense number of years." Other instances might be put, in which sixty years' possession will not confer a title, as where such possession is during the estate of a life tenant (*k*).

5. *The Modern Statute.*

The intention of modern statutes limiting the time within which actions should be brought to recover land, was, as we have seen, first to abolish at once all the old remedies, and the necessity for them, which existed on account of the variety of rights arising out of a variety of circumstances, and to make one kind of action, applicable to all cases if brought within the time limited by the statute.

6. *Adverse Possession Abolished.*

Under the earlier Statutes of Limitations, the time limited did not begin to run except from *adverse* possession, and great difficulties sometimes occurred in determining whether the possession of the party claiming under the statutes, was or was not *adverse* to the party otherwise entitled. This doctrine of non-adverse possession is yet important in cases of written

(*j*) Sugden Stat. p. 4.
(*k*) *Else* v. *Else*, L.R. 13 Eq. 196.

leases at a rent under four dollars which are excepted out of section 6, sub-section 5 of the present Act; and moreover, the present statute cannot be understood without adverting to it.

As a general rule it may be laid down, that possession was not adverse when the parties claimed under the same title; when the possession of one was consistent with the title of the other; or when the party claiming title had never in contemplation of law been out of possession. The mere fact of a tenant's remaining in possession after the tenancy had expired was not deemed an adverse possession; neither was the possession of a person let in under a contract to purchase, though default were made.

The possession of one joint tenant, parcener, or tenant in common was deemed the possession of all the co-tenants or co-parceners; so that even the receipt by one of them of all the profits was not sufficient to cause the possession to be deemed adverse. An actual tortious ouster in deed, or what was tantamount thereto, was requisite to make the possession adverse; or such a state of facts as that an actual ouster would be presumed to have taken place. Thus, if the co-tenant not only received the whole rents, but on being asked for payment of his co-tenant's share, refused payment and denied the right, it was held to be evidence of an ouster. So also sole possession for forty years by one tenant in common being unexplained, was held sufficient for a jury to presume actual ouster.

The possession of a relative of the heir, *possessio fratris*, was not always deemed adverse to the heir; as when a man seised in fee died leaving two sons, and the younger entered by abatement, the statute did not run against the heir at law; for the law presumed that the younger son entered, claiming to uphold and preserve the title of the ancestor, which was that by which the elder son claimed. But had the elder son entered, and then been disseised by the younger, the possession of the latter would then have been adverse.

Except in the case mentioned of small leases, and cases of tenancies at will (under section 6 (7)), this doctrine of non-adverse possession is abolished (*l*). The general purport of the present Act is to make the time for bringing an action to recover land run from the time of the right first accruing, without considering the nature of the possession. Thus, the possession of one tenant in common or joint tenant is not the

(*l*) *Nepean* v. *Doe*, 2 Sm. Lg. Cas. 10th ed. 640.

possession of his co-tenant (*m*), and the possession of a relative is not the possession of the heir (*n*). And it is entirely immaterial that the claimant may not know of his right or its infringement (*o*).

7. *What the Statute Includes.*

The interpretation clause of the Act (*p*) defines "land" as including "messuages and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be laid out in the purchase of land, and any share of the same hereditaments and properties or any of them, and any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interest, or any of them, are in possession, reversion, remainder, or contingency."

The section distinctly includes incorporeal hereditaments. But in *Mykel* v. *Doyle* (*q*), where a fence had been built across a parcel of land over which the plaintiff had a right of way and had so stood for more than ten years, the court held (Armour, J., dissenting) that this did not bar the plaintiff's right of action for disturbance of his way, because the Act could not be applied to incorporeal hereditaments. This case was followed by Street, J., in *McKay* v. *Bruce* (*r*); but was doubted by Burton, C.J.O., in *Bell* v. *Golding* (*s*). For the present, therefore, it must be taken that incorporeal hereditaments are not within the statute, excepting, of course, rent charges, which are frequently named in the various sections; and so where an easement is interrupted or disturbed, the period of limitation remains unaffected by the Act. Reference will be made to the extinction of easements hereafter.

With regard to rights of entry and action, it is impossible to understand how any one but the person entitled to a right of entry or action can be in possession thereof. If A. has a right

(*m*) S. 12, and see *Harris* v. *Mudie*, 7 App. R. 414; *Hartley* v. *Maycock*, 28 Ont. R. 508; *Burroughs* v. *McCreight*, 1 Jo. & Lat. 290.

(*n*) S. 13.

(*o*) *Leeds* (*Duke of*) v. *Earl of Amherst*, 2 Ph. at p. 124.

(*p*) S. 2 (*c*).

(*q*) 45 U.C.R. 65; followed in *Ihde* v. *Starr*, 19 O.L.R. 471; 21 O.L.R. 407.

(*r*) 20 Ont. R. 709.

(*s*) 23 App. R. 485, at p. 489.

of entry or action against a disseisor, he may convey the land and with it the right of entry; but if he does not convey the land how can any other person wrongfully become entitled to A.'s right of entry so as to compel A. to bring an action to recover it? In any event, how can any one bring an action to recover a right of action?

Again, as to possibilities, if A. grant land on condition, there is a possibility of reverter to A. by breach of the condition. How can any one wrongfully acquire this possibility, so as to compel A. to bring an action to recover the possibility? Is such an action conceivable?

Rent is variously used in the statute. By the interpretation clause (*t*) it includes "all annuities and periodical sums of money charged upon or payable out of land." In some sections it means a "rent-charge," in which a man may have an estate. In others it means rent-service, or rent payable to a landlord. Thus in section 5, "no person shall . . . bring any action to recover any land or rent," it means *rent-charge*. In section 6, whenever it is spoken of it means a rent-charge, except when spoken of as rent payable or rent reserved, that is the money payment.

The distinction between the word "rent" as used in the sense of rent charged on land, and as an incorporeal hereditament wherein a distinct estate may exist, and as used in the sense of rent reserved, or rent service (which is a mere incident of the reversion, and wherein no estate exists) may be well illustrated by reference to section 6 (6). That clause enacts that "where any person is in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, etc." And section 6 (7) contains similar phraseology as to tenant at will.

Now, as remarked by Lord Denman (*u*), tenant at will of *land* out of which rent is *reserved*, cannot by any possible construction of language be said to be in receipt of that rent which he pays; he cannot be tenant at will of the land and of the rent also, indeed, no one can be said to be tenant of, or have any estate in, the rent reserved by a lease. The word *rent*, therefore, in the seventh section [R.S.O. c. 75, s. 6 (7)] must mean rent-charge; and there is no absolute absurd-

(*t*) S. 2 (*d*).

(*u*) *Doe d. Angell* v. *Angell*, 9 Q.B. 328; *Grant* v. *Ellis*, 9 M. & W. 113, where there is a misprint of 2nd for 3rd section, as to which see Sug. Stat. 46.

ity in supposing that a person seised in fee, for life, of a rent-charge, might, for a gross sum of money, demise it for years or at will at a smaller rent" (*v*). By applying the above remarks to other sections (as, for instance, s. 6, s.-s. 5), in which the word rent is used, little difficulty will be had in understanding in what sense it applies. And the reader should bear in mind that there may be both a seisin and a disseisin of a rent-charge, that in it there may be distinct estate for life or in fee; and thus the statute frequently refers to land or rent (meaning rent-charge) together, and makes each subject to the same rule under the same circumstances, since, for the purposes of the statute, at least, there is no difference, inasmuch as an estate in fee in a rent-charge is an incorporeal hereditament, whilst the same estate in the land is a corporeal one.

Rent reserved on a lease is governed by other sections.

Title by possession may be gained to the surface of land, though the under *stratum* may be occupied by the owner (*w*); or to a tunnel though the surface is not in the occupation of the trespasser (*x*); to a cellar (*y*); or to a room in a house (*z*).

The land of a railway company may be lost by the possession of an intruder (*a*). This must be distinguished from the attempted acquisition of an easement over railway lands, for a prescriptive right implies a grant, whereas none is implied under the Statute of Limitations.

8. *Land Titles Act.*

Where land is registered under *The Land Titles Act* no length of possession will defeat the registered title. The intention of this legislation is to make the entry in the books of the office the only and the absolute evidence of title. Consequently it is enacted that "a title to any land adverse to or in derogation of the title of the registered owner shall not be acquired by any length of possession" (*b*).

But this is not to prejudice any adverse claim, in respect of length of possession of any person who was in possession of the land when the registration of the first owner took place, as

(*v*) See *Hope* v. *White*, 19 C.P. 479, for an instance of this.
(*w*) *Midland R. Co.* v. *Wright*, (1901) 1 Ch. 738.
(*x*) *Bevan* v. *London Portland Cement Co.*, 62 L.T. 615.
(*y*) *Rains* v. *Buxton*, 14 Ch.D. 537.
(*z*) *Iredale* v. *Loudon*, 14 O.L.R. 17; 15 O.L.R. 286; 40 S.C.R. 313.
(*a*) *Midland R. Co.* v. *Wright*, (1901) 1 Ch. 738.
(*b*) R.S.O. c. 126, s. 29 (1).

against any person registered as first owner with a possessory title only (*c*).

9. *Crown Lands.*

Formerly, the Crown, not being expressly named, was not affected by that part of the Act relating to possession of land. But the clauses relating to prescription in cases of easements do expressly mention the Crown (*d*).

There is a maxim at common law that *nullum tempus occurrit regi*. Time does not run against the Crown. By an Act called the *Nullum Tempus* Act (*e*), the Crown might have been barred under the circumstances mentioned therein. This Act was held to be in force in Upper Canada, but not to apply to the unsurveyed or waste lands of the Crown (*f*).

But in a case from Australia it was held by the Privy Council that such lands were within the meaning and operation of the Act (*g*).

The *Nullum Tempus* Act has been superseded by the following enactment: "No entry, distress or action shall be made or brought on behalf of His Majesty against any person for the recovery of or respecting any land or rent, or of land or for or concerning any revenues, rents, issues or profits, but within sixty years next after the right to make such entry or distress or to bring such action shall have first accrued" (*h*). And by section 17, "nothing in the foregoing sections shall apply to any waste or vacant land of the Crown whether surveyed or not." From this it is apparent that no Statute of Limitations applies to the lands of the Crown other than those which are occupied.

With regard to lands of the Crown, it will be a question of fact in each case whether they fall within section 4 (1), subjecting them to the sixty years' limit, or within section 17, which exempts them entirely, if vacant or waste.

Waste lands were held in *Regina* v. *McCormick* (*i*) to be ungranted, unsurveyed lands, and this was not disputed in *A.-G.*

(*c*) Ibid. s.-s. 2.
(*d*) S.-s. 34, *et seq.*
(*e*) 9 Geo. III. c. 16.
(*f*) *Regina* v. *McCormick*, 18 U.C.R. 131.
(*g*) *Atty.-Gen. of New South Wales* v. *Love*, (1898) A.C. 679.
(*h*) R.S.O. c. 75, s. 4 (1).
(*h*) R.S.O. c. 75, s. 4 (1).
(*i*) 18 U.C.R. 131.

N.S.W. v. *Love* (*j*). But in *A.-G. N.S.W.* v. *Williams* (*k*) it was not decided (being unnecessary) whether Government House, Sydney, which was unoccupied, was within the expression "waste lands" in an Act placing waste lands under the control of the local legislature. All the ungranted lands of the Crown, surveyed and unsurveyed, and all vacant lands, of the Crown, being withdrawn from the operation of the Act by section 17, there seem to remain, as regards the Crown, cases of dispossession or ouster only. For although the Act provides for discontinuance, which occurs when the owner leaves the land and a trespasser subsequently enters on the vacant land; yet, as the Act does not apply to vacant lands of the Crown, there is nothing left to be affected by the Act but cases of actual dispossession.

Where lands are in fact within the operation of section 4 (1), the clauses of the Act relating to the time of accrual of the right of entry, acknowledgments and the effect of the statute which are applicable to private persons are made applicable to the Crown, by sub-section (2) of section 4.

Though it is a maxim of the common law that the Crown cannot be disseised (*l*), the entry of any person on the possession of the Crown being termed an intrusion (*m*), yet in *Tuthill* v. *Rogers* (*supra*), a case under the *Nullum Tempus* Act, it was held that the Crown was not to be deemed as in actual seisin where a subject was wrongfully in possession, otherwise, if the Crown could not be disseised, the Act would be a nullity. And in *Handley* v. *Archibald* (*n*), it was said by Strong, C.J., that the Act does not deal with feudal possession, but with "statutory possession as distinguished from seisin." It may be taken, therefore, that cases of dispossession will be treated in the same way as cases of dispossession of a private person, save that it must always be dispossession of some representative or agent of the Crown.

As between parties other than the Crown, it has been held in this province that time does not run while the fee is in the Crown, as between or against persons claiming as lessees or locatees of the Crown before patent issued. Consequently, where the plaintiff and defendants held, respectively, the north and south halves of a lot as lessees of the Crown, the defendants

(*j*) (1898) A.C. 679.
(*k*) (1915) A.C. 573.
(*l*) *Tuthill* v. *Rogers*, 1 Jo. & Lat. at p. 77.
(*m*) *Webb* v. *Marsh*, 22 S.C.R. at p. 44.
(*n*) 30 S.C.R. at p. 137.

holding up to a certain line for more than twenty years, and they then obtained letters patent for their respective portions; and afterwards it was discovered that the defendants had always encroached upon the plaintiff's half as granted by the patent, it was held that the plaintiff was not barred of his right to recover the portion which had been wrongfully held by the defendants (*o*). The rights of the Crown not having been interfered with by the possession, there was a good title to grant the land by the letters patent to the plaintiff. And a patentee from the Crown may maintain an action against one whom he finds in possession, for the patent has the effect of a feoffment with livery of seisin, and the trespasser's entry must therefore be regarded as subsequent to the patent (*p*).

But, as a mortgage made by a nominee of the Crown, or any person through whom any party obtaining letters patent for the land derived his claim, might have been registered, and was subject to the same conditions and had the same effect as if letters patent had issued before the execution of the mortgage under the Heir and Devisee Act (*q*), the statute of limitations was held to apply. So, where D.C., being in possession as locatee of the Crown, mortgaged his interest in 1860, and on his death in possession his widow and heir-at-law took possession and afterwards, and after sale by the mortgagee under the power of sale in his mortgage, the patent issued to the widow and heir-at-law in 1875, and an action was brought in 1878 by the purchaser under the power, it was held that he was barred(*r*).

Since the new enactment does not affect waste or vacant lands of the Crown, the decisions cited will still govern in like cases.

The possession must not consist of isolated acts of trespass (*s*), but must consist of continuous acts of ownership in assertion of a right.

10. *Operation of the Act.*

The intention and operation of the present Statute of Limitations is to require the owner of land who is kept out

(*o*) *Jamieson* v. *Harker*, 18 U.C.R. 590. See also *Dowsett* v. *Cox*, *Ibid.* 594; and *Chondiri Makbul Husain* v. *Lalta Pershad*, 17 T.L.R. 505, at p. 506; *Gummerson* v. *Maddison*, (1906) A.C. 569.

(*p*) *Greenlaw* v. *Fraser*, 24 C.P. 230.

(*q*) R.S.O. (1897) c. 31, s. 28.

(*r*) *Watson* v. *Lindsay*, 27 Gr. 253.

(*s*) *Atty.-Gen.* v. *Chambers*, 4 De G. & J. 55; *Doe d. Wm. IV.* v. *Roberts*, 13 M. & W. 520.

of possession to make an entry or bring his action against the trespasser within ten years from the time when the right to enter or to bring the action first accrued. If he does not make the entry or bring the action within that period, not only is his *remedy* barred, but "the right and title of such person to the land or rent . . . shall be *extinguished*" (*t*). The effect of this enactment is to completely obliterate all distinction between rights of property and rights of possession. As soon as the statutory period has elapsed the title of the owner is extinct. Under the previous Statute of Limitations the remedy alone was barred, the right was not extinguished.

The effect of the present enactment is to deprive the owner of his right of property at the same moment that his remedy is barred. And, therefore, he never can again become invested with any right of property in the land, except by obtaining it again by conveyance (*u*). And if the former owner, after being barred, should enter upon the land again, he would be a trespasser (*v*). The statute says nothing of the occupant's title. And, therefore, although great authorities have spoken of the effect of the Act as follows: "to make a parliamentary conveyance of the land to the person in possession after that period of twenty years has elapsed" (*w*); "when the remedy is barred the right and title of the real owner are extinguished, and are, in effect, transferred to the person whose possession is a bar" (*x*); "the whole right, title, estate and interest of the mortgagee would be transferred to the mortgagor" (*y*); "it is a divesting of the title, or a transfer of the title to somebody else . . . At the end of ten years . . . the title of the mortgagee to the lands was extinguished, and by virtue of the statute a parliamentary reconveyance was made to the plaintiff" (*z*); yet these expressions are incorrect. The extinction of the title of the true owner leaves the trespasser in possession without liability to be dis-

(*t*) R.S.O. c. 75, s. 16.

(*u*) *Doe d. Perry* v. *Henderson*, 3 U.C.R. 486; *McDonald* v. *McIntosh*, 8 U.C.R. 388; *Re Alison*, 11 Ch.D. 284; *Sanders* v. *Sanders*, 19 Ch.D. 373.

(*v*) *Holmes* v. *Newland*, 11 A. & E. 44; *Court* v. *Walsh*, 1 Ont. R. 167; see *Moran* v. *Jessup*, 15 U.C.R. 612.

(*w*) Parke, B., in *Doe d. Jukes* v. *Sumner*, 14 M. & W. 42.

(*x*) Lord St. Leonards, in *Incorporated Society* v. *Richards*, 1 Dr. & War. 289. See similar expressions of the same judge in S.C. 1 Con. & L. 85; *Scott* v. *Nixon*, 3 Dr. & War. 405.

(*y*) Lord Selborne, in *Heath* v. *Pugh*, 6 Q.B.D. 365.

(*z*) Boyd, C., in *Court* v. *Walsh*, 1 Ont. R. 170.

turbed by anyone, because the only person who could have ejected him has lost his title to the land. The operation of the statute has been better described by Strong, J. (*a*): "The Statute of Limitations is, if I may be permitted to borrow from other systems of law terms more expressive than any which our own law is conversant with, a law of extinctive, not of acquisitive prescription; in other words, the statute operates to bar the right of the owner out of possession, not to confer title on the trespasser or disseisor in possession. From first to last the Statute of 4 Wm. IV. says not one word as to the acquisition of title by length of possession, though it does say that the title of the owner out of possession shall be extinguished, in which it differs from the Statute of James, which only barred the remedy by action, but its operation is by way of extinguishment of title only" (*b*). The operation of the statute, then, is to extinguish the paper title; and the result of that operation is to leave some one in possession who cannot be disturbed for want of a title in any other.

The question recently arose in a curious way, compelling the recognition of the purely negative operation of the statute. A trespasser gained title by possession to a land-locked parcel of land, and then claimed a right of way to get to it. He had used a way to get in and out, but not long enough to get a right of way by user. And it was held that the operation of the statute was negative, no title being conveyed to him, and, consequently, that no right of way passed as appurtenant thereto (*c*).

So, also, where a house was demised for eighty-nine years, and a stranger got into possession and remained there for over forty years, paying rent to the landlord, and then assigned his right to an assignee, the latter was held not to be liable to the landlord on the covenants in the lease; for the title of the lessee was extinguished and not transferred to the assignee (*d*).

And where land was conveyed to A. and his heirs to such uses as B. should appoint, and, until appointment, to the use of A. and his heirs, and a trespasser entered and held for more

(*a*) *Gray* v. *Richford*, 2 S.C.R. at p. 454.

(*b*) See also 1 Hayes Convey. 168; 11 Jur. N.S. 152; Dart V. & P. 6th ed. 464; *Brassington* v. *Llewellyn*, 27 L.T. Ex. 277.

(*c*) *Wilkes* v. *Greenway*, 6 Times L.R. 449; see also *McLaren* v. *Strachan*, 23 Ont. R. at p. 120, note.

(*d*) *Tichborne* v. *Weir*, 67 L.T. 735. See also *Re Jolly*, (1900) 1 Ch. 292; reversed (1900) 2 Ch. 616, without affecting this point.

than ten years, and afterwards B. made an appointment, it was held that A.'s title was extinguished and the appointment ineffective (*e*).

The right of the disseisor, however, when once established, is so strong that it is such a title as the court will force upon an unwilling purchaser (*f*).

Where the title of the owner was barred by the occupation of several trespassers, they became, at common law, joint tenants of the land (*g*). But now, by the Conveyancing Act (*h*), where two or more persons acquire land by length of possession they shall be considered to hold as tenants in common and not as joint tenants.

11. *When the Statute is Operative.*

In order that the statute may affect the owner of land there must be such a state of affairs as that he can bring an action or make an entry, that is to say, there must be some one in possession keeping the owner out of possession. There is no obligation, in fact, it is impossible, to bring an action to save the owner's right, if there is no one in possession. Therefore, where land is vacant the statute does not operate (*i*). Mere cesser of payment of rent will, however, as we shall see, bar the owner of a rent charge.

Every owner of land is in constructive possession thereof by virtue of his title, when the land is vacant (*j*). He cannot enter upon himself, nor is there any one against whom he can bring an action. Consequently, as often as a trespasser vacates the land, so often is the owner again in possession (*k*). And, therefore, if a trespasser has been in possession for a period less than the statutory period, and vacates the land, but after an interval returns, his former occupation goes for nothing; because, in the interval, the true owner was in possession, and there was no one against whom to bring an action, and therefore the statute ceased running. And for the same reason, also, if one trespasser should leave the land, and another, not claim-

(*e*) *Thuresson* v. *Thuresson*, 2 O.L.R. 637.

(*f*) *Scott* v. *Nixon*, 3 Dr. & War. 388.

(*g*) *Ward* v. *Ward*, 6 Ch. App. 789.

(*h*) R.S.O. c. 109, s. 14.

(*i*) *Ketchum* v. *Mighton*, 14 U.C.R. 99; *Doe d. Cuthbertson* v. *McGillis*, 2 C.P. 139; *Delaney* v. *C.P.R. Co.*, 21 Ont. R. 11.

(*j*) *Bentley* v. *Peppard*, 33 S.C.R. 444.

(*k*) *Handley* v. *Archibald*, 30 S.C.R. 130; *Solling* v. *Broughton*, (1893) A.C. at p. 561.

ing under the first, should enter, he cannot add the possession of the first to his own; and though the two, when added together, make up the statutory period of ten years, yet the owner is not barred (*l*).

And where the fact of possession is undetermined, or the evidence is indecisive, possession in law follows the right to possession (*m*).

But the wrongful seisin of a trespasser is transmissible, and if the first trespasser should transmit his seisin to another by descent, devise, conveyance (*n*), or, it seems, even by contract (*o*), the whole is taken as the continuous possession of one person, and, if it reaches the statutory period, bars the owner. There must, therefore, be continuous possession or occupation by one trespasser, or by several whose wrongful seisin is carried on by conveyance or descent in order to bar the owner.

And the occupation must be "actual, constant, visible," to the exclusion of the true owner (*p*).

Not only must the acts of ownership, or the possession, be continuous, not consisting of isolated or intermittent acts of trespass (*q*), but the character of the possession claimed must be unequivocal. And so where the plaintiff, having a right of way over a strip of land belonging to the defendants, leading from his farm to a highway, erected gates at both ends of the strip, kept them locked, and sometimes used to turn his cattle in for grazing, and so continued for more than the statutory period, it was held that the title of the defendants was not extinguished (*r*). The gates might have been erected to protect the right of way, and in no way effected an eviction of the defendants from the land.

(*l*) *Agency Co.* v. *Short*, 13 App. Ca. 793.

(*m*) *Kynoch Ltd.* v. *Rowlands*, (1912) 1 Ch. at p. 534.

(*n*) *Asher* v. *Whitlock*, L.R. 1 Q.B. 1; *Yem* v. *Edwards*, 1 De G. & J. 598; *Calder* v. *Alexander*, 16 T.L.R. 294.

(*o*) *Simmons* v. *Shipman*, 15 Ont. R. 301.

(*p*) *McConaghy* v. *Denmark*, 4 S.C.R. 609; *Bentley* v. *Peppard*, 33 S.C.R. 444; *McIntyre* v. *Thompson*, 1 O.L.R. 173.

(*q*) *Coffin* v. *North Am. Land Co.*, 21 Ont. R. 80; *Atty.-Gen.* v. *Chambers*, 4 De G. & J. 55. *Coffin* v. *North Am. Land Co.* was approved by the Court of Appeal in *McIntyre* v. *Thompson*, 1 O.L.R. 163, but was overruled by a Divisional Court in *Piper* v. *Stevenson*, 28 O.L.R. 379, cited in *Cowley* v. *Simpson*, 31 O.L.R. at p. 205; but the statement in the text is unaffected, however it may be applied to the facts of a particular case.

(*r*) *Littledale* v. *Liverpool Coll.*, (1900) 1 Ch. 19. And see *Philpot* v. *Bath*, 21 T.L.R. 634.

So, also, the acts of ownership are not extended beyond the land actually occupied. Where land is enclosed and occupied, no difficulty arises. But where possession is taken of unenclosed land the quantity occupied by the trespasser is a question of fact. His wrongful occupation is not limited or bounded in any way by surveys or surveyors' lines. He excludes the true owner from that part only which he physically occupies (*s*).

A different rule prevails where the benefit of the statute is claimed by a person having a paper title which, however, is defective. By reason of his title, defective though it be, he is in constructive possession of all that it covers, and so extinguishes the title to the whole by the entry on and remaining in possession of any part (*t*).

And where a person enters under a tenant for life, he is estopped from denying the title as against the remainder-man, and cannot claim title by virtue of the possession held during the estate for life (*u*).

12. *When Time Begins to Run.*

By the fifth section of the Act it is declared that no person shall make any entry or distress, or bring any action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to such person, or to some person through whom he claims.

It is necessary, therefore, to ascertain when the right to make the entry or distress, or bring the action, first accrues.

13. *Dispossession or Discontinuance.*

When the claimant, or some person through whom he claims, has been in possession, or in the receipt of the profits of such land, or in receipt of such rent, and has been dispossessed, or has discontinued such possession or receipt, then his right first accrues at the time of the dispossession or discontinuance of possession, or at the time at which any such profits or rent were so received (*v*).

(*s*) See *Harris* v. *Mudie*, 7 App. R. 421; *Bentley* v. *Peppard*, 33 S.C.R. 444; *Glyn* v. *Howell*, (1909) 1 Ch. 666; *Cowley* v. *Simpson*, 32 O.L.R. 200.

(*t*) *Heyland* v. *Scott*, 19 C.P. 165; *McKinnon* v. *McDonald*, 13 Gr. 152; *Harris* v. *Mudie*, 7 App. R. 428, 429; *Robertson* v. *Daley*, 11 Ont. R. 332; *Bentley* v. *Peppard*, *supra*.

(*u*) *Dods* v. *McDonald*, 36 S.C.R. 231.

(*v*) S. 6, s.-s. 1.

This clause deals with possession of land, possession of a rent charge, receipt of profits of land; and the statute begins to run upon disseisin by a trespasser's ousting the claimant from the possession; or, upon the claimant's going out of, or discontinuing possession, and some one else going in; or, when a stranger receives the rent due to the claimant, or payment merely ceases, then from the last receipt by the claimant,—as the case may be.

When the claimant has been actually dispossessed or dissesised, *i.e.*, ousted by a trespasser, his right immediately arises to bring an action to recover the land, or to make an entry thereon in assertion of his ownership. And if he does neither, his right to make such entry, or bring such action, becomes extinct at the expiration of ten years from the ouster. If the necessity for bringing an action ceases, by reason of the trespasser's leaving the land, the statute ceases to run, as we have seen.

Discontinuance of possession requires some explanation. The word *discontinuance* was formerly applied to the case where tenant in tail enfeoffed in fee, and the feoffee, having entered in the lifetime of the feoffor, retained possession after his death; this was called a discontinuance. The word is not used in that sense in this section. It means the vacating of the land by the claimant, followed, however, by the occupation of the trespasser. It is not enough that the land should be left vacant; for in contemplation of law the owner is still constructively seised. As soon as a trespasser enters, after the owner has left the property vacant, then the right to re-enter upon, or bring an action against, the trespasser immediately arises. "The difference between dispossession and the discontinuance of possession might be expressed in this way—the one is where a person comes in and drives out the other from possession, the other case is where the person in possession goes out and is followed into possession by other persons" (*w*).

In order to establish discontinuance there must be some evidence of an intention to abandon the land, and it must be followed by an actual taking of possession by the trespasser (*x*). Omission to work mines is not a discontinuance (*y*).

(*w*) Per Fry, J., in *Rains* v. *Buxton*, 14 Ch.D. 539, 540; *Littledale* v. *Liverpool Coll.*, (1900) 1 Ch. at p. 22.

(*x*) *Kynoch Ltd.* v. *Rowlands*, (1912) 1 Ch. 527.

(*y*) *McDonnell* v. *McKinty*, 10 Ir. Law R. 514 (1847); *Smith* v. *Lloyd*, 9 Ex. 562.

And it makes no difference, except in the case of the grantee of the Crown to be presently mentioned, that the claimant does not know of the wrongful possession. So, where the defendant occupied a cellar under the ground of the plaintiff for sixty years, this, in the absence of fraud, was held to be a discontinuance of possession on the part of the plaintiff, though he was ignorant of the occupation (*z*).

The mere fact of possession is not sufficient, however, to make the statute operate. The possession, if by licence of the owner, or as agent or servant of the owner, is the possession of the owner. Thus, where a caretaker has been in possession, he gains no title as against the owner (*a*). Nor, of course, does an agent; and where one tenant in common who managed the land for all, put the defendant in possession as caretaker, and afterwards the land was partitioned, but no conveyances were made for some time, and the defendant remained in possession, it was held that he acquired no title as against any of the claimants (*b*).

And the possession of an agent is so much the possession of his principal that his possession will enure to the benefit of his principal, though he be the real owner himself. Thus, a tenant in tail affected to devise the entailed land to his wife. His eldest son acted as his mother's agent in collecting the rents and accounting for them to her; and it was held that his possession was not in consequence of his title as tenant in tail, but as agent of his mother, and that she thereby acquired title as against him (*c*).

And the possession of a servant is, of course, the possession of his master (*d*).

Where time is running against the owner of land, and he allows it to be sold for taxes, and buys it in himself, the effect of the tax sale is to extinguish all existing interests in the land, and to invest the purchaser with a new title; and so the possession of the trespasser before the tax sale counts for nothing (*e*).

Where the claimant has been in possession of a rent-charge,

(*z*) *Rains* v. *Buxton*, 14 Ch.D. 537.

(*a*) *Greenshields* v. *Bradford*, 28 Gr. 299; *Ryan* v. *Ryan*, 5 S.C.R. 387; *Cowley* v. *Simpson*, 31 O.L.R. 200.

(*b*) *Heward* v. *O'Donohoe*, 18 App. R. 529. And see *Dominion Imp. & Dev. Co.* v. *Lally*, 24 O.L.R 115.

(*c*) *Williams* v. *Pott*, L.R. 12 Eq. 149.

(*d*) *Birtie* v. *Beaumont*, 16 East 33.

(*e*) *Soper* v. *Windsor (Corporation of)*, 32 O.L.R. 352; 22 D.L.R. 478.

the time begins to run earlier than in the case of dispossession of land. Thus, if payment should cease, the time begins to run, not from the default or discontinuance, but from the last time at which such rent was received. So that, if the rent were payable annually, the time would be limited to nine years from the default, being ten years from the last receipt by the claimant. "The object of the Legislature seems to have been to fix a point which should be perfectly clear, rather than one which should, abstractedly considered, be the most just" (*f*). It is true that there is, in such a case, a year during which the claimant could not have taken any proceedings, all rent having been paid and the next gale not yet due, and he would thus be guilty of no laches in not beginning an action, and would be guilty of a wrong if he distrained; but the point fixed by the statute is too clear to admit of doubt.

It must be borne in mind that, in the case of a rent-charge, the mere cesser of payment will cause the statute to operate, as well as the payment to a person not entitled (*g*).

Where the owner or claimant is not personally in occupation of the land, but has demised it to a tenant, the case is provided for by sub-sections 5 and 6. We shall treat further of this in dealing with cases between landlord and tenant.

14. *Death of a Person in Possession.*

Where the claimant claims the estate or interest of some deceased person, who continued in possession until the time of his death, and was the last person entitled to such estate or interest who was in possession, then the right accrues at the time of such death (*h*).

It will be observed that this clause applies only to the case of a person dying in possession. If a person were first dispossessed, and then, being out of possession, died, time would run against those claiming under him from the dispossession, under sub-section one. This clause provides for the case of a stranger taking possession after the death of the owner and before the entry of the heir at law or devisee of him who died in possession. Though this clause distinctly states that the time begins to run at the time of the death, yet it must always

(*f*) *Owen* v. *De Beauvoir*, 16 M. & W. at p. 565.

(*g*) *Owen* v. *De Beauvoir*, 16 M. & W. 547; *Irish Land Com.* v. *Grant*, 10 App. Cas. 14; *Howitt* v. *Earl of Harrington*, (1893) 2 Ch. 497.

(*h*) S. 6, s.-s. 2.

be understood that the object of the statute is to require persons laying claim to land to bring their actions within the ten years against anyone in possession. Thus, the fifth section in this respect governs the whole of the instances dealt with in the sixth section, and the hypothesis underlying it is that there must be some one against whom an action can be brought. In *Owen* v. *DeBeauvoir* (*i*), Parke, B., in dealing with the case of rent, where the period from which time is to run is arbitrarily fixed at the last receipt, refers to this clause in illustration of the intention of the statute to fix definite periods (the date of the death in this instance) for the commencement of its operation. But the dictum was not necessary for the decision of the case, and it seems clear from modern authority that an heir at law or devisee would not be barred unless someone was in possession (*j*). But if the deceased person was in receipt of a rent charge, and at his death payment was withheld, the time in that case would clearly run from his death.

At this point attention must be called to section 8, which enacts that, "for the purposes of this Act, an administrator claiming the estate or interest of the deceased person of whose property he has been appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration." When this section was passed, the administrator did not succeed to realty. The administrator, however, did succeed to terms of years; and if a tenant for a term of years were ousted and died intestate, his administrator, taking title only from the grant of letters, would not but for the section be affected by the intermediate lapse of time (*k*). It was otherwise as to an executor, whose title is derived under the will, and consequently arises at the testator's death. Though the title of an administrator relates back in some cases for the benefit of the estate (*l*), so as to enable him to sue for injury to goods and chattels between the death and the grant, it did not relate back so as to cause the statute to run, that being to the prejudice of the estate. By the present enactment, the title now has relation back to the death, so that although letters of administration might not be taken out until ten years had elapsed from

(*i*) 16 M. & W. 547, at p. 565.

(*j*) *Agency Co.* v. *Short*, 13 App. Cas. 793.

(*k*) *Wooley* v. *Clark*, 5 B. & Ald. 744. For an instance of barring a tenant for years, see *Tichborne* v. *Weir*, 67 L.T. 735.

(*l*) *Morgan* v. *Thomas*, 8 Ex. 302.

the death, the administrator would be barred, if the other conditions were present (*m*).

This section acquires new significance on account of *The Devolution of Estates Act*, which casts the realty upon the administrator; and with respect to land and rent charges, time will now run against the administrator though letters of administration may be delayed in issuing. Although the administrator's title lasts for three years only, the land then shifting into the beneficiaries, yet, if an administrator should subsequently be appointed, it is conceived that his right to register a caution would be affected by this section which makes the statute operate from the death of the intestate.

15. *Upon Alienation Inter Vivos.*

This clause (*n*) is much the same as the preceding one in principle, but it applies to cases of alienation otherwise than by devise, or inheritance. When the person claiming an estate or interest in possession, claims it by assurance (*o*) made to him or to some person through whom he claims, by a person in possession or receipt of the profits of the land, or the rent, and no person has been in possession under such instrument, then the right first accrues when the claimant, or the person through whom he claims, became entitled to the possession under such instrument.

In order to make the section applicable, there must be a person in possession of an estate or interest in possession, a grant or assurance to the claimant or some one through whom he claims, and a remaining in possession of the grantor. Time then runs from the time when the claimant, or the person through whom he claims, became entitled to possession under the grant. Thus, if A. conveys to B. in fee, and continues in possession, time runs against B. from the delivery of the deed. But if A. conveys to X. in fee to the use of A. for ten years, and from and after the expiration of ten years, to the use of B. in fee; here B. is not entitled to possession under the conveyance for ten years from its execution. Time, therefore, would not begin to run against him until the lapse of ten years, provided that A., the grantor, then remained in possession.

(*m*) See *Holland* v. *Clark*, 1 Y. & C.C.C. 151; *Re Williams*, 34 Ch.D. 558.

(*n*) S. 6, s.-s. 3.

(*o*) "Assurance" means "any deed or instrument other than a will": s. 2 (*b*).

16. *Land in a State of Nature.*

Where the patentee of the Crown, his heirs or assigns, by themselves, their servants or agents, have not taken actual possession, by residing on or cultivating some part of the land, and some other person, not claiming to hold under such grantee has been in possession, such possession having been taken while the land was in a state of nature, then unless it can be shown that the patentee, or person claiming under him, while entitled to the land had knowledge of the same being in the actual possession of the trespasser, the lapse of ten years shall not bar the grantee; but the right shall first accrue when such knowledge of the wrongful occupation was obtained; but no action shall be brought after twenty years from the taking of the wrongful possession (*p*).

The conditions necessary for the application of this section are (1) no possession subsequent to the patent by the grantee of the Crown, or any one claiming under him; (2) possession by some one who does not claim under the patentee of the Crown; (3) entry by the wrongdoer while the land is in a state of nature; (4) no knowledge of such wrongful possession by the grantee of the Crown or those claiming under him, while he or they is or are entitled. Under such circumstances, time runs against the claimant, but the bar is not complete for twenty years from the taking of the wrongful possession. If knowledge of the wrongful possession is gained by the person entitled during that period, time begins to run from such knowledge, and the bar is complete at the end of ten years therefrom, or at the end of twenty years from the wrongful taking of possession, whichever arrives first.

(1). As to the first element, that there should be no possession taken by the grantee, his heirs or assigns, there is little to be said. The mode of taking possession is defined by the statute—"by residing upon or cultivating some portion thereof." The time of residence or the amount or degree of cultivation cannot be taken into account, if there has been residence or cultivation. And such "residing upon or cultivating" the land must have taken place *after* the grant from the Crown (*q*).

(2). Possession by a stranger. This possession must, it is conceived, be the same kind of possession as would be sufficient to make the statute operate in other cases.

(*p*) S. 6, s.-s. 4.

(*q*) *Stewart* v. *Murphy*, 16 U.C.R. 224; *Mulholland* v. *Conklin*, 22 C.P. 381.

Nothing express is said in the statute as to the time when the trespasser's possession should commence in cases under this clause. In *Hill* v. *M'Kinnon* (*r*), Robinson, C.J., suggested the point, but it was not necessary to decide it. But it has been held, as we have seen, that the Crown grant has the same effect as a feoffment with livery of seisin, so as to cause the possession of a stranger in possession at the time to be deemed as having commenced after the patent (*s*). And, as the trespasser acquires no title against the Crown before patent issued, the patent gives a good title to the patentee, though there may have been a stranger in possession for more than the statutory period before that date (*t*). And if time does not run against the Crown before patent issued, it could hardly have been intended that the same possession should count against the grantee of the Crown immediately upon his title accruing. The words of the statute seem to lead to the same conclusion. "In the case of lands granted by the Crown, of which the grantee, his heirs or assigns, . . . have not taken actual possession, . . . and in case some other person . . . *has been* in possession, etc." We may take it, then, that the possession of the trespasser is not more effective if taken before patent than if taken afterwards. If taken during the ownership of the patentee, it is plainly within the statute; and if taken before, the effect of the patent is to make it constructively a taking after the grant.

(3). The use of the term, "such possession having been taken while the land was in a state of nature," raises an obscurity, however. The condition as to the patentee is that he should not have taken possession by "residing upon or cultivating some portion thereof;" while the condition as to the trespasser is that he should have entered while the land was in "a state of nature." Unless the terms are interchangeable and synonymous, or rather, unless the second has the same signification as the first, no intelligible meaning can be assigned to the clause. It would not avail the patentee that he had never taken possession by residing on or cultivating the land, if the trespasser could say that he found undoubted evidence of man's work upon it, which was, in fact, done by a stranger to both. The statute was passed for the protection of the owner, not for

(*r*) 16 U.C.R. at p. 219.
(*s*) Ante, p. 470.
(*t*) *Fitzgerald* v. *Finn*, 1 U.C.R. 70.

the profit of the trespasser. And although the land might not be in a state of nature absolutely, yet, if it be in a state of nature relatively to the owner, *i.e.*, in so far as he is concerned, by his not having resided on or cultivated any portion thereof, then he is protected. If it be urged that the trespasser, seeing some signs of residence or cultivation, could not know that they had been done by a stranger, and not by the patentee, the answer is that he has no rights at all, and no consideration is due to him as a wrongdoer (*u*).

(4). The *onus* is cast upon the trespasser of proving knowledge in the owner of his occupation of the land in order to make the limitation of ten years apply (*v*). And the knowledge of the adverse possession must be acquired by the person to whom it is imputed *while he is entitled*(*w*); so that if the patentee, after conveying to another, becomes aware of the wrongful possession, it will not affect his assignee, nor avail the trespasser anything; and the knowledge must be imputed to a person having such a title as would give him a right of entry. Consequently, where the devisee of one who held a bond for a deed from the patentee, acquired knowledge of the wrongful possession, it was held not to avail the trespasser (*x*).

The clause will operate even though the patentee, or the person claiming under him, may not be conscious that he owns the land (*y*). The trespasser within the meaning of this clause is one who is not in truth and actual fact claiming under the patentee. So, where a person was in possession under a deed from one whom he supposed to be the heir at law of the patentee, but who (the jury found) was not such heir, it was held that he was not relieved from proving knowledge of his possession in the real owner (*z*).

The clause is necessarily confined to cases falling within its express provisions. And so, where a patentee mortgaged the land, no possession having been taken by either the mortgagor or the mortgagee, it was held that this clause did not affect the right of entry, which was governed by the clauses as to

(*u*) See *Stovel* v. *Gregory*, 21 App. R. 137.

(*v*) *Doe d. McKay* v. *Purdy*, 6 O.S. 144, per Macaulay, J.; *Re Linet*, 3 Ch. Ch. 230. And see *Reynolds* v. *Trivett*, 7 O.L.R. 623.

(*w*) *Mulholland* v. *Conklin*, 22 C.P. at p. 382.

(*x*) *Johnson* v. *McKenna*, 10 U.C.R. 520.

(*y*) *Doe d. Pettit* v. *Ryerson*, 9 U.C.R. 276.

(*z*) *Turley* v. *Williamson*, 15 C.P. 538.

mortgages (*a*). Nor does it apply to a purchaser at a tax sale (*b*).

17. *Landlord and Tenant—Lease in Writing.*

When the claimant is in possession or in receipt of the profits of any land or in receipt of any rent by virtue of a *lease in writing*, the rent reserved being $4 a year or upwards, and the rent reserved by such lease has been received by some person wrongfully claiming to be entitled to the land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved has afterwards been made to the claimant, his right shall be deemed to have first accrued at the time when the rent reserved was first received by the person wrongfully claiming it, and no such right shall be deemed to have first accrued upon the determination of the lease to the person rightfully entitled (*c*).

A distinction will be observed between cases under this clause and the case (under clause 1) of receipt of the "profits" of land or of a rent charge. In the latter case time runs from dispossession or discontinuance. In the former (under clause 5) time runs from the wrongful receipt of rent by the stranger.

The making of a lease creates an estate for years in the tenant, and the mere fact that he does not pay his rent during the currency of his term, or the existence of his estate, does not impair the right of the landlord to re-enter when the estate of the tenant ends by the expiry of his term, and in such a case time runs against the landlord from the expiry of the term (*d*). But when a stranger wrongfully claims the reversion, and the rent reserved is paid to such stranger, and the tenant ceases to pay the rent to the landlord (for both must concur), then time begins to run from the receipt by the stranger of the rent reserved, who thus claims, and actually begins to enjoy, the fruits of the reversion. The most effective assertion of a claim to the reversion is the receipt of the rent, and so time runs from the first wrongful receipt, unless, subsequently, the tenant should pay the rent reserved to the landlord (*e*). The case of

(*a*) *Doe d. McLean* v. *Fish*, 5 U.C.R. 295.

(*b*) *Brooke* v. *Gibson*, 27 Ont. R. 218; *Cushing* v. *McDonald*, 26 U.C.R. 605.

(*c*) S. 6. s.-s. 5.

(*d*) *Sanders* v. *Annesley*, 2 Sch. & L. 106; *Chadwick* v. *Broadwood*, 3 Beav. 308; *Doe d. Davy* v. *Oxenham*, 7 M. & W. 131; *Liney* v. *Rose*, 17 C. P. 186.

(*e*) *Chadwick* v. *Broadwood*, 3 Beav. 308; *Hopkins* v. *Hopkins*, 3 Ont. R. 223.

Williams v. *Pott* (*f*) is a striking instance of the effect of this clause, the true owner having, as agent for a person without title, collected the rent and accounted for it to such person, and the effect being to extinguish the title of the true owner.

Where the reversion expectant on a lease in writing has been severed, and the rent has become apportionable, but has not in fact been apportioned, and no notice of severance has been given to the tenant, who has continued to pay his rent to the original lessor and his successor in title, the receipt of such rent by the latter before apportionment is rightful, and therefore he is not wrongfully in receipt of such rent, and the person entitled to the severed portion of the reversion can recover from him his proportion of the rent received by him (*g*).

It is worthy of observation that this clause is precise in referring to the payments as payments of *the rent reserved by such lease*, indicating that the very rent must be paid as rent to the stranger. And furthermore, it adds negatively, as a condition, that no payment in respect of *the rent reserved by such lease* shall have afterwards been made to the person rightfully entitled.

If the lease is in writing, but at a less rent than $4 a year, the case is governed by the old law; and the non-payment to the landlord and wrongful payment to a stranger claiming against the landlord, will not bar him of his right to enter on the determination of the lease.

18. *Landlord and Tenant—Parol Lease.*

Where the claimant is in possession, or receipt of the profits, of land, or in receipt of any rent as tenant from year to year or other period, *without any lease in writing*, the right of the claimant, or of the person through whom he claims, first accrues at the determination of the first of such years or other periods, or at the last time when any rent, payable in respect of such tenancy, was received, whichever last happened (*h*).

Thus if a tenant from year to year paid no rent, time would begin to run from the end of the first year of his tenancy; and so with other periods. But if he paid any rent, time would begin to run from the last payment of rent, without regard to the period of his tenancy, unless he paid rent in advance within

(*f*) L.R. 12 Eq. 149.

(*g*) *Mitchell* v. *Mosley*, (1914) 1 Ch. 438.

(*h*) S. 6, s.-s. 6.

the first year or other period (*i*). But the payment must be a payment of rent in respect of the tenancy; payment of taxes to the municipality, though part of his contract, will not suffice (*j*); but it is otherwise if there is an agreement to pay the taxes as rent (*k*).

Under this clause, unlike cases under clause 5, mere non-payment of rent bars the landlord, without payment to a stranger, and the statute operates, in such case, in favour of the tenant; while wrongful payment to a stranger, under clause 5, causes the statute to operate in favour of the stranger.

19. *Encroachments by Tenants.*

Where a tenant encroaches upon land adjacent to the demised land, as between himself and his landlord he takes it as part of the demised premises; but that presumption will not prevail for the landlord's benefit as against third persons (*l*).

20. *Tenancy at Will.*

Where the claimant is in possession or receipt of the profits, or in receipt of any rent, as tenant at will, the right shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined (*m*).

"It seems to be assumed in this section," says Lord St. Leonards (*n*), "that no rent is paid."

Though it is not inconsistent with a tenancy at will that rent should be reserved (*o*), yet in such cases the recurrent payments of rent are evidence that the holding is permissive, if indeed it does not turn the tenancy at will into a yearly tenancy (*p*). And by sub-sec. 6, where there is a parol lease from year to year, or other period, time begins to run from the end of the first of such years or other periods, or at the last

(*i*) *Finch* v. *Gilray*, 16 App. R. 484.

(*j*) *Finch* v. *Gilray*, 16 App. R. 484; *Brennan* v. *Finley*, 9 O.L.R. 131. But see *Kirby* v. *Cowderoy*, (1912) A.C. 599.

(*k*) *East* v. *Clarke*, 33 O.L.R. 624; 23 D.L.R. 74.

(*l*) *Bruyea* v. *Rose*, 19 Ont. R. 433, and cases cited.

(*m*) S. 6, s.-s. 7.

(*n*) Sug. R P. Stat. 2nd ed. p. 52 (*n*).

(*o*) Litt. sec. 72; *Doe d. Dixon* v. *Davies*, 7 Ex. 89; *Doe d. Barton* v. *Cox*, 11 Q.B. 122.

(*p*) *Hodgson* v. *Hooper*, 3 El. & El. at p. 174.

time when any such rent was received, whichever last happened (*q*).

Assuming that the clause in question applies only to tenancies at will where no rent is reserved, there are two rights of entry provided for, viz., either at the determination of such tenancy, or at the expiration of one year next after its commencement, at which time such tenancy shall be deemed to have determined.

It seems that there cannot be a tenancy at will for a determinate period (*r*). And therefore the "determination of such tenancy" must mean the determination by one of the parties. The reasonable construction of the section, according to Lord St. Leonards, is that the right of entry shall accrue ultimately at the end of a year from the commencement of the tenancy at will, though it may accrue sooner by the actual termination of the will (*s*).

If the tenancy is determined within the year, without more, then a right of entry accrues at once, and time begins to run from that period. But if the termination of the tenancy is accompanied, or followed, by the creation of a new tenancy at will, then time begins to run from the determination of such second tenancy at will, or at the expiration of a year from its commencement, and not from the time when the right of entry accrued at the determination of the first tenancy. Time is always computed from the determination, by statute or by act of the parties, of the last tenancy at will which existed before the question is raised as to title under the statute (*t*). If the tenancy at will is not determined during the year, then it is deemed, for the purposes of the statute, as terminating at the expiration of a year from its commencement. As long as the bar created by the statute is not set up, there is no reason why a tenancy at will should not last for an indefinite time, and until put an end to by act of the parties. But once the tenant sets up the statute as a bar, then the tenancy is deemed to have ceased at the expiration of the year from its commencement. If the same tenancy were deemed to continue, or "if a new

(*q*) See, also, sec. 15.

(*r*) Bac. Abr. Tit. Leases (L) 3; "If one makes a lease for ten years at the will of the lessor, this is a good lease for ten years certain, and the last words void for repugnance." And see *Morton* v. *Woods*, L.R. 4 Q.B. 293; *Re Threlfall*, 16 Ch.D. 274.

(*s*) Sug. R.P. Stat. 2nd ed. p. 52 (*n*).

(*t*) *Locke* v. *Matthews*, 32 L.J.C.P. at p. 101.

tenancy is to be inferred from the mere holding on of the tenant at will, the statute never could apply at all to tenancies at will" (*u*).

The nature of the tenant's holding after the expiration of the year is of importance, because an entry which might be sufficient to determine a tenancy at will merely might not be sufficient as an entry to stop the running of time in favour of a trespasser or tenant at sufferance. In *Day* v. *Day* (*v*), the Privy Council held that after the expiration of a year from the commencement of the tenancy at will, the tenant holding on becomes tenant at sufferance. It is there pointed out that a determination of the will after the year is only relevant in so far as it may have been preliminary to the creation of a fresh tenancy at will within the limitation period; and where the statute sets time running at the end of the first year, "it would be inconsistent with its purpose to allow the running to be stopped by the happening of that which, if time had not been running, would in itself have set it running." That is to say, as the statute sets time running at the end of the year, it would not be consistent to hold that it was stopped merely by entry sufficient to determine the will; because if the tenancy at will were then existing, such an entry would end it and make time *begin* to run under the statute. And their Lordships conclude that "the actual subsequent determination of the tenancy could only have the effect of making the tenant, for *all* purposes, when he was already, from the end of the first year, for the purposes of the bar of the statute—a tenant at sufferance." That is to say, at the expiration of the first year the tenant, holding on, becomes tenant at sufferance, for the purpose of the statute, and time is running thereunder (*w*); but the tenancy may still subsist for other purposes not relevant to the statute, and if either party puts an end to it, then it is ended for all purposes; but time, for the purpose of the statute, is still reckoned from the end of the first year. This case was followed (necessarily) in *McCowan* v. *Armstrong* (*x*).

In *Noble* v. *Noble* (*y*), the question was again discussed, and the trial Judge and a Divisional Court, and in the Court

(*u*) *Doe d. Dagneau* v. *Moore*, 9 Q.B. 555, at p. 558, per Patteson, J.

(*v*) L.R. 3 P. C. 751, at p. 760.

(*w*) See *Doe d. Goody* v. *Carter*, 9 Q.B. 863; *Foster* v. *Emerson*, 5 Gr. at p. 104.

(*x*) 3 O.L.R. 100.

(*y*) 25 O.L.R. 379.

of Appeal, Meredith, J.A., were of opinion that the tenant at will becomes tenant at sufferance at the expiration of the year. In the Court of Appeal, Magee, J.A., said (*z*): "The statute, of course, has no such effect as to terminate the tenancy at the end of the first year . . . The statute, however, contemplates that a tenancy at will created eleven years before action may have continued the whole time, and yet, if the landlord has neither received rent nor obtained a written acknowledgment, his rights will be barred." It is difficult to see how this conclusion is arrived at, considering the conclusive reasoning of the Privy Council, and the binding effect of their Lordships' decision. If the bar is completed at the end of eleven years, time must have been running under the statute, and that because the tenancy terminated at the end of the first year, for the purposes of the statute.

Assuming, then, that the tenant at the expiration of a year becomes tenant at sufferance, the right of entry for the purposes of the statute immediately accrues to the owner, and time begins to run from that time. If nothing transpires, the owner is barred at the end of eleven years from the commencement of the tenancy.

In order to stop the running of time the owner must be restored to the possession of the land, either by entering on and retaking actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will (*a*). Where there is actual proof of a lease, then the case is taken out of this sub-section altogether, unless it creates another tenancy at will.

But where an entry is relied upon, it is not sufficient that the entry be merely sufficient to determine a tenancy at will (if such a tenancy existed). There must be actual possession taken *animo possidendi*, and it makes no difference how long possession is then retained (*b*).

In connection with this, it must be observed that, by section 9, "no person shall be deemed to be in possession of any land within the meaning of this Act, merely by reason of having made an entry thereon." The mere entry referred to in this

(*z*) 27 O.L.R. at p. 350.

(*a*) *Day* v. *Day*, L.R. 3 P.C. at p. 761.

(*b*) *Randall* v. *Stevens*, 2 El. & Bl. at p. 652.

section has been said to be a bare legal entry, such as is spoken of in Litt. s. 417, by which, if a person enter on one parcel of land in the name of all, he shall have as good a possession and seisin as if he had entered in deed into every parcel (*c*); or such an entry as was made for the mere purpose of avoiding a fine, which might be made by stepping on any corner of the land in the night and pronouncing a few words without any attempt or intention or wish to take possession (*d*). The mere making of an entry amounts to nothing unless something is done to divest the possession of the tenant and re-vest it in fact in the landlord (*e*).

An entry under an assertion of right, and a submission by the occupant and assent to remain as tenant to the owner, is sufficient to create a new tenancy at will, and make a new point of time from which time is to be computed (*f*). Where the owner went to the land with a proposing tenant, and the occupant showed them over the premises and said he would give as much as any one if it was to be rented, it was held to be a sufficient entry (*g*).

Going on the land with a proposing purchaser, and stating to the occupant that he had come to take possession and was going to sell to the proposing purchaser, and planting a small tree on the land, was held to put the owner in possession (*h*). Bringing an action of ejectment, and compromising by resuming possession of part of the land, and permitting the tenant to remain in possession of the remainder, is equivalent to an actual entry and resumption of possession, and time was reckoned from that date (*i*).

Going upon the land and actually turning the tenant and his family out of possession, and removing most of his furniture and goods, is a resumption of possession, although the tenant is let back into possession the same day; and time runs from such dispossession (*j*).

Where the only possession was a fence enclosing the land,

(*c*) *Locke* v. *Matthews*, 32 L.J.C.P. at p. 101.

(*d*) *Randall* v. *Stevens*, 2 El. & Bl. at p. 652; *Cooper* v. *Hamilton*, 45 U.C.R. at p. 512; *Canada Co.* v. *Douglas*, 27 C.P. at p. 346.

(*e*) *Doe d. Baker* v. *Coombes*, 9 Q.B. 714.

(*f*) *Smith* v. *Keown*, 46 U.C.R. 163.

(*g*) *Cooper* v. *Hamilton*, 45 U.C.R. 502.

(*h*) *Doe d. Shepherd* v. *Bayley*, 10 U.C.R. 310.

(*i*) *Locke* v. *Matthews*, 32 L.J.Ch. 98.

(*j*) *Randall* v. *Stevens*, 2 El. & Bl. 641.

taking down part of the fence and putting up a post and board with a notice thereon to apply to the owner for letting was held to be a taking of possession and not a mere entry (*k*).

Defendant was living on land with his mother-in-law. While he was absent, doing some work, the owner went on the premises and took from the mother-in-law a confession that she was tenant at sufferance and an undertaking to give up possession to the owner when he required it. This was held to be a sufficient as against the defendant to stop the running of time under the statute (*l*).

Where one occupied land beneficially, on an arrangement with the owner that he should take care of it, and the owner occasionally went on the land and exercised acts of ownership, Erle, J., was of opinion that every time that the owner put his foot on the land it was so far in his possession that the statute would begin to run from the time when he was last upon it (*m*).

Visits by an heir at law to the house, his mother having married again, and stopping there several weeks at a time, and making a mortgage the proceeds of which were handed over to his stepfather, were held to show as against the mortgagee that the stepfather was tenant at will to the heir at law; in fact, the visits alone, according to Erle, J., were sufficient to show that the occupation was permissive (*n*).

Going upon the land, and giving advice as to improvements, conveying one acre to the occupant, and selling another portion to a stranger, were held to prevent the bar of the statute (*o*).

On the other hand, judgment in ejectment (under the old law) unexecuted, was not in itself sufficient (*p*).

Going on the premises and taking a stone out of the wall of a hut, removing a part of surrounding fence, and stating that he took possession, the occupant not having been personally disturbed, was held not to put the owner in possession (*q*).

A visit paid by a father (owner) to his son (occupant) within the limitation period, was held not to be sufficient to

(*k*) *Worssam* v. *Vandenbrande*, 17 W.R. 53.

(*l*) *Canada Co.* v. *Douglas*, 27 C.P. 339.

(*m*) *Allen* v. *England*, 3 F. & F. 49. A Rule was refused.

(*n*) *Doe d. Groves* v. *Groves*, 10 Q.B. 486.

(*o*) *Foster* v. *Emerson*, 5 Gr. 135. Not followed in *Keffer* v. *Keffer*, 27 C.P. 257; approved by a Divisional Court in *Noble* v. *Noble*, 25 O.L.R. 379; and disapproved by Magee, J.A., on appeal: 27 O.L.R. at p. 551.

(*p*) *Thorp* v. *Facey*, 35 L.J.C.P. 349.

(*q*) *Doe d. Baker* v. *Coombes*, 9 C.B. 714.

stop the running of time (*r*); nor was the fact that the land was, with the son's knowledge, assessed to the father as "freeholder" and the son as "owner" sufficient (*s*).

Where the occupant procured the owner to mortgage the land and give him the money, the occupant agreeing to pay off the mortgage, which he subsequently did, it was held not to stop the running of time (*t*).

Visiting the occupant from time to time, furnishing material for repairs, and paying taxes, were held by a Divisional Court to be sufficient to prevent the bar, but by the Court of Appeal not to do so (*u*).

Going upon the premises to make repairs, there being no evidence that this was against the will of the tenant, was held not to interrupt the running of time (*v*).

It is apparent that this clause revives to some extent the old doctrine of non-adverse possession. When the question has to be decided, as a question of fact, whether the old tenancy subsists, or a new one has been created, after the expiration of the first year, it is evident that the nature of the tenant's possession has to be enquired into. The nature of the possession in other cases is immaterial, the time running arbitrarily from the periods mentioned in the various clauses of the section under consideration; but in this instance the nature of the possession is a matter of no small concern.

By clause 8, it is enacted that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will to his mortgagee or trustee, within the meaning of clause 7. Under certain circumstances a mortgagor remaining in possession without any right conferred by the mortgagee might have been looked on as tenant at will. The exception created by this clause has been said to be equivalent to saying that the right of entry of a trustee against his *cestui que trust* shall not be deemed to have first accrued at the expiration of one year next after the commencement of the tenancy; and it seems to have been introduced, in order to prevent the necessity of any active steps being taken by the trustee to preserve his estate from

(*r*) *McCowan* v. *Armstrong*, 3 O.L.R. 100. See also *Hartley* v. *Maycock*, 28 Ont. R. 508; and *cf. Doe d. Groves* v. *Groves*, 10 Q.B. 486.

(*s*) *McCowan* v. *Armstrong*, 3 O.L.R. 100.

(*t*) *Keffer* v. *Keffer*, 27 C.P. 257.

(*u*) *Noble* v. *Noble*, 25 O.L.R. 379; 27 O.L.R. 342; 9 D.L.R. 735.

(*v*) *Lynes* v. *Snaith*, (1899) 1 Q.B. 486.

being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time (*w*).

This clause applies also to land not actually the subject of the trust, but of which possession has been obtained by reason of the trust (*x*).

Where the circumstances are such that the person having the legal estate could not enter, then the statute is not operative. Thus, where in pursuance of an agreement under seal to grant leases for ninety-nine years, at a pepper-corn rent, certain persons went into possession of land, and no leases were ever executed, but the circumstances were such that specific performance would have been adjudged against the owner, it was held that the statute did not operate, because the owner never had a right of entry; and Kay, L.J., thought that under such circumstances the lessees were *cestuis que trustent* within the meaning of this clause (*y*). And where a purchaser goes into possession under an agreement for payment of the purchase money by instalments, the vendor has no right of entry until default made in payment of an instalment (*z*). It was held in this case also that the clause in question applies to the case of an implied trust, and that the purchaser in possession and not in default is not tenant at will to his vendor by reason of this clause. There are objections to holding the vendor to be a trustee for the purchaser, already referred to, and the safer ground of decision for not applying the Statute of Limitations seems to be that of *Warren* v. *Murray*, that the vendor has no right of entry as long as the purchaser is not in default (*a*).

21. *Forfeiture or Breach of Condition.*

These two clauses must be considered together (*b*). Where the claimant has become entitled by reason of any forfeiture, or breach of condition, then the right first accrues when the forfeiture was incurred or the condition broken; but when such right does accrue, in respect of any estate or interest in reversion or remainder, and the land has not been recovered by virtue of such right, the right is deemed to accrue in respect

(*w*) *Garrard* v. *Tuck*, 8 C.B. at p. 253.
(*x*) *East Stonehouse Urban Council* v. *Willoughby*, (1902) 2 K.B. 318.
(*y*) *Warren* v. *Murray*, (1894) 2 Q.B. 648.
(*z*) *Irvine* v. *Macaulay*, 28 Ont. R. 92; 24 App. R. 446.
(*a*) *Building & Loan Ass'n* v. *Poaps*, 27 Ont. R. 470.
(*b*) S. 6, s.-ss. 9 and 10.

of such estate or interest in reversion or remainder, at the time when such estate becomes an estate or interest in possession, as if no such forfeiture or breach of condition had occurred.

Forfeitures and breaches of condition which confer a right of entry may in general be waived; the right to forfeit being at the election of the person entitled to the benefit of the condition (*c*); and the statute retains this right to him, and permits the person having the right to re-enter to waive the forfeiture or breach, and retain his right to enforce his entry after his reversionary estate or interest becomes an estate or interest in possession. If clause 9 had stood alone, the reversioner or remainderman would have been obliged to re-enter, otherwise time would have run against him arbitrarily from the act of forfeiture or breach. If the estate is such that there is no reversion or remainder (as upon a grant in fee-simple on condition) so that clause 10 cannot apply, it is apprehended that clause 9 alone will then apply, and at the expiration of ten years from the act of forfeiture or breach, the right will be barred.

In *Cobean* v. *Elliott* (*d*), a devise in fee was made, with the restriction that the devisee should not lease the land except with the consent of his brother. The devisee entered and openly violated the condition by leasing without his brother's consent. The court held that there was no acceptance of the devise, and that the devisee was in possession as a trespasser, and barred those entitled to enter on breach. In other words, the court treated the action of the devisee as a disclaimer (*e*). It is submitted, however, that the case falls under the present section. There was no act of disclaimer before or at the time of the entry, so that the entry should have been attributed to the title under the devise. The act of leasing was in fact an acceptance of the devise, but a rejection of the condition against leasing without consent, which was a condition subsequent. And time would run from the time of the breach of the condition under the present section.

Attention must again be called to the distinction between a condition, and a conditional limitation, or a limitation over of the estate upon the happening of a condition (*f*).

Where an estate is made upon condition, and the condition

(*c*) *Doe d. Bryan* v. *Bancks*, 4 B. & Ald. 401.
(*d*) 11 O.L.R. 395.
(*e*) See ante, p. 361.
(*f*) See p. 163.

is broken, the estate nevertheless continues, and in order to determine it the grantor or his heirs must enter. The common case of a lease with a proviso for re-entry on breach of covenants is an instance of this. Or, if A. should grant land to B. for life, provided that if B. does, or omits to do, a certain act, the grant shall be void and the land forfeited to A.; here, the estate continues in B., though the condition may have happened, unless A. enters and re-claims his estate.

But if A. grant land to Z., to hold to the use of B. for life, but if B. shall do, or omit to do, a certain act, then from and after such act or omission to hold to the use of C.; here, there is no right in the grantor to enter, and no necessity for C. to do so in order to end B.'s estate; for the effect of the conveyance is to vest the land in C. upon the happening of the condition, B.'s estate at once coming to an end on, or lasting only until, the happening of the condition, without any entry, by force of the limitation in the conveyance.

In the first case, upon the happening of the conditioned event, A., the grantor, acquires a right of entry, and, under clause 9, time begins to run at once; but A. may waive the forfeiture or breach, and B., remaining in possession, gains no advantage from the statute; for under clause 10, A., in respect of his reversion, has another right which first accrues at the death of B., when A.'s reversion becomes an estate in possession (*g*). In the second case, upon the happening of the condition, the estate immediately vests in C., and C. being thus entitled at once to the possession of the land under the instrument, time begins to run against him at once if B. remains in possession.

This section has been held by Sir Geo. Jessel, M.R., to apply to cases both of conditions and limitations. So that where an estate passed to another by limitation, on breach of a condition to assume name and arms, that other had the full statutory period from the determination of the prior estate just as he would have had if that estate had been determinable by and was in fact dependent on re-entry for its forfeiture or determination (*h*). It is submitted with great respect, however, that where the nature of the limitation is to make the estate shift into the remainderman, or into some other person

(*g*) *Astley* v. *Earl of Essex*, L.R. 18 Eq. 290; *Leeds (Duke of)* v. *Earl of Amherst*, 2 Ph. 117.

(*h*) *Astley* v. *Earl of Essex*, L.R. 18 Eq. 390. And see *Leeds (Duke of)* v. *Earl of Amherst*, 2 Ph. 117.

in defeasance of the prior estate, the remainderman, or such other person, is entitled to an estate in possession, the prior estate having continued only until the happening of the condition; and, therefore, that there is no further time allowed. Thus, if land were limited to A. for ten years, remainder to B. in fee; and A. remained in possession for more than ten years after the ten years allowed him by the conveyance; here B.'s estate became an estate in possession at the expiration of A.'s estate of ten years, and time would run against him for such expiration. Similarly, it is submitted, if land were limited to A., a widow, *durante viduitate*, and from and after her death or marriage to B., and she married and remained in possession, time would begin to run against B., from the marriage, and he would never have another right of entry, because his remainder became an estate in possession immediately upon the marriage (*i*). Where the limitations of the estate are such that the estate may remain, notwithstanding the act of forfeiture, then the two rights undoubtedly exist.

22. *Future Estates.*

Where the estate or interest claimed is an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained the possession or receipt of the profits of the land, or the receipt of such rent, in respect of such estate or interest, then the right first accrues at the time when such future estate or interest becomes an estate or interest in possession (*j*).

A right of entry in respect of an estate in remainder, shall be deemed to accrue when the estate in remainder becomes an estate in possession, by the determination of any estate or estates in respect of which such land has been held or the profits thereof or such rent has been received, notwithstanding that the person claiming such land or rent, or some person through whom he claims, has, at any time previously to the creation of the estate which was determined, been in possession or receipt of the profits of such land, or in receipt of such rent (*k*). As long as the tenant for life is in possession time can never run against the remainderman (*l*).

(*i*) See *Clarke* v. *Clarke*, 2 Ir. R. Com. Law, 395 (1868).
(*j*) S. 6, s.-s. 11.
(*k*) S. 6, s.-s. 12.
(*l*) *Gray* v. *Richford*, 2 S.C.R. 431; *Dods* v. *McDonald*, 36 S.C.R. 231.

The first of these sections applies when *no person has obtained the possession, etc., in respect of such estate, i.e.*, such future estate; the second of them applies *notwithstanding that the person claiming such land (i.e., the remainderman), or some person through whom he claims has, at any time previous to the creation of the particular estate, been in possession of such land, etc.* Whether the remainderman has not been in possession, or whether he has been in possession before the particular estate was created, the statute operates in each case.

The second of these clauses (s.-s. 12) prevents any doubt that might arise as to whether a person being in possession of an estate, and then going out to make room for somebody entitled to a sub-interest, could be barred of the remainder of his interest by that person's possession. For instance, suppose A. to be in posssesion subject to a power of leasing vested in B.; B. exercises the power, and leases for ten years; now, in this case, clause 12 declares that the possession of this lessee for ten years shall not prevent A.'s regress at their termination, but that A.'s right shall be considered as accruing anew at the end of the ten years, and the consequent determination of the lessee's estate (*m*).

The simple case of an estate for life to A., remainder in fee to B., where A. has been dispossessed, requires some consideration. If the person last entitled to a particular estate, on which a future estate is expectant, has not been in possession at the time when his interest determined, then, no action shall be brought by any person becoming entitled in possession to a future estate or interest but within ten years next after the time when the right to make an entry or bring an action accrued to the person whose interest has so determined, or within five years next after the time when the estate of such person becoming entitled in possession has become vested in possession, whichever of those two periods is the longer (*n*).

A reversion in fee expectant on a term of years is not a future estate expectant on a particular estate within the meaning of this section. For the purpose of the statute it is a present interest, and immediate psosession thereof may be had by the wrongful receipt of the rent by a stranger (*o*). And so, where a lessee of a long term was dispossessed and barred by

(*m*) *Nepean* v. *Doe*, 2 Sm. Lg. Cas. 10th ed., notes pp. 652, 653.
(*n*) S. 7 (1).
(*o*) Ante, p. 484.

lapse of time, and afterwards affected to surrender his lease to the lessor, it was held that the lessor had no right of entry until the expiration of the time for which he had demised the land (*p*).

Where, however, an estate in remainder or reversion is expectant on a life estate, and the tenant for life is dispossessed, the case is different.

First, the trespasser may not have been in possession long enough to bar the tenant for life. If the life drops before the statutory bar is complete, then the person last entitled to the particular estate "has not been in possession . . . when his interest determined." And the person entitled to the future estate expectant on the life estate has either ten years from the time when the right to make an entry first accrued to the person whose interest has determined, that is, ten years from the dispossession of the life tenant, or five years from the time when his estate became an estate in possession, that is, five years after the death of the life tenant, whichever is the longer period. If, therefore, a tenant for life is dispossessed, and dies four years thereafter, the remainderman has six years from the death of the tenant for life within which to bring his action, being ten years from the date when the life tenant's right of entry accrued, because it is longer than five years from the death of the tenant for life, at which date he became entitled in possession (*q*).

Secondly, the trespasser may have been in possession for ten years during the lifetime of the tenant for life, who thereby has been completely barred. In order fully to consider the application of this section to such a case, reference must be made to s. 16, which enacts that "at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period shall be extinguished." The estate of the life tenant being extinguished, is, in the words of the Act, "determined." It is not transferred to the trespasser (*r*). The operation of the Act is negative only; it destróys the estate of the barred owner and leaves in possession an intruder whose

(*p*) *Walter* v. *Yalden*, (1902) 2 K.B. 304.
(*q*) Darb. & Bos. 2nd ed. 324.
(*r*) Ante, p. 471.

security lies in the inability of the person whose title has been barred to eject him. His interest is a *quasi* fee. It is not measured by any rules of law.

Giving the word "extinguished" its natural and full meaning, it is submitted that where a life tenant is barred, s. 7 (1) does not govern the right of entry of the remainderman. That section provides two alternative periods.

(1) The first period is "ten years next after the time when the right to make an entry . . . first accrued to the person whose interests has so determined." Inasmuch as the life tenant's right of entry first accrued when he was dispossessed, and ten years' possession puts an end to his estate, if the remainderman is to have only ten years from the first accrual of the life tenant's right of entry, to bring his action, he would also be barred simultaneously with the life tenant; and he could not save himself by bringing an action before the expiration of the ten years, for it is only the life tenant (before the bar) who could bring an action. It is, therefore, impossible to apply this part of the section to the case in hand; and as it never can apply, it may be concluded that the whole section is not applicable, because the other period is alternative, and is to be measured by the former one in order to give the remainderman as long a time as possible. Or, in other words, if this part of the section is not applicable, then the other period is not an alternative, though intended by the statute to be one.

(2) Let us, however, consider it. The remainderman is to have "five years next after the time when the estate of the person becoming entitled in possession has become vested in possession." When does the future estate become "vested in possession"? Clearly, at the determination of the life estate. If the determination of the life estate occurs when it is extinguished, this would give the remainderman five years from the completion of the bar by the life tenant—but, only in case this is a longer period than that prescribed in the first alternative. But it must always be a longer period than ten years from the accrual of the right of entry of the life tenant, and yet the statute proceeds on the hypothesis that it may be shorter. The same remark applies if the vesting in possession of the future estate is taken to occur at the death of the life tenant instead of at the determination of his estate. And, in any case, if the first part of the section can never be applied, the second part cannot be an alternative as it is plainly intended to be. The conclusion is that this section cannot

apply to the case of a life tenant with remainder expectant thereon, where the life tenant has been barred.

It is submitted that it is governed by the general effect, if not by the express words of section 6 (11). This clause provides that the right of entry of the remainderman shall accrue when his estate becomes an estate in possession. The remainder becomes an estate in possession upon the determination of the particular estate. The determination of a particular estate may occur by merger, effluxion of time, or by extinction, and the future estate or interest then becomes an estate or interest in possession.

If land be granted to A. for life, remainder to B. in fee, and A. surrenders to B., B.'s remainder is accelerated by the extinction or merger of the life estate and becomes an estate in possession.

And if A.'s estate is extinguished or put an end to by process of law, is there any reason why the remainder should not be similarly accelerated? In order to maintain the contrary it is necessary to hold that the life estate is not determined when it has been extinguished, or that it has been transferred to the intruder for the life of the life tenant at the moment when it was extinguished. "It is impossible to depart from the plain terms of the statute, which expressly enacts that after [ten] years' possession against a former title, that title shall be deemed to be 'extinguished,' and a new title created" (*s*). And Rose, J., said (*t*): "'Determination,' 'determined,' are the words made use of in ss. 2 and 3 of ch. 16 (*u*). Can it be said that an estate which has been extinguished has not been 'determined'? If it has, then the plain, literal reading of the Act leaves no room for doubt" (*v*).

The case of *Walter* v. *Yalden* (*w*) is not opposed to this view; for in that case it was held that a reversion expectant on a term of years was not a future estate, but a present one. And it is clear that such a reversion may be barred by the receipt of rents by a stranger under s. 6 (5) pending the term of years, who thus obtains immediate possession of the reversion (*x*).

(*s*) *Per Curiam, Brassington* v. *Llewellyn*, 27 L.J. Ex. 297.

(*t*) *Hicks* v. *Williams*, 15 Ont. R. 225, at p. 233.

(*u*) 24 Wm. IV., now R.S.O. c. 75, s. 6.

(*v*) In *Stuart* v. *Taylor*, 33 O.L.R. at p. 39; 22 D.L.R. 282, Riddell, J., expressed the opinion that the estate is not extinguished for all purposes; but, as His Lordship said, it was not necessary for the decision of the case.

(*w*) (1902) 2 K.B. 304.

(*x*) See ante, pp. 484, 497.

In any event, reversions expectant on terms of years are governed by the sections respecting landlord and tenant, while future estates are governed by the sections now under consideration.

The result is that upon extinction of the life estate by possession, the remainder is accelerated and becomes an estate in possession, and time begins to run against the remainderman at the end of the period in which the life tenant was barred (*y*).

The enactment, of course, applies where the tenant in fee grants away a life estate. His right of entry accrues when his reversion becomes an estate in possession. And if tenant in fee were dispossessed, and while dispossessed granted the land to A. for life, and A. took possession, the right of the tenant in fee would accrue at the determination of A.'s estate, and the prior possession of the trespasser would go for nothing. But a dispossessed tenant in fee cannot stop the running of time by simply settling the property, as we shall see; it is the taking of possession by the grantee for life in such a case that revests all the titles under the settlement (*z*).

When a life tenant conveys away his estate, he is not then "the person last entitled to the particular estate," under s. 7 (1). Thus, tenant for life conveyed his estate to a stranger six years before his death. And an action was brought more than six years afterwards, but less than twelve (the periods under the English Act), to recover the land. It was held that the plaintiff was not barred, because the life tenant was not the person last entitled, but his grantee. The clause was intended to provide for the case where the right to possession and the possession itself are separated; in such cases a cause of action accrues to the owner of the particular estate, and on its cesser another cause of action accrues to the remainderman, and the two periods run from the accruing of these rights of action (*a*).

Where the owner has been dispossessed, and after such dispossession, executes a settlement of the land constituting future estates, he does not thereby cause time to cease running; but all claiming under such settlement will be barred at the end of ten years from the time when the first right of entry accrued (*b*). Where the right of any person to an estate in possession has

(*y*) See 11 Jur. N.S. at p. 152.
(*z*) Darb. & Bos. 2nd ed. 319.
(*a*) *Pedder* v. *Hunt*, 18 Q.B.D. 565.
(*b*) S. 7, s.-s. 2.

been barred, and such person has at any time during such period been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise in or to the same land, no right accrues in respect of such other estate, etc., unless in the meantime the land has been recovered by some person entitled to an estate, interest or right which has been limited to take effect after or in defeasance of such estate in possession (*c*).

Clause 12 of section 6 applies where the particular tenant and the remainderman are different persons. This clause applies where the owner of the particular estate is also the owner of a future estate (*d*).

The present clause applies to cases where a person immediately entitled has been dispossessed and barred of his present right. He cannot then set up an estate or right in remainder, which he also had at or during the time of his dispossession, but is barred of all. But if any other person is entitled to an estate limited to take effect after his immediate or present estate, and recovers the land after such person is barred of his present right, then the whole title revests, and the future estate is saved.

Thus if land be limited to A. for life, remainder to B. for life, remainder to A. in fee; and A. is dispossessed and barred of his right, and then B. enters and enjoys his life estate, here A. has a new right with respect to his remainder (*e*).

23. *Acknowledgments.*

Where an acknowledgment in writing of the title of the person entitled to land or rent has been given to him or to his agent, signed by the person in possession, or in receipt of the profits or in the receipt of such rent, such possession or receipt shall be deemed to have been the possession or receipt of or by the person to whom or to whose agent the acknowledgment was given at the time of giving the same; and the right of such last-mentioned person, or of any person claiming through him, to make an entry shall be deemed to have first accrued at and not before the time when the acknowledgment, or the last of them, if more than one, was given (*f*). The conditions necessary for the application of this section are that the acknowledgment should be in writing; made by the person in possession

(*c*) S. 7, s.-s. 3.

(*d*) *Doe d. Hall* v. *Moulsdale*, 16 M. & W. 689; *Stuart* v. *Taylor*, 33 O.L.R. 20; 22 D.L.R. 282.

(*e*) *Doe d. Johnson* v. *Liversedge*, 11 M. & W. 517.

(*f*) S. 14.

himself; made to the person entitled or his agent. No verbal admission or acknowledgment will be of any avail, the statute requiring that it shall be in writing (*g*). But if the writing has been lost or destroyed, parol evidence may be given of it in the same manner as other lost documents are proved (*h*).

The signature must be by the party in possession himself, and not by his agent (*i*), but it may be signed for him by an amanuensis (*j*).

The acknowledgment may be made to the person entitled or his agent (*k*), but it cannot be made to a stranger (*l*); but the agent need not be authorized to act at the time of the acknowledgment. If there be a subsequent ratification of his receipt of the acknowledgment it is sufficient (*m*). It is not necessary that the person making the acknowledgment should understand its nature, if it is in fact true (*n*).

Joining in a conveyance of part of the land with the true owner has been held to be a sufficient acknowledgment of his title (*o*).

The operation of the Act is in effect to make an acknowledgment equivalent to possession or receipt of rent by the person to whom it is given at the time when it is given, and is in fact equivalent to removing the trespasser from possession for the time being and putting the owner in possession (*p*). But it is ineffectual after the statutory period has run, for the owner has then no right of entry, his title being completely extinguished (*q*).

Attention may here be called to the different provisions regarding acknowledgments according to the different circumstances in which they may be given.

(*g*) *Doe d. Perry* v. *Henderson*, 3 U.C.R. 486; *Doe d. Ausman* v. *Minthorne*, 3 U.C.R. 423.

(*h*) *Haydon* v. *Williams*, 7 Bing. 163.

(*i*) *Ley* v. *Peter*, 3 H. & N. 101.

(*j*) *Lessee of Dublin* v. *Judge*, 11 Ir. L.R. 80 (1847).

(*k*) *Ruttan* v. *Smith*, 35 U.C.R. 165.

(*l*) *Markwick* v. *Hardingham*, 15 Ch.D. 339.

(*m*) *Trulock* v. *Robey*, 12 Sim. 402; *Jones* v. *Bright*, 5 Bing. 533; *Lyell* v. *Kennedy*, 14 App. Cas. 437.

(*n*) *Ferguson* v. *Whelan*, 28 C.P. 112.

(*o*) *Re Dunham*, 29 Gr. 258.

(*p*) *Cahuac* v. *Cochrane*, 41 U.C.R. 436; *Canada Co.* v. *Douglas*, 27 C.P. 344.

(*q*) *Sanders* v. *Sanders*, 19 Ch.D. 373; *McDonald* v. *McIntosh*, 8 U.C.R. 388.

Possession of land. (a) The acknowledgment must be in writing; (b) signed by the trespasser himself; (c) made to the claimant or his agent (*r*).

Arrears of dower, rent and interest. (a) The acknowledgment must be in writing; (b) signed by the person by whom the money is payable, or his agent; (c) made to the person to whom payable, or his agent (*s*).

Mortgagee to mortgagor. (a) The acknowledgment must be in writing; (b) by the mortgagee, or the person claiming through him (*t*); (c) if there are more than one mortgagee or persons claiming under him or them, an acknowledgment signed by one or more is effectual only against the party signing (*u*); (d) made to the mortgagor, or some person claiming his estate, or the agent of such mortgagor or person (*v*); (e) if more than one mortgagor the acknowledgment may be given to any one or more of them, or his or their agent, and is as effectual as if given to all (*w*).

Money charged on land, and legacies. (a) The acknowledgment must be in writing; (b) signed by the person by whom payable, or his agent; (c) made to the person entitled, or his agent (*x*).

24. *Disabilities—Land or Rent.*

If at the time when the right of entry or action first accrues to the person entitled, such person is under any of the disabilities of infancy, idiotcy, lunacy or unsoundness of mind, then, notwithstanding that the statutory period of limitation may have elapsed, such person, or the person claiming through him, may make an entry or bring an action within five years next after the cesser of disability, or death of such person, whichever first happens (*y*).

But no entry shall be made or action brought by any person under disability at the time when the right first accrued, or by any person claiming through him, but within twenty years after the time when the right first accrued, although the dis-

(*r*) S. 14.
(*s*) S. 18.
(*t*) S. 20.
(*u*) S. 22.
(*v*) S. 26.
(*w*) S. 21.
(*x*) S. 18.
(*y*) S. 40.

ability continued during the whole twenty years, or although the five years allowed from cesser of disability or death may not have expired (*z*).

It will be observed that the allowance for disabilities is confined to the person to whom the right *first* accrued, and that from the moment at which such person, being under *any* disability when his right accrued, shall be free from any disability, the five years allowed will begin to run, and having once commenced running, will run on, without regard to any disability which he may afterwards contract; while, if he should continue to labour under some disability, whether original or supervening, without a free interval, till his death, the five years would begin to run from his death, without regard to the condition of the next claimant, and although such claimant should, at the time when the right accrues to *him*, be actually under disability. But the right will be absolutely barred, at the end of twenty years, although the person to whom it first accrued should continue under disability for the whole of that time, having never, therefore, been personallly able to assert his right, or although five years should not have elapsed since he ceased to be under disability, or died.

And so, where an annuity was charged by a testator on land in favour of a person who was of unsound mind at the date of the testator's death, and payments were made from time to time to his mother in his behalf, but ceased for some years, it was held that the disability would have saved his right under s. 40 for five years after its cesser, or after his death, whichever should first happen, but as the annuitant was alive and still under disability, and twenty years had not elapsed from the time of the last payment, the claim was not barred (*a*).

To illustrate the matter further, let us suppose A., donee in tail, to be insane when his right accrues; if he should be restored to reason, a term of five years from the time of his restoration, whether the term of ten years from the accruer of his right shall have elapsed or not, is then allowed to him and the issue in tail. If he should die *without* having been restored, the issue would then have five years from his death, whether the ten years had elapsed or not; but if he should continue insane for twenty years, the right would be absolutely barred; or, if he should be restored, or, without having been restored, should

(*z*) S. 41.

(*a*) *Trusts & Guarantee Co.* v. *Trusts Corp'n of Ont.*, 2 O.L.R. 97.

die at the end of say nineteen years, the issue, or he and the issue, whether such issue were under disability at his death or not, would have, instead of five years, only one year from his restoration or death. If A. should continue insane for twenty years; or, if he should be restored, or *without* having been restored, should die at the end of, say, nineteen years, and the issue, or he and the issue, should neglect to take any proceeding within one year from such restoration or death, the persons in remainder or reversion, whether under disability of not, would be absolutely barred (s. 29). So, if A. should be restored at the end of, say, eighteen years, and die *within* two years from the period of his restoration; or, if he should continue insane for, say, eighteen years, and then die, leaving issue in tail, which issue should fail *within* two years from his death; in either case, the persons entitled in remainder or reversion, whether under disability or not, would be absolutely barred unless they prosecuted their claim before the expiration of the two years (s. 30). In the examples here given, it is assumed that no disability, as, for instance, of infancy, existing concurrently with A.'s insanity, when the right first accrued, is of longer continuance; otherwise, the determination of the concurrent disability last removed, must be substituted for his restoration to sanity. It is also assumed that the estate of A. is a tenancy in tail, which, as also the reversion or remainder dependent thereon, are capable of bar by lapse of time and otherwise, as presently explained in treating of sections 29, 30 and 31.

No allowance whatever is made for any disability except that in existence when the right first accrues. And if the first disability ceases by death, and five years more are allowed, and the person then claiming the right is under disability, the time runs against him nevertheless (*b*).

Hence, if an infant is dispossessed and thus a right of entry accrues to him, his disability saves him for the time (*c*). But if his ancestor had been dispossessed and time had commenced to run, and then the infant succeeded by inheritance, his infancy would not be a disability (*d*).

With regard to the disability of infancy, however, care must be taken to distinguish those cases in which possession is taken under such circumstances that the person in possession

(*b*) S. 42; *Farquharson* v. *Morrow*, 12 C.P. 311.
(*c*) *Jones* v. *Cleaveland*, 16 U.C.R. at p. 11.
(*d*) *Garner* v. *Wingrove*, (1905) 2 Ch. 233.

will be considered as a bailiff for the infant; in which event his possession will be the possession of the infant, and the statute will not operate. Whenever any person, as bailiff, servant, agent, attorney, caretaker, guardian (whether natural or statutory), or in any other fiduciary character, enters into possession, the possession is that of the person entitled; and so long as such person continues in possession his possession is to be ascribed to the character in which he entered, and he cannot denude or divest himself of such character except by going out of such possession and delivering up the land to the owner (*e*). And, therefore, where a man made a conveyance to his wife, inoperative to convey the legal estate, but sufficient to constitute him a trustee for her, and remained in possession with her, and after her death continued in possession for eighteen years, it was held that his occupation must be attributed to his rightful title as natural guardian of his infant children, and that the statute did not operate against them (*f*). And the fiduciary character is maintained even after the infant attains his majority (*g*). And where a stranger enters, with notice of the infant's title, he is similarly treated as in possession for the infant, and time does not run (*h*). The law is thus summed up in an Irish case (*i*): "Where any person enters upon the property of an infant, whether the infant has been actually in possession or not, such person will be fixed with a fiduciary position as to the infant—first, whenever he is the natural guardian of the infant; secondly, when he is so connected by relationship or otherwise with the infant as to impose upon him a duty to protect, or, at least, not to prejudice his rights; and thirdly, when he takes possession with knowledge or express notice of the infant's rights. Indeed, the last ground is but an instance of the application of the general principle, that a person entering into possession of trust property, with notice of the trust, constitutes himself a trustee, in which case, unless he

(*e*) *Kent* v. *Kent*, 20 Ont. R. at p. 463.

(*f*) Ibid; affirmed in appeal, 19 App. R. 352, and see the cases cited in the court below. See, however, *Fry* v. *Speare*, 34 O.L.R. 632, where it is said that there is no irrebuttable presumption that a parent in possession holds as bailiff for his children. This case, however, did not call for a decision on the point, as it was found that a stepmother had actually excluded her stepchildren from the land, and so established a title by possession against them.

(*g*) Ibid.

(*h*) *Re Taylor*, 8 P.R. 207.

(*i*) *Quinton* v. *Frith*, Ir. R. 2 Eq. at p. 415 (1868).

enters as a purchaser for value and continues in possession for [ten] years from his purchase, or unless the trust be merely constructive (*j*), the statute will afford no defence."

25. *Concealed Fraud.*

In every case of a concealed fraud, the right of any person to bring an action for the recovery of any land or rent, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have accrued at, and not before, the time at which such fraud was, or with reasonable diligence might have been, first known or discovered (*k*).

The conditions necessary for the application of this section are: (1) fraud; (2) concealment; (3) deprivation of the land by means of the fraud; and (4) non-discovery, and inability with reasonable diligence to discover the fraud (*l*).

"What is meant by concealed fraud? It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold" (*m*).

It is not sufficient that the fraud should simply be unknown to the person aggrieved; it must be concealed from him (*n*). Where the facts proved show mere ignorance of the trespass on the part of the plaintiff, and no fraud on the part of the defendant, the enactment does not apply. The plaintiff must prove fraud and the concealment of the fraud. And so, where after a discontinuance of possession of a cellar, possession was taken thereof unknown to the owner, and without any fraud, it was held that this section did not apply (*o*). In a pleading which alleged that possession had been taken in the name of an infant who was falsely alleged to be the heir, it was held that this was not a sufficient allegation of concealment, but only of an entry under a false claim (*p*). But where an ille-

(*j*) A constructive trust is now held to stand in the same position as an express trust: *Irvine* v. *Macaulay*, 28 Ont. R. 92; 24 App. R. 446.

(*k*) S. 32.

(*l*) *Willis* v. *Howe* (*Earl*), (1893) 2 Ch. 545, at pp. 549, 551.

(*m*) *Petre* v. *Petre*, 1 Drew. 371, at p. 397; *Lawrence* v. *Norreys* (*Lord*), 15 App. Cas. at p. 220.

(*n*) *Willis* v. *Howe* (*Earl*), (1893) 2 Ch. at p. 552.

(*o*) *Rains* v. *Buxton*, 14 Ch.D. 537.

(*p*) *Willis* v. *Howe* (*Earl*), (1893) 2 Ch. 545.

gitimate child was brought up as the eldest son and heir, and the plaintiff, the legitimate, son, was brought up to believe that he was the second legitimate son, it was held that the designedly bringing up of the plaintiff in the belief that he was the second legitimate son was concealed fraud within the meaning of the statute (*q*).

Taking a deed from a person who subsequently alleged that he was so dull of intellect as to be incapable of understanding the transaction is not concealment (*r*). But taking a deed from a lunatic, keeping and acting on it as a title deed, nobody knowing of it, is a concealment within the statute (*s*). The statement in the schedule of an insolvent that he had no property of a specific kind, the assignee not knowing of it, and there being nothing to point out that the insolvent had any such property, whereby the assignee was prevented from acquiring it, is concealed fraud, because the property vested in the assignee under the assignment, and he was deprived of the possession by reason of the concealment (*t*).

The fraud must be the fraud of, or in some way imputable to, the person who invokes the aid of the statute, and must have deprived the plaintiff or his predecessors of the land. So, where a deed to the plaintiff was concealed from her, and an innocent person remained in possession of the land, not knowing of the deed, and not having obtained possession by availing himself of the fraud, it was held that he was a mere trespasser, and that his possession barred the plaintiff (*u*).

Finally, the fraud must not have been discovered, and the circumstances must be such that it could not, with reasonable diligence, have been discovered within the statutory period, and when discovered it must be within the statutory period before the bringing of the action (*v*).

26. *Mortgages and Charges.*

Where a mortgagee has obtained possession of the mortgaged property, the mortgagor, or any person claiming under him, will be barred of his right to redeem if he does not bring

(*q*) *Vane* v. *Vane*, L.R. 8 Ch. 383.
(*r*) *Manvy* v. *Bewicke*, 3 K. & J. 342.
(*s*) *Lewis* v. *Thomas*, 3 Ha. 26.
(*t*) *Sturgis* v. *Morse*, 24 Beav. 541.
(*u*) *Re MacCallum*, (1901) 1 Ch. 143.
(*v*) *Willis* v. *Howe* (*Earl*), (1893) 2 Ch. at pp. 549, 551.

his action within ten years from the taking of possession; or within ten years from an acknowledgment, or the last of them, if more than one, by the mortgagee or any person claiming through him (*w*).

Time begins to run from the date when the mortgagee takes possession, and not from the date fixed for redemption. And so, where a mortgage, made in 1884 and payable in ten years, became in arrear and the mortgagees took possession in 1897, and collected the rents, which by 1902 had satisfied the mortgage, it was held that the mortgagor was barred in 1899 (twelve years after the taking of possession), and that the rents collected after that date were their own property and not held on trust for the mortgagor (*x*).

By section 18 no arrears of interest in respect of any money charged upon land shall be recovered "by any distress, or action," but within six years next after the same becomes due. The operation of this section is confined to cases of distress or actions by the mortgagee; and so, where mortgaged land was sold in an administration action and the money paid into court, the personal representatives of the mortgagee were held entitled to the whole of the arrears of interest, and not to six years' arrears only (the mortgage being overdue for more than six years), notwithstanding the provisions of this section, the application for payment out being made by the mortgagor, who was held to be in the same position as a mortgagor seeking to redeem (*y*).

When neither mortgagor nor mortgagee is in possession, but the land is vacant, and no payment is made and no acknowledgment given, the mortgagee is in constructive possession of the land, and time runs in his favour; so that he may maintain an action of trespass against anyone unlawfully entering (*z*). Where the owner has been dispossessed, and while out of possession mortgages the land in fee, it has been held, both in this province and in England, that the mortgagee has a new right against the mortgagor, and as long as interest is paid the statute does not operate; in other words, that the mortgagor saves himself by mortgaging the land and paying

(*w*) S. 20.

(*x*) *Re Metropolis & Counties Perm. Inv. Bldg. Soc.*, (1911) 1 Ch. 698.

(*y*) *Re Lloyd*, (1903) 1 Ch. 385.

(*z*) *Delaney* v. *Can. Pac. R. Co.*, 21 Ont. R. 11; *Kirby* v. *Cowderoy*, (1912) A.C. 599.

interest (*a*). But the contrary has recently been held in England (*b*).

In case there are more mortgagors than one, or more than one person claiming through the mortgagor, the acknowledgment of the mortgagee, if given to one only of such persons, will be as effectual as if given to all (*c*).

In case there are more mortgagees than one, or more persons than one claiming the interest of the mortgagee, an acknowledgment signed by one or more of such mortgagees or persons, is effectual only as against the person signing, and does not operate to give the mortgagor a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the land mortgaged; and where the persons giving the acknowledgment are entitled to a divided part of the land, and not to any ascertained part of the mortgage money, the mortgagor is entitled to redeem such divided portion of the land on payment, with interest, of the part of the mortgage money which bears the same proportion to the whole of the mortgage money as the value of the divided portion of the land bears to the whole (*d*).

When the mortgagor is in possession, no action shall be brought to recover the mortgage money but within ten years after a present right to receive the same accrued to some person capable of giving a release or discharge, unless in the meantime some part of the principal money or interest has been paid, or some acknowledgment of the right thereto has been given by the person by whom the same is payable (*e*).

Where the mortgage contains an acceleration clause, making the principal sum fall due on default in payment of interest, time runs, as to the principal, from the date of the default, and not from the date of maturity expressed in the mortgage (*f*).

The payment must be made to the person entitled, and so payment into court of rents and profits by trustees for sale, on account of conflicting claims of incumbrancers, no steps being taken by the mortgagee to enforce the mortgage within the statutory period, and no payment of interest and no acknow-

(*a*) *Cameron* v. *Walker*, 19 Ont. R. 212; *Doe d. Palmer* v. *Eyre*, 17 Q.B. 366; *Ford* v. *Ager*, 2 H. & C. 279.

(*b*) *Thornton* v. *France*, (1897) 2 Q.B. 143.

(*c*) S. 21.

(*d*) S. 22.

(*e*) S. 24.

(*f*) *McFadden* v. *Brandon*, 8 O.L.R. 610.

ledgment having been made, was held not to be a payment, and, the mortagees' title being extinguished, the mortgagors were held to be entitled to receive payment out of court (*g*), and the payment to be effective must be made within the statutory period, inasmuch as the mortgagees' right is extinguished after the lapse of ten years without payment or acknowledgment (*h*).

The payment must also be made by some person either bound to pay, or liable to be foreclosed in default of payment (*i*); the principle underlying the statute being that a payment to prevent the bar by the statute must be an acknowledgment by the person making the payment of his liability, and an admission of the title of the person to whom the payment is made (*j*). Hence, a payment by a stranger, which would be a mere gratuity (*k*), a payment of rent by a tenant of the mortgaged property to the mortgagee (*l*), the receipt, by the mortgagee, from a life insurance company of the surrender value of a policy on the life of the mortgagor, which was held as part of the security for the mortgage money (*m*), or the seizing of chattels under a chattel mortgage held as part of the security (*n*), are not payments within the meaning of the Act, and do not stop the running of time under the statute. But a payment by the solicitor of the mortgagor who was also solicitor for the mortgagee is a payment "by the person by whom the same is payable" so as to prevent the running of time (*o*).

The expression, "in the meantime," used in the statute, with reference to payment or acknowledgment, means the interval of time between the bringing of the action and the time when the remedy would otherwise have been barred (*p*).

The acknowledgment, as well as the payment, must be made within the statutory period; if made after the mortgagee's title

(*g*) *Re Hazeldine's Trusts*, (1908) 1 Ch. 34; and see *Re Fox*, (1913) 2 Ch. 75.

(*h*) *Hemming* v. *Blanton*, 42 L.J.C.P. 158; *Re Hazeldine's Trusts*, (1908) 1 Ch. 34.

(*i*) *Chinnery* v. *Evans*, 11 H.L.C. 115; *Harlock* v. *Ashbury*, 19 Ch.D. 539; *Re Clifden (Lord)*, (1900) 1 Ch. 774.

(*j*) See *Lewis* v. *Wilson*, 11 App. Cas. 639.

(*k*) *Chinnery* v. *Evans*, 11 H.L.C. 115.

(*l*) *Harlock* v. *Ashberry*, 19 Ch.D. 539.

(*m*) *Re Clifden (Lord)*, (1900) 1 Ch. 774.

(*n*) *McDonald* v. *Grundy*, 8 O.L.R. 113.

(*o*) *Bradshaw* v. *Widdrington*, (1902) 2 Ch. 430.

(*p*) *Re Clifden (Lord)*, (1900) 1 Ch. 774.

has been extinguished it is of no avail (*q*). And a notice of exercising the power of sale contained in a mortgage after extinction of the mortgagee's title is equally ineffective (*r*).

When there are two mortgages, and time is running under the statute against the second mortgagee, the operation of the statute as to the second mortgagee, is not suspended by the fact that the first mortgagee has been in possession of the land (*s*).

Where a judgment of foreclosure has been obtained, the mortgagee acquires a new right and title, and has another period of ten years within which to recover possession (*t*).

It will be observed that there is no saving for disability in these cases.

An execution against lands in the sheriff's hands constitutes a lien upon lands, and it was formerly held, under the first part of section 24, that it was barred at the expiration of ten years if no sale took place (*u*). But now, by sub-section 2, the lien created by the writ shall remain in force as long as the writ is in the sheriff's hands and is kept alive by renewal; and if in force at the end of twenty years, it may be kept renewed (*v*). But if the writ is not in force at the expiration of twenty years from the judgment, no new writ can be issued thereafter (*w*).

27. *Estates Tail.*

Tenants in fee tail are treated for the most part as if they were tenants in fee simple, *i.e.*, when time begins to run on dispossession of a tenant in tail, the bar is complete in ten years, not only against the tenant in tail himself, but also against his issue and those in remainder or reversion.

By sections 29 and 30 it is enacted that, when the right of tenant in tail has been barred, no action shall be brought by any person claiming any estate, interest or right which such tenant in tail might lawfully have barred; and where the tenant in tail dies before the expiration of the statutory period, no person shall bring an action to recover the land but within the period during which the tenant in tail, had he lived, might have brought the action.

(*q*) *Hervey* v. *Wynn*, 22 T.L.R. 93.
(*r*) *Shaw* v. *Coulter*, 11 O.L.R. 630.
(*s*) *Samuel Johnson Sons Ltd.* v. *Brock*, (1907) 2 Ch. 543.
(*t*) *Heath* v. *Pugh*, 6 Q.B.D. 345; 7 App. Cas. 235.
(*u*) *Neil* v. *Almond*, 29 Ont. R. 63; *Re Woodall*, 1 O.L.R. 288.
(*v*) See *Poucher* v. *Wilkins*, 33 O.L.R. at p. 130; 21 D.L.R. 444.
(*w*) *Doel* v. *Kerr*, 34 O.L.R. 251.

But for the fact that there is a remainder or reversion expectant on every estate tail, the two cases would be exactly parallel. There is nothing more extraordinary in the heirs of a tenant in tail being barred by the laches of their ancestor than there is in the fact that the heirs of tenant in fee-simple are similarly barred. But the peculiar feature of the operation of the statute, as affecting tenants in tail, is that the remainderman is also barred without any possibility of asserting his right, unless the issue in tail fail within the statutory period.

In order properly to appreciate the effect of these sections the student should have some knowledge of the mode of barring estates tail under the disentailing Act, a subject which we have not yet reached, and which is considered in the following chapter. In order that these sections may not be passed over, the mode of bar under that statute will be briefly explained and an endeavour made to illustrate the effect of the Act as regards tenancies in tail. On a gift to A., in fee tail, the reversion in fee-simple is left in the donor, to whom or whose heirs, on failure of the issue in tail, the estate will revert, if the entail be not barred in the meantime. The donor, instead of leaving in himself the reversion, might on the gift grant it as a remainder to B. in fee; and the same observations above made as to the reversioner, apply now to the remainderman. Now, in these instances, the tenant in tail, by a simple assurance under the disentailing Act (which we will not now stop to consider), bars the estates in remainder or reversion, as well as his own issue; that is, he can by the aid of the statute convey a fee-simple to a stranger, though he has but a limited interest himself; and the result is that not only are his issue thus deprived of their chances of succession, but the remainderman or reversioner is also deprived of all chance of the land reverting to him on failure of issue of the tenant in tail. The student will now understand the policy and effect of these sections. Section 29 proceeds on the simple and just principle, that as the issue, remainderman, or reversioner, may be barred by some *active* step of the tenant, they shall equally be barred by such *passive* conduct on his part as would bar him; in other words, the neglect of the tenant is tantamount to a disentailing deed. Under section 29, if time has commenced running against the tenant in tail, it will continue to run on his death against all whom he might have barred, notwithstanding any disability they may be under. It will be observed these sections vary in principle from others relating to future estates, which, as before explained, make

time run against the parties entitled to such estates from the time they become estates in possession, whereon their right of entry first accrues. In cases of tenancies in tail, remaindermen or reversioners whom the tenant might himself have barred have no such indulgence.

It should be mentioned that if the tenant has made a conveyance in fee-simple, not amounting to a bar, and then consequently *afterwards* discontinues possession or is ejected, time will not begin to run against the issue till their right of entry on death of the tenant, as in such case the statute does not apply, since the tenant has not, in the language of section 6, clause 1, "while *entitled* been dispossessed or discontinued possession." And again, the tenant has not, in the language of section 29, during his lifetime, "the right to make an entry" as against his own deed, that can be barred. In fact, where the tenant by his own conveyance precludes himself from possession, the right of his grantee rests on the grant itself, and there is no necessity for applying any statutory bar in his favour or for giving him any right under the statute (*x*).

Again, land may be limited to A. for life, and from and after his death to B. in fee tail, remainder to C. in fee. In this instance, A., the tenant for life, is called the protector to the settlement; and B., the tenant in tail, cannot effect a complete bar without his consent. If he does not obtain his consent, he can, under the disentailing Act, only bar his own issue. With this explanation, we have now to consider section 31. It enacts that when the tenant in tail has made an assurance which does not operate to bar the estate in remainder, and any person is by virtue of such assurance in possession of the land or rent, at the time of the execution of the assurance or at any time afterwards; and the same person, or any other person (other than some person entitled to possession in respect of the remainder), continues in possession for ten years next after the commencement of the time at which the assurance would (if it had then been executed by the tenant in tail or the person who would have been entitled to the estate tail if the assurance had not been executed) without the consent of any other person have operated to bar the estate in remainder; then such assurance shall be deemed to have been effectual as against the remainderman.

In order to illustrate this section, let us take the case of a

(*x*) *Cannon* v. *Rimington*, 12 C.B. 1, 18; and see *Cuthbertson* v. *McCullough*, 27 App. R. at p. 464; *Re Shaver*, 3 Ch. Ch. 379.

settlement with a protector, just instanced. In this case, if B., tenant in tail, without the consent of A., the protector to the settlement, conveys to X., a stranger, so as to bar his own issue, but not the remainder in fee to C.; here C. is safe, unless the circumstances mentioned in section 31 occur. Suppose that X. goes into possession; even now time does not run against C. But if A., tenant for life and protector to the settlement, dies, then time begins to run against C., and in ten years the conveyance to X. will be treated as sufficient to have barred C. The principle is, that according to the concluding words of the section a point of time has arrived, viz., the death of the protector, at which the tenant in tail could have effected a complete bar without the consent of any other person; and what he might have done actively at that time is permitted by the statute to be done by the passing of time.

The conveyance of the tenant in tail, ineffectual at the time to completely bar the entail for want of the protector's consent, becomes an effectual conveyance ten years after the death of the protector if the purchaser remains in possession.

In neither of these cases is the remainderman at any time able to assert his right, assuming that the issue in tail continue. Under sections 29 and 30, where tenant in tail is dispossessed and does not bring an action to recover the land, the remainderman cannot take any step to save his estate, because he is not entitled to the land until the issue in tail are extinct. Although this seems to work an injustice, it does no greater injustice than to allow tenant in tail to bar the entail by assurance, which the remainderman is equally helpless to prevent. And the position is precisely the same in cases under section 31.

28. *Prescription.*

This is the only remaining subject under this statute that we have to consider; and it is absolutely requisite, in order to understand the subject, that a knowledge should be had of prescription as it existed at common law. For those clauses of the statute which relate to prescription do not supersede the old law, but modify it, and furnish an additional mode of claiming title.

Prescription applies to easements only, and not to the land itself, and it is the title by which a man, by long user simply, acquires a right over another's land. At common law usage *from time immemorial* was necessary to establish a prescriptive right; and time immemorial for this purpose began at a time

anterior at least to the beginning of the reign of Richard I. Thus, if evidence were given of uninterrupted user for over twenty years, or otherwise raising a presumption (as hereafter explained) in favour of the prescriptive right, it might still have been *destroyed* (among other modes) by showing that the usage first existed subsequently to the accession of King Richard, and this explains the expression sometimes applied to prescriptive rights, that they must have existed *from time whereof the memory of man runneth not to the contrary*.

From the almost complete impossibility of direct proof that such claim had its origin not later than the period referred to, the courts on evidence of its peaceable actual enjoyment for twenty years, or even for a less period if accompanied by other presumptive evidence, presumed the enjoyment to have been from time immemorial, so as to sustain the claim by prescription.

So also, after twenty years of such enjoyment, they presumed a *grant* to have been made, that is, that the right claimed originated in a grant which was lost, and so the right claimed might be set up as under a grant.

But in all cases there must have been actual usage during the required period; not a mere claim of right to use or enjoy; and it must have been as of right, and free from interruption, dispute, and denial, during the period relied on as establishing the presumption. It must not have been in the absence or ignorance of the parties interested in opposing the claim during the period it was exercised; nor under a grant or licence from them during the period relied upon. Such parties also must have been capable of resisting the claim during the period it was exercised; therefore, no right would accrue against a landlord, if during the period the enjoyment took place, the tenement were under lease. The exercise of the alleged right must have been over the land of another, and not during unity of possession of the alleged servient tenement with the alleged dominant tenement; for then the alleged enjoyment of the right would not have been of it as a right, but the enjoyment would have been of the very soil itself of the alleged servient tenement.

When once the claim was sufficiently established by proof of constant apparent peaceable user as above at some time for a sufficient period, then a cesser, or wrongful interruption of such user at a subsequent period for a comparatively short time (say ten or even twenty years) would not defeat the

right gained by such user (*y*). It is important to bear this in mind because it will be seen hereafter that the statute simply provides, firstly, that such claims shall not be defeated in certain ways; and secondly, the statute gives a new way of asserting the right which can be defeated by modern interruption. It may be necessary, therefore, for the claimant to plead his right as depending on a *non-existing grant* of the right claimed, if the facts are not favourable to the claim under the statute (*z*).

This doctrine of, and claim under, an alleged *non-existing grant* is as follows: From the same facts (after 20 years' enjoyment), that a presumption arose of immemorial usage, so as to support a claim by way of prescription, there would also in most cases arise a presumption of a grant of the right claimed; and therefore, a claimant could advance his claim either as a prescriptive right, or by pleading a grant to him from a party entitled to make such grant. The latter mode was always adopted, when the claim if made as a *prescriptive* right, could have been defeated by showing when the enjoyment was first had; whereas, by pleading the right as existing by a grant, if sufficient evidence, as by 20 years' open constant peaceable user, were given, establishing the presumption of a grant having been made of right of such user, then the non-user prior to the alleged grant, became manifestly immaterial.

In these cases, the grant never in fact existed. The party pleading it averred that it was lost, and relied on evidence of enjoyment as presumptive evidence of its having existed. This was well known by juries as well as by judges to be mere fiction, and was introduced and allowed to temper the rigorous rule which destroyed the claim if pleaded by way of prescription. It was observed that "so heavy a tax on the conscience and good sense of juries, which they were called on to make for the sake of administering substantial justice, ought to be removed by the legislature. The Act in question is intended to accomplish this object, by shortening in effect the period of prescription, and making that possession a *bar* or title of itself, which was so before only by the intervention of a jury" (*a*).

The old form of pleading is yet of service, and must be resorted to sometimes, for it will apply, and a claim under a non-existing grant may be good, not only where a claim of

(*y*) Co. Litt. 114 b.

(*z*) *Hulbert* v. *Dale*, (1909) 2 Ch. 570.

(*a*) Per Parke, B., quoting from Starkie on Ev.; *Bright* v. *Walker*, 1 Cr. M. & R. at p. 218.

prescriptive right at common law would fail, but also where a claim under the statute would fail by reason of absence of enjoyment *down to the time of suit*, as we shall presently see.

On the other hand, where the facts permit it, one advantage of setting up the right under the statute is, that under it the right may be claimed after the prescribed period, as absolute and indefeasible, which, if pleaded as depending on grant is still an open question before the jury, and sustained after all by mere *inference* of the grant, or prescription alleged. "The legislature must be taken to have intended that where a defendant can show a prescriptive right such as the statute requires, he should be entitled to succeed without the exercise of any discretion on the part of the jury; that the statute should serve him as a kind of parliamentary conveyance of the easement" (*b*).

For the first time in this province a difficulty was raised as to the application of the theory of lost grant in *Watson* v. *Jackson* (*c*), where Middleton, J., held that, as against a registered purchaser for value without notice, a lost grant could not be set up on account of the provisions of the Registry Act. On the appeal the Divisional Court considered it unnecessary to consider the effect of the Registry Act (*d*), but referred to *Haight* v. *West* (*e*). In that case the question was raised as to whether a lost grant in favour of a charitable object which required enrolment in order to validate the grant, could be presumed, there being no evidence of the enrolment, and the learned judge thought that if a lost grant could be presumed the enrolment might also be presumed, because it would not be known, in case of a lost grant, in what part of the rolls search should be made. In the Court of Appeal, Lindley, L.J., delivering the judgment of the court, thought it by no means clear that, in the absence of proof of non-enrolment, an enrolment, if necessary, ought not to be presumed. It is obvious that this authority does not touch the question as to registration, because registration is not necessary to validate a grant, whereas enrolment was a necessary proceeding in order to prevent the grant from being void.

The reason for presumption of enrolment (namely, that in case of a lost grant one would not know where to look for the en-

(*b*) *McKechnie* v. *McKeyes*, 10 U.C.R. 56.
(*c*) 30 O.L.R. 517, at p. 520.
(*d*) 31 O.L.R. at p. 494; 19 D.L.R. 743.
(*e*) (1893) 2 Q.B. 19.

rolment) might possibly be urged here if registration was necessary. For a deed in general terms might be registered in the general registry, and in any event there is nothing in the Registry Act which requires registration to be against any particular parcel of land.

It is submitted, however, that the provisions of the Registry Act do not interfere with the doctrine. The theory of a lost grant is a mere fiction. Every one knows that there never was any such deed. It is a mere presumption of law, expressed in legal form, that there was a lawful origin for the right exercised. Now, if in contemplation of law there never was any deed, there could be no registration, because the Registry Act requires only the registration of "instruments." It is true that in the English case Lord Justice Lindley's dictum involves the hypothesis that proof of non-enrolment might result in invalidating the supposed grant—but, it would be for the reason that enrolment was essential to the validity of the deed. In the same way, though registration is not necessary to the validity of the deed, it is necessary to preserve its priority; and it might be argued that it was void for non-registration as against a subsequent registered purchaser for value if he had no notice.

There is, however, another consideration bearing upon the point. Section 34 of the Act provides that "no claim . . . by . . . grant . . . shall be defeated or destroyed by showing [certain things] but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated." And it is to be absolute and indefeasible after enjoyment for a long period. The manner in which such claims could have been defeated before the Act have already been pointed out, and non-registration was not one of them. And it is difficult to assume that the legislature provided with such care for preserving certain well known methods of defeating such claims, when nine-tenths of them might be defeated in another way, viz., by want of registration. And, it may be added, the specific inclusion of some methods of defeating such claims ought to mean the exclusion of all others.

Still, though the matter has been thus disturbed, it cannot be said to have been settled by authority, as neither the English case nor *Watson* v. *Jackson* called for the decision of this point (*f*).

(*f*) In *Re Cockburn*, 27 Ont. R. 45, the matter of lost grant was discussed, but the point was not adverted to.

A claim by *prescription* at common law, as distinguished from a claim under a non-existing grant, or under the statute, could never have been sustained in this country; for here manifestly no right can rest on immemorial usage in the strict legal sense put on those words (*ff*). And we shall therefore have to deal only with the two methods of claim, *i.e.*, by non-existing grant, and under the statute.

It may be well at first to point out the distinction between custom and prescription. Custom is properly a *local* usage, and not annexed to any *person*; such as a custom in the manor of Dale that lands shall descend to the youngest son. Prescription is merely a *personal* usage; as, that Sempronius and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege. As, for example, if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation (which is held to be a lawful usage), this is strictly a custom, for it is applied to the *place* in general, and not to any particular *persons*; but if the tenant who is seised of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used time out of mind to have common of pasture in such a close, this is properly called a prescription; for this is a usage annexed to the *person* of the owner of this estate. All prescriptions must be either in a man and his ancestors, or in a man and those whose estate he hath; which last is called prescribing in a *que estate*.

As to the several species of things which may, or may not, be prescribed for, we may, in the first place, observe, that nothing but incorporeal hereditaments can be claimed by prescription; as a right of way, a common, etc.; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had. For a man shall not be said to prescribe, that he and his ancestors have immemorially used to hold the castle of Arundel; for this is clearly another sort of title; a title by corporal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. But as to a right of way, a common, or the like, a man may be allowed to prescribe; for of these there is no corporal seisin, the enjoyment

(*ff*) *Burrows* v. *Cairns*, 2 U.C.R. 288; *Grand Hotel Co.* v. *Cross*, 44 U.C.R. 153.

will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage.

It has been said that if a right exercised over the land of another is unknown to the law as an easement no prescriptive right can be acquired to enjoy it; but in *Atty.-Gen. of Northern Nigeria* v. *Holt* (*g*) the Privy Council adopted the principle expressed by Lord St. Leonards in a Scotch appeal to the House of Lords that "the category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind." And in a recent case, where land shown on a plan was set apart as "commons," and the neighbouring proprietors were granted the right of using it, it was held that the grantee had the right to use the commons for purposes of general enjoyment or amusement, and that the word was not to be taken in its technical sense (*h*).

At common law a prescription must always have been laid in him that was tenant of the fee. A tenant for life, for years, at will, or a copyholder, could not prescribe, by reason of the imbecility of their estates. For, as prescription at common law is usage beyond time of memory, it is absurd that they should pretend to prescribe for anything, whose estates commenced within the remembrance of man. And therefore the copyholder must have prescribed under cover of his lord's estate, and the tenant for life under cover of the tenant in fee-simple. As if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must have prescribed under cover of the tenant in fee-simple; and must plead that John Stiles and his ancesotrs had immemorially used to have this right of common, appurtenant to the said manor, and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life.

A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Consequently, if the owner of the servient tenement could not grant such a right as that claimed, no claim by prescription could be founded upon long usage (*i*). And when a prescriptive right is claimed against a company,

(*g*) (1915) A.C. at p. 617.

(*h*) *Re Lorne Park*, 33 O.L.R. 51; and see *Atty.-Gen.* v. *Antrobus*, (1905) 2 Ch. at p. 198.

(*i*) *Atty.-Gen.* v. *Antrobus*, (1905) 2 Ch. at p. 198; but see *Re Lorne Park*, 33 O.L.R. 51.

and the right claimed is of such a nature that it would have been *ultra vires* of the company to grant it, the right cannot arise by prescription (*j*).

Amongst things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. For, if a man prescribes in a *que estate* (that is, in himself and those whose estate he holds), nothing is claimable by this prescription, but such things are incident, appendant or appurtenant to lands; for it would be absurd to claim anything as the consequence, or appendix of an estate, with which the thing claimed has no connection; but, if he prescribes in himself and his ancestors, he may prescribe for anything whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross. Therefore, a man may prescribe, that he, and those whose estate he hath in the manor of Dale, have used to hold the advowson of Dale, as *appendant* to that manor; but, if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So also a man may prescribe in a *que estate* for a common *appurtenant* to a manor; but if he would prescribe for a common *in gross*, he must prescribe in himself and his ancestors.

And if a way be granted to one unconnected with the enjoyment or occupation of land, it cannot be annexed as an incident to it. If a way be granted in gross, it is a personal right only, and cannot be assigned (*k*). Nor can a way appendant to a house or land be granted away, or made in gross; for no one can have such a way but he who has the land to which it is appendant.

Though an incorporeal right must be appurtenant to a corporeal hereditament, yet a right to discharge water on the neighbouring land from a highway may be supported after

(*j*) *Staffordshire Canal* v. *Birmingham Canal*, L.R. 1 H.L. 254. *Canada Southern R. Co.* v. *Niagara Falls*, 22 Ont. R. 41; *Can. Pacific R. Co.* v. *Guthrie*, 31 S.C.R. 155; leave to appeal to the Privy Council was refused. The question of the liability of railway and other public companies to be subjected to easements is too large to be discussed in the text; but the following cases may be consulted: *Grand Trunk R. Co.* v. *Vallieur*, 7 O.L.R. 364; *Leslie* v. *Pere Marquette R. Co.*, 24 O.L.R. 206; 25 O.L.R. 326; *Great Western R. Co.* v. *Solihull R. D. Cl.*, 18 T.L.R. 707; *Atty.-Gen.* v. *Great Northern R. Co.*, (1909) 1 Ch. 775; *Great Central R. Co.* v. *Ballywith-Hexthorpe*, (1912) 2 Ch. 110; *Arnold* v. *Morgan*, (1911) 2 K.B. 314; *Coats* v. *Herefordshire Co. Cl.*, (1909) 2 Ch. 579.

(*k*) *Ackroyd* v. *Smith*, 10 C.B. 164.

long user by a presumption of a legal origin for the right, the acts done being within the powers of the public authority (*l*). And a right of way to a fishery has been held to be appurtenant to the right of fishing (*m*).

We now proceed to deal with the statute. It provides for two cases, viz., profits *à prendre* by section 34; and easements by section 35. The right to the use of light by prescription is abolished by section 36. The distinction between easements and profits *à prendre* is this, that the right to easements gives no right to any profit of the soil charged with them; but the right to take "something out of the soil" is a profit *à prendre* (*n*).

We have already seen that a right claimed by immemorial usage could have been defeated by showing when it commenced.

A main object of the statute was, 1st, to prevent a *prima facie* right acquired by enjoyment as named in sections 34 and 35, from being defeated by showing that it had not existed prior to the respective periods named; 2nd, to leave it open to be defeated in any other way as theretofore; but, 3rd, to render it absolute and indefeasible after a more lengthened period of enjoyment, unless such enjoyment were had by consent or agreement; 4th, to state and define the time and the circumstances which would give a right by force of the statute in the cases it refers to; 5th, to prevent any presumption arising in favour of a claim on proof of enjoyment for a less time than the prescribed period; and, 6th, to vary the mode of pleading.

By section 34 it is enacted that no claim which may lawfully be made at the common law by custom, prescription or grant to any profit or benefit to be taken or enjoyed from or upon any lands, including Crown lands, except rent, shall, when such profit has been taken and enjoyed by any person claiming right thereto, without interruption, for thirty years, be defeated by showing that it was first taken at any time prior to such thirty years; but such claim may be defeated in any other way by which such claim might be defeated at the time of passing the statute; and after an enjoyment for sixty years the right becomes absolute and indefeasible, unless it appears that it was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

(*l*) *Atty.-Gen.* v. *Copeland*, (1902) 1 K.B. 690.
(*m*) *Hanbury* v. *Jenkins*, (1901) 2 Ch. 401.
(*n*) *Manning* v. *Wasdald*, 3 A. & E. 764.

By section 35, no such claim to any way or other easement, or to any watercourse, or the use of any water to be enjoyed, or derived upon, over, or from any land or water of any person, including the Crown, when such way or other matter has been enjoyed by any person claiming right thereto, without interruption, for twenty years, shall be defeated by showing that such way or other matter was first enjoyed at any time prior to such period of twenty years; but such claim may be defeated in any other way by which it could be defeated at the time of passing the statute; and where such way or other matter has been enjoyed for forty years the right is absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement given or made for that purpose by deed or writing.

The periods of thirty and sixty years under section 34, and twenty and forty years under section 35, are required by section 37 to be the periods *next before some action* wherein the claim was or is brought into question. And no act or other matter shall be deemed to be an interruption, unless the same has been submitted to or acquiesced in for one year after the party interrupted has had notice thereof, and of the person making, or authorizing the same to be made. While, as we have seen, the user for the necessary time is evidence of a lost grant, and a cesser of enjoyment will not necessarily defeat a right so claimed; it is most important to observe that if the claim is laid under the statute, it must be without interruption for a year, and the user must continue down to the bringing of the action, or rather within a year therefrom.

The Act is so worded that, though there may have been fifty years' enjoyment up to the time of the act done, that is no defence, unless it continues up to the time of the commencement of the suit (*o*). Thus to an action of trespass *quare clausum fregit*, the defendant in his plea justified, setting up a prescriptive right under the statute by user and enjoyment of a right of way for twenty years before the commencement of the suit; at the trial he proved an uninterrupted user of the road for forty-eight years, but he failed to give any proof of user during a period of fourteen months next before the commencement of the suit; the court held the plea was not sustained by the proof. Parke, B., remarked: "It is quite impossible

(*o*) Per Parke, B., *Ward* v. *Robins*, 15 M. & W. 241; *Hyman* v. *Van den Bergh*, (1907) 2 Ch. 516; (1908) 1 Ch. 167.

that acts of user should continue to the very moment of action brought, or that they should be continued to within a week or month of that time; but I think that, according to the true construction of the statute, some act of that description must take place in each year" (*p*). In such a case as this, the defendant should, as before explained, have pleaded the right as arising from a non-existing grant. It is not necessary, however, that an act of user must be shown in *each* year, if it be shown that there was what fairly amounts to an actual enjoyment of the right for the statutory period, it being a question of fact in each case, having regard to the nature of the right claimed (*q*).

But the user must be for the whole statutory period, for the potential acquisition of an easement, or an inchoate easement is unknown to the law (*r*). But the user need not be that of one person during the whole period. Where successive owners of the dominant tenement have exercised the right continuously, it becomes absolute (*s*).

Where, however, the right has been enjoyed for nineteen years and a fraction, it is evident that an interruption cannot take place for a year within the twenty years. It is not the twenty years' enjoyment that gives the right; but twenty years' enjoyment without interruption for a year. Hence, where A. had free access of light and air through a window for nineteen years and three hundred and thirty days, and B. raised a wall which obstructed the light, and the obstruction was submitted to for only thirty-five days, and A. then brought an action to remove the obstruction, it was held that the right of action was complete (*t*). But in such a case an action will not lie for an injunction to restrain the raising of such an obstruction within the period of twenty years, for though the interruption for a year cannot take place, yet the cause of action is not complete until the expiration of the twenty years (*u*).

The interruption referred to is not mere cesser of use or enjoyment, but an act "submitted to or acquiesced in" by

(*p*) *Lowe* v. *Carpenter*, 6 Ex. 832; *Haley* v. *Ennis*, 10 U.C.R. 404.

(*q*) *Hollis* v. *Verney*, 13 Q.B.D. 304, and cases there collected; *Smith* v. *Baxter*, (1900) 2 Ch. 138.

(*r*) *Greenhalgh* v. *Brindley*, (1901) 2 Ch. 324.

(*s*) *Ker* v. *Little*, 25 App. R. 387.

(*t*) *Flight* v. *Thomas*, 8 Cl. & F. 231; *Burnham* v. *Garvey*, 27 Gr. 80.

(*u*) *Battersea* v. *Commissioners*, etc., (1895) 2 Ch. 708, better reported 13 Rep. 795; *Bridewell Hospital* v. *Ward*, 3 Rep. 228.

the party interrupted, who must have notice of the interruption, and so it must amount to an adverse obstruction (*v*).

As regards the meaning of the words, *enjoyed by any person claiming right thereto*, in sections 34 and 35, they mean, "an enjoyment had, not secretly, or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion, or even on many occasions of using it; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user, or by deed conferring the right, or though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing, not under seal, in case of a plea for forty years, or by such writing, or parol consent or agreement, contract or licence, in case of a plea of twenty years" (*w*).

And again, "if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth as a trespasser would have done—if he shall have occasionally asked the permission of the occupier of the land—no title would be acquired, because it was not enjoyed 'as of right.' For the same reason it could not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed 'as of right' the easement, but the soil itself" (*x*). And so, when there has been enjoyment by permission (*y*); contentious user, as when the act claimed as of right is punished by conviction not appealed from, or a series of acts take place under such circumstances that it can be found that the claim was never "as of right," but always the subject of contention (*z*); in such cases the enjoyment is not "as of right." But if the right claimed has actually been enjoyed by the claimant for the requisite period "as of right," and not by permission, or secretly or in a contentious manner, and it is one that could originate in

(*v*) *Carr* v. *Foster*, 3 Q.B. 581; *Hollis* v. *Verney*, 13 Q.B.D. 304; *Smith* v. *Baxter*, (1900) 2 Ch. 138.

(*w*) *Tickle* v. *Brown*, 4 Ad. & E. 382. And see *Union Lighterage Co.* v. *London Graving Dock Co.*, (1901) 2 Ch. 300; (1902) 2 Ch. 557.

(*x*) *Bright* v. *Walker*, 1 Cr. M. & R. at p. 219.

(*y*) *Monmouth Canal* v. *Harford*, 1 Cr. M. & R. 614; *Gardner* v. *Hodgson's Kingston Brewery Co.*, (1903) A.C. 229.

(*z*) *Eaton* v. *Swansea Waterworks*, 17 Q.B. 267.

grant, it is immaterial on what ground the claimant rested his alleged right to enjoy it (*a*). It is not the title to use but the fact of user which has to be considered (*b*).

The claim must, however, be to exercise the right over the lands of another. There must always be a dominant and a servient tenement. "In substance the owner of the dominant tenement throughout admits that the property [*i.e.*, the servient tenement,] is in another, and that the right being built up or asserted is the right over the property of that other" (*c*). Consequently, where one exercises rights over property which he believes or claims to be his own, he cannot afterwards set up a claim to a prescriptive right on account of such user; for the acts of user were not acts as of right over the admitted property of another, but acts in assertion of a title to the land itself (*d*).

So also, user of a piece of land, supposed by the person using it to be part of a public lane, is not such user as will give an easement over the land (*e*).

But permission for user does not in every case prevent the acquisition of an easement; for the enjoyment *as of right* is not to be confined to an adverse right, and enjoyment is as of right if had by permission. Whether an easement can be gained after user enjoyed by permission depends on the time when permission was granted. On this point it has been laid down that if the permission is given *before* the commencement, and if it extends over the *whole* period of the prescriptive right claimed, the user is as of right, and without interruption, within the meaning of the Act; but that it is otherwise, if permission is given from time to time during the continuance of the user, because that is an admission that at that time the asker had no right (*f*).

The enjoyment "as of right" must, moreover, be in assertion of a right against the will of the person over whose land it is claimed. And so, where an annual payment had been made for over forty years to the owner of the property by the person using a way, it was held that the enjoyment was not as of right against the will of the property owner, but an enjoyment with

(*a*) *De La Warr* (*Earl*) v. *Miles*, 17 Ch.D. 535.
(*b*) *International Tea Stores Co.* v. *Hobbs*, (1903) 2 Ch. at p. 172.
(*c*) *Atty.-Gen. N. Nigeria* v. *Holt*, (1915) A.C. at p. 618.
(*d*) Ibid; *Lyell* v. *Hothfield* (*Lord*), (1914) 3 K.B. 911.
(*e*) *Adams* v. *Fairweather*, 13 O.L.R. 490.
(*f*) *Kinloch* v. *Neville*, 5 M. & W. 795; *Tickle* v. *Brown*, 4 Ad. & E. 369.

his permission renewed from year to year on making the payment (*g*).

By section 37, no person shall acquire a right by prescription to the access and use of light to or for any dwelling-house, workshop or other building; but this does not apply to any such right as was acquired by twenty years' user before the 5th March, 1880. There may, however, be an easement for air, as distinct from light; and this right is not affected by this clause (*h*).

Section 38 prevents any presumption in favour of any claim by the claimant of exercise or enjoyment for a less time than the periods mentioned; which again is contrary to the common law rule, whereby a presumption might frequently be created by user for a less period than named in the Act.

The Crown is included in the bar created by sections 34 and 35, unless in cases of unsurveyed lands, as mentioned in section 45 (*i*).

28. *Disabilities—Easements.*

The time during which any person, otherwise capable of resisting any claim to any of the matters mentioned in sections 34 to 39 of the Act, is an infant, idiot, *non compos mentis*, or tenant for life (*j*), or during which any action has been pending and has been diligently prosecuted, is to be excluded from the computation of the shorter of the two periods mentioned in those sections, but not in the computation of the period for making the right indefeasible (*k*). And where any land or water upon, over or from which any such right has been enjoyed or derived, has been held under or by virtue of any term of life or any term of years, exceeding three years from the granting thereof, the time of enjoyment during the continuance of such term is to be excluded in the computation of the period of forty years, in case the claim is, within three years next after the end or sooner determination of such term, resisted by any person entitled to any reversion expectant upon the determination thereof (*l*).

(*g*) *Gardner* v. *Hodgson's Kingston Brewery Co.*, (1903) A.C. 229.

(*h*) *Cable* v. *Bryant*, (1908) 1 Ch. 259.

(*i*) *Bowlby* v. *Woodley*, 8 U.C.R. 318.

(*j*) And so, where land was held by successive tenants for life in strict settlement during the whole of the period of user claimed, it was held that no prescriptive right arose: *Roberts* v. *James*, 18 T.L.R. 777.

(*k*) S. 43.

(*l*) S. 44.

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29. *Extinction of Easements.*

It has been decided, as we have seen (*m*), that the Statute of Limitations does not apply to easements. Consequently, there is no bar under the statute for not bringing an action to prevent disturbance of the right. But an easement may be extinguished or abandoned. And it is a question of fact in each case whether there has been an intention to abandon, and an abandonment of, the right.

Mere non-user is not of itself an abandonment, but is evidence with reference to an abandonment (*n*). And so where there was continuous non-user and non-claim of a right of way accompanied by adverse obstruction by the erection of buildings upon the land over which the right was alleged to exist for eleven years, it was held that the owner of the dominant tenement had abandoned his right (*o*). Whether the acts done are done by the owner of the servient tenement acquiesced in by the owner of the dominant tenement, or by the owner of the dominant tenement himself, makes no difference. The abandonment may be presumed in either case if the facts are sufficient (*p*). And the owner of the dominant tenement may so use it as to prevent him from successfully maintaining an action to assert his right, in which case the servient tenement is discharged from the burden of the easement (*q*).

An easement may also, of course, be released by conveyance. And if the dominant tenement is mortgaged, the mortgagor may release the right as far as he and those claiming under him are concerned, but the right will still subsist in the mortgagee. On payment of the mortgage and reconveyance of the land the right of the mortgagee disappears, and the easement is completely extinguished (*r*).

(*m*) Ante p. 465.

(*n*) *Jones* v. *Tuckersmith* (*Township of*), 33 O.L.R. at p. 653; *James* v. *Stevenson*, (1893) A.C. at p. 168.

(*o*) *Bell* v. *Golding*, 23 App. R. 485.

(*p*) Ibid., and cases cited therein.

(*q*) *Anderson* v. *Connelly*, 22 T.L.R. 743.

(*r*) *Poulton* v. *Moore*, (1915) 1 K.B. 400.

CHAPTER XXII.

CONVEYANCES BY TENANTS IN TAIL.

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1. *The Old Law.*

CONVEYANCES by tenants in tail, whereby the estate tail, and all estates to take effect after, or in defeasance of the same, are barred, are now governed solely by R.S.O. c. 113. Before considering this statute, however, it will be advisable to give the student an insight into the former mode of bar by levying a fine, or suffering a recovery, or by warranty; not so much because these modes ever prevailed to any extent in this province (in fact there are but one or two records of fines at Osgoode Hall), as for the reasons that the former modes elucidate the present mode of bar; and the reports and text-books constantly allude to warranties, fines and recoveries, as methods of conveying not only estates tail, but also many other estates and interests, of the nature and effect of which, therefore, the student should not allow himself to be ignorant. "This statute consults the old law, and it is not possible to appreciate or expound its provisions without some knowledge of the law of settlement, and an acquaintance, more intimate, with those assurances which the statute has superseded; with their various uses and modes of operation, their learning, and their language" (*a*).

By the feudal constitution, if the vassal's title to enjoy the

(*a*) Hayes Convey. 5th ed. 131.

feud was disputed, he might vouch or call the lord or donor to warrant or insure his gift, which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense. And so, by our ancient law, if, before the statute of *Quia emptores*, a man enfeoffed another in fee, by the feudal verb *dedi*, to hold of himself and his heirs by certain services, the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered. It was on these principles that the word "grant" in a conveyance in fee was supposed to imply a covenant for title; but all doubt on that point is removed by R.S.O. c. 109, s. 11, which enacts that "an exchange or a partition of any tenements or hereditaments shall not imply any condition in law, and the word 'give' or the word 'grant' in a conveyance shall not imply any covenant in law, except so far as the word 'give' or the word 'grant' may, by force of any Act in force in Ontario, imply a covenant."

A tenant in tail in possession might, without the forms of a fine or recovery, in some cases make a good conveyance in fee-simple by superadding a warranty to his grant, which barred his own issue, and such of his heirs as were in remainder or reversion.

By our modern statute (*b*), "all warranties of lands made or entered into by a tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail."

Before proceeding further it will be necessary shortly to look at the ancient procedure by fine and recovery, and the effects thereof in some cases, because the present statute is to some extent based upon the ancient methods, and cannot be understood without reference to them.

There were two modes before this Act of barring an entail, "by *recovery* at the common law, which gained the *clear fee*, and by *fine* according to the statute law, which gave a fee measured by the *duration of the issue* on whom the estate tail would, if unbarred, have devolved" (*c*). Both results may be produced by proceedings under the statute, and we shall shortly explain the nature and effect of fines and recoveries respectively.

(*b*) R.S.O. c. 113, s. 3.

(*c*) Hayes Convey. 5th ed. 134.

2. *Fines.*

A *fine* was one of those methods of transferring estates of freehold by the common law, in which livery of seisin was not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to have been an amicable composition or agreement of a suit, either actual or fictitious, by leave of the King or his justices; whereby the lands in question became, or were acknowledged to be, the right of one of the parties. In its original, it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual that fictitious actions were every day commenced, for the sake of obtaining the same security.

A *fine* was so called, because it put an *end*, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter.

The mode of levying a fine was as follows: The party to whom the land was to be conveyed commenced an action at law against the other, generally by a writ of *covenant real*, the foundation of which was a supposed agreement or covenant that the one should convey the lands to the other on breach of which agreement the action was brought. Then followed the leave to agree the suit, "*licentia concordandi*," for the defendant, knowing himself to be wrong, was supposed to make overtures to the plaintiff, who accepted them. Next came the *concord*, or agreement itself; which was usually an acknowledgment from the deforciants (or those who kept the other out of possession), that the lands in question were the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine was called the *cognizor*, and he to whom it was levied the *cognizee*. This acknowledgment must have been made either openly in court, or before certain judges or commissioners bound by statute to take care that the cognizors were of full age, sound memory, and out of prison. If there were any feme-covert among the cognizors, she was privately examined whether she did it willingly and freely, or by compulsion of her husband.

By several statutes still more solemnities were superadded, in order to render the fine more universally public, and less liable to be levied by fraud or covin; among other things all

proceedings were directed to be enrolled of record, and read, and *proclamation* thereof made in open court during the four succeeding terms.

But in order to make a fine of any avail at all, it was necessary that the parties should have some interest or estate of freehold (*d*) by right or by wrong in the lands to be affected by it; else it were possible that two strangers, by mere confederacy, might, without any risk, defraud the owners by levying fines of their lands; for if the attempt were discovered they could be no sufferers, but only remain *in statu quo*; whereas, if a tenant for life levied a fine, it was an absolute forfeiture of his estate to the remainderman or reversioner, if claimed in proper time.

3. *Recoveries.*

A common recovery was so far like a fine, that it was a suit or action, either actual, or fictitious and amicable; and in it the lands were *recovered* against the tenant of the freehold; which recovery, being a supposed adjudication of the right, bound all persons, and vested a free and absolute fee-simple in the recoveror. A recovery, therefore, was in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding.

In the first place, if the tenant in tail in possession desired to suffer a common recovery, in order to bar all entails, remainders, and reversions, and to convey the land in fee-simple, in order to effect this the purchaser brought an action against him for the lands; and sued out a writ, called a *præcipe quod reddat*. In this writ the demandant alleged that he had title, and that the defendant (here called the *tenant to the præcipe*) had no title. Whereupon the tenant appeared and called upon one X., who was supposed, at the original purchase, to have warranted the title to the tenant; and thereupon prayed that X. might be called in to defend the title which he had so warranted. This was called the *voucher*, *vocatio*, or calling of X. to warranty; and X. was called a *vouchee*.

Upon this X., the vouchee, appeared, was impleaded, and defended the title, and afterwards abandoned the defence. Whereupon judgment was given for the demandant, now called the recoveror, to recover the lands in question against the tenant, who was now the recoveree. And the tenant had judgment to recover of X. lands of equal value, to descend to

(*d*) *Davies* v. *Lowndes*, 5 B.N.C. 172.

the issue in tail on the former title, in recompense for the lands so warranted by him, and now lost by his default; which was agreeable to the doctrine of warranty mentioned before. This was called the recompense, or *recovery in value*. But X. having no lands of his own, being usually the crier of the court (who, from being frequently thus vouched, was called the *common vouchee*), it was plain that the tenant had only a nominal recompense for the lands so recovered against him by the demandant; which lands were now absolutely vested in the recoveror by judgment of law, and seisin thereof delivered by the sheriff of the county. So that this collusive recovery operated merely in the nature of a conveyance in fee-simple, from the tenant in tail to the purchaser.

The recovery here described is with a *single* voucher only; but sometimes it was with *double*, *treble*, or further vouchers, as the exigency of the case might require. And, indeed, it was usual always to have a recovery with *double* voucher at least. The tenant in tail first conveyed an estate of freehold to an indifferent person, against whom the *præcipe* was brought, who was a mere friendly nominee of the tenant in tail, and was termed *tenant to the præcipe*, or, to the *writ of entry*; and then he vouched the tenant in tail, who vouched over the common vouchee. For if the recovery were had against the tenant in tail, it barred only such estate in the premises of which he was then actually seised; whereas, if the recovery were had against another person, and the tenant in tail were vouched, it barred every latent right and interest which he might have in the lands recovered.

If a tenancy for life, not being at a rent, or other freehold estate in possession, preceded the estate tail, then, as the action had always to be brought against the first actual tenant of the freehold, the tenant in tail could not without his aid and assent, and his lending himself to the fictitious proceedings, suffer a recovery. Often this aid was refused. The tenant of the first estate of freehold thus was *protector* of the ultimate reversion and remainders, if any. The protectorship of a settlement under the statute is on the analogy of the protectorship as above. If, however, the first actual tenant of the freehold was a *lessee for life at a rent*, then by 14 Geo. II., c. 20, those entitled to the next freehold estate in remainder or reversion might make a good tenant to the *præcipe* or writ of entry as defendant. And this again is recognised by section 13 of the Estates Tail Act, under which lessees at a rent are ex-

cluded from protectorship of the settlement, and by section 15, the person next entitled to be protector becomes protector.

The supposed recompense in value was a reason why the issue in tail were held to be barred by a common recovery; for, if the recoveree obtained a recompense in lands from the common vouchee (which there was a possibility in contemplation of law, though a very improbable one, of his doing), these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail, and would be assets; on which principle a warranty was a bar. This reason also held with equal force as to *most* remaindermen and reversioners; to whom the possibility remained and reverted as a full recompense from the realty, which they were otherwise entitled to.

The *force* and *effect* of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates tail, but of remainders and reversions expectant on the determination of such estates; in this respect being more effective than a fine. So that a tenant in tail might by this method of assurance, convey the lands held in tail to the recoveror, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions.

Deeds were often made to declare the uses or parties to be benefited by the fine or recovery, as the circumstances might require, in case the cognizor or recoveror desired limitations other than simply to himself to his own use. If made previously to the fine or recovery, they were called deeds to *lead* the uses; if subsequently, deeds to *declare* them; as, for instance, to the use of the recoveror for life, then to A. in fee.

Having to some extent explained the ancient method of barring entails, we now proceed to the modern statute.

4. *The Modern Statute—Who May Bar an Entail.*

Every actual tenant in tail, whether in possession, remainder, contingency or otherwise, may dispose of, for an estate in fee-simple absolute, or for any less estate, the lands entailed, as against all persons upon whom the lands entailed might devolve if the entail was not barred, and also as against all persons, including the Crown, whose estates are to take effect after the determination, or in defeasance, of such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail, and the right of all other persons except

those against whom the disposition is authorized by the Act to be made (*e*).

By the interpretation clause (s. 2, s.-s. 1 (*a*)) "actual tenant in tail" shall mean exclusively the tenant of an estate tail which has not been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned into a right.

This section, it will be observed, gives to actual tenants in tail greater power than they theretofore possessed; for a tenant in tail in contingency, or one whose estate by some previous act, as by feoffment of his ancestor, or discontinuance, was divested, though not barred, could not have suffered a recovery.

Whenever an estate tail has been barred and converted into a base fee, the person who, if such entail had not been barred, would have been actual tenant in tail, may dispose of the lands as against all persons, including the Crown, whose estates are to take effect after determination or in defeasance of the base fee, so as to enlarge the base fee into a fee-simple absolute; saving always the rights of all persons in respect of estates prior to the estate tail which has been so converted into a base fee, and the rights of all other persons except those against whom such disposition is by the Act authorized to be made (*f*).

A base fee is that estate into which an estate tail is converted, when the issue in tail are barred but not those in remainder or reversion (*g*). Thus where there is a protector whose consent has not been obtained, and the tenant in tail executes a disentailing assurance, he defeats his own issue, and converts the estate tail into a fee-simple which will last as long as there are issue in tail who would have inherited the entailed land but for the bar; but the remainderman is not barred; and upon the failure of the issue in tail the land reverts to or vests in the reversioner or remainderman.

Before the Act, a tenant in tail, who had by fine levied barred his own issue, but not the remainderman or reversioner (which he could not do immediately by fine), still retained, and his issue in tail inherited, the privilege of defeating the remainder or reversion by consenting to be vouched in a recovery. Section 6 provides that the person who would have been actual tenant in tail (but for the converting of the estate

(*e*) R.S.O. c. 113, s. 4.
(*f*) S. 6.
(*g*) S. 2, s.-s. 1 (*b*).

tail into a base fee) may now enlarge the base fee into a fee-simple absolute; but if there be a protector his consent will be necessary (*h*). Where a tenant in tail has converted the estate tail into a base fee, by conveying to a purchaser for value without the consent of the protector, he is still able to enlarge the base fee into a fee-simple under section 6, because, by s. 2 (1) (g), "tenant in tail" includes a person who, where an estate tail has been barred and converted into a base fee, would have been tenant in tail if the entail had not been barred (*i*).

There were certain persons excepted from the power given by this section. Where, under a settlement made before 18th May, 1846, a woman was tenant in tail of lands within the provisions of 11 Hen. VII. c. 20, the power was not to be exercised by her, except with such assent as (if the Act had not been passed) would under that Act have rendered valid a fine or common recovery levied or suffered by her of such lands. In such a case a widow who was tenant in tail *ex provisione viri*, *i.e.*, by gift of her husband or any of his ancestors, could not bar the entail, unless with the concurrence of the person who would be entitled to enter if she were dead (*j*). It was the practice at one time, on marriage, to settle an estate jointly on the husband and wife in tail, or to the husband for life, remainder to the wife for life, remainder to the issue in tail; and the statute was passed to prevent her barring the entail after her husband's death, where the property was originally of the purchase or inheritance of the husband, or the gift in tail of his ancestors. Since the date mentioned, however, the Act of Hen. VII. does not apply (*k*).

By an Act of 34 and 35 Hen. VIII. c. 20, no recovery had against tenant in tail, of the King's gift, where the remainder or reversion is in the King, shall bar such estate tail, or the remainder or reversion of the Crown (*l*). These persons were excepted from the power to bar such entails specifically by the terms of R.S.O. (1897) c. 122, s. 6, and now by general wording of R.S.O. c. 113, s. 5. Tenants in tail after possibility of issue

(*h*) S. 20.

(*i*) *Bankes* v. *Small*, 36 Ch.D. at pp. 721, 727.

(*j*) Burton Rl. prop. s. 708.

(*k*) R.S.O. (1897) c. 122, ss. 4, 5.

(*l*) A curious instance of an entail created by Chas. II., when a King *de jure* but not *de facto*, being held to be unbarrable is *Robinson* v. *Giffard*, (1903) 1 Ch. 865.

extinct, whose estates are reduced to life estates, are excepted from the operation of this statute (*m*).

And nothing in the Act is to enable any person to dispose of any lands entailed in respect of any expectant interest which he may have as issue inheritable to any estate tail therein (*n*). Thus, A. being tenant in tail, his eldest son, being issue inheritable, cannot convey under the Act. In this respect the Act does not go to the extent of the old law, by which even an expectant heir in tail could bar his issue. And although contingent, executory and future interests and possibilities may be disposed of by deed, no such disposition is to defeat or enlarge an estate tail (*o*).

It is not only the issue in tail who can be barred, and all estates to take effect after the determination of the estate, including thus, remainders and reversions, but also all estates to take effect in defeasance of the estate tail; and therefore an executory or shifting limitation over, after an estate tail, to take effect in defeasance thereof, and not await its regular determination by failure of issue, can be barred (*p*). Thus, if land be limited by way of use, or of devise, to A. in tail, but if B. should return from Rome to B. in fee, the conveyance of A. under the statute will defeat the executory interest or estate; and this was so before the statute on a recovery suffered by A.

5. *Protector of the Settlement.*

Before entering upon the mode of barring the entail, it will be necessary to ascertain who may be protector of the settlement, and what is his office.

In order to understand the office of the *protector*, it is necessary to call attention to the nature of an estate in *strict settlement*, as also to the modes in which it was formerly and is now preserved and defeated. Limitations on a strict settlement were before explained (*q*); we will therefore here merely state that the great object to be attained has always been to preserve the property inalienable for as long a period as possible in the hands of the particular family or class of persons in whose favour the limitations are made; in short, to revert, as far as possible, to the state of the law immediately after the passing the statute

(*m*) S. 5.
(*n*) S. 7.
(*o*) R.S.O. c. 109, s. 10.
(*p*) *Cardigan* (*Lady*) v. *Curzon Howe*, (1901) 2 Ch. 479.
(*q*) Ante p. 231.

De donis. The mode adopted has long been thus: Assuming A., unmarried, to be the person in whose family the property is to be preserved; it will be limited to him for life, with remainders to his first and other sons unborn successively in tail, with remainder over in fee, and trustees are interposed to preserve the contingent remainders to the sons. The limitations of course will vary according to the circumstances of each case, as whether A., being married, had at the time of the settlement sons living; for if so, they will not be made to take in tail, but for life with remainder to their issue in tail. The above simple case, however, will serve our purpose; and it will be seen, with reference to what has been before mentioned, as to the mode of bar by warranty, fine, or recovery, that, prior to the statute, till one of the issue next entitled in tail should have attained the age of twenty-one, no complete bar could have taken place; for the tenant for life could not by warranty, or fine, or recovery, bar those in remainder or reversion; at least a fine was no absolute bar, except by non-claim: the tenant in tail, in possession, or in remainder, could not by warranty bar his issue or the reversioner; nor, if in remainder, before his estate came into possession bar remaindermen; the fine of tenant in tail in possession, though it would bar his own issue, did not necessarily bar the subsequent remainders except in case of non-claim; and the fine of tenant in tail in remainder did not bar them even by non-claim.

In short, the only mode by which an indefeasible fee-simple could be created was by a recovery; and to effect this it was requisite that the tenant for life and tenant in tail of full age next in remainder should concur. For the recovery suffered by tenant for life alone was void, and no recovery could be suffered by tenant in tail alone, as the tenant for life was the party seised of the freehold; and it was against him therefore only that the necessary proceedings could be had; and he, again, was required to vouch the remainderman in tail on a supposed warranty. The tenant for life, therefore, *protected the entail*, and by withholding his concurrence prevented its alienation.

A protectorship is still preserved by the statute in analogy to the above. It will be observed, also, that on the death of the tenant for life, when the remainder in tail became an estate tail in possession, the tenant in tail could make a tenant to the *præcipe*, and by being vouched in a recovery, convey a fee-simple. To obviate this power of destroying the entail, the usual mode was for the father (the tenant for life), when his

eldest son arrived at full age, to join him in a recovery and re-settle the property, giving the father an estate for life, with remainders for life to the eldest son, and in tail to the issue of such eldest son; a further remainder to the second son for life, remainder in tail to his issue, and so on with each son *in esse* and his issue. By these means the power of defeating the entail was postponed for one generation beyond the former settlement; for under that, the eldest son, whilst tenant in remainder, could have by fine bound his own issue, and when his remainder came into possession, by a recovery have barred his issue and all remainders; but under the re-settlement he and all his brothers *in esse* take as tenants for life, and the first who take as tenants in tail are grandchildren. This is the mode still adopted; the re-settlement taking place by means of a conveyance under the statute instead of by a recovery.

The protector of the settlement, as a general rule, subject to exception in particular cases, is the person to whom is given by the same settlement creating the entail, the prior beneficial estate, or the first of several prior beneficial estates, such estate being still subsisting, and not less than one for years determinable on a life or lives, or a greater estate, not being for years (*r*). The Act interposes a "new conservative power" in the office of the protector. "By the old law, a tenant in tail in remainder, expectant on an estate of freehold, was precluded from suffering an effectual recovery without the concurrence of the freeholder; for it was necessary that the person against whom the process issued should be invested with the immediate freehold; or, in other words, that there should be what was technically called a tenant to the *præcipe*" (*s*).

It is to be observed that the prior estate must be *subsisting* and under the *same* settlement; for, if created by some other conveyance than the settlement, the owner will not be protector, and the tenant in tail is not restrained from conveying in fee-simple, or exercising the other powers given to him by the Act.

The office of protector, subject to the exceptions under ss. 17 and 18 of R.S.O. (1897) c. 122, is a *personal* one, and continues notwithstanding that the protector should cease by alienation or otherwise to be owner of such prior estate; for no "assign" of the protector shall be protector (*t*). Thus, if the limitations be to A. for life, remainder to B. for life, remainder

(*r*) S. 9.
(*s*) Hayes Convey. 5th ed. 166.
(*t*) S. 14.

over in tail; although A. should convey his life estate voluntarily, or be deprived of it by his bankruptcy or otherwise, he would still continue to be protector for his life, provided the life estate, formerly his, continued to subsist; but if that estate should merge or be surrendered, and thus cease to *subsist*, A. would cease to be protector. Thus, if the life estates of A. and B., being both *legal* estates, were to be conveyed to the same person, the life estate of A. would be extinct, and he would cease to be protector. If, therefore, A. should have disposed of his life estate, it would not be enough to procure his consent without ascertaining that such estate is actually subsisting; and it would be in the power of the legal owner for the time being of such estate, by his act in merging or surrendering the estate to deprive A. of the protectorship, and promote B. to the office (*u*).

The ownership of a mere *equitable* or *beneficial* estate will qualify for the protectorship; it is not requisite that the estate should be a legal one; indeed, bare trustees by s. 14 are as to settlements made after 1st July, 1846, expressly excluded; and moreover, the word "estate" in this section and throughout the Act is, by s. 2 (1) (*c*), made to extend to an estate in equity as well as at law. Thus, if on any settlement subsequent to 1st July, 1846, lands be limited to the use of A. and his heirs for the life of B., in trust for B. for life, with remainder to C. in tail, remainder to D. in fee, the protector would be B., the owner of the equitable estate, and not A., in whom the legal estate is vested (*v*). This is a variation from the old law, under which the trustee, or the party to be tenant to the *præcipe*, was protector.

Where two or more persons are owners, under a settlement within the meaning of the Act, of a prior estate, the sole owner of which (if there had been only one) would, in respect thereof, have been the protector, each of such persons, in respect of such undivided share as he could dispose of, is sole protector to the extent of such undivided share, for all purposes of the Act (*w*).

Where a married woman would, if single, be the protector in respect of a prior estate, which is not settled, or agreed or directed to be settled, to her separate use, she and her husband together are, in respect of such estate, protector of the settlement, and are to be deemed one owner; but where the settle-

(*u*) Hayes Convey. 5th ed. 170.
(*v*) Hayes Convey. 5th ed. 174.
(*w*) S. 10.

ment is to her separate use, or her estate is, by the Married Women's Property Act, her separate estate, she is alone the protector (*x*).

When the protector is a lunatic, idiot, or of unsound mind; or has been convicted of treason or felony (*y*); or, not being owner of a prior estate under a settlement, is an infant, or it is uncertain whether he is living or dead; or where the settlor declares that the owner of the prior estate shall not be the protector, and does not appoint a protector; or, if there is a prior estate sufficient to qualify the owner to be protector, and there is no protector; in such cases the Supreme Court is the protector (*z*).

Where there is more than one estate prior to the estate tail, and the owner of the prior estate, in respect of which he would be protector, is disqualified, then the person (if any) who, if such estate did not exist, would be the protector, shall be such protector (*a*).

The persons disqualified are persons in whose favour a lease at a rent has been created or confirmed by the settlement (*b*), dowresses, bare trustees (except bare trustees under settlements made on or before 1st July, 1846) and heirs (*c*), executors, administrators and assigns, in respect of any estate taken by them in that capacity (*d*).

The cases arising under section 14 may be illustrated thus: Lands are settled upon A. for life with power to appoint and lease for lives, or for years determinable on lives, with remainder in tail, remainder over. A. appoints and leases to B. for life, or for ninety-nine years determinable on a life, reserving rent. In this instance, according to the principles upon which appointments operate, the estate of B. inserts itself into the settlement prior to the estate of A.; but A. remains protector under this section. A case of this kind must not be confounded with the case of A. conveying or assigning his own estate, and not creat-

(*x*) S. 11.

(*y*) The distinction between felony and misdemeanor was abolished by the Criminal Code, 55 & 56 V. c. 29, s. 535. By the Interpretation Act, R.S.O. c. 1, s. 29 (*g*), "felony" shall mean any crime which before the passing of the Criminal Code, 1892, would have been a felony under the law of Canada.

(*z*) S. 18.

(*a*) S. 15.

(*b*) S. 13.

(*c*) *Re Hughes*, (1906) 2 Ch. 642.

(*d*) S. 14.

ing a new one under a power; in this latter case the assignee of A.'s estate is disqualified under section 14, and A., by the direct enactment in section 9, remains protector.

One of the reasons for excluding a dowress from the office of protector, while a tenant by the curtesy is admitted, is that the former is only partially interested, viz., to the extent of one-third, while the latter takes the whole for life (*e*).

At first sight it might appear that because, by section 15, where the owner of the first estate is disqualified, the owner of the next in order becomes protector, there might be a conflict between sections 9 and 15. Yet it must not be supposed that, where the protector assigns his prior estate, he is thereby disqualified, and the office passes to the next owner of a prior estate. For by section 9 it is expressly declared that the owner of the first estate, or of the first of such prior estates, if more than one, shall be protector, although the estate may be charged or incumbered even to an extent sufficient to absorb all the rents and profits, and although such prior estate may have been absolutely disposed of. Thus, if under the settlement A. be tenant for life, remainder to B. for life, remainder to C. in tail, etc., and A. should convey his life estate to X.; the question would be whether, under section 15, the office of protector would pass to B. (X. being excluded as being an assign under section 14); or whether A. would not continue to be protector. It would seem, however, that by the direct operation of section 9 the owner of such prior estate, or of the first of such prior estates, if more than one, would remain protector. Section 14 does not in fact disqualify the protector when he has parted with his estate, but disqualifies his assign, who does not become protector by acquiring the estate; and in such case section 15 does not apply at all; it applies only when the owner of the first estate cannot be protector by reason of his being the owner of a lease at a rent, a bare trustee, etc.

By sections 17, 18 and 19 of R.S.O. (1897) c. 122, bare trustees and certain persons who would have been tenants to the writ of entry before 1st July, 1834, when fines and recoveries were abolished, are made protectors to the settlement (*f*).

(*e*) 1st Rep. Real Prop. Comrs. 32, 33.

(*f*) These sections do not appear in the present statute, but they are not repealed: 10 Edw. VII. c. 52, s. 32. It may be proper here to point out a mistake which occurs in sections 15 and 19 of the Revised Act of 1897, and also in the corresponding sections of the Imperial Act, the knowledge of which may save the student the useless labour of endeavouring to reconcile those sections. Section 15 refers to settlements made before 1st July,

Every settlor may, by the settlement, appoint any number of persons *in esse* not exceeding three, to be protector of the settlement in lieu of the person who would have been protector but for this section, and either for the whole or any part of the period for which such person might have continued pro-

1846; while section 19 refers to settlements made before 1st July, 1834. Section 27 of the Imperial Act excepts the case thereafter provided for of trustees under a settlement made on or before 31st December, 1833, the day when the Act came into force, whilst section 31, which intended to provide for the excepted case, provides for the case of a settlement made before passing of the Act, namely, 28th August, 1833. That this is a mistake is clear, but the effect is not so clear: Sugden (Stat. 2nd ed. 219) and Chitty (Stat. vol. 2, p. 92, note 5) quoting Sugden, saying that section 31 will, in connection with section 27, be extended to 21 December, 1833; Hayes (Convey. 5th ed. 519) and Shelford (Stat. 7th ed. 255, note b) adopting the contrary view. The like mistake has been carried into the Provincial Act, except that whilst section 15 refers to 1st July, 1846 (the time of coming into force of the original Provincial Act), section 19 refers to 1st January, 1834, the period when the Stat. 4 William IV. c. 1, virtually abolishing fines and recoveries, came into force. It would seem that the Imperial Legislature when they excluded bare trustees from being protectors still desired not to interfere with existing vested rights, and not displace from being protectors, trustees who as the parties to make the *tenant to the præcipe*, were such under settlements made before the Act should come into operation; when therefore they excluded bare trustees from being protectors by section 27, leaving by section 22 (section 10 Revised Statutes) as before explained, the party equitably entitled to the estate conferring the office to be protector, they excepted in section 27 (excluding trustees) cases of settlements made before the time of operation of the Act, and intended by section 31 to continue trustees as protectors under settlements made up to that time. It was just they should be so continued, and necessary to perfect the doing so (considering section 27) that section 31 should have referred to the time of the operation, instead of the time of the passing the Act, and possibly therefore in the Imperial Act the time, 28th August, 1833, may be read 31st December, 1833. It does not seem, however, that the same reasons exist here for doing this violence to language, for the grounds fail on which it may be supported in England. Section 15 of the Provincial Act excluding trustees except those under settlements made before the 1st July, 1846 (when the original Act came into force), whilst section 19 continues trustees as protectors under settlements made, not up to the time of the passing of that Act (18th May, 1846) as in the Imperial Act, but to a period long anterior, namely, the 1st July, 1834. It seems to us the Provincial Legislature had a sufficient object in fixing this date, and that it can well be supported; for subsequently to July, 1834, when the statute 4 Wm. IV. c. 1 came into force, an estate tail could not be barred, at least the ulterior remainders or reversion could not be defeated by the tenant in tail, even though there should be no protector; and this being so, there was no necessity after 1st July, 1834, to appoint a protector, for there was nothing to protect against. The result would be that in settlements made here subsequent to 1st July, 1834, the settlors must be supposed to have acted quite independently of any idea of a protector, and there can be no necessity for the statute being read as continuing trustees as protectors down to 1st July, 1846, when the settlors themselves never intended them to be so; in fact, it might be a positive hardship and unjust to give to such persons such an important office, and certainly there would be no such hardship as above alluded to under the Imperial Act.

tector; and the person who, but for this section, would have been sole protector, may be one of those persons appointed protector; and the settlor may give power in the settlement to perpetuate the protectorship of the settlement in any one or more persons *in esse* and not being aliens, whom the donee of the power thinks proper, in the place of any one or more persons who may die, or by deed relinquish his or their office of protector, the number never to exceed three (*g*). Where there are two or more protectors and no provision is made for appointing successors, then, though no reference is made to survivorship, the office survives, and the consent of the survivor enables the tenant in tail to bar the entail; and a power in the settlement to appoint protectors to fill vacancies does not negative the presumption of survivorship if the power is not exercised (*h*).

Every deed by which a protector is appointed under a power in a settlement, and every deed by which a protector relinquishes his office, is void unless registered in the registry office of the registration division in which the lands lie within six months after the execution thereof (*i*).

6. *How Entail May be Barred.*

The disposition under the Act may be made by the execution and registration of such an assurance (not being a will) as would have sufficed if the estate had been an estate in fee-simple.

The enactment is as follows (1): "Every disposition of land under this Act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee-simple absolute; and no disposition by a tenant in tail shall be of any force, under this Act, unless made or evidenced by *deed*."

(2) "No disposition by a tenant in tail resting only in contract, either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force under this Act, notwithstanding such disposition is made or evidenced by deed" (*j*).

By the former Act (R.S.O. (1897) c. 122, s. 29) the assurance

(*g*) S. 16.
(*h*) *Cohen* v. *Bayley-Worthington*, (1908) 1 Ch. 26; (1908) A.C. 97.
(*i*) S. 17 (1).
(*j*) S. 25.

must have been one which, before the Ontario Judicature Act, would have been sufficient to convey a fee-simple. This condition was based on the assumption that, after the rules of equity were to prevail over the law where there was a conflict, an assurance sufficient in equity to pass a fee-simple might be sufficient to bar an entail. The assumption was unfounded, however, because the section itself required an "assurance," not a "contract," even when made for consideration.

The reference to the time, however, had another effect, for it required a conveyance of the form used at that date, viz., one with technical words of limitation. Since the Conveyancing Act, 1886 (*k*), words of limitation are not necessary to pass a fee; and if no such words are used the conveyance passes all the estate which the conveying parties have in the land "*or which they have power to convey.*" As the present enactment requires only such an assurance as will now pass a fee, the result is that two forms of conveyance may be used, viz., either a conveyance without words of limitation, or one with the common law limitations or with the statutory substitute "in fee-simple."

If a conveyance without words of limitation were now used by a tenant in tail, under the supposition that he was conveying his own interest only, it would have the effect of passing not only his own interest in the land, viz., an estate for his own life, but also all that he had power to convey; and as he has power to convey a fee-simple, it would have the effect of barring the entail. Consequently, if a tenant in tail desires now to pass only his own interest in the land, he must so express it in the conveyance.

Secondly, the tenant in tail may either adhere to the common law words of limitation, or he may use the statutory substitute "in fee-simple." In an Irish case the disentailing assurance contained recitals that the deed was intended to be enrolled, and that it was intended to convey the land freed and discharged from the estate tail and all remainders, etc., and the land was limited to J.L. *in fee* to the use of H.C.G. *in fee-simple*. And it was held that, though there was no power (in consequence of s. 28 (1), which prohibits the exercise of the equitable jurisdiction of the court) to rectify the conveyance by inserting the word "simple" in the limitation to J.L., yet, as the word "fee" was ambiguous and might mean either fee tail or fee-simple, and as the remainder of the deed showed a clear inten-

(*k*) Now R.S.O. *c.* 109, s. 5.

tion to bar the entail, the words "in fee" should be interpreted to mean in fee-simple, and that the assurance was effective to bar the entail (*l*).

The disposition, then, must be made by deed, but not by a contract, though it is under seal and for a valuable consideration. The deed must be an assurance, that is a conveyance, or an instrument that passes the estate, and does not simply entitle the person in whose favour it is made to call for a conveyance. It must also be of such a nature that "if his estate had been an estate at law in fee-simple absolute" he could have passed it by such assurance, *i.e.*, as explained by Mr. Hayes (*m*), "as if an estate in fee-simple absolute occupied the very place of the estate tail."

Again, to the sufficiency of an assignment of a *mere equitable* interest recognisable only in equity, as a general rule, any form of words or instrument for valid consideration sufficient to show the intent will suffice; and the technical rules which would govern the conveyance at law in case the interest conveyed had been a legal instead of an equitable estate will not prevail; but this will not hold good now in cases coming within this section. Thus, if lands are limited to the use of A. in fee, in trust for B. in tail, with remainders over, a disposition in fee by B. of his equitable estate tail in order to operate under the statute, as a conveyance of the equitable fee-simple, must not only be by *deed*, but by such a deed, and so worded, as would suffice at law, and "by which such tenant in tail could have made the disposition if his estate were an estate at law in fee-simple absolute," instead of a mere equitable estate tail.

The nature of the conveyance depends also on the nature of the property or subject to be affected, as well as upon the quantity of interest or estate. Thus, if the entailed property be incorporeal, as a rent charge, though the tenant's estate in it be immediate, or, if the subject be corporeal, and the tenant's interest in it be not immediate, but future, as a contingent remainder, the conveyance, in either case, should not be by way of lease and release, which in the first case would be ineffectual, and in the latter inappropriate, to pass the estate, if a fee-simple absolute occupied the place of the estate tail.

In every case, since corporeal as well as incorporeal hereditaments lie in grant, it will be safer in all cases to adopt that

(*l*) *Re Ottley's Estate*, (1910) 1 Ir. 1.
(*m*) Convey. 5th ed. 156.

mode of conveyance, as it has a broader effect than any other.

Where a married woman is tenant in tail, the conveyance, to bar the entail, must be such a conveyance as she would use to convey her estate in fee-simple.

The matter must not rest in contract. If a contract for sale be made, it will be binding on the tenant in tail solely, and he may personally be compelled to carry out his contract specifically by executing a disentailing assurance (*n*). But there is no power to force the protector (if there be one) to give his consent; and if he contracts to consent it is an open question whether he can be compelled to specifically perform his covenant (*o*); nor can the issue in tail be forced to observe the contract in any particular, if the vendor dies without actually barring the entail (*p*).

By section 28 (1), in case of a disposition under the Act by the tenant in tail, and in the case of a consent by the protector, the equitable jurisdiction of the courts in regard to specific performance of contracts and the supplying of defects in the execution of powers of disposition given by the Act, and the supplying of want of execution of any of the powers, and in regard to giving effect in any other manner to any act or deed which would not be an effectual disposition shall be excluded. The object of this section was to prevent a court of equity from holding that a contract to execute a disentailing assurance was, as against the issue in tail, and remainderman, as effectual in equity as if a disentailing deed had in fact been executed, and from remedying any defects in the execution of a deed intended to bar an estate tail (*q*). It does not prevent a court of equity from enforcing a contract to effectually bar the entail, and so, where a tenant in tail conveyed in fee to a purchaser without the consent of the protector, and covenanted that he would enlarge the base fee so created after the death of the protector, it was held that the section did not prevent the court from enforcing the covenant by directing a proper additional conveyance to be executed so as to convey a fee-simple to the purchaser (*r*).

(*n*) *Graham* v. *Graham*, 6 Gr. 372. See *Petre* v. *Duncombe*, 7 Ha. 24, where the right was not disputed; *Bankes* v. *Small*, 36 Ch.D. 716.

(*o*) *Bankes* v. *Small*, 36 Ch.D. at pp. 724, 729.

(*p*) S. 28 (1).

(*q*) *Bankes* v. *Small*, 36 Ch.D. 716; and see Hayes Conv. 5th ed. p. 163.

(*r*) Ibid.

Nor does it take away the jurisdiction of the court to rectify a disentailing assurance on the ground of mistake so as to make it conform to the intentions of the parties (*s*).

The assurance, in order to be effective, must be registered within six months after the execution thereof, otherwise it will not have any operation under the Act (*t*). But if unregistered, or not registered in time, it will take effect to the extent to which it would be valid at common law, and so pass the estate for the life of the tenant in tail (*u*). Certain leases are excepted from the provisions as to registration; thus leases for any term not exceeding twenty-one years, to commence from the date thereof, or from any time not exceeding twelve months from the date, where a rent is thereby reserved, which, at the time of granting such lease is a rack-rent, or not less than five-sixths part of a rack-rent. It will have been observed that by section 4 every actual tenant in tail may dispose of the entailed lands "for any less estate" than a fee-simple absolute. And, but for the exception in the present clause as to registry it would have been actually necessary to the validity of a lease for twenty-one years or under that it should be registered. While, however, registration may not be essential to the validity of the lease, it may still be necessary, under the Registry Act, to register any lease of more than seven years, or for a less term when possession does not go along with it, in order to preserve its priority.

The Statute 32 Hen. VIII. c. 28, under which tenants in tail are enabled to grant certain leases binding on the issue in tail, but not on those in remainder or reversion, is probably superseded by the present Act; but the early statute is not repealed. And if a lease for years, or for life, or not exceeding three lives, should fail to take effect under the present Act, it might still be supported if in conformity with the statute of Hen. VIII.

7. *Consent of Protector.*

When an actual tenant in tail, not entitled in remainder or reversion in fee immediately expectant on the determination of his estate tail, is desirous of making a disposition of the entailed lands, and there is a protector of the settlement, then

(*s*) *Hall-Dare* v. *Hall-Dare*, 31 Ch.D. 231. And see *Re Ottley's Estate*, (1910) 1 Ir. 1.

(*t*) S. 26.

(*u*) *Dumble* v. *Johnson*, 17 C.P. 9.

the consent of the protector is necessary in order to enable the tenant in tail to dispose of the lands to the full extent authorized by the Act. But, without such consent, the tenant in tail may dispose of the lands as against any one who might claim the estate tail in case he did not make the disposition (*v*). That is to say, that if there is a protector, and his consent is not obtained, the effect of the disentailing assurance is to bar the issue in tail, but not the remainderman, and convey to the purchaser a base fee, or a fee-simple limited to last as long as there are issue in tail. But the remainder will vest in possession as soon as such issue come to an end. If the consent of the protector is obtained, then the bar is complete and a fee-simple absolute passes to the purchaser.

If the tenant in tail is also entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, the consent of the protector is not necessary. The reason of this is very obvious. The protector's office is to protect the interest of the remainderman against the tenant in tail; and where they are the same person his office is unnecessary. In a case where M. was tenant for life, with remainder to his first and other sons successively in tail male, remainder to M. in tail male, with remainder over, and M. executed a disentailing assurance, in which he expressed that he intended to bar all remainders, it was held that the bar was complete though he did not express his consent as protector in the deed (*w*).

The consent of the protector may be given either by the disentailing assurance, or by a distinct deed. If given by the disentailing assurance, it is no objection to it that the protector executed it after the death of the tenant in tail, but within time to enrol (in this province, register) it according to the statute; and if registered within the statutory period it is sufficient, though the registration is made after the death of the tenant in tail (*x*).

But if given by a distinct deed it must be executed either *on or before* the day on which the disentailing assurance is made; otherwise it is absolutely void (*y*), and, as we have seen, equity has no power to aid. If the consent is given by a distinct deed,

(*v*) S. 19.
(*w*) *Re Wilmer's Trusts*, (1910) 2 Ch. 111.
(*x*) *Whitmore-Searle* v. *Whitmore-Searle*, (1907) 2 Ch. 332.
(*y*) S. 27 (1).

it is unqualified, unless by such deed it is restricted to a particular assurance referred to in the consent (*z*).

The protector is absolutely free and unfettered in giving his consent; any device, shift or contrivance by which it is attempted to control him in giving his consent, or to prevent him from using his absolute discretion, and any agreement entered into with him to withhold his consent, being absolutely void; he is not a trustee in respect thereof, and no court has any power to control or interfere to restrain the exercise of his power of consent or treat his giving consent as a breach of trust (*a*); nor can the court cure or aid any defect on equitable grounds; the rules of equity in relation to dealings and transactions between the donee of a power and any object of the power in whose favour the same may be exercised are not to be held to apply to dealings and transactions between the protector and the tenant in tail, under the same settlement, with regard to the consent (*b*); and when once the consent is given, it is irrevocable (*c*).

Although by section 21 any agreement with the protector to *withhold* his consent is void, it does not follow that he may not make an arrangement or bargain to *give* his consent (*d*). Any agreement to *withhold* must necessarily be one made at the instance of the remainderman, who is the only person interested in securing his refusal to consent. The tenant in tail is solely interested in procuring the protector to *give* his consent, and though he must not resort to any "device, shift or contrivance" to procure the consent, he is not prohibited from making a bargain; the rules relating to dealings between the donee of a power and the object of the power not applying. But it is an open question whether a contract to give his consent can be enforced (*e*).

When a married woman is, either alone or jointly with her husband, protector of a settlement, she may give her consent in the same manner as if she were *feme sole* (*f*). This is hardly in harmony with section 11, which provides that where a married woman would, if single, be protector of property not settled

(*z*) S. 27 (2).
(*a*) S. 21.
(*b*) S. 22.
(*c*) S. 27 (3).
(*d*) Hayes Convey. 5th ed. 183.
(*e*) *Bankes* v. *Small*, 36 Ch.D. at pp. 724, 729.
(*f*) S. 27 (4).

to her separate use, she and her husband together shall be protector. If the property is separate estate, then the married woman alone is protector. As the purpose of the office of protector is to give or withhold consent, it is difficult to see why the giving of consent in all cases should be allowed to the married woman alone, when section 11 is so careful in providing that the husband shall be a protector as one person with his wife. But section 27 (4) is quite clear in its provisions, and in its general terms is in sharp contrast with section 11, which provides with such care for the distinction between separate and non-separate property. In practice the want of harmony between the two sections will probably not be felt, as all property of married women in Ontario is now, most probably, separate estate.

When the Supreme Court is either sole protector or protector jointly with some person, the consent may be given by the court upon petition or motion in a summary way (*g*); and no document or instrument or evidence of the consent shall be requisite beyond the order in obedience to which the disposition is made (*h*).

If the consent is given by a deed distinct from the disentailing assurance, it is void unless registered in the registry office of the division in which the lands referred to lie, either *at or before* the time of registering the disentailing assurance (*i*); and, as before remarked, a mistake cannot be corrected nor defective proceedings aided in any way.

It has been held by the Court of Appeal that the consent of the protector need not be *express*, but may be inferred from his joining in a conveyance with the tenant in tail (*j*).

Where there is a protector of the settlement, and his consent has not been obtained to the disentailing assurance, then, as long as there is a protector his consent is necessary to enable the person who would have been tenant in tail, if the entail had not been barred, to exercise the statutory power of disposition (*k*); but with such consent, the person who would have been tenant in tail may enlarge the base fee into a fee simple absolute (*l*).

(*g*) S. 29.

(*h*) S. 30.

(*i*) S. 27 (5).

(*j*) *Ostrom* v. *Palmer*, 3 App. R. 61; and see *Re Wilmer's Trusts*, (1910) 2 Ch. 111.

(*k*) S. 20.

(*l*) S. 6.

And, though the tenant in tail has converted the estate tail into a base fee by conveying to a purchaser for value without the consent of the protector, he is still able to enlarge the base fee into a fee-simple under section 6, because by section 2 (1) (*g*), "tenant in tail" includes a person who, where an estate tail has been barred and converted into a base fee, would have been tenant in tail if the entail had not been barred (*m*).

8. *Enlargement of Base Fee.*

Whenever a base fee in any land and the reversion or remainder in fee in the same lands unite in the same person, and there is no intermediate estate between them, then the base fee does not merge, but is enlarged into as large an estate as the tenant in tail, with the consent of the protector, if any, might have created under the Act if the remainder or reversion had been vested in any other person (*n*).

Some knowledge of the doctrine of merger is requisite to appreciate this section. We shall here merely state that, by the operation of that doctrine as a general rule, when two estates unite in the same person in the same right, the lesser is merged in the greater; and the effect is, that such person being deemed to hold thereafter under the greater estate, holds subject to charges or incumbrances existing thereon at the time of the merger, and cannot set up the former lesser estate, which is merged and has ceased to exist, as a shield against the incumbrances (*o*). In illustration of the above and of the object of the statute, let us first take a case before the statute. Suppose A. to be tenant in tail with reversion in fee to B. and that B. incumbers his reversion to more than the value perhaps of the fee-simple in possession of the property; and that afterwards A. acquires such reversion so incumbered from B.; this acquisition would not prejudice A.'s estate in tail or his issue; for no merger of an estate tail takes place when it meets with the remainder or reversion in fee (*p*); and consequently A. or his issue might enjoy the entail as long as issue continued, free from the incumbrances. But, if at any time A., or any of his issue, tenants in tail, instead of suffering a *recovery*, which would

(*m*) *Bankes* v. *Small*, 36 Ch.D. at pp. 721, 727.

(*n*) S. 24.

(*o*) Notwithstanding the provision of the Judicature Act as to the equitable rule in cases of merger, it is probable that it does not apply to a pure case of merger of legal estates: *Thellusson* v. *Liddard*, (1900) 2 Ch. 635.

(*p*) Ante p. 237.

have created a *new fee-simple*, created a *base fee* by *fine* to his own use in fee; then, in case the party so creating such base fee was then entitled to such incumbered reversion, a merger would take place; the former tenant in tail would hold only under the reversion in fee, and as such subject to the incumbrances; for the exception preventing the merger of an *estate tail* did not extend to prevent a merger of a *base fee*. The reason for the prevention of merger in the case of an estate tail did not apply to prevent a *base fee* from merging, there being no issue in tail to be protected, the base fee going to heirs general. One object of this section was to prevent the disastrous consequences of a merger of the *base fee* under the above and other circumstances. Another object was to prevent like consequences in cases where after the statute a base fee only should be created by some disposition to be made under it, and the person entitled to the base fee should be entitled to, or should subsequently acquire, the remainder or reversion in fee (*q*).

9. *Bar by Mortgage.*

If a tenant in tail makes a disposition of the lands under the Act by way of mortgage, or for any other limited purpose, the disposition shall, to the extent of the estate thereby created, be an absolute bar to all persons as against whom the disposition is by the Act authorized to be made, notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition is effected (*r*).

The moment the mortgage is effected the mortgagee becomes seised in fee-simple absolute, subject to redemption, in the same manner as if the estate of the tenant in tail had been a fee-simple absolute. And not only is that the case with the mortgagee, but the estate of the mortgagor is immediately converted into an equitable estate in fee-simple, entirely freed from the settlement (*s*). When the terms of the mortgage are satisfied, a reconveyance or a statutory discharge of mortgage vests in the mortgagor, not an estate tail, but a fee-simple (*t*). Where, however, a mortgage in fee contained a contract by the mortgagee to re-settle the property on being paid off, by reconveying "the said hereditaments unto the said mortgagors respectively,

(*q*) Hayes Convey. 5th ed. 187.
(*r*) S. 8, first part.
(*s*) *Culbertson* v. *McCullough*, 27 App. R. 459.
(*t*) *Re Lawlor*, 7 P.R. 242; *Lawlor* v. *Lawlor*, 10 S.C.R. 194.

or as they shall respectively appoint according to their original respective estates and interest therein"—the tenant for life and tenant in tail having joined in the mortgage—it was held that the mortgagors were entitled to a re-conveyance on the terms of the original settlement (*u*).

But if the disposition is but for an estate *pur autre vie*, or for years absolute or determinable, or if, by a disposition under the Act by tenant in tail, an interest, charge, lien or incumbrance is created without a term of years absolute or determinable, or any greater estate for securing or raising the same, then such disposition shall, in equity, be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition is effected (*v*). The resulting beneficial interest after satisfaction of the purpose for which the limited interest was created will be for the benefit of the entail (*w*).

10. *Money to be Laid Out.*

The Act is applied by section 31 to money to be laid out in the purchase of land to be entailed, and to land which is to be converted into entailed estate. This happens when trustees are directed to invest money in land, which, when purchased, is to be settled in tail for the benefit of a certain party; or to sell land, and invest the produce in like manner. With respect to trusts of this description, the Act provides that all the clauses it contains shall be applicable, as far as circumstances will admit, to the moneys or lands so to be invested, in the same manner as they would apply to the lands to be purchased, supposing the same to be actually purchased and settled conformably to the trust (*x*). But when the trust fund consists of leasehold estate, or of money, it is to be considered as to the person in whose favour, or for whose benefit the disposition is to be made, as personal estate; and any disposition of such estate by the intended tenant in tail must be made by mere deed of assignment, registered in the county where the lands lie within six months after execution.

(*u*) *Plomley* v. *Felton*, 14 App. Cas. 61.
(*v*) S. 8, latter part.
(*w*) Hayes Convey. 5th ed. 184.
(*x*) *Re Harvey*, (1901) 2 Ch. 290.

11. *Voidable Estates.*

When a tenant in tail has created a voidable estate in favour of a purchaser for valuable consideration, and afterwards by an assurance other than a lease not requiring registration under section 26, makes a disposition under the Act of the land in which the voidable estate has been created; then such disposition, whatever its object may be, and whatever the extent of the estate intended to be thereby created, shall, if made with the consent of the protector (if any) or by the tenant in tail alone (if none) have the effect of confirming the voidable estate to its full extent as against all persons except those whose rights are saved by the Act (*y*).

And if there is a protector, and his consent to the subsequent disposition is not obtained, then the disposition is to confirm the voidable estate so far as the tenant in tail is then capable of doing so without the protector's consent (*z*).

But if such disposition is made to a purchaser for valuable consideration, not having express notice of the voidable estate, then the voidable estate is not confirmed as against such purchaser (*a*). The Imperial Act has in it, after the words "has created," the words "or shall hereafter create;" so also had the original Provincial Act. The Consolidated Statute of Upper Canada had in it the word "already" before "created." The probability is that the section as it now stands, considering its previous history, was not intended to affect voidable estates created after it appeared in its present form.

The enactment is to a certain extent analogous to the former law, under which, if a tenant in tail created an estate or charge defeasible by the issue in tail, and then levied a fine, or suffered a recovery, its effect was to confirm such estate or charge as against those claiming under the fine or recovery (*b*).

(*y*) S. 23 (1).
(*z*) S. 23 (2).
(*a*) S. 23 (3).
(*b*) Shelford, Stat. 5th ed. 328, note (*g*).

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