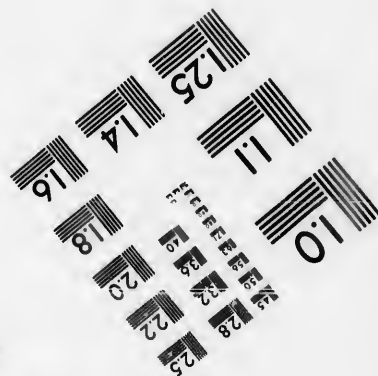
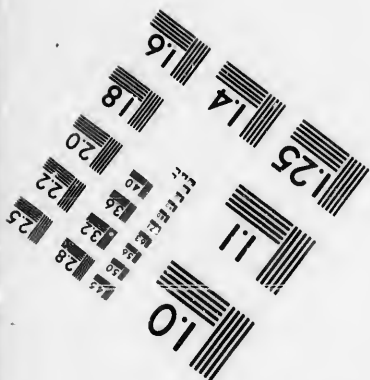
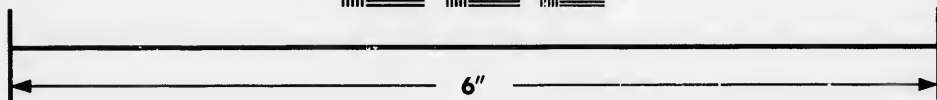
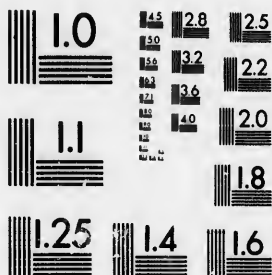


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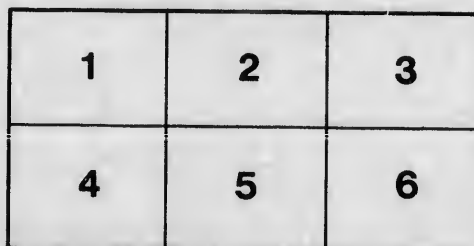
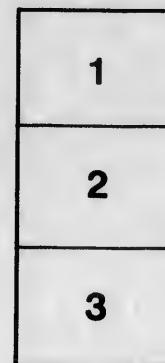
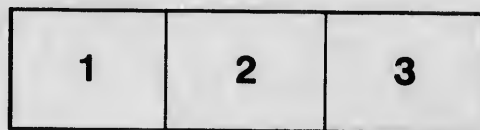
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**EPITOME**

OF THE

**LAWS OF NOVA-SCOTIA,**

BY

**BEAMISH MURDOCH, Esq.**

**BARRISTER AT LAW.**

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**VOL. II.**

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**HALIFAX, N. S.**  
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**1832.**

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## ABBREVIATIONS EXPLAINED.

F. N. B.—Fitzherbert's *Natura Brevium*.  
Co. Lit.—Coke upon Littleton.  
Hargr.—Hargrave.  
Rol. Abr.—Rolle's Abridgement.  
Com. Dig.—Comyn's Digest.  
Toml. ed.—Tomlyn's Edition.  
Bull. N. P.—Buller's *Nisi Prius*.  
Swiub.—Swinburne on Wills.  
Hawk. P. C.—Hawkins' Pleas of the Crown.  
Kent. Com.—Kent's Commentaries.  
Vin. Abr.—Viner's Abridgment.  
C. J.—Chief Justice.  
Vin. Lect.—Vinerian Lectures.  
Plowd. Com. Plowden's Commentaries.  
Bac. Abr.—Bacon's Abridgment.  
Hal. Hist. P. C.—Hale's History of the Pleas of the Crown.  
Dr. & Stud.—Doctor and Student.  
Bythe. on Conv.—Bythewood on Conveyancing.

*Reporters' Names.*—Bos. & Pull; Bosanquet and Puller, Scho. & Lef. Schoales & Lefroy, Esp. N. P. C. Espinasse's, *Nisi Prius* Cases, Stark. Starkie, Salk. Salkeld, Atk. Atkins, Cro. Jac. Cro. Car. Co. Eliz. Croke's Reports in the respective reigns of James, Charles and Elizabeth, Str. Strange, H. Bl. Harry Blackstone, Ld. Raym. Lord Raymond, Mod. Modern Reports, Lev. Levinz, Carth. Carthew, Ves. Vesey, Ves. Jun. Vesey Junior, P. Wms. Peere Williams, Eq. Ca. Abr. Equity cases abridged, Pre. in Chan. Precedents in Chancery, Yelverton, D. & E. Durnford, and East. B. & A. Barnwell and Alderson, Meriv. Merivale, Vern. Vernon, Wils. Wilson, Keilw. Keilway, Phillim. Phillimore, Ves. & Bea. Vesey and Beames, Ca. tem. Talbot. Cases in Lord Talbot's Time, Vaugh. Vaughan, Ambl. Ambler, Taunt. Taunton, Bro. P. C. Brown's Parliamentary cases, Bro. C. B. Brown's Chancery Cases, Lutw. Lutwyche, Jac. & Walk. Jacob and Walker, Freem. Freeman, Ball. & Beat. Ball and Beatty.

## BOOK I.

### PART 2.

#### GOVERNMENT OF FAMILIES.

The public government and general regulation of society having been considered, I will now advert to the government of families.

#### CHAPTER I.

##### MASTER AND SERVANT.

Let us first attend to the office of the Master of a family. As slavery does not exist in this country, a servant must become so by an express contract; and if we advert to the principles of our law and constitution, we may infer that such a contract should be for a limited and fixed period; for if the term of service had no precise point at which it was to end, it would virtually be a contract of slavery; although Mr. Christian, the editor of Blackstone, (as well as that great author) appears to entertain no very settled opinion on this point. See 1 B. C. ed. of 1823, p. 425, and note 1. The contract between a master and servant must also contain terms of compensation for the services

to be rendered. In the case of a menial or domestic servant, (so termed from the Latin words *moenia*, walls or a dwelling, and *domus* a house) if the time be not specified, and cannot be proved to have been agreed on, the construction of the common law made it a contract for a year, upon this principle of justice "that the servant shall serve and the master maintain him throughout all the revolutions of the respective seasons; as well when there is work to be done as when there is not." 1 B. C. 425. Co. Lit. 42. F. N. B. 168. but this is altered by the Provincial Act of 1787, 1 P. L. 255, 28 G. 3. c. 6 sec. 1, by which it is prescribed, that no person shall hire a servant of either sex, "for any longer term than one month, unless a memorandum of such hiring shall be made in writing, and signed by both parties, in the presence of one witness at least, who shall read and explain the same to both parties: which memorandum shall specify the period for which such servant shall have agreed to serve, and the wages or other considerations which he or she is to receive for his or her service; and all verbal agreements between master and servant, for a longer period than one month, are hereby declared to be null and void." Under this act we may fairly presume that a hiring for an undefined period would be construed to be a hiring for one month, and in case of the servant continuing with the master after the month expired, to be a contract from month to month, until it should be ended by reasonable notice on either side.

The Provincial act of 1765, 1 P. L. 113, 5 Geo. 3 c. 7, sec. 1, directs apprentices and servants, whose contracts extended to six months service or upwards, to obtain a certificate of discharge when leaving their masters, and imposes a penalty of £10. on persons harboring or knowingly taking into their service any such servant or apprentice, who has not such certificate, on conviction at the ses-

sions ; to be levied by warrant of distress from the General Sessions, half to the poor of the town, and half to the prosecutor. Sec. 2—Any justice of peace, on application, may enquire into the case where the master refuses to grant such a certificate, and if he finds the master to be in the wrong, may grant a certificate to the servant himself, which is made valid to entitle persons to hire or entertain him. A servant convicted before two justices of peace, of making or producing a counterfeit certificate, may be publicly whipped at their discretion. (It has been held that a servant may be dismissed for incontinence or moral turpitude, such misconduct dissolving the contract, being inconsistent with the implied terms of it.) The Act of 1765, before referred to, 1 P. L. 114, provides several regulations respecting servants : which act, though the word apprentice is used in the preamble and in the 7th clause, seems to refer chiefly to such menial servants as are bound by indenture, and to servants hired for six months, or a longer term, as agricultural or fishery servants, by written contract, and does not appear to embrace common servants, or apprentices to trades and professions. The 3d section directs, that in case of absence or desertion, such bound or hired servants shall make satisfaction by serving in addition "double their time of service so neglected ;" and if the absence was at seed time or harvest, or the fishery season, and the expense of recovering them extraordinary, the General Sessions may adjudge a further term of service, to compensate the master for actual damage proved. The 4th section obliges the master, who would avail himself of the act, to carry the servant, immediately on recovering him, before any justice of the peace, and there to prove his complaint, and obtain the justice's certificate of the facts proved ; which certificate is made evidence before the sessions, who are to pass judgment under the 3d section. The 5th section provides that all complaints of ill usage, made by



such bound and hired servants against their masters, may be tried by any two justices of the peace. Such complaint must "be made within a reasonable time, not exceeding ten days after the cause given;" unless the master prevent the servant, or he, the servant, is sick. The justices may make an order to discharge the servant from his contract, or order any other relief to him, on proof to their satisfaction that the complaint is well founded.—Either party may, if dissatisfied with their order, appeal to the next Quarter Sessions, whose decision is to be final. The 6th section imposes a penalty of £10. on any master of a privateer or merchant ship, harboring any such bound or hired servant, knowingly, without the written license of the employer:—half to the poor of the township, half to the informer prosecuting—recoverable in any court of record in the province. The 7th section directs the indentures of persons bound in other parts of the king's dominions, and assigned here, to be previously inspected, and their validity adjudged on\* and recorded, by one or more justices of the peace; but as this† relates only to a description of emigrants called redemptioners, who used to pay for their passage by a service under indentures, (a practice long abandoned,) this clause may be considered in desuetude. The 8th section enacts a forfeiture of wages by any person contracting in "the capacity of a salter, splitter or shores man," with those who carry on the fishery; and proving incapable. Any one justice of the peace is authorized to adjudge this forfeiture, on proof exhibited regularly before him.

\* The statute of 1787, before quoted, 29 G. 3, c. 5, sec. 2, 1 P. L. 255, authorizes any one justice of the peace to hear complaints of the master or mistress of *any hired servant*, of their wilful misbehavior, and to order part of their

\* See British statute 4. G. 1. c. 11. s. 3. 5.

† Vide the preamble to sec. 2, 1. P. L. 114.

wages to be stopped, as a punishment, if the complaint prove well founded. . . . Provided such stoppage for any one offence, shall not exceed the sum of five shillings."—

The same act, and the act of 1762, 1 P. L. 77, contain a variety of clauses, to prevent the sale of spirituous liquors to servants and apprentices, whether by their employers or others—to nullify claims and notes where such articles form the consideration, and to compel the restitution of articles pledged by servants to liquor traders, with many penalties on such transactions. These clauses have been already explained at full length in the first part of this work—(see Vol. I. p. 189.) The laws for binding out beggars and vagrants, are also described. (Vol. 1. p. 195.)

The stat. 1787, 1. P. L. 256, sec. 7, gives the sessions of each county power to make regulations to punish ill doing servants, and to apprehend and restore runaway servants; but no fine or penalty is pointed out, to give a force and sanction to this general power. Service for one whole year, in any place under contract to serve for a year next before the claim of relief, constitutes a settlement, under the poor laws of the province.—(See Vol. I, p. 194.)

The act of 1787, sec. 8, c. 6, 1 P. L. 256, 257, directs that "all and every the former laws of the province respecting masters and servants, or either of them so far as the same or any part thereof are not expressly abrogated or altered by this present act, shall be construed to be in full force." There are many English statutes ancient and modern, relative to masters, apprentices, and servants, which are referred to in 1 B. C. c. 14; but as the subject matters to which they refer are expressly provided for by the provincial acts here pointed out, which embody with some modification their principal enactments; and as their character is chiefly penal, and it would appear next to impossible to amalgamate them with the provincial acts in any consistent manner, we may reasonably conclude that they do not form any part of the laws of this province.

Having thus gone through the several positive enactments of law in force in Nova Scotia under this title, we may next notice with propriety the contract of hiring in its several parts.

The contract with servants is either for a stated time or undefined as to time—for a stated price or undefined wages,—the services to be rendered are either specific or undefined. It has been already said that the time when not fixed, would probably be construed to be one month, by analogy with the common law principle which made the undefined term one year. If wages are not fixed by the agreement, the presumption will be that it was intended the servant should receive the current rate of wages for servants of his class. This, however, does not preclude a party from engaging to serve for shelter, clothes or nourishment, without money wages: but such contract must be proved, as it will not be presumed, although the servant be of inferior qualifications. Where the services are not defined, it may be fairly inferred that they are not to be exacted, beyond what the servant may be fairly supposed to be able to perform and understand. They must not be such as contravene any religious or moral principle, or any specific law—Paley's law of principal and agent, 315. For example, to work on sundays, except for necessity or charity,—to neglect all religious exercises, in order to attend to the orders of the employer—to participate in the breach of the revenue laws, or any other known law of the land. These exceptions are implied in all kinds of contract of service or apprenticeship. Unless otherwise agreed on, the master will be bound to lodge and feed the house servant, but not to clothe him, as the wages are intended to meet that and all other wants he may have. Under the laws of the province respecting statute labor on the highways, or militia duty, the master will not, I conclude, be justified in

making any deduction from the wages of any description of servants, for the loss of service he sustains by the operation of those acts.

Contracts for service are frequently entered into by parties laboring under various disqualifications to make formal and binding contracts, but as the servants usually become so from the necessities of their situation, it would be very injurious to themselves, if they could invalidate their bargains upon the ground of minority or coverture; as such a construction would be a serious obstacle to their employment. The law of the province therefore authorizes the child to be bound until the age of 21, with the approbation of its parent or guardian; and provides, as we have seen, that the justices of the peace and overseers of the poor should bind out poor children, orphans, &c. in the same way. It may be fairly presumed that a married woman, in the prolonged absence of her husband, if destitute of other means of support; or in case of his presence, and inability or wilful neglect to maintain her, may enter into temporary contracts of service, as in such cases his consent may be inferred. In general, however, the contract, to be perfect, requires the voluntary consent of the infant, or *feme covert*, as well as that of the parent, guardian or husband. How far a person under age hiring a servant is bound by his contract, must be regulated by the same principles which govern the other contracts made by minors, and will depend on the apparent propriety and necessity of his having a servant. Where a married woman hires a servant, it should be with the consent of her husband either express or implied. The validity of the acts of infants and married women, will be more particularly described in another place. These contracts may be dissolved by the\* death of either party, by

\* Toller on Executors. 151. 152.

mutual consent,—by gross misconduct and breach of duty on either part,—and by the servant's becoming unable, by unavoidable misfortune, to fulfil his engagement.—Servants not living in the master's house will be entitled to wages and terms as agreed on, but not to be fed or lodged, unless specially mentioned. Apprentices to trades, &c. are usually bound by a specific written contract, signed and sealed, and their rights and duties are to be known by the terms and stipulations there expressed. There is a class of service, or rather agency, such as that of stewards, factors, &c. who are considered in one respect, as servants *pro tempore*, and in a limited sense with regard to their acts affecting the property and interests of their principals.—“At common law every man might use what trade he pleased.” 1 B. C. 427. This right was restricted in England by statute 5 Eliz.c. 4, § 31. But as this act was in terms restrained to the territory of England, and is restrictive of a common right, is a penal act, and in other respects inapplicable to an American colony, it is not in force here. “A master may by law correct his *apprentice* for negligence or other misbehavior, so it be done with moderation: though if the master or master's wife beats any other servant of full age, it is a good cause of departure.” 1 B. C. 428. As there may be a variety of things in the conduct of a servant that may satisfy his master of his misconduct, and yet not be provable by the master, by witnesses: it has been thought that an action would not lie against a master who, on being applied to for a character of one who had been his servant had aspersed him, unless express malice could be shewn to be the motive. *Rogers v. Clifton*, 3 Bos. & Pul. 594, per Chambre Justice, and it has also been held that a servant cannot sue a master for refusing to give him a character.—per Lord Kenyon *Carrol v. Bird* 3 Esp. N. P. C., 201.

In the settlement of the affairs of deceased persons,

servants wages are entitled to a preference among simple contract debts.—Toller on Executors, 286, but this point will be hereafter considered.

Thus far concerning the contract of service, as regards the parties, but let us observe the results of it with reference to others.

First the maintenance and aid of a servant in law suits is permitted to the master. 2 Rol. Abr. 115, 1 B. C. 428. A master may prosecute for damages, any one who injures or takes away his servant, for the loss he thereby sustains. In like manner he may sue any one, who entices away his apprentice or servant, or continues to employ one deserting from his employment before the contract is dissolved. The action for loss of service is allowed to the parent whose daughter has been debauched, and this may be brought in the case of an adopted daughter, or by a master who is not the natural parent. See Selwyn's N. P. 1096, 7. and the cases there cited; and the courts of law are disinclined to set aside a verdict,—obtained in these cases of seduction, on the ground of its being heavy, the damages accordingly are usually very great. A master may justify an assault in defence of his servant, and the servant in defence of his master. 1 B. C. 429. o. tit. Trespass 217. A servant may be sued without his master for committing a trespass by his master's command. 3 Lev. 352, for servants are bound only to obey the *lawful* commands of their masters; and where the master has not authority to do a thing, whoever does it by his command, is a trespasser as well as the master; and both may be liable to be sued for forcible injury done by the master's command. 8 Ed. 4. 45. 22 Ed. 4. 45. Paley's Law of Principal and Agent. 315. In many cases the master is responsible for the acts of his servant (though not criminally. 2 Str. 935, R. v. Stone, 7. T. R.) the servant being considered in the



light of an instrument, moving according to his employer's wishes. Thus if an innkeeper fail to provide honest servants and honest inmates, according to the confidence reposed in him by the public, his negligence is highly culpable, and he must answer *civilly* for their acts, even if they should rob the guests. Jones on Bailments, 95. 6. Any carrier is responsible for the acts of his servants. Cavenagh v. Such. 1 Price 328. Williams v. Cranston, 2 Stark. N. P. C. 82, and generally in all cases the rule of law is that the negligence or unskilfulness of a servant, acting under his master's directions express or implied, is the negligence of the master, for which he is responsible in a pecuniary way. Jones on Bailments, 3d edition, 89. Paley's Principal and Agent, 224. But the master is not responsible for an injury wilfully committed by the servant without his knowledge or assent. 1 Salk. 282. 1 East. 106. 4 B. & A. 590.

So the master is responsible for any deceit practised upon third persons by the servant in the course of the master's business. Horn v. Nichols 1 Salk. 289. 3 Atk. 47. 2 Salk. 441. Cro Jac. 473. 1 Str. 653. Bridgm. 128. 1 Com. Dig. 240. F. ol. Abr. 95. 9 H. 6. 53. So, where a servant, ordered to sell a horse, warrants him sound, the master is bound by the warranty, though he knew not of it, Alexander v. Gibson 2 Camp. 555. 4 T. R. 177. 5 Esp. 72. But where a stranger was sent with the horse to sell, his warranty would not bind the owner, who had not authorized him to warrant. Fenn v. Harrison, 3 T. R. 760, 761 : but in this case the stranger would be himself liable for it. And generally a *contract* made by a servant, either under the express or implied authority of the master, is binding on the master. Thus in a variety of instances, where the master has paid for articles, previously purchased on credit by his servant in his name, this has been held to be a recognition of the servant's authority, as respects future purchases on credit. Shower. 95. 10 Mod. 111. 3 Keb. 625.

Strange 506, 3 Esp. N. P. C. 85. 1 Esp. N. P. C. 350. But where no dealings have existed between the master and the tradesman or vendor, but the servant has been always furnished regularly with money by the master, and the master's intention does not appear to have been that he should buy on credit, there the master will not be liable for his purchases. See *Kendal v. Andrews*, Esp. N. P. 141, *Peake N. P.* 49. See also *Pearce v. Rogers*, 3 Esp. 214—4 Esp. 174, and 2 *Stark. N. P. C.* 281. This implied authority of a servant to bind his master by his contracts, must be inferred from circumstances which amount to a fair presumption that the master previously directed him to make them, or subsequently assented to or ratified them. As to what circumstances produce this inference, see *Rusby v. Scarlet*, 5 Esp; 76. 1 H. Bl. 156. *Ward v. Evans*, 2 Ld Raym. 928, 2 Salk. 442. 1 Com. 138. 6 Mod. 36. 11 Mod. 87, 10 Mod. 109.

At common law, if through a servant's negligence, a man's house caught fire, and his neighbor's was, in consequence destroyed, he was answerable for the damage caused to the other by his servant's neglect; but this was abolished in England by the statute 6 Anne c. 3. which, so far as it repeals this harsh rule of the common law, is, I should suppose, in force here. 1 B. C. 430. A master is also responsible if any of his family throw any obstruction in the highway.—*ibid.*

There are many small fines and penalties in the provincial statutes, which may be incurred by children and servants under age, and the master or parent is sometimes made responsible, but these will be found digested under different heads of this work. In the case of a tenant, a notice to quit is sufficient, if left at the house with a servant, from which it will be presumed that it reached the tenant. *Jones dem. Griffiths v. Marsh*, 4 T. R. 464. *Doe*



ex Dem. Buross v Lucas, 5 Esp. 153 ; and the service of a declaration in ejectment, on a servant at the premises, and where the defendant acknowledged he had received it at the time, was held good. 14 East. 441. Adams on Ejectment 209. It has been held that a turnkey, who is the servant of the gaoler, is not liable to answer for the escape of prisoners to the creditor. There are some old decisions in Style 318 & 427, & Cro. Car. 38. 256. (under the statute of Winton, which authorized a person robbed on the highway, to sue the hundred for compensation,) as to the rights and liabilities of servants robbed of their master's money ; but as that statute is not in force here, they need not be discussed. If a servant should die before the expiration of the term of his contract, his personal representatives will be entitled to receive a ratcable portion of his wages for the term he completed ; and by parity of reasoning, if the employer should die before the term expires, the servant will have a similar claim against his estate. See the case of Worth v. Viner in Vin. Abr. vol. 3, p. 8. tit. Apportionment.

## CHAPTER II.

### *Husband and Wife.*

This relation is, according to our laws, the result of a contract entered into by persons not prohibited by the law from intermarrying, and capable in other respects of contracting; and solemnized according to the forms of their own religion. This contract must be entered into voluntarily, according to the manner of the civil law "*consensus non concubitus, facit nuptias*," adopted by the English common law. 1 B. C. 434. The disabilities which prevent persons from entering into a valid contract of marriage may be divided into those which are permanent, and those which are temporary. 1. Of the temporary, the first is a prior marriage, existing and undissolved,—this disability renders the marriage totally void, and by Prov. Act of 1758, 32 Geo. 2, c. 17, sec. 4 & 5, 1 P. L. 24, it is made felony, see post. title (Crimes) (Felonies.) 2. The next temporary disability is want of age. Males under 14, and females under 12 years of age, are not capable in law of entering into a binding contract of marriage, and when either arrive at the age of consent (which those terms are

called) he or she may disagree, and declare the contract void, without the necessity of recurring to any court for a sentence of divorce,—but if at the age of consent they agree to continue together, the former contract and solemnization will thus be rendered perfect, and no re-marriage need take place. If the husband be above 14 and under 21, and the wife under 12 at the time of marriage, on her attaining 12, *he* may annul the contract as well as *she* may ; but were his above 21 at the time of the marriage, this would not be in his power. 1 B. C. 436. Co. Lit. 79. Str. 937. S. C. Fitz. 175, 275.

By the common and canon law the consent of parents or guardians is not necessary to the validity of marriage. Several statutes render this consent necessary in Great Britain where either party is under the age of 21. It will be necessary to enquire whether any of these have efficacy in this province, and the more so, because the subject is of such importance to families and society.\* The law which requires an affidavit of the consent of parents and guardians, previously to issuing a marriage license, must be considered as superseded by the provincial statute respecting marriage licenses, of which hereafter. The act of 4 and 5 Phil. & Mary, c. 8, which imposes on any one who shall marry a female under 16, without consent of parents or guardians, heavy fines, imprisonment, and on *her*, forfeiture of the use of her estate for the husband's life, can hardly be regarded as in force here, when its penal character, and the circumstances of a young colony are attended to. The interest of society requires that no

\* "No peculiar ceremonies are requisite by the common law to the valid celebration of the marriage. The consent of the parties is all that is required; and as marriage is said to be a contract *jure gentium*, that consent is all that is required by natural or public law." Kent's Com. 75. Consent of parents and guardians to marriage of minors not necessary by Common law. Kent 2. Com. p. 73.

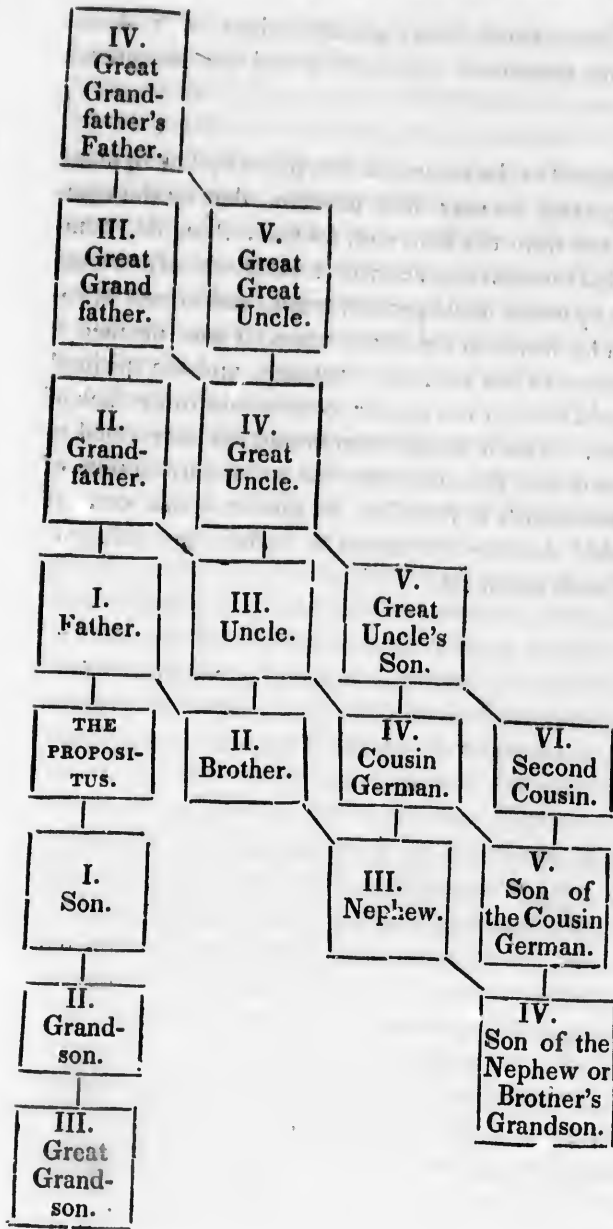
checks should be placed on the increase of population in countries but partially settled, except such as are imperiously demanded by the first principles of religion and morals. The other marriage act, British statute 26 Geo. 2, c. 33, passed since the establishment of this colony, does not, in its express terms, include marriages contracted here. But if it had been more ancient, yet, as its provisions were calculated to remedy inconveniences arising in a wealthy and very populous country; and if in force here could be of use in very rare instances, while in general its operation would be troublesome, and restrictive of matrimony, (the great body of the people of all classes being differently circumstanced from the higher classes of Great Britain for whose special benefit this act was passed) we can scarcely view it as an act that could be applicable to our situation; and when we reflect that its policy has been much questioned, even as suited to the most wealthy and cultivated society, we may conclude that this as well as the other statutes in restraint of marriage, are contrary to colonial policy, and are not here in force.

3. Alienation of mind, as long as it continues, renders the sufferer incapable of entering into this contract or any other. 1 B. C. 438. 4. Impotence is another cause of incapacity to marry, by the Provl. Stat. of 1758, 32 Geo. 2, c. 17, sec. 7, amended by act of 1761—1 G. 3, c. 7. 1 P. L. pp. 24 and 69. 5. Precontract, which may be defined as the subsistence of a former contract of marriage undissolved, which has been valid in all its circumstances, although not solemnized by the rites of religion, by the same clauses, 1 P. L. 24 and 69. A permanent disability to contract together a valid marriage, exists between near relations by blood or marriage. The rule adopted by the provincial statutes on this subject, see 1 P. L. 24 and 69, is to render void all marriages contracted between "kindred within the degrees prohibited in an act, made in

“ the 32d year of King Henry the Eighth entitled an act concerning precontracts, and touching degrees of consanguinity.” That statute declares that nothing (God’s law excepted) shall impeach any marriage, but within the Levitical degrees, the farthest of which is that between uncle and niece. This prohibition extends to all in the direct line ascending and descending, and to all collaterals within the fourth degree of the civil law table of consanguinity, which is at the end of this chapter. The reckoning in this table is by beginning with the person proposed and counting up to the common ancestor, and down to the other person in question. See 1 B. C. 435, 2 B. C. 207. The same degrees by affinity are also prohibited. Thus a widow or widower cannot marry any person within the forbidden degrees of consanguinity to their deceased partner,—but a marriage does not produce this relation between others, who are respectively of the family of the parties married. Therefore two brothers may marry two sisters, or a father and son a mother and daughter ; or if a brother and sister marry two persons not related, and the brother and sister die, the widow and widower may intermarry. It is the rule of English law that while the other disabilities we have named, render a marriage void to all intents, yet impotence, precontract and kindred, only make it voidable, and if either party die before a divorce be obtained, the marriage for all legal purposes must be considered as valid and the offspring legitimate. This rule appears to have originated from the spiritual courts having exercised an exclusive jurisdiction over the trial of these three classes of objections to marriages, and as the object of a trial in such causes was to separate the parties, and thus prevent their continuance in a sinful union, this object became unattainable by the death of either party, and the common law courts interfered to prevent further proceedings. 1 B. C. 434. But as our provincial act refers the judgment of divorces to the Governor and Council, a

court of a civil nature, it may possibly admit of a doubt whether this anomalous principle would be recognized here.

With respect to the solemnities required by law to make a marriage valid, we may first observe, that by the common law, and until the Brit. stat. 26 Geo. 2, c. 33, commonly called the marriage act, where a contract of marriage was made by words in the present tense, (and in case of cohabitation by words in the future tense,) it was deemed a valid marriage in law for many purposes, and the spiritual courts would compel the parties to celebrate in the face of the church. This it would seem should be understood to be the law of this Province now, and as the jurisdiction of the spiritual courts is vested in the governor and council they would I think be authorized to enforce the solemnization of such contracts.





That marriages may be legally solemnized according to the religious persuasion of the parties contracted, may be gathered from the language of the act of 1758, 32, G. 2. c. 5.—Sec. 2, which authorises the celebration of divine service, and the sacraments by all protestant dissenters and exempts them expressly from all contribution to the Episcopal church. 1 P. L. 7—from the language of the act of 1758. 32. G. 2, c. 17. sec. 1, 1 P L. 24, which legalizes marriages celebrated after publication of notice on three sundays or holidays ‘in some congregation within the town or towns where each of the parties do reside.’ The act of 1793, 33, G. 3. c. 5. to confirm marriages theretofore solemnized before magistrates and other lay persons in places where the inhabitants were remote from any clergyman, and the act of 1795, 35, G. 3, c. 2, authorising the Governor to appoint laymen to celebrate marriages in remote situations; also, the repeal of all laws against Roman Catholics,—from the language and spirit of these acts as well as from the Colonial practice and the non existence of any restrictive act, it may be adopted as a fundamental rule that marriages may be legally solemnized according to the rites of the religion professed by the parties contracting, or either of them.

The act before quoted, 1, P. L. 24, forbids any person from officiating “in solemnizing any marriage before notice of the parties intention of marriage shall be publicly given, on thrice several Sundays or holy days, in time of divine service, in some congregation within the town or towns, where each of the parties do reside, or for which marriage licence shall not have been obtained, under the hand of the Governor, or Commander in Chief of the Province for the time being,” under pain of £50, penalty, recoverable in any Court of Record in the Province. The same act, sec. 2 and 3, imposes a penalty of £50, on any clergyman, where the parties reside, refusing to make



such publication, or refusing to marry persons duly published or producing a licence, and also subjects him to an action of damages at the suit of any of the parties aggrieved: The form of licence in use will be found at the end of this chapter, and also, that of the bond which is required at the office of the Provincial Secretary, before such a licence is granted.. The party about to take a wife must procure some substantial person to join him in this security in the penalty of £100 to indemnify the Governor and his officers, and to prevent persons prohibited from marrying.

Very serious disputes have arisen in the province, from a claim made by the Episcopal clergy, to the exclusive right of marrying by licence, and as the executive have confined the issuing of these licences, to the clergy of the Episcopal Church, the House of Assembly has manifested a strong desire to have a declaratory law to enable all clergymen to have them. An act was passed through all its stages in the Provincial Legislature, for that purpose, in the year 1819. 59, G. 3, c. 16, 3, P. L. 55, but the assent of his Majesty was refused to it. It would be assuming in me to give any opinion in a work like the present, on the legal question that has been made as to the right of the Executive, to refuse their licenses to other clergymen besides those of the Established Church ; but I may be permitted to remark, that if all the sects were equalized in this respect, it would give much satisfaction to those who think the present practice a serious grievance, and it would produce no injury to any description of persons. The remote and isolated condition of the early settlers in Nova Scotia, rendered necessary the act of 1795, 33, G. 3, c. 5. 1 P. L. 316, before quoted, which legalized the previous marriages solemnized by laymen, when the parties were at a distance from any clergyman, provided witnesses were present, and cohabitation followed, and owing to the

scattered nature of many settlements, and the repugnance often felt by persons to a marriage, by a clergyman of a different church from their own, a further act was thought necessary in 1795, 35, G. 3, c. 2, 1 P. L. 348, whereby the Governor is authorized "to appoint such fit and proper persons as he shall think necessary, within any of the townships or districts of this Province, wherein no regular or licenced clergyman doth reside, to solemnize marriages within such township or district, between parties both of whom shall have resided one month at least within such township, or district, by licence or otherwise, as required by the laws of this Province."—Such marriages are declared valid. The Commissioner as he is termed, is required by sec. 2d, to file a certificate with the Clerk of the Peace of the County within 30 days after, under penalty of £10, for each offence. This by section 3rd, the Clerk of the Peace is to record within three days after under penalty of £5 for each offence. Fines recoverable under both sections in any court of record in the Province—half to the poor of the township, half to prosecutor. By Sec. 4, such record is made legal evidence of the marriage in all Courts of Law and Equity in the Province.

The Executive appear to have issued these commissions even in places where there were clergymen resident, but not belonging to the Church of England, as however there are now clergy of that church in almost every part of the country, the practice of these lay marriages is growing rare, and will probably soon cease to exist.

The Canon laws of the English Church prescribe many rules respecting the solemnization of marriages which it would appear by Provincial act of 1759, 33 Geo. 2, C. 3, sec. 8, 1 P L 50, are considered binding here on the clergymen of the establishment, but it may be assumed that a

marriage celebrated by them would not be invalidated for any non-compliance with these rules, however the clergyman himself might be amenable to ecclesiastical censure for breach of the canons. The same principle may be safely applied to the validity of marriages in other sects. Thus it appears that marriages may be celebrated in private houses, or in the evening, and yet be valid, and in the usage of the colony little attention has been paid to such questions. See 1 B. C. 439, 440. As to the fees of the clergy for marrying, I can find no particular act—and in practice they are fixed by the liberality of the parties.

For the preservation of evidence of marriages, births and deaths, an act was passed in 1761, 1 Geo. 3, c. 4. 1 P. L. 67, appointing the proprietor's clerk in each township where no parish was established, a register of marriages, births and deaths. By the act of 1782, 22 G. 3, c. 3. 1 P. L. 226, the Town clerk was substituted as the officer to make the registry—by the 2nd clause of the first of these acts, this registry was made legal evidence. Their provisions will be more detailed hereafter under title "*Registry.*"

We will next enquire how this important contract may be dissolved. This must either be by the death of one of the parties, or by divorce. Divorce may effect a total or partial dissolution of the bonds of marriage. In England the total divorce can only be decreed for causes which rendered the contract voidable at the time it was entered into. These are precontract, impotence then existing—consanguinity, affinity then existing—and compulsion, by which the voluntary character of the contract is destroyed. No subsequent acts or accidents can entirely dissolve it by the law of that country. Yet as private acts of Parliament are there granted from time to time, to dissolve marriages in consequence of adultery, and are attended with

very heavy expenses to the applicant, the system seems to favor the wealthy by holding out to him a remedy from which all in middle or humble life are debarred. Our Provincial Statute, 32 Geo. 2, c. 17, sec. 7, 1758, 1 P. L. 24, as amended by the act of 1761, 1 Geo. 3, c. 7, 1 P. L. 69, affords the remedy of total divorce in all causes of impotence, precontract, kindred within the before mentioned act of 32 G. 8—and of adultery and cruelty.\*

The act of 1758, 24, 1 P. L. section 6, enacts, "that all matters relating to prohibited marriages and divorce, shall be heard and determined by the governor or commander-in-chief for the time being, and his majesty's council for this province." By which as well as by the commission and instructions of the governor and the colonial usage, the governor and council form a tribunal to decide all questions of importance arising between married persons as respects their nuptial engagement, and also to annul or confirm marriages impeached for any want of form or regularity. The total divorce for precedent causes which declares the contract not to have been valid when it was entered into, destroys by its consequences the legitimacy of the children born during the union of the parties, and has other legal consequences of a serious nature. The total divorce for adultery will not render the children of the marriage illegitimate, unless the circumstances, and

\* By an act of 1816, 56 G. 3 c. 7, 2 P. L. 201, it is enacted, in explanation of the acts of 32 G. 2, & 1 G. 3--That the court of marriage and divorce in cases of adultery or cruelty, may either annul the marriage from the date of the act of adultery or cruelty in proof, or separate the parties from bed and board only, allowing alimony to the wife, and costs according to the condition of the parties, and the practice of the ecclesiastical courts in England. The second clause provides that parties separated only from bed and board are not to marry again without incurring the crime of bigamy. This act does not contain a suspending clause, but was disallowed by His Majesty.

the decree founded on them should so direct. That for cruelty can have no such consequence as regards the offspring, whose rights cannot be in any way affected by it.

The court of marriage and divorce, as the governor and council acting in this capacity are called, proceeds upon the model of the civil law forms, and besides the total divorce can grant a separation from bed and board, that is, can direct the parties to live apart from each other for the rest of their lives, in cases where from bad temper or other misconduct, their happiness is destroyed by the union. In the cases where the law authorizes total divorce on the ground of kindred, if the objection is proved sufficiently, it may be presumed that the Court will be bound by the principles of divine and moral law to make the divorce total. In the case of precontract if the party claiming under the former contract will abandon the right, the court I should think might affirm the marriage. In cases of impotence I should think the party claiming divorce may at any stage abandon the claim, and having done so, would not be suffered to revive it. In cases of adultery I should suppose it would be in the power of the party claiming to be divorced, to abandon the claim in like manner, but it would be natural to conclude that the claim must be (in this class of cases) made for a total and not for a partial divorce, because as our act increases the severity of the English law on the delinquent, it should be not further increased by construction, which would be the case if the offended partner could claim a separation only which would prevent the other from remarrying, and leave him or her open to greater temptation of repeating the offence. The lesser divorce under our law seems thus to be principally applicable to cases of misconduct and bad temper in married persons, when the marriage union has been productive of unhappiness to one or both parties, and yet the degree of cruelty is less than would justify a total divorce,

or other circumstances render it inexpedient. In cases of divorce from bed and board only, the court is authorized to decree alimony to the wife, that is to say, a reasonable allowance for her support out of the husband's estate, to be fixed by the discretion of the court, under all the circumstances of the case. For the recovery of this, if not paid, besides the process from the court itself there is a common law writ,\* "*de estoveriis habendis.*" This allowance is usually proportioned to the station in society of the parties. This cannot however be allowed in any case to her who has eloped with, or lives with an adulterer.† As, however, our acts so much alter the English law on this subject, much will remain in the discretion of the court.

The legal consequences of union in marriage, arise chiefly from the principle, that husband and wife are considered as one person in English law, a married woman is termed in the old law French, a *feme covert*, and the husband called her *baron*, forms which imply the government and protection of the husband over his wife, and her condition while married is named *coverture*. From this principle a man cannot legally grant any thing to his wife or enter into covenant with her except by the intervention of trustees. Hargrave, Co. Lit. 30, and generally all compacts

\* 1 Lev. 6. 1 B. C. 441.

† Cowel tit. Alimony,

The passages of Scripture respecting the right to divorce under the Christian Dispensation, are—Mark x. 11; Luke xvi. 18; Matt. v. 32; do. xix. 3; 1 Cor. vii. 10. 11; John viii. See also Deut. xxii. 22—and xxiv. 1; Luke xvi. 17 & 18.

No divorce was known at Rome before the year of the city 520. The civil law gave very extensive license of divorce. The canon law allowed no total divorce where the contract was originally valid. In this respect the Protestant countries of Germany follow chiefly the civil law in its laxity, and the Roman Catholic countries of the continent uphold the principles of the canon law. See an excellent essay on the state of the law of divorce in England, in Blackwood's Mag. for Novr. 1829.



which may have existed between a man and woman, will be annulled by their intermarriage, Cro. Car. 551,—they must at least be so far suspended that neither party can enforce them against the other in the courts of law, but in the case of compact entered into with a view to marriage settlements, as trustees are generally introduced, these may be the subject of Chancery proceedings. A wife may act for the husband under power of attorney, and a husband may bequeath any thing to her in his will, as it does not take effect in his life, and during their union. The husband is bound to pay the debts which his wife had contracted, before the marriage, and has a right to receive and make what use he pleases of her personal property, and also of whatever sums others may owe her. When the marriage is dissolved by death or otherwise, his liability for those debts contracted by her *before* the marriage is at an end, unless there be some part of her personal property which did not come into his hands during the marriage, he may be called upon to collect it as administrator, and as far as it extends it is liable to this class of debts. 1, P. Wms. 468. According to the language of Blackstone the husband adopts the wife and her circumstances together, therefore it may be concluded that if she has children by a former marriage dependant on her for support, the husband must be considered as having tacitly contracted to aid her in their maintenance during their early years, particularly as a forcible separation of the mother from her infants would be wrong. A similar principle would perhaps extend to the maintenance of her parents, if helpless and infirm.\* On this rule depends the law by which if a widow intermeddles with the effects of her deceased husband and marries again, the second husband becomes chargeable with her liabilities incurred as the administratrix. The husband is also bound to provide his wife with

\* But see the next Chapter of this Book.

necessaries, and (if she purchase them) to pay, unless she elope with an adulterer, or receive a separate maintenance from her husband, and live apart from him. 8, T R. 545, see Selwyn N. Prius. tit. Baron and feme. The husband must join the wife in all suits at law, brought for her benefit, and he must be joined with her as a co-defendant in all civil actions brought against her. If the husband be banished she may sue alone. Co. Lit. 133. and in the Courts of equity, in many cases, she may sue without her husband and may even sue him by the intervention of a *prochein ami* or friend in place of an attorney, 2 Vern. 614. P. Wms. 39. In criminal prosecutions, the wife may be indicted and punished separately, 1, Hawk, P. C. 3—as the union is only civil in its nature, but in many cases for minor offences, a married woman is held excusable, if acting wrong through the compulsion or persuasion of her husband, and sometimes the higher kinds of crime, are visited more gently on a wife, presumed to have been led or forced into such acts by her husband. The policy of the law will not suffer a husband or wife to bear witness, either for or against each other, either in civil or criminal prosecutions, lest on the one hand they might be under too great a temptation to swerve from the truth in each other's favor or on the other, lest the comfort and harmony of married life, should be disturbed. But in the case of a forced marriage, or of violence to the person of the wife this rule is held not to apply, 1 B. C. 443. Lord Audley's case, 1 State trials. Stra. 633, Bull, N. P. 286, 2, T. R. 263.

The law regards the murder of the husband by his wife, as an offence of a deeper dye than others of that class, and it is accordingly subjected to a different punishment under the name of *petit treason*. By the Provincial act of 1758, 32, G. 2, c. 17, sec. 8. 1 P L. 25. Incest is punishable by Pillory and fine of £50, or 6 months imprisonment, and adultery subjects the offender to a fine of £50, or 6 months imprisonment, and gives the



aggrieved parties an action for damages besides—see *post titles* [crimes] and [actions.] With respect to the property of a woman who marries, all the personal property which comes into the possession of the husband, becomes his, so that he may dispose of it by gift, will or otherwise, as he thinks proper, and it is liable to be taken for his debts. As to her real estate, the administration and management of it belongs to him during the marriage, and he is entitled to receive and dispose of the rents and profits without being accountable to her or her heirs, and in England by what is called “the curtesy of England,” this interest in her real estate, continues to the husband as long as he lives, if the marriage produced a child which could inherit the estate, and this takes place whether the child live or die.—Many reasons have been suggested as the original cause of this anomaly,—if I may be allowed a surmise, I should suppose it grew into a custom from the unwillingness of the son to dispossess his widowed parent of his mother’s land, and a similar reluctance on the part of a wife’s kindred, from the delicate courtesy of a chivalric age. Whether the interest of the husband thus survives the marriage as regards immoveable, or real property in this Province, is a question which will be adverted to under the general head of Inheritance in a subsequent portion of this book. The general principle on which the English law is grounded as to the management of the wife’s property, is apparently this, that where no marriage settlement is made, to regulate the affair by express stipulations, the moveables of each party, their joint earnings and acquisitions, and the rents and profits of their real estates become a united fund for the benefit of them and their family, nominally the husbands’ property, and actually under his direct control, and liable for all the debts of the husband, for all those of the wife before coverture, and for her necessary support, and that of their children, during the coverture. On the death of the husband, the

wife is entitled as long as she lives, to one third of the rents and profits of the real estate, and this cannot be affected by any act or will of the husband, and provided he has not disposed of the personal estate by will, she is entitled to one third (if there are children of the husband by that or a former marriage,) but if not to one half. This right to Dower (as it is called) out of the real estate, she may be totally or partially deprived of by her own act during the marriage. Thus, if she join in a deed of any real estate of his, she cannot afterwards claim dower out of that part so disposed of; and if she join in a mortgage of any part of the real estate, her claim to dower on that part mortgaged will amount only to a claim of dower, in the residue of the value, if there be any left, after satisfying the mortgage and interest. To prevent compulsion being used by the husband, the acts of the Province require an acknowledgment of the wife, before a Justice of Peace, in private, that she acts freely in signing the deed, in order to deprive her of her claim to dower, and by a similar law, a married woman cannot dispose of real estate of her own by deed, unless her consent is given in a like way, on a private examination before a judge of the Inferior Court of Common Pleas. The details of these laws and the forms necessary under them, will be given in the part of this work, describing the laws of real estate. Bonds, covenants and contracts entered into by a married woman, are void, neither can she make a will; because being under the control of her husband, she is not presumed to act freely in any of these cases, yet a power may be given to her, in a marriage settlement, to make an instrument of the same nature and efficacy, as a will, and perhaps many other acts may be authorized in the same way. Property may be settled on her by the will of another person, or by trust deeds, which she may be in the same way authorized to dispose of, and she may by deed entered into with the intervention of a Judge of Com-

mon Pleas settle her own estate in a way to give validity to a testamentary disposition of her own in the nature of a will.

Anciently by law, the husband could *beat* his wife, so that the chastigation was not excessive—but for a long time the law has allowed the wife to bind him over to the peace as it is called, that is to exact security before a magistrate that he should do her no personal injury. 2 Lev. 128, 1 B. C. 445. It was the error of a rude and barbarous age to suffer such brutal violence to be used by a man towards the weaker sex. We have already seen some of the consequences of divorce. The total divorce leaves each party at liberty to marry again, but the separation *a mensa et thoro*, or lesser divorce, while it puts an end to the intercourse between the parties, leaves them yet debarred from entering into another contract of marriage. The Provincial Statutes have no direct reference to this lesser divorce, and as they admit of the greater divorce in almost all imaginable cases, there may perhaps be a doubt raised whether they do not tacitly abrogate the divorce, *a mensa et thoro*. A husband is answerable to pay damages for any injury his wife does to others, by word or act, if it be of such a nature as to entitle the injured party to that kind of redress, and in many respects he will be bound to answer, though not criminally, yet civilly, and perhaps by fines, for her acts, wherever she may be fairly considered acting on his behalf under an actual or implied authority from him.

### CHAPTER III.

#### *Parent and Child.*

The next relation in families is that which subsists between Parent and Child.

The law classes children into legitimate and illegitimate ; legitimate children are those born of parents lawfully married together. The birth must take place during the coverture or union of the parents, that is to say, after the marriage has been regularly solemnized, though it is immaterial how short a period intervenes between the marriage and the birth. The Roman law went further, and gave to children born before the marriage the advantage of legitimacy, which our law denies them. Posthumous offspring will be also legitimate if born within a reasonable time after their father's decease. Cro. Jac. 541. The heir presumptive, or devisee interested may by writ *de ventre inspiciendo* cause an inquiry to be made, whether a widow who states herself to be pregnant by the deceased

husband, be really so or not, 1 B. C. 456. Co. Lit. 8. If a man dies, and his widow soon after marries another, and a child is born within such a time, that he might be the child of either husband, it is laid down in the old writers that he is more than usually legitimate, as he may when arrived at manhood, elect his father to be either of the husbands of his mother.\*

The presumption of law is in favor of the legitimacy of the child of married persons, but if proved to be the fruit of the wife's adultery, this presumption may be overturned. 5 Rep. 98, 4 T. R. 356 & 251. The children of a marriage will be rendered illegitimate; if that marriage be dissolved by a decree grounded on circumstances, which prove the contract of marriage to have been void at its commencement. See Co. Lit. 235. 1 B. C. 457. The reciprocal duties of parents and children towards each other, are grounded upon moral and religious obligations, and our laws leave these duties to be enforced chiefly by the sanctions of religion, morals and manners; interfering only to compel a parent to maintain his children or their offspring, or to compel the child or grandchild to support the parent or parents' parent, in cases where the public would otherwise be burthened with their expense under the Poor Laws,—in which cases the law is made compulsory (but only to the extent of 5s. per week for each person requiring relief). See before, under title (Charity) (poor laws.) Upon the same principle illegitimate children are made the subject of enactment. To prevent the public from being burthened with their support, the Provincial act of 1758, 32 G. 2, c. 19. 1 P. L. 27, directs in case of the birth or approaching birth of such a child, which is likely to be-

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\* The rule of civil law which legitimates children whose parents intermarry *after* their birth, is adopted in 11 of the United States, viz:—Vermont, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky, Missouri, Indiana, and Ohio. Kent, 2 v. 173, *in notis*.

come chargeable to the public, and the mother making oath to a written deposition as to the father, before any justice of peace of the vicinity, the justice (on the request of the overseers of the poor of the place, or any one of them, or of any substantial householder belonging to it), to issue his warrant to apprehend the supposed father, and to bring him before himself or some other of the justices and to commit him to gaol or the house of correction, unless he give security to indemnify the place from the support of the child or children, and also enter into recognizance with sufficient security for his appearance at the next quarter sessions, when he shall be continued on recognizance until the woman is delivered. (This enables him to dispute the truth of her deposition at the sessions if he thinks proper). If the woman die, or is married before delivery, or miscarry, or prove not to have been pregnant at the time of her deposition, he shall be discharged from his recognizance, or from prison, if he has been committed.

Sec. 2nd: Any two justices of the peace of the vicinity of the place where such a child is born on complaint of the overseers of the poor, (or of one of them, or of a substantial householder,) are authorized at their discretion to make an order for the relief of the place, and the support of the child, and to compel the mother or supposed father to give sufficient security that the child shall be supported without expense to the place, or to pay £20 into the hands of the overseers of the poor, which sum is to be applied to support the child, and if there be a surplus it is to go to other town uses. This order is to be signed by the two justices, and directed to the overseers of the poor. The father or mother disobeying this order are liable to be committed to the gaol or house of correction for 6 months, unless they give security to appeal the order to the next sessions, and to abide the result of that appeal. Sec. 3, im-



poses on any woman making a fictitious charge under this law against a man to the punishment of being sent to the house of correction, there to be whipped, and to remain for six months. Sec. 4, gives an appeal to the sessions, (and a jury trial) to any man who thinks himself wrongfully accused, from the order of the two justices. See 1 Stra. 503. 612, 2 Stra. 716. 1050.

The several duties of parents towards their children to maintain them in infancy and weakness, to protect them from injury, and to give them a suitable education are recognized by the law when they come incidentally in question. Thus, whatever a parent may expend for these purposes, his time, attention and money, would not be sufficient to entitle him to make any claim of a debt against his child, nor *vice versa* in case of the child supporting the parent, could he make him his debtor, unless upon an express contract, or upon a contract which from the circumstances of the parties might be fairly presumed to have been tacitly made. When indeed the parent advances money or property to children setting out in life, to enable them to succeed, in the nature of a portion, in case the parent should die without having made a regular disposition of all his affairs by will or otherwise: then the interests of the other children will be so far protected by the provincial statute, that the portions advanced will be deducted from the child's share, except the case of an eldest son\* who is not subject to this deduction. The Roman law did not permit a parent to disinherit his children totally, unless upon some reasonable cause which he could point out; but there is no such restriction in our law, and the parent may dispose of his property if he think fit without regard to his children, the wife's interest in the landed estate being the only subject over which he has

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\* There may be a doubt if the eldest son is excepted from this rule. See the subsequent chapters respecting inheritance.



not a disposing power ; but in the language of law, the heirs and children are favorites of the law, and their right of succession cannot be taken from them by dubious or ambiguous words in a will, the utmost certainty of the testator's intentions being required to transfer the property to a stranger. 1 Lev. 130, and by a provincial statute, posthumous children not provided for in a will have a share of the estate. The duty of protection is also left much to the natural feelings of parents, who generally are more likely to injure others in their anxiety for their offspring, than to neglect them in their weak and infant state. As in the case of a master, so a parent may maintain and assist his children in law suits without being guilty of the legal crime of maintenance, a parent is also justifiable in using a certain degree of force to protect his children if attacked by other persons, much indulgence being shewn to the natural feelings in such cases. 1 Hawk. P. C. 131, 83, Cro. Jac. 296.

As to the power of parents over their children, by our laws their authority extends to reasonable correction or punishment. Though the marriage of the child under age is not liable to be dissolved for the want of the parents consent, yet the law does not favor marriages entered into without it. During the child's minority, the father is entitled to administer his estate, (if he have any) to the extent of receiving the profits, and making necessary repairs. Yet he is to account to the child for the receipts when he comes of age. See 1 Bro. 388. While the child lives with him he is entitled to the benefit of his labor, as he is in the case of a servant or apprentice. This parental authority ceases when the child arrives at the age of 21 years, and in the case of a daughter it will cease on her marriage at an earlier age. The parent may delegate part of his authority over his child to a tutor or schoolmaster to the extent requisite for education, and may, by

deed or will, as we shall see in the next chapter, delegate a guardianship over his infant children, to continue after his decease. The child is bound to obedience to the parents while under the age of 21—to succor and assist them whenever they stand in need, and to pay them the tribute of reverence and respect at all times. These duties are chiefly left to the influence of natural and religious causes, as they can scarcely be considered a subject for legislation. An illegitimate child being considered by our law as not ascertained in a certain manner to be the child of his supposed father, is for that reason, (and for the discouragement of irregular connections) deprived of all claims upon the inheritance of either of his parents or their families, but he may be provided for by them by deed or will. In the same spirit the rule of our law is that he can have no heirs except his own legitimate issue, or those he chooses to appoint for himself—for as the law does not give him the benefit of inheritance from his father or mother's family, it will not give them a right to inherit any acquisitions he may make by industry and good behavior. Legitimate children must be called after their father's surname, but an illegitimate child may be legally called by whatever name he is commonly known by.

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#### CHAPTER IV.

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*Guardianship and Infants.*  
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An infant, in the language of our law, means any person under 21 years of age. The father, (and on his death the mother,) if not rendered unfit or incompetent by particular circumstances, has the natural guardianship of his children, with respect to their persons only, 1 B. C. 460. Co. Lit. 84 a 87 b 88, 5 Mod. 221; Kent Com. v. 1, 181. Guardianship by nature it is thought in the English law, only extends to the eldest son or heir apparent, and the guardianship for nurture applied to the younger children, but as in our laws all the children are heirs, the guardianship by nature extends to them all, and the guardianship for nurture is merged in it and superseded, see 1 Kent, Com. 182. The natural guardianship, where there is no father or mother living, will devolve upon the other ancestors, 2 Atk. 15, Carth. 386. Natural guardianship endures until the infant arrives at the age of 21 years. Hargr. Co. Lit. 88b. (12). By the provincial statute.

of 1758, 32 G. 2, c. 26. 1 P. L. 37. The father, whether he be of full age or a minor himself, is authorized by deed or will in writing with two credible witnesses to dispose of the guardianship of his children born or unborn, until they are 21, to such persons as he thinks proper in possession or remainder. The guardian so appointed may have an action of ravishment of ward or trespass by this act, against any one who detains the children from them, the damages recovered to go to the use of the children. The testamentary guardian has the custody not only of the lands descended or willed by the father, but of all lands and goods by any means acquired by the infant which the guardian in so-cage had not. Vaugh. 185, 186. 2 Fonbl. T. on Eq. 225. 5th ed. The testamentary guardian is directed and authorized by the Provl. act which is in pursuance of the act 12, Car. 2, in England to the same effect. A will merely appointing a guardian, need not be proved in order to act upon it, and a deed made in conformity with the act would be considered revocable and ambulatory, the same as a will, 1 Kent. Com. 182. Sec. 2, gives the guardian so appointed by the father, the custody of the profits of the real, and the management of the personal estate of the children during their minority, and empowers them to bring actions in relation thereto for the children. Sec. 4, 5, 6, authorize the Governor to appoint guardians chosen by minors above fourteen years of age, or of his own choice for children under that age, "when and so often as there shall be occasion." Security must be taken for the performance of their duties, and they are accountable to and removable by the Governor. Their power extends over both the persons and estate, and they may bring actions for the children. Sec. 7, makes the estate of a guardian responsible if he dies before accounting for the infant's property, and if the infants die before full age, their representatives or heirs are enabled to call guardians

to account. Sec. 8, is a saving clause, to prevent the rights of masters over their apprentices from being infringed by this act,

If the father or mother of a child having an estate act as its guardians, they are liable to account to the child for the rents and profits. See Co. Lit. 88, 3 Rep. 39. The guardianship *for nurture* belongs to the parents, and ceases at the age of 14 years. The guardianship *in socage* which also terminates at 14 years of age, and is called also guardianship *at common law*, takes place in England only when the minor is entitled to some estate in lands, and it then "devolves upon the next of kin, to whom the inheritance cannot possibly descend; as where the estate descended from his father; in this case his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the guardian"—the law of England not trusting the person of the infant in the hands of one who might inherit the estate. The Roman law on the contrary, gave the guardianship to the next of kin as one most interested in preserving and improving the estate. As by our Provincial laws, the real estate, unless otherwise disposed of by will or settlement, goes to the next of kin without making the distinction as to the derivation of the estate from the father or mother's side, it would appear that the guardianship in socage is not applicable\* or in force here, and as our laws of real estate approximate more to the Roman than the English, and the real estate devolves upon all the next of kin in equal shares, there is not the same ground for distrusting any of them, our act having then given to the governor the discretionary power of appointing guardians for infants under 14 years of age, we may conclude that in the exercise of that discretion, any argument against the appointment of a relative to be

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\* See 1 Kent, Com. 182.

guardian, arising from his possible interest in the child's death will be more than counterbalanced in ordinary cases, by the probable affection he will feel for his kinsman, and the greater care he is likely to take of an estate which may possibly fall to himself or his children. When the estate is very large, and the heirs of the infant few in number, there may be cause to be jealous—but generally, we should presume that the nearest relative of good character and discretion would be preferable as the guardian of the infant and his estate, according to the principles of our law—and the power the governor has of annulling the appointment if he see reason to find fault with the guardian lessens the risk of mismanagement. The chancellor also in his court exercises by right derived from the crown the general and supreme guardianship of all infants, as well of idiots and lunatics, to which we have alluded under the head of "Prerogative." The court of chancery will interpose when the parent or any guardian abuses his trust, to punish, or remove him, or even to substitute another in his stead. 3 Bac. Abr. 401 to 410, 2 Fonbl. Treat on Equit, 234 note. The offices of governor and chancellor have hitherto been united in this Province, but if they were separated, there would, it should seem, be then in most cases two concurrent jurisdictions over matters of guardianship, the one under the common law, exercised by the chancellor, and the other under our statute, exercised by the governor. It appears to be doubtful whether a guardianship is determined by the marriage of the infant, 1 Kent Com. 185, 1 Ves. 89, 3 Atk. 619, 1 Ves. 160. Though the marriage of a female, it would seem has the effect of terminating any guardianship over her. If a minor above fourteen does not consent to receive a new guardian, then no court will appoint a guardian except for the conducting of some particular suit, where the minor would otherwise be injured. Harris n. Just. Inst. lib. 1, tit. 23. sec. 2.



The office of guardian includes the care and custody of both the person and estate of an infant, but in the case of lunatics and idiots it is usual to consider these charges as separate.\* In the Roman law, he who had charge of the person was called the *tutor*, and he who took care of the estate, the *curator*. The authority of a guardian is the same with that of a father, for the time being, and the guardian is also bound to account to the ward, when of age, for all that he has transacted on his account, and is bound to make good all losses arising from his wilful neglect or misconduct. On this account, where the estates are large, guardians in England often apply to the court of chancery, act under its directions, and account annually with its officers. This course, which is also frequently adopted by executors and other trustees, where the estates are large, or where there is difficulty in settling, or doubt as to the most advantageous manner of doing so, is a safeguard to all parties concerned, as the court has a most extensive authority in matters connected with trusts of all kinds, and for that which is done by its direction, the trustees or guardians will be free from personal liability. See Toller on Exors. 182, 183. As an infant at fourteen, having no guardian may choose one, it is usually done by a deed of appointment, under seal. If an infant under fourteen should choose a guardian, it is prudent to have it formally ratified when the infant is fourteen, but our statute law has made such ample provision on this subject, and the Chancery possesses such large powers also, that it will seldom be necessary to resort to this method of election. Guardianship is a delegated authority, and consequently cannot be again delegated, excepting the instance of the father, Vaugh. 181. 2 Atk. 14. Vaugh. 185. 2 P.

\* But they are frequently confided to the same individual, and relations are generally preferred to strangers.—2 Madocks, Ch. 740.



Wms. 121, 2 Inst. 260. Nor will it descend to the heirs or executors of the Guardian, being a personal confidence. Cro. Jac. 99, Vaugh, 183. Plowd. Com. 293. But it seems if several be guardians of an infant, the office will go to the survivors, 2 P. Wms. 107, 121, 3 Bac. Abr. 407. It is usual however, to appoint expressly the survivors or survivor, guardians and guardian. It is the prevailing opinion, that guardians of every kind can make leases of the infant's lands, which will be valid, until the infant comes to the age of 21 years, 4 Bac. Abr. 139. 1 Ld. Raym. 131. 1 Leon. 158. Vaugh, 182. Plowd. 293. Cro. Jac. 55, 99. 2 Lev. 219, 2 P. Wms. 105. The chief benefit of appointing a guardian by election is to save expenses of applying to Chancery, but the Governors appointment here is comparatively unexpensive and should not be dispensed with in matters of considerable value. No person can claim to be guardian to a natural child, but the Court of Chancery will confirm a guardian in such a case who has been named by the father. 1 Madd. Chan. 334. 2 Bro. C. C. 583. 2 Cox. 46.

*Guardian appointed by Judge of Probates.*

A distinction is made in the spiritual courts (which correspond with our Courts of Probate)—between infants and minors. The former term is there applied to children under seven years of age, the latter from seven to twenty one. By common law the ordinary, whose powers belong here to the judge of probates, may *ex officio* assign a guardian to an *infant* (under seven) and the *minor* himself nominates his guardian who is admitted by the judge. According to the practice of the court the guardianship in either instance is granted to the next of kin of the child unless sufficient objection to him be shewn. This guardian is usually named to execute the functions of an infant or minor who is an executor, or is entitled to be adminis-

trator, until his arriving at the proper age to act in person. All Courts of Justice may appoint guardians to infants who appear before them in the situation of suitors, if there be no regular guardian, and this appointment is limited to the care of the particular cause in which the guardian is named. See 3 B. C. 427. The Provincial Statute of distributions authorizes the appointment of guardians by the Judge of Probates for all minors in order that there may be some person qualified to take charge of their distributive share of the lands and goods of the intestate parent or relation. The words of the act are "having appointed guardians in manner as hereafter may or shall be by law prescribed, for all minors, shall then out of all the residue of such real and personal estate distribute," &c. Prov. Act of 1758, 32 G. 2, c. 11, Sec. 12, 1 P. L. 12. The act respecting guardianship already described, which gives the governor power to name guardians, does not refer to the Judge of Probate, or take notice of the authority given to him, but an act of 1826, 7 Geo. 4, c. 8, 3 P. L. 254, 255, which repeals disabilities of Roman Catholics as to guardianship, authorizes the Judges of Probate to appoint guardians for "children or minors, according to the provisions of the act of 1758. 32 G. 2, c. 26, which directs the appointment of guardians by the Governor. Taking the common law practice of the court, and the effect of these acts in connexion, we may fairly infer that the Judge of Probate may appoint a guardian for an infant under 14, either to administer an estate, of which he is executor or administrator, for him during his minority, or to receive his distributive share of any estate to which he is entitled, taking security as directed by the act of 1758, c. 26, Sec. 4, 5, 6, and if the infant is above 14, may appoint a guardian of his nomination with similar precaution, but that his power is only supplementary to that of the father or the governor, so that if there be a guardian already appointed regularly by

either, he is not to appoint. The guardian appointed by the judge of Probate, would I think be liable to be removed by the Governor if cause be shewn. *ibidem*, Sec. 4, 5, 6, and by the act of 1826, c. 8, he is generally to have "the same rights and privileges, and to be subject to the same limitations and conditions" as guardians appointed by the governor under the act of 1758, c. 26.

### *Infants.*

The periods of life for various purposes in law, are different in males and females. A male at 12, may swear allegiance, at fourteen is said to be at years of discretion and may confirm or annul a previous contract of marriage and may at that age contract a valid marriage. If his discretion be actually proved may make a will of his personal property, that is to say of moveables, money, &c. The common law in England has been altered in this respect by the stat. 38 G. 3, c. 87, s. 6, which requires a guardian to act for an executor who is under seventeen, but it does not extend here. At seventeen he may be an executor, or act as the procurator of another under letter of attorney, (5. Co. 29, h. 1. Hal. Hist. P. C. 17. but see. Co. Lit. 172. Cro. Eliz. 637.) and at 21, he is at his own disposal, free from any parental authority, and may also at that age legally dispose of any property he possesses whether in lands or moveables. A female at 7 years may be betrothed,—at 9, is entitled to dower, at 12 is capable of contracting marriage, and may then make a will of personal estate, if proved to have adequate discretion, at fourteen is at the years of legal discretion, and may choose her guardian, at seventeen be an executrix, and at 21, dispose of her lands, &c. being then emancipated from parental control. If she is married under 21 years, she passes from parental control to be under that of her husband, but if she become a widow under the age of 21, she does not return

under the control of her parents, but remains her own mistress. In countries where the Roman law, or civil law as it is called prevails, the age of 25 is adopted in lieu of 21, but in our laws 21 is the period at which persons become entitled to their full civil rights, becoming then fully responsible also for all their own contracts.

Infants cannot sue or be sued in their own names alone, if they prosecute it must be by their guardian, or by some friend, who will undertake to sue for them and who in law is called *prochein amy*, a law French term, meaning near or next friend.—Suits brought by an infant in Chancery to call a guardian to account for misconduct may thus be commenced by *prochein amy*. If an infant be sued his guardian must be joined in the same proceeding.—Co. Lit. 135. Infants under 7 years of age, are not liable to capital punishment, from 7 to 14, they are also free from such heavy infliction, unless the wickedness of their design be such as to shew that they understood the evil of what they were about, and in some cases of homicide mentioned 1, B. C. 464, 5. Children under 14 were capitally punished. From 14 upwards, they are not considered in our law excusable on account of their youth.

At 16 years of age, the males become liable to perform militia duty, and road work. The poor and county rates to which all *inhabitants* are liable, are usually assessed on all above 21 who are able to contribute. At 21, a man is capable of being a Juror, of voting at an election of representatives or of being elected, if otherwise qualified. The general rule of law is that an infant cannot sell or dispose of his lands by will, deed or otherwise, and that he cannot enter into any contract that will be binding on him. There are, however exceptions to these rules some of which have been already noticed. Yet by English stat. 7 Ann. c. 19. Infants holding as trustees, are enabled to convey under

the direction of the Court of Chancery. An infant also may purchase lands, and on coming of age may ratify or annul the purchase at his option and so may his heirs, Co. Lit. 172. In some cases he may bind himself apprentice for 7 years or less, by deed—he may contract marriage, and any purchase or contract he may make for his necessary maintenance and education, suitable to his station and prospects in life, is fully binding on him. His contracts generally, though voidable, are not void, and such as on coming of age, he confirms, become then of full validity, 1, T. R. 648. An infant above the age of fourteen is liable to be criminally prosecuted for a riot, an assault and battery or any other flagrant breach of the peace, 1 Hal. P. C. 20, 21, 22. See 4, B. C. 23, 24. An infant unborn is capable of receiving a legacy. An infant will be bound by the partition of lands, if it be fair and equal, Co. Lit. 171. b.—an infant heir may be compelled to set out dower to a widow. <sup>a</sup>

An infant is liable for all torts committed by him, that is to say for all injuries he may inflict on other persons not dependant on contracts or promises. Thus he may be compelled to pay damages for slander, for an assault and battery or the like, 8, T. R. 336, 7. Bac. Abr. Infancy, H. he may be also sued in an action of detinue for goods delivered to him for a purpose which he has failed to perform, and which goods he refuses to return, 1 New Rep. 140.

## CHAPTER V.



### *Of Societies Incorporated.*

Besides the organization of mankind into nations, and families, and the relations thence arising of governors and governed, of public magistrates and private citizens, of husbands and wives, masters and domestics, parents and children, the wants and propensities of men produce among them many voluntary associations for the purposes of religion, education and commerce—as well as every other object in which many persons feel a common interest. In order to accomplish their intentions, these societies often obtain the interposition of legislative or sovereign authority, to confer on them such rights and privileges in their collective capacity as may facilitate their views, or reward their exertions. Such privileges are sought and conferred by enactment of the legislature (or by charter from the crown, which in this respect may exercise a legislative power within certain bounds\*) where

\* This, however, is rarely if ever done in modern times, except under the the terms of an act previously passed by the legislature.

the number of persons associated is great, the interests involved large, or the public benefit proposed considerable, and the objects could not be well obtained without peculiar legal immunities. Hence the origin of the word privilege, which in its etymology means a private law, signifying that it conferred on certain private persons or societies advantages not generally enjoyed, its ancient meaning extending it to all acts of legislation which placed any one man or set of men in a different predicament from the rest of the community, or which affected in any way the private rights of particular individuals either favorably or unfavorably. Societies then may be divided into 1. Prileged. 2nd. Unprivileged.

#### *Privileged Societies*

These are known to the English law by the name of corporations aggregate, there being also what are called sole corporations, consisting of one person only and his successors, who are incorporated by law in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the King is a sole corporation, and so are all those public officers upon whom, and their successors in office, some particular privileges are conferred by special laws, such for example as the power of suing, or being sued in their official character, making leases of public property, &c. In so far as these privileges extend they are considered in the phraseology of English law, as corporations sole. Thus bishops, churchwardens, &c. are corporations for certain purposes.

Colleges and Academies belong to the class of privileged societies, where they have been incorporated, thus the college at Windsor, and the yet unestablished College at Halifax, have been incorporated by the Provincial Legislature--so has also the Academy at Pictou, and the



privileges granted to these universities, where the power of conferring degrees is a part of them, enable them thereby to give to the graduates certain personal privileges. Thus a graduate is admitted to the rank of Barrister at Law after a shorter term of legal study than any other person—and it is usual, if not essential, to be possessed of a degree to enable a candidate for holy orders in the English church, to be made a deacon. So we have seen that the Provincial Law permits a person having a diploma or testimonial from any regular medical college or university to practice physic or surgery, without undergoing the examination, or obtaining the license enjoined on others. The value of this privilege of conferring degrees is the greater, as they are recognized as testimony of the education and capacity of the graduate, not only in the countries where they are granted, but also wherever learning is esteemed. Corporate powers have been bestowed on the trustees of schools by provincial acts, as has been noticed. Insurance, mining, canal, steam boat, and other companies of a trading character, have been incorporated in this country. These will all be particularly noticed, when we come to consider the laws of local and particular application which will be all distinctly specified, after the general laws are gone through.

When a corporation is established a name must be attached to it, by which designation it should sue or be sued, and execute all formal legal acts, though a very minute variation therein is not material. It may, however, have a name only by implication, as if the inhabitants of a town were incorporated with power to choose a mayor annually, though no name be given, yet it is a good corporation by the name of mayor and commonalty. 1 Salk. 191, and the change of name by a new charter will not deprive it of former privileges, 4 Co. 87. There are certain incidental privileges which follow an incorporation.

Such are, 1st. a continuance of succession, and the election of new members. These, however, as well as, 2nd. the power of bringing and defending suits, of granting or accepting grants in its corporate name, of 3rd, purchasing land, and having 4th, a common seal, and of 5th, making bye laws for its own regulation, are usually specified and limited in the acts or charters of incorporation; yet as they are necessary to the existence and usefulness of an incorporated society, the law will in many cases presume them to be annexed to a general grant of incorporation; and in the mother country where a variety of corporate bodies derive their original from prescription, ancient usage or charters of early date, it of more importance to trace out the incidents which by implication follow a vague charter of incorporation. In this Province incorporations are few in number, and of recent origin, and are all grounded upon clearly expressed enactments of the Provincial legislature, wherein provision is made for the rights and immunities they are to enjoy. In such cases we may conclude that those powers which were left out in the acts, were intended by the legislature to be withheld, and so there will be rarely if ever any room afforded to claim any privilege of importance, as annexed by implication only, to a grant of corporate powers. On the contrary, as the meaning of the legislature is the legal guide to interpret acts, and the clear expression of the powers granted, leaves no ground to suppose that other rights were meant to be conferred, on these general principles of construction, the presumption with respect to our acts of incorporation, would seem reasonably to arise that the words of the acts should be construed narrowly, rather than their meaning should be enlarged, especially as most of them tend to monopolies, which the law does not favor. Blackstone, however, from whose views we should hesitate in any way to dissent, considers the 5 powers above named as we have numbered them, to be "inseparably incident," to every corporation

aggregate, 1 B. C. 476. Whether this dogma can in any way be reconciled with the impressions we have ventured to state, may be doubtful. Yet, it appears better to state the views which arise in the mind of one endeavoring to reduce into system the laws of this country, which, to borrow a geological term, are in a state of transition, and to give the grounds of opinion, than to withhold them from an excess of deference to authority. If some of those views are erroneous, no injury can arise from them as they are always stated hypothetically, and the courts and the profession will eventually confirm or reject them: while an over cautious timidity would deprive the reader of the benefit of the suggestions which are obvious to the compiler of a work like this, and yet would not in all likelihood present themselves to the student, who investigated only detached questions in the course of business. It is not, however, to be understood, that the writer would go out of his direct path to start new opinions. This question respecting corporate rights is the first which has occurred in which he has seen the slightest cause to vary from the principles of the English text books—although he has occasionally given his own sentiments on questions not treated of by them, being entirely of colonial origin.

A corporation aggregate can only appear in the courts through the intervention of its attorney. It cannot be party to actions for assault and battery, or other personal injuries. It cannot commit crimes in its collective capacity, and consequently is not the subject of criminal indictment, or of the legal consequences of crimes. It cannot be an executor or administrator. It cannot be seized of lands to the use of any. It cannot be arrested, and therefore the compulsory process to enforce an appearance of a corporation as party in any suit, is by distress on its lands and goods. All these powers and liabilities belonging to persons in their natural and individual capacity, and a corpo-

ration being an artificial being. Where a corporation has a president or other superior, constituting by the terms of its erection an integral part as its head, in case of a vacancy in that respect, it cannot perform any function (except that of appointing a new person to the situation) until it is filled up. Co. Lit. 263, 4. Where no specific direction is given in the charter, or act of creation, the majority of votes binds the corporation. 33 Hen. 8, c. 27. The Court of King's Bench, (whose powers and functions belong to our Supreme Court,) exercises the legal power of interference to keep civil corporations within the bounds of their chartered rights, acting in this respect at the complaint of some person aggrieved by the usurpation of undue authority, or the non-performance of some duty incumbent on the corporation. The application usual is for a writ of *mandamus* to some member or officer of a corporation, directing the wrong complained to be done away with, and the rights of a corporation over its members, if brought in question are frequently tried in the preliminary arguments before the Court, as to the propriety of granting the writ.

A corporation may be dissolved by act of the legislature, by expiration of its charter if it be limited in point of time, by the death of all its members, by surrender of its franchises, or by forfeiture for abuse or neglect of the terms on which it was instituted. In the case of a corporation continuing to exercise privileges which it has forfeited, or of a body affecting to exercise corporate privileges to which it has not been entitled a writ of *quo warranto* lies to try the validity of its pretensions. Land granted to a corporation will, on its dissolution, revert to the grantors, unless otherwise stipulated, and on dissolution all debts due to or from it, are totally extinguished unless provision has been previously made to guard against this inconvenience. The legal rights and incidents of so-

cieties not privileged will be considered as they occur under the investigation of mercantile and other contracts, that of partnership especially, and in the observations on joint and common ownership of lands and moveable property. Incorporation is desirable in institutions of learning to give permanency and regularity; in commercial associations for banks, mining, &c. and in canal and bridge speculations, to limit the responsibility of the shareholders to the amount of their shares or subscriptions, as they would otherwise under our laws of partnership be collectively and individually responsible for all the claims and debts that might arise against an undertaking in which their share was very small.

The statutes of mortmain in England prevent any purchase or acquisition of lands by corporate bodies without a royal license. They were intended as a restraint upon the gifts and bequests, (so prevalent once) in favor of monastic establishments. Corporations were also excepted from the statutes of wills, so they could not take by devise. This rule has been softened by the statute 42 Eliz. c. 4, which authorized the devise of lands to a corporation for a charitable use. As we have not re-enacted the statutes of mortmain, and they were grounded on a state of circumstances entirely different from ours, and were evidently local and territorial in their character, we cannot imagine them to be in force in this province. Sec. 2, Kent. Com. 228. No exception is made in our statute of wills to prevent any devise to corporations. See 1 P. L. 9. 10. act 1758, 32 G. 2, c. 11, sec. 1. By a determination of the King in Council, it was settled that the statute of charitable uses did not extend to the Island of Nevis. Howel's State Trials, xx. 289. and by the English court of Chancery it was decided not to extend to the Island of Grenada, or any other colony, being a law of local policy adapted solely to the country in which it was made. 2 Me-

riv. 160, 163. So the Bankrupt laws, law of tithes, poor laws, the rule to prohibit two partners underwriting the same policy of insurance, &c. &c. considered not to extend to the colonies. 2 Meriv. 150, 152. So it may be concluded that a corporation is not precluded from purchasing or receiving gifts or devises of land unless when restricted by the terms of the act of incorporation.

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BOOK II.

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THE LAWS OF PROPERTY.

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CHAPTER I.

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*Of Property in General.*

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The first book having described the general nature of the government, the legislative authority, the public magistracy, the public laws in general, and several relations which regulate families, I shall next advert to the rules which attend the acquisition, management, and transfer of property.

The origin of the right which is exercised of exclusive ownership to land and moveables, has furnished an extensive topic of discussion to writers upon natural law. It may be sufficient for our purpose to notice the rules by which in practice this right is recognized. With respect to land, or as it is termed in the Roman law, immovable property, the law of nations prescribes certain regulations concerning the ownership of the various portions of the earth. The first of these which is also applicable to individual rights, arises from occupancy. The possession of land on the part of any nation to which no other has a prior title, is held to confer a right of ownership—but this possession must be a real and actual occupation,



as a momentary or nominal possession might be taken of a country in the name of any sovereign or state, and yet should not be considered as conferring any right, because the reason of the rule is founded on the principle that the earth being intended for the use of the human race, any portion of it which takes the possession of a particular unoccupied territory, does so for the extension of subsistence to its numbers, and as the bounty of Providence has made the earth wide and large enough for its inhabitants, those who are thus extending themselves peaceably over its surface, should not be disturbed on any pretence. Prior discovery has been set up at times as affording a claim to uninhabited countries, but seems to have but little foundation in reason. Conquest is also a species of title sometimes assumed to territories, but this kind of title having its origin in force and not in right or justice it seems to be always open to objection. There are cases, however, in which conquest may afford a very legitimate ground to establish a right to territory. Thus where one nation uses the utmost exertion to deprive another of its territories, and in the natural self-defence of its possessions and the lives of its subjects, the attacked power is under a necessity of conquering, and holding adjacent territories, which its adversaries employed as a source of attack and annoyance ; the possession of such conquests, (especially when confirmed by treaty and cession on the part of the defeated,) will make out a title having every ground of justice and propriety, which subsequently will be confirmed beyond doubt, by length of time and improvement bestowed upon it.

A question has often been suggested by theoretical men, as to the right of the European nations to dispossess the aboriginal inhabitants of America, of the territories of the new world. I will not enter into any inquiry as to the justice of the invasion of the agricultural and comparative-

ly civilized countries of the southern continent by the Spanish and Portuguese nations, but confine myself to the case of these Northern regions, where our own nation and that of France took possession of an uncultivated soil which was before filled with wild animals and hunters almost as wild. It might with almost as much justice be said that the land belonged to the bears and wild cats, the moose or the cariboo, that ranged over it in quest of food, as to the thin and scattered tribes of men, who were alternately destroying each other or attacking the beasts of the forest. But the course of events has nearly extirpated them from the soil; and the subject of their wrongs, for many they had to complain of, is now matter for the historian, rather than for the jurist. I do not think that they themselves had any idea of property (of an exclusive nature) in the soil, before their intercourse with Europeans. Much injustice however was done to those simple creatures by those who communicated to them the artificial vices of civilized society. This evil communication by accustoming them to intoxication, and its attendant miseries has done more to destroy them entirely than any other cause.\* We

\*Since the above was written I have had the loan of Chancellor Kent's commentaries on American law, from a professional friend, and feel gratified to find that a corresponding view of the nature of Indian rights, is taken by that eminent writer, and has been recognized by the courts of the United States. He enters more fully into the question, see his 3rd volume. p. 307 to 320, and quotes the opinion of Vattel. *Droit des gens*. 6. 1. Sec. 81, which confirms the principle. The interests of these unhappy races were much protected by the spirit of christianity and benevolence, which prevailed among the early settlers from Great Britain in these countries as Mr. Kent has shewn, and we find the legislature of Virginia as early as 1662, c. 10—forbidding and annulling all bargains for their lands entered into by private persons. This was done to prevent their being robbed of their hunting grounds under pretence of purchase—and among the ordinances of New England is one which declares their right to all lands on which they had settled and improved to be undoubted.

will assume occupancy as the original foundation of the rights of property in general, as indeed it may be said that all other kinds of title are either occupancy under some other name or incidental to it. Thus conquest is occupancy attended with force. Accession gives land which is newly formed by any process of nature to those in occupation of the adjacent soil. From this principle many of the rules which govern society with respect to property appear to be derived. The alienation of any part of the territory acquired by a nation, by this means, requires the will of the whole nation expressed through its sovereign authority to render it valid, because the occupation is the occupation of the whole nation, and therefore the owner of a part cannot aliene it to a foreign power or person without a legislative act of his own state.

The death of the father of a family does not cause the land occupied by him to revert back to the state of vacancy in which he found it, but by natural right defined and protected by civil institutions, the occupation is continued by its remaining to his family. See 2 B. C. 10. & 1 Brown Civ. and Ad. Law, 168. From the same causes delivery and possession become often very important in the transfer of property, and in the proof of a contested ownership.

*In what things Property may exist.*

There are many things which are not to be considered in the light of property, being such as are intended for the general use of the whole human race, such as the ocean, the air, &c. 2. Such as are public to the whole province or nation : as the running streams,\* harbors, bays—the the public roads, &c. Though in a modified sense a cer-

\*Vide Magna Charta, as to the public right to the use of running streams.

tain dominion or property may exist in these. Birds, beasts and fishes, except they are by taming, eaging or other means brought into possession, are not the subject of property. The crown being the original proprietor of the whole of this province, all titles to property in the soil, forests, mines or their productions must either remain in the prerogative or be derived from it to some corporations, or private persons. All property to lands, therefore must be commenced as to title in gift, grant or sale from the crown either express or implied, and all landed property to which no such title can be established, remains the land of the crown. The produce of agriculture, manufactures and fishery are subjects of property.

*Division of Property into Real and Personal.*

The law of England distributes property into real and 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.\* The difference of the rules of inheritance in England, and also of the other laws concerning real or landed estate, from those which govern personal or moveable property is very great, insomuch that it may be generally found, that what is law with respect to the one class of property, is not so with respect to the other, but in this province the laws of property have almost effaced those artificial refinements of the feudal system so that lands and moveables are affected by the same liabilities and descend in the same manner, with few exceptions but those which arise from due attention to the natural difference between them. Real estate or things real

\* The civil law discriminates things (*in patrimonio*) or private property into things corporeal, and incorporeal—and subdivides things corporeal again into moveables and immoveables, which division appears to be more simple and natural, than that of the common law. See 1, Brown. Civ. and Adm. Law, 173.

may be considered as lands, tenements or hereditaments. 'Land,' includes in its legal meaning all immoveable property. 'Tenement,' includes every thing of a permanent kind whether corporeal or incorporeal which may be holden, thus an office, a rent, a right of common as well as houses or lands, are capable of being included in the term. Hereditaments\* is the most comprehensive of these expressions as any thing † corporeal, or incorporeal, real or personal, moveable or otherwise, which may be inherited, comes within its meaning. Even a condition the benefit of which may descend to heirs is an hereditament. Land includes all corporeal hereditaments, except moveables. Land as a general term of law includes not only the soil but all that is built upon it or grows on it. Thus woods houses, grain, &c. while fixed to or growing on the ground is included as a part or accessory of the land. Water is also considered as a corporeal hereditament, under the name of land covered with water, in which form it is to be sued for. Land also includes every thing under the soil as mines &c. as by the maxims of law, the right of property is not confined to the use of the surface, but extends upwards and downwards indefinitely.

In some of the old colonies many statutory regulations were passed defining the rights to waste and improved lands. In Maryland, there was an act which regulated the mode of surveying lands, and the right of occupiers under grants, with great minuteness. See Maryland act of, 11, Wm. 3. 1699. p. 93, where marsh land on rivers and creeks, is declared to belong conditionally to the owner of the adjacent *terra firma*, and no patent to another to be made of it until he is notified to take out a grant and refuses. Ma-

\*Derived from the latin words, *haeres*, heir, *haereditas*, an inheritance.

† Corporeal, i. e. material, substantial, which is the object of the senses.

ny of the colonies in the 17th century adopted a method of preserving the boundaries of townships and large tracts of land from dispute by making periodical processions round the bounds, a custom usual as to parishes and manors formerly in England and there called perambulation or riding the boundaries. Our laws have in part adopted these regulations. See vol. 1, 159. In the surveying of lands there was a custom in all the colonies of giving an allowance of 10 per cent to the line in case it was necessary to bring it to a remarkable rock, tree, brook or other natural object of more or less permanency, and sometimes to make up for the inferior quality of the soil in a lot, or the part of it useless to the cultivator, as a lake or a pond. Under the shelter of this usage much irregularity and unfairness occasionally existed, sometimes some hundreds or even thousands of acres being occupied, beyond the real extent granted owing to the surveyors carelessness or favor. The practice has for these causes been lately abandoned, but it prevailed here for a long time, and owing to this and also to the altering from year to year of the variation of the compass in North America, it often becomes exceedingly difficult to identify the boundaries of the original grants, the old surveys and the modern possessions. There are also other sources of difficulty in the manner in which most of the surveys formerly, and some even now are made, viz : by merely running out the front line on a road or a river, and not actually running out the side lines, except perhaps for a few rods, and not at all the rear lines. In these cases the occupation goes on at random, and difficulties afterwards arise to ascertain the rights of the owners of adjoining lots. The compass too, in a country so full of iron ore of rich quality, is very apt to vary considerably in running out a short line, and the surveyors having not always attended to the correction of the lines by running them back to their place of starting, this circumstance creates much error. The difficulty



of surveying accurately among thick woods and swamps, has caused much of this negligence formerly, as the remuneration was small and the labor great.

*Of Incorporeal Hereditaments.*

An incorporeal hereditament is a right arising from or out of something corporeal, whether it be moveable or immoveable. It generally is some beneficial interest which one man possesses in the lands or goods of which another is the direct owner. The learned commentator enumerates ten examples of this description of property, some arising by the operation of law, and others resulting from the acts and agreements of individuals. Of these the 1st is Advowson—a subject of greater importance in England than it is here. Advowson is the right of presentation to a church or other ecclesiastical benefice.—This power is in very many instances private property in Europe, but not so here, as the acts of the Province confer the power of appointing the clergy of the established church, either on the governor in his official, or the parishes in their corporate capacity, and the other churches in the province elect their own ministers. An advowson is therefore not to be considered as an hereditament in our provincial law. 2. Tithes. No such right exists in this country by any law or usage.

3. *Common.* The right of common is a profit which a man hath in the land of another, as to feed his beasts, to catch fish, to dig turf, to cut wood or the like. These rights forming an extensive head of English law, arise chiefly from the custom of manors or other prescriptive rights in the old country. But none such exist here, yet we have commons regulated by Provincial Statute, none of which appear to come within this definition, as the persons entitled to the use of these commons are in some cases also



owners of the soil of the common under grant from the crown, or the common has been granted by the crown to some trustees or corporation for the benefit of the inhabitants of some township, who are entitled as well to the property of the soil as to the use of it under such grants. See vol. 1, 153. But common may in this country be created by deed as an incorporeal hereditament, as one man may grant such rights in his lands to a number of others, and in that case the rights arising to the commoners under such an instrument, would be construed by the language and intention of the deed, and not by the laws respecting commons in England, which arose out of the peculiarity of feudal arrangements. See Co. Lit. 122, a.

4. *Ways.* This right to the use of private ways may arise by permission, as when the owner of lands grants to any person liberty to pass over his grounds. This being matter of compact, the extent and duration will depend on the form and terms of the grant. It cannot arise by prescription in this country. It may result by operation of law from circumstances as if the land of A be entirely surrounded by that of B. there A must necessarily be entitled to a right of way across B's ground, as otherwise he could not use his own.

5. *Offices.* This is the fifth description of incorporeal hereditament, specified by Blackstone. In the mother country, public situations have been granted in different ways, so as in many instances to become the property of individuals or families; but in this province offices are held at the pleasure of the crown, or are otherwise regulated by acts of assembly, so that an office seems not to be a hereditament in Nova Scotia, not being the subject of inheritance.

6. Dignities are also classed as incorporeal hereditaments, but our provincial laws recognize no hereditary office or dignity except that of the Crown itself, though undoubtedly if an hereditary Peer of the mother country is at any time resident or sojourning in the province, courtesy would entitle him to the respect due to the important office in the Great Senate of the nation, which he holds by descent, but we have no positive law on the subject.

7. *Franchises.* This is the next head in the commentaries. It is there defined to be "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject." Such a right must originate in a grant from the crown, either express or presumed. Corporate rights are one class of franchises, or liberties as they are also called. There are also a great variety of exclusive privileges which come under this title, and subsist in England under ancient laws and usages which are not in use here. Such are franchises under the forest laws, free warrens, free fisheries,\* &c. The *charta de foresta*, and *magna charta*, contain provisions which restricted the crown from conferring exclusive rights of this description, as subversive of common right, and detrimental to the interests of the crown. Most of the rights yet subsisting in England to this kind of franchise were granted or assumed before these wholesome provisions were made for the general good. In point of fact the crown carefully avoids at the present day (at least it is so here) the alienation of any part of its prerogative rights or authority in favor of private persons.

(*Fishery.* At Common law the owners of lands on the bank of fresh water rivers had the exclusive right to fish,

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\* This means an exclusive right to the fish in a river granted to a private person.

and the ownership of the bed of the river to the centre line of the current—*ad filum medium aquae*, the owner of land on both sides of course owned the river and the sole right to fishery, as far as it went through his lands. Nevertheless the public right existed for all persons to use such streams as a highway for boats and rafts, and if the owner erects any obstruction to this right of water way, it is considered at common law a nuisance and any one may lawfully remove it. But wherever the tide ebbs and flows as in arms of the sea, bays, harbors, creeks and navigable streams, there the public have a right to fish, as well as a right of way, and neither the crown nor any holding under grant from it can interfere with this natural right. It is true that the earlier sovereigns of England were led occasionally to make grants to private persons of the exclusive use of navigable streams, that is of those where the tide flows, but the practice was condemned and abolished by magna charta, c. 47, and by the 2d and third charters of Hen. 3.—c. 20 and 9. Hen. 3, c. 16, and no grant since the reign of Hen. 2. of any exclusive right of this kind in tide waters is valid in England, much less can any such claims exist in the colonies. See this subject carefully investigated in Kents Com. 3 vol. 329.

It has been held in England, that no person has a right to cross another's land in order to get at the sea, as for example, for bathing, 5 B. & A. 268, but when the beach or shore of the sea below high water mark is not expressly granted away as private property for any special purpose it is considered at common law as a natural highway, being the property of the crown and not of the grantee of the land adjoining, and it is very generally used as such for a variety of purposes, by the inhabitants of our shores in Nova Scotia. The common law principle that navigable rivers are such as the tide ebbs and flows in has been modified in its reception in Pennsylvania, as inapplicable in

that respect to the magnificent streams of the Delaware, Susquehannah, &c. above the flow of the tide—though it is generally received as the rule in the rest of the United States, 3 Kent, Com. 336.

The civil law made all streams where the flow of water was perennial, public property, and their banks were also considered to be for the use of the public at large, and the French law allows the use of towing paths along their sides. The statute law of this province has, as we have seen in the first volume, made some rules for the convenience of the public, on the subject of river fisheries. Vol. 1, 151 to 153.

Mr. Kent says, that the “distinctions between common of piscary, free fishery and several fishery seem to be quite unsettled in the books, and the authorities referred to by Mr. Hargrave throw embarrassment in the way of the attempt to mark, with precision, the line of discrimination between these several rights of fishery.” 3 Com. 329, 330. See Co. Lit. 122 a. It has been decided in the courts of the United States, that the owners of land adjacent to navigable waters, have the exclusive right of drawing the seine and taking the fish on their own land, and that in the case of an island or even a rock in tide waters, none but the owners have a right to the use of it for fishing purposes. 3 Com. 335.)

8. *Corodies*.—An obsolete class of rights—they consisted of certain provisions which a monastery or an abbot, for example, was bound to supply for the maintenance of one or more persons by some agreement or arrangement with its founders or benefactors.

9. *Annuities*.—An annuity is a yearly sum chargeable on the person of the grantor. This (if for life or lives) may

be a real estate\* of the party who receives, but it is but in the nature of a personal debt as respects the person bound to pay it. Thus a formal deed granting a yearly payment will not bind real estate, if none be expressly mentioned to be bound in it; but if land be bound to the payment then it becomes a rent-charge. An action of debt does not appear to lie for an annuity, Dr. & St. 108. 9, but a writ of annuity. Co. Lit. 144, b.

10. *Rents*—Are the last species of incorporeal hereditaments described in the commentaries. Rent (according to the common law principle derived from the feudal maxims respecting tenure) is understood to be a return or acknowledgment for the possession of some land or other corporeal tenement. It is defined as "*a certain profit issuing yearly out of lands and tenements corporeal.*"† Rent may be payable in money, in goods, or in services. It must be certain and defined, or capable of being reduced to certainty, at the instance of either party. It may be reserved by the week, month, year, or any other fixed period. It cannot be reserved to a stranger but must be to him, conveying the estate, that is the lessor and his representatives. Co. Lit. 143, b. It cannot be reserved to issue out of, or be chargeable upon an incorporeal inheritance. Co. Lit. 144, a. as for example out of a right of fishery. At common law there are three kinds of rent. 1. Rent ser-

\*Real estate in this instance is a term applicable to incorporeal property, though Blackstone confines "things real" to immovable property.

† According to the civil law, rent is considered not as an acknowledgment for the possession of another's land, but as a proportion of the *products* of the land payable by the tenant to the owner; on this account, when tempest or fire, &c lessens the productive value of the premises under lease, the tenant is not excused by the common law from payment of rent, but by the civil law such incidental deterioration of the property would be admitted against the claim of rent—See 1 Brown, Civ. & Adm. Law. 179, on the subject of rent.

vice, which consists of some personal service to be performed by the tenant for the lord of the soil, with or without any money or other payment annexed. For such service the landlord could distrain at common law, if the rent were not duly paid. 2. Rent charge is a rent reserved\* out of land, the owner of which has parted with his whole estate in it, and the rent is made payable by the purchaser and his assigns, with a clause of distress in the conveyance, in case the rent lie in arrear. In this case, the right to distrain arises not from common law, but from the clause of the instrument to that effect. 3. Rent seck, is a rent reserved by deed in fee, not containing any clause of distress. Distress is incident at common law, to leases for terms of years, although not specially reserved. Co Lit, 204, b, Dr. & Student, 150. The Eng. Stat. 2 Wm. & M. c. 5, gives it in leases for lives or years generally, which the Prov. act, respecting distress seem to recognize indirectly. Rent is at common law payable on the land demised except in the case of a lease from the crown, or where it is otherwise agreed on. The tenant has until the close of the day on which the rent has to be paid to settle it. See 1 P. Wm. 178, The rules of law respecting tenants, and the remedies by distress, or suit for rent, will be found in subsequent parts of this work.

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\* In a feoffment there can be no reservation of any part of the annual profits themselves to the feoffor. Co. Lit. 142 a.



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## CHAPTER II.



### *Tenures.*

The highest interest which any man can have in property is the unlimited and independant ownership, and control over it. This description of estate which was in early times usual, both as regards landed and personal property, underwent a considerable change in most parts of Europe, after the destruction of the Roman empire by the northern invaders. Under the empire, the property of each individual, whether in goods or land, was held to be absolute and uncontrolled, except where by some compact or act of his own, he had given to some other person a claim over it. But when the invading hordes had subjected any of the former provinces, their military chieftain or king parcelled out both the territory and its inhabitants in large grants among the subordinate chiefs who had led their bands under him to victory, retaining in his own possession a considerable domain, of which he became the immediate lord. In return for these grants, the chiefs were bound to fidelity to him both in peace and war, and



each was under obligation to repair to his standard with his troop of vassals, and retainers, and to maintain them, whenever the defence of their new acquisitions should require it. Each of those chiefs was a king upon a small scale, within his allotted portion of the kingdom, parceling it out again in smaller divisions among his sub-officers and soldiers of the conquering race, upon terms of obeying and being faithful to him, and reserving for himself a demesne held more immediately in his own hands. These allotments were called *feoda*, feuds, fiefs or fees. On breach of the fidelity due from the crown vassal to the king, or from the inferior vassal to his lord, the rights of the traitor were forfeited, and the land reverted to the king or the lord who had been betrayed by his tenant. An oath of fidelity or fealty was added to prevent the breach of these conditions by the effect of religious awe.

The introduction of this connected system of tenures and dependancy, under the name of feuds, procured the name of allodial lands for all that were not embraced in some grant of this kind, and as those chiefs or great crown feudatories could afford protection to those who became their tenants, many of the conquered who were not dispossessed of their lands, yet voluntarily made themselves tenants to some great noble among the victors, to procure his countenance and support against injury. Thus the system of feudal tenure rapidly spread, and in some kingdoms left but few traces of the former description of title. However, our Saxon ancestors in England, had not fully received it, and it was in consequence of the Norman conquest that it obtained a complete footing in England. Hence it became a fundamental principle of English tenures, that the king is the universal lord, and original proprietor of all the lands in his kingdom, and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him to be held

upon feudal services.' This maxim Blackstone terms a 'mere fiction.'—2, B. C. 50. However, it had many of the consequences of a reality to the nation as the reasoning and decision applied to real estate was implicitly derived from it. Feudal grants were made by words of pure gratuitous gift and perfected by open and notorious delivery of possession of the lands. The tenant besides his oath of fealty to the lord usually on receiving the grant, did homage for it, (openly and humbly kneeling to him being disarmed and placing both hands within those of the lord,) by stating that he became "his man" with other ceremonies of submission.

In pure and regular feuds, the tenant was bound to attend the lord's court in time of peace. In this court each lord was judge in his own territory, an appeal lying from him to the king's court, where he and all other immediate tenants of the crown were bound in their turn to attend and receive justice as vassals. The services in war were generally forty days in the year, their campaign being then usually of but a few weeks duration. The barons or great lords often making war upon each other, the vassals were bound to follow their lord on these occasions; except when the immediate lord raised a revolt against the king, or other lord paramount under whom he himself held, in which cases the tenant was not bound to fight for him. These feuds were not at first hereditary, the lord disposing of them on the death or treason of the vassal, as he thought proper,—usually preferring the eldest son or younger brother of the deceased as the best fitted to supply his place and render the military service. In process of time however, compact and custom introduced the rule of descent in favor of the eldest son. He, on entering into his father's possessions, paid a fine to the lord, and if an infant, became the ward of the lord, who managed the property, and married him off as he thought proper. Feudal inter-

ests could not be sold or given by will without the lord's consent.

*'Ancient English Tenures.'*

The ancient English tenures are classed into four species of lay tenure besides one ecclesiastical, viz : knights service, socage, copyhold, ancient demesne and frankalmoin.

1. *Knight's service.*—This was a tenure purely military, and was introduced very extensively in England in the middle ages. The tenant was bound to perform 40 days service as a knight (in every year) if called upon, or to furnish a knight in his stead. It is also called tenure in chivalry. In some cases where the land was less in value than what was called a knight's fee, that is, less than would support the tenant, he was bound to perform 20 days military service for his lord. Those who held of the crown were called tenants *in capite*, or chief tenants of the king. (Where there was a tenant of any kind, and his lord held under a superior, the superior lord was called the lord paramount, and the inferior, the mesne lord.) To this tenure there were seven inseparable incidents or consequences. 1. aids ; 2, relief ; 3, *primer seisin* ; 4, wardship ; 5, marriage ; 6, fines for alienation ; 7, escheat.

*Aids* were due, 1. to ransom the lord if he were a prisoner ; 2, to help to pay the expense of making the lord's eldest son a knight ; 3. to help to form a portion for the lord's eldest daughter.

*Relief* was the sum due to the lord, by the heir, before he was permitted to enter upon the estate of his ancestor.

*Primer seisin* was incidental to tenure *in capite* only. Under this name the crown was entitled in addition to relief, to take one years profits of the lands on the death of every tenant in chief.

*Wardship* is the right which the lord had, to have the profits of the land, and the custody of the infant heir of a knight's fee. The heir was to be maintained but had no claim on the lord for the surplus profits during minority. On being knighted, this wardship ceased and the young tenant in chivalry was compellable to accept knighthood, (if a male) or else to pay a fine for refusal.

*Marriage*, was an authority the lord had to insist on the tenant's marrying (while under age) such person as he should nominate. In case of refusal the lord had a right to damages for the loss of the profit, he might have obtained by the marriage. This in the case of heirs or heiresses of large estates was usually a very considerable amount.

*Escheat* was the right the lord had to repossess his grant on the failure of heirs of the feudatory, or on his committing treason or felony. These events dissolving the implied contract between the lord and the vassal, the land reverted or returned back to its former owner.

*Tenure by grand serjeanty* was a kind of knight's service, but in lieu of military service, the tenant was to carry the king's banner, be his butler at his coronation, or perform some nominal and trifling service of that description. It differed little in its incidents from the other tenures in chivalry. The military services became afterwards reduced to an assessment in lieu of personal duty under the name of scutage or escuage.

#### *Modern English Tenures.*

The tenure by knight service with all its incidents, having become the source of multiplied oppression, was discontinued during the great civil war, which its results had

tended to excite and after the restoration it was swept away by legislative enactment. The statute 12, Car. 2, c. 24, declaring "that the court of wards and liveries and "all wardships, liveries, *primer seisins*, and *ousterlemains*, "values and forfeitures of marriage, by reason of any tenure of the king, or others, be totally taken away. And "that all fines for alienations, tenures by homage, "knight's services and socage, and also aids for marrying "the daughter or knighting the son, and all tenures of the "king *in capite*, be likewise taken away. And that all "sorts of tenures, held of the king or others, be turned "into free and common socage; save only tenures in "frankalmoign, copyhold, and the honorary services " (without the slavish part) of grand serjeanty."

Grand serjeanty has been already explained, petty serjeanty resembled it in some respects, being a holding of lands from the king, on condition of paying him some trifle such as a glove or a hawk, yearly—but it was of the nature of free socage. Copyhold tenures exist to some extent to this day, in England, and arose from the situation of the conquered people, who in feudal times were slaves annexed to the soil and sold and transferred along with it, being called *villains* or *serfs*. Each lord of a manor had a number of these on his estate and by degrees they obtained leases and other privileges which vary in every such manor or lordship. The personal slavery has long since vanished, but the title to the land has continued to carry along with it many of the rules and usages that existed in the time of slavery. Thus the modes of transfer and the rules of inheritance as regards copyhold lands, are different in most respects from those which regulate freehold or leasehold lands and differ among themselves according to the ancient customs of each manor. The land formerly held by the crown, and then cultivated by the immediate serfs of the crown, is now called *antient demesne*, and is a

kind of copyhold tenure, carrying along with it its peculiar rules of inheritance, and transfer, although the connection with the crown has ceased. *Frankalmoign* is a tenure by which ecclesiastical corporations held land on condition of praying for the souls of the donors. There are other tenures arising from peculiar local customs in parts of England, such as Gavelkind in Kent, and borough English, but the statute of Charles has reduced almost all freehold estate into free and common socage. The tenure in free and common socage was a holding from the king or some mesne lord. It was subject to a rent of some kind in all cases, though for this purpose fealty alone was in some titles considered as rent. It was subject in all cases to the oaths of fealty. It was subject at common law to aids, but these were abolished by the statute of 12, Charles 2, before quoted. Relief was due upon it, to the amount of one year's rent on the demise of the tenant. It was before the statute, liable to *primer seisin*. It was subject to a kind of wardship which has been described in the chapter of Guardian and Infant. It was subject to Escheat. The lands granted by the Crown in this province have been given in free and common socage in accordance with the statute of Charles 2. A copy of the usual form of these grants is in the appendix.

*On the nature of the tenures of lands in Nova Scotia.*

We have seen that the general principle of the feudal system considers the king as the absolute lord of the whole soil of his kingdom. Thus the allodial title to land was in England formerly abolished, as this principle of the king's seignory is treated as a maxim of English law, see Co. Lit. 1, & 98, and 2 B. C. 105. Yet we find that in effect much of the land continued to bear in reality all the characteristics of allodial land, which it had been among the Saxons and under the Roman Empire. The Gavelkind land in



Kent particularly, remaining purely allodial, inasmuch as the inheritance was divisible among the children, and even the escheat did not attach to it for felony, the maxim of Kentish law being "the father to the bough and the son to the plough," and much of the socage lands elsewhere being subject to few marks of tenure, as fealty to the king which is insisted on by some writers, was no more than the obedience to the head of the government due from all subjects. Although the French Norman maxim "*nulle tenure sans seigneur*." "No land without a lord," was transplanted by the conquerors into the English system of jurisprudence, yet the allodial tenures were allowed to remain over some of the lands, under the same name in Germany.\* And it will be easy to perceive on a careful enquiry into the ancient and subsisting English tenures, that the maxim of the universal seignory of the crown was adopted rather to produce uniformity in law language and forms, than for any other purpose.

The lands in the province are all either the property of the crown, or held by titles derived under it, the rights of the Acadian French settlers having been extinguished by the Provincial act of 1759, 33, Geo. 2, c. 3, 1 P. L. 44, which recites in its preamble, that this province and the property thereof, always belonged of right to the crown of England, both by priority of discovery and ancient possession, that no legal right or title could be deduced except by grant from the English crown, to any part of the land in Nova Scotia, that the French king by the treaty of Utrecht in 1713, had ceded to Queen Anne, the province and all rights therein of himself or his subjects, that many of the French by remaining in the province beyond the

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\* Si de allodialibus et bonis liberis sit sermo, filiae in bonis "paternis, non modo in defectum masculorum, sed cum ipsis "æquis partibus succedunt." Actes et memoires des negociations de la Paix de Ryswick, tom 3 p. 60, c.



time limited had become British subjects, but had refused to take the oath of allegiance, and had committed treasons, rebellions, and murder, by joining and aiding their countrymen and the savages, in attacks on the English colonists; and had finally been removed from the province by the governor to save the colony from destruction. That the governor had granted some of the lands these French Acadians had occupied, to subjects from the neighboring colonies, who had become settlers here, and that doubts had arisen among these new settlers respecting the title of the former French inhabitants. To settle which, it went on to enact in the 1st clause, "that no action shall be returned in any of his majesty's courts of record in this province, for the recovery of any of the lands, within the same, by virtue of any former right, title, claim, interest or possession of any of the former French inhabitants, or by virtue of any right, title, claim or interest, holden under or derived from them, by grant, deed, will, or in any other manner whatsoever." 2. "And be it further enacted, that when any action shall be brought for the recovery of any lands within this province, and it shall appear upon evidence, that the grounds of such action is founded upon any such right, title or possession, of the said French inhabitants, or derived from them as aforesaid, that then this act may be pleaded in bar to all such actions: and all his majesty's judges and justices of the said courts, are hereby required and enjoined, upon such plea and proof thereof, to dismiss such action, and award costs for the defendants."

Title to land is derived in most cases under grant from the crown under the great seal of the province, with the conditions, reservations, and quit rent as in the copy of a grant in the appendix. In some instances the early governors granted the land in their own names instead of that of the king, whom they represented; but this defect

has been cured in retrospect by the act of 1791, 31 Geo. 3, c. 10, 1 P. L. 287, 8, which directs that all grants of land purporting to be grants in fee simple, made by any governor, lieutenant-governor or commander-in-chief, *before the date of the act, under the great seal of the province,* shall convey a title in fee simple forever, “*notwithstanding*” any defect in the form or words thereof, and notwithstanding that such grant or grants might not express his majesty’s name therein. Provided that lands specified in such grant or grants were vested in his majesty, by inquest of office or otherwise at the time of making the same, and provided also that any defect in form or words as aforesaid, shall not be construed to extend said grant, beyond the limits intended by the true intent and meaning thereof, any thing herein contained to the contrary notwithstanding.” The reservations and terms in many of the early grants differ in various points from those more recent, but they all usually contain conditions of making settlement or cultivating the land.

In the town and peninsula of Halifax, the lots of land were originally granted by a simple registry of the names of the owners in a book kept by the government, opposite to the number of the lot. This description of grant was declared valid by the provincial act of 1760, 34 G. 2. c. 8, 1 P. L. 60. which enacts that every person having a claim by such registry (except those who before the act were absent from the province or neglected for 7 years to improve their lots) should “be entitled to a full and absolute estate in fee simple in the lands so registered, any want of form in the said registry notwithstanding.” This act is confined in its operation to lands in the peninsula of Halifax. Lands have frequently been granted to the colonists by what are called licenses of occupation, being written licenses signed by the governor, to occupy a particular piece of land. These according to the practice of

the government and the usage of the colony are considered as absolute grants in fee simple, although expressed simply as a permission to the individual to occupy the ground. They were frequently granted in the early periods of the settlement, but more rarely afterwards, and I believe have not been given for many years past. In cases where possession has been held of land in the province for a length of time, without a grant from the crown of any kind, this possession may or may not be viewed as conferring a title. The English stat. 9 Geo. 3, c. 16, disables the crown from claiming lands which have been held for 60 years by adverse possession, This statute probably would not be held to affect this province as it abridges the prerogative, yet length of possession being at common law presumptive evidence of a grant even against the crown, 1 Phillips, Ev. 149, Cowp. 102, 110, 8 East, 263, 12 Rep. 5. 3 T. R. 151, 158, 7 T. R. 492, 11 East 488, this statute may be considered as expressing the opinion of the parliament as to the period which may fairly give rise to such a presumption adverse to the interests of the crown. Taking possession of crown lands without license in writing from the governor, by provincial stat. of 1767, 7 Geo. 3, c. 1, 1 P. L. 125, is subjected to a fine of 50, recoverable by bill, plaint or information, in any court of record in the province. Some of the grants of the crown do not reserve any quit rent, and recently the crown lands are selling, to be held free of quit rent.

Thus it will be perceived that rent to the lord, one of the remaining features of feudality, is not existing in much of the land of the province, and the quit rents where reserved, have in practice been abandoned for nearly 60 years, that is since the year 1774, and the attempt to revive the claim has in 1812 and 1830, been met by strong remonstrances on the ground of inexpediency and length of discontinuance, by the house of representatives of the Pro-

vince. Primogeniture and its concomitants are abolished by the provincial statute of distributions. Lands are made liable as much as personal property to the payment of debts both by a British statute respecting the plantations, and a number of Provincial acts. Livery of seisin is not used or commonly thought to be necessary, and in fact immovable and movable property are subjected with few exceptions to the same rules of acquisition and transfer. Their natural difference creates some dissimilarity in the laws concerning them in all codes. It may be stated that with some slight variations our landed property has in all cases the general character in essentials of allodial land, and in some is assimilated so closely, that it would be difficult to point out any but a \* nominal distinction.

In the Island of Cape Breton while it formed a separate government, the crown lands there were not granted in

\* Since the above was written it has given me more confidence in this opinion to find by a perusal of Kent's commentaries that the same view has been taken of North American landed estate in the U. States. The learned author says that in the state of New York, "The statute of 1787, declares, "that the tenures upon all grants from the people of this state, shall be allodial, and not feudal, and be discharged from all services whatsoever, and shall be taken to be, and "and continue in, free and pure *allodium* only."—3v. 411.

"Socage tenures do not exist any longer, even in theory, "in those parts of this state which have been patented since "the revolution; and where they do exist they partake of "the qualities of allodial estates." "Whether a person holds "his land in pure allodium, or has an absolute estate of inheritance in fee simple, is perfectly immaterial, for his title is "the same to every essential purpose. The distinction between the two estates has become merely nominal."—3v. 412. "As the practice of exacting fealty has gone entirely "out of use in England, and was never known in this state, "and is altogether inconsistent with our policy and manners, "fealty, in the technical sense, may fairly be considered as "a dormant incident of feudal tenure never to be revived." See also 2 Cowen's Rep. 652, (Am. Reporter cited.)

perpetuity, but were given to the inhabitants under crown leases and licenses of occupation. Since the reannexation of the island, the crown has treated those settlers as grantees in fee simple, and they are entitled to vote at elections by act of 1824, 4 & 5, Geo. 4. c. 22. Sec. 6. 3, P. L. 190. I am not aware of any decision by which the nature of the title, held in Nova Scotia by virtue of licenses of occupation, can be accurately settled. Where there has been a continuance of possession and improvement made under them, it has been (as far as I can learn) the invariable practice of the government to consider them as fee simple titles; and no difficulty has ever been made in obtaining regular grants in the usual form, under the great seal of the province, in favor of the party who received such a licence or his heirs or assigns. In the strictness of common law principles, it might be contended that these licenses only gave an estate at will, to the grantees, who might be deprived of their interests, whenever the government thought proper; but when the permanent and in some instances expensive improvements are considered, which they have generally made on the land, it may be fairly concluded, that these outlays of labor and money, by which the value of the other lands of the crown ungranted, is raised, and the number of its subjects increased would not have taken place, if the settlers had not reason to suppose that they would never be disturbed in their possession. Where however this kind of possession has been abandoned, before any improvement was made, and where possession never followed the licence to occupy, it may be fairly assumed, that the effect of such licence has been done away with, by the act of the parties. It is stated in Chalmers's opinions, 2 vol. p. 44, that it is allowed in all the American colonies, as a maxim of law, that a title to the possession of lands must necessarily be supported by an actual culture, and planting of it, and that consequently the neglect of the one, will extinguish the other, and that the planting of lands in the

plantations, is a condition in law, either express or implied annexed to their titles, and that acts of resumption had been passed by the assemblies on that principle. The same rule is applied in the escheat of lands in Nova Scotia, which is usually sought where lands have been long left in a state of nature by the grantees, and the progress of settlement in the vicinity renders it important, that they should be transferred to persons likely to bring them into cultivation. The proceedings in escheat, are regulated by provincial acts, and will be described when actions and courts of justice are delineated in a subsequent part of this Epitome.

#### *Of Estate in Land.*

The interest which a man is entitled to in any property is termed his estate in it. This interest considered with reference to its extent and duration, leads to the following classification.

1. *Estates* in land are divided into freehold estates, and those less than freehold.

*Freehold* estates comprize all estates of inheritance, and also all estates for life, in lands or other real property.

*Estates less than freehold*, comprize all estates for a fixed term of years, estates at will, and estates by sufferance.

2. Estates are also divided into *estates absolute*, and *estates upon condition*.

3. Estates are also classed as estates in *possession*, *remainder* and *reversion*.

4. Estates are also arranged according to the number of owners, and the nature of the title by which they hold together, into estates in *severalty*, *joint tenancy*, and in *common*.



### CHAPTER III.

#### *Estates of Inheritance.*

Estates of inheritance are either absolute or limited.

*An absolute estate of inheritance* in lands is called an estate in fee simple. In this estate the owner holds it to himself and his heirs for ever, without specifying any particular heirs; and this kind of estate may exist either in corporeal or in incorporeal hereditaments. The fee simple or inheritance of lands and tenements is said to vest or be vested in him who is entitled to it. Thus where one having an absolute estate of inheritance grants a lease of them for a term of years or for life, yet the inheritance or fee simple is not divested, but remains in him, and on his death (or his sale of the property) will vest in the heir, devisee or purchaser—and at the close of the lease it reverts or returns to him or them, as in the former estate. It was at one time considered that the inheritance might be so si-



tuated that it did not vest in any one, but remained in *abeyance*, or in waiting for some contingency when it would be vested, but this doctrine has been apparently destroyed by Mr. Fearne. See his work on contingent remainders. 513, 4th edition, *ib.* 526. The word "heirs," is by the rules of common law indispensable to create an estate in fee simple by grant or deed, but in wills this strictness is less rigorously pursued. A deed granting land to a man forever would not be construed to convey to him more than an estate for his own life. This strictness is admitted to arise from the remains of the feudal system, and as, in this country, deeds are drawn in numberless instances by persons unacquainted with any legal doctrines, it would occasion much mischief and injustice if brought into operation. Owing to such considerations the legislature of the province in 1758, 32 G. 2. 1. P. L. 1, confirmed all possessions under grants and deeds which were registered or under any last wills, notwithstanding any want of legal form. This of course was retrospective in its operation; but I should conceive that with respect to any conveyance of later date, if it manifestly appeared that the intention was to sell the whole inheritance, and especially if the amount of the price or consideration showed it to be so, that the seller and his representatives would be considered as having contracted for the absolute disposal of the fee simple, and would be compelled to ratify it and execute a correct deed in regular forms. Such at least seems to be the dictate of natural justice, and it would be desirable (owing to the great frequency of deeds irregularly drawn) that some statute should be passed to confirm the intent of the vendor. An estate of inheritance may be limited, by qualifications or conditions which affect its duration or else regulate the line of succession in a particular way. The most of these will be reserved to be described in the general head of estates subject to condition, but the estates termed base or qualified fees will now be considered, and also estates tail.

1. *A base or qualified fee*, is one with a qualification annexed, which limits its duration by the continuance of the qualification. If a grant be made to A. and his heirs, *tenants of the manor of Dale*; whenever the heirs cease to be tenants of that manor, the grant is nullified.

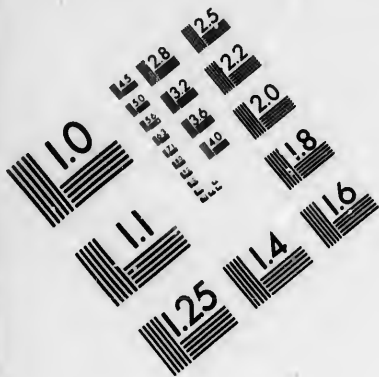
2. *Estate Tail*, was as common law called a fee simple conditional. It was an estate created by a gift or grant of an inheritance limiting the descent to some of the heirs of the grantor, and excluding others from the succession in the estate so granted, as 'to the heirs of his body' by which all heirs except lineal descendants were excluded, or 'to the heirs by a particular marriage, &c.' This kind of gift was construed at common law to be a gift of the inheritance, upon condition that it should revert to the donor, if the donee had no heirs of his body; but if he had, then it should remain to the donee, and it was called a fee simple upon condition that he had issue. The late chief justice Belcher, in a manuscript note upon the margin of his Coke Littleton states that, "Among the Saxons where lands were conveyed by writing, or act of the party, it was a maxim that the will of the conveyer should be strictly observed, nor could ever any one that came in by virtue of such writing, alien the land to cross the current of the original conveyance, so that the *entailing of estates* was very ancient, though by corrupt custom it was eluded, as *Ld. Dyer* observes in *Barclay's case*, *Plo. Com.* 251. "*Ll. Alured, Sax. ch. 7*, see *Bacon* 106." The mode discovered of eluding the effect of the donor's intention was grounded on this reasoning. When a condition is performed the condition ceases, and the right to which it was annexed as a qualification becomes absolute and free from the condition. So, as soon as the issue contemplated in the gift was born, the estate of the grantee was supposed to have become absolute, and free from any restriction,—at least thus far. 1, That he could convey away the land,

and thus bar the rights of his issue, and extinguish the reversionary interest of the donor and *his* heirs.—2. To render the inheritance liable to escheat for treason, while before the birth of issue his own life interest only would escheat, as before that he did not own the inheritance. 3. To empower him to affect the land with rents, commons, and certain other incumbrances so as to bind his issue. However if the donor after the birth of issue should die without aliening, and his line should fail, the land will revert to the donor, as under the terms of the gift it can only descend to the lineal heirs of the grantee.

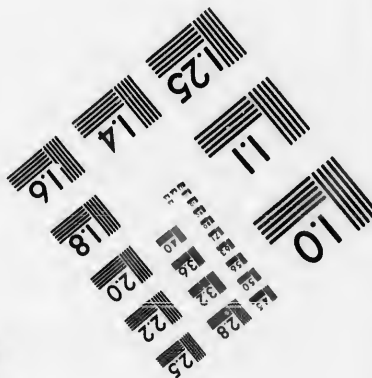
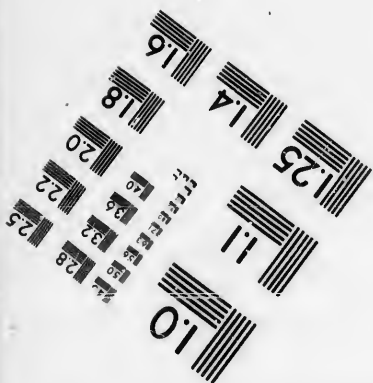
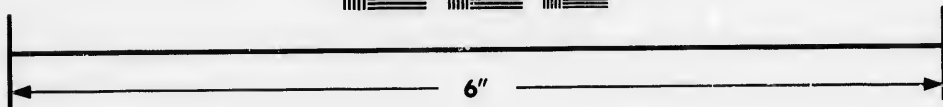
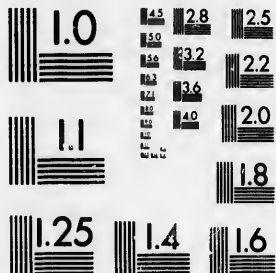
Entails, being the result of a very natural desire to preserve valuable inheritances in families from the extravagance or imprudence of individual members, were favorites with most of the nobles who then were the largest proprietors of land; and as this cunning interpretation springing out of the Norman jurisprudence, defeated the real intentions of the donors of estates tail, it was enacted by the statute of Westminster the second commonly called the statute *de donis conditionalibus*, being the 13 Edw. 1, c. 1. A. D. 1284. That from thenceforth the will of the donor should be observed, and that the tenements so given should at all events go to the issue, if there were any; or if none, should revert to the donor. See Co. Lit. 19, a. 392, b. where king Edward is called the most sage king that ever was. The provincial statute of 1815, 55, G. 3, c. 14. 2 P. L. 155, recognises expressly the existence of estates tail in this Province, and thus by implication, extends the statute of Westm. 2, to the colony, as this statute created the tenancy in tail. See Lit. s. 13. In the construction of the statute *de donis*, a new kind of estate was recognised in the donee, called an estate in fee-tail, and the reversion was vested in the donor, whereby he or his heirs should have the inheritance back, on failure of the line of succession to which he had limited his gift. All lands and in-

corporeal hereditaments arising from or annexed to lands, are subjects of an entail, under this statute, but moveables or mere personal property of any kind is not, (and an annuity granted out of personal estate, to a man, and the heirs of his body, would be but a fee conditional at common law. No estate tail or fee conditional, can be created of personal property, except in such a case of an annuity. Hargr. Co. Lit. 20, Fearn, 345, 3d ed. The statute uses the word tenements which as explained by Sir Edw. Coke. 1 Inst. 19, 20, include all real estate in land and every thing which savours of the realty. He also states that the statute gave no power of entailing estates, except they were estates in fee simple at common law. Therefore an estate to a man and his heirs, for another's life, (which is a base or qualified fee of a peculiar description, and not superior to an estate for life, in its character,) is not such an estate of inheritance, as can be made the subject of an entail. 2 Vern. 225. Where an estate in lands or tenements, is given to one, and the *heirs of his body begotten*, it is called an *estate tail general*. Where the estate is still further limited, so as not to include all his lineal heirs by descent, it is called an *estate tail special*, thus it is so where the words are to A. B. and the *heirs of his body, by C. B. his wife*, to be begotten. These estates may be still further varied by limiting them to male or to female heirs, thus there may be a grant in tail female or male, general, or special. The creation of an estate tail requires not only the use of the word "heirs" in which it partakes of the strictness of fee simple grants, but there must be words of procreation added, such as "body" "issue" "children" or the like, besides the expression "heirs." This rule is much relaxed in the construction of devises by will, where the intention of the testator is manifest to create a particular estate; but in all other forms of conveyance, seems indispensable. To the estate tail, there are three things incident. 1. That the tenant in tail is not punishable for





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waste. 2. That his wife shall have her dower in the estate. 3. That the husband of a woman tenant in tail, shall have the estate by curtesy in the land. 4. That tenant in tail may alien by common recovery. Any conditions annexed to the gift restraining these incidental powers and privileges, will be void. Co. Lit. 224, a.

An estate tail may also be destroyed by the operation of a conveyance by fine, or by collateral or lineal warranty with assets. By a train of decisions and statutes in England, the operation of the statute *de donis*, has been long since modified, so as to enable the tenant in tail, by certain forms of conveyance, to alienate the land entailed, or to divest it of its peculiar character and to reduce it to fee simple, and it is made liable to certain classes of incumbrances of his creating, to certain kinds of leases of his making, and also made liable to forfeiture, in cases of high treason. The act of the Province before referred to, having been passed, to afford a simpler form of conveyance by tenant in tail, in order to bar the estate tail, has constructively adjudged the statute *de donis*, and also the rest of the English law, which gives to this kind of estate its peculiar qualities, to be in force in the colony. As however, the nature of the conveyances of estates tail, will be explained at length, in a subsequent part of this volume, it is unnecessary to dwell upon these circumstances, at present.

By the statute 32, Hen. 8. c. 28, tenants in tail are enabled to make leases for three lives or 21 years, which will bind their issue, but not the persons in remainder, or the reversioner, Husbands holding land in fee simple, or in tail, in right of their wives, or jointly with them are also vested with the same privilege, provided the wife be a party, and execute the lease, by deed of Indenture, and the rent be reserved according to the title of the inheritance. The lands

must be such as have been usually letten for 20 years before, and the rent, the usual rent, during the same antecedent period. The lease under this statute, must always be by deed indented, and must not contain an exemption to enable the tenant to commit waste. These and other niceties on the subject are more fully elucidated in Co. Lit. 44 a & b—46, b. See also Bac. Abr. Gwill. ed. 30, Kitchin. 4 Edition 307, Cro. Jac. 563. 7 D & E. 478. Cro. Eliz. 769, Cro. Jac. 232. 1 Chan. Ca. 171, 2 Ves. sen. 634. 1 Lev. 239. Prec. in Chan. 278. 1 Eq. cases abr. 265. B. 3. Cowp. 267, 1 Scho. & Lefr. 71. 1 Roper H & W. 95. Miller v. Maynwaring, Sir W. Jones, 354. 2 Wm's Saunders, 1806. 3 Bac. Abr. 305. These cases involve the questions respecting the husband's power of letting the wife's land, as well as the construction of the statute, and the degree in which the issue in tail are bound by its operation. One may suppose that this statute is in force here, as it is an appendix to the stat. *de donis*.

#### *Estates for Life.*

Where a man holds lands or tenements for the term of his own life, or for that of any other person, or for the lives of more than one person—in all these cases his interest in the property is called an estate for life, and this kind of estate may exist in moveable as well as immovable property. Estates for life may be created by act of the parties, as in conveyances by lease or devise, or they may arise by the operation of law as in the case of the widow's dower in real estate. Livery of seisin is required by the common law to the conveyance by deed of a life estate as well of an estate of inheritance. The lessor in granting an estate for life, may annex to it such conditions, limitations and rents as he thinks fit, in the deed of conveyance; but it is prudent to make the lessee a party to the deed fully, by his executing it, in order to make the terms fully

binding on him. Where an estate is granted to a man, without any specification of the nature of the estate intended to be conveyed, as if one grants to *A. B. a certain house*, this is construed to be an estate to *A. B.* in the property for his own life time. So if it be granted to *A. B. for life*, this will be construed to be *for his own life time*. So an estate granted to *A. B. for ever* will be reduced by construction to an estate for his own life time, for the want of words of inheritance. This kind of estate is favored by the rule of law, which in grants directs the construction to be taken most strongly against the grantor, except in grants from the king.

Sometimes an estate for life is so made, that it is to end in case some contingency specified should occur. Thus an estate may be given to a widow for life, with a proviso that if she marry again, it is to cease. In former times there was also a distinction between a grant *for life* and a grant for the *natural life*. The former being held to be ended by the *civil death*, as if one became a monk. The other enduring till actual death, and the latter form is still usual in conveyances, though the distinction in English law appears to have become obsolete. It is a distinction well known to the civil law, and borrowed from it. In all estates for life arising by legal operation, and also in all created by act of the parties, the following *incidents* arise by legal implication and consequence, but in estates for life created by act of the parties, they may be restrained, prevented or modified by the terms of the conveyance, or agreement of the parties.

1. *Estovers*. Under this name the tenant for life (and also the lessee for a term of years) is entitled to use the woods of the estate within reasonable limits—1. for what is called *housebote*, implying what is necessary to repair the house and buildings demised, and also for fuel to be

used in it. 2. *Plough bote*, including all wood necessary to make or repair implements of husbandry, carts, &c. necessary for the cultivation of the demised premises. 3. *Hay bote*, meaning the wood necessary to repair the fences of the land, and these he may take without leave, unless restrained by his covenants.

2. *Emblements*. This is a privilege incident to all estates for life, and also to estates at will. When a tenant for his own life sows the lands, and dies before the harvest, his personal representatives are entitled to the crop as his property, and the crop is in these cases called emblements. The same rule applies to the tenants *pur autre vie*, that is for the life of another person. If the tenancy at will be dissolved by act of the landlord, the emblements belong to the tenant, and where the tenancy for life is destroyed by act of law, as in an estate to husband and wife during coverture, and a total divorce ensuing, then they shall have the emblements, but where any estate for life is forfeited or terminated by the act of the tenant himself, he loses the right to emblements. This is extended particularly to entitle clergymen to the emblements of their glebes by English act 28 Hen. 8, c. 11, which enables an incumbent to bequeath the corn and grain growing on the glebe land by will. This act we may, I think, esteem as applicable to such glebes as have been granted in Nova Scotia. The reason of this privilege is that the tenant having been at the expense of preparing, manuring, and sowing the ground, should not lose the benefit of his exertions and cost by an event which was uncertain and unanticipated. A third incident of life estates is that the under tenants who occupy the property by leases for a term of years, from the tenant for life, have certain peculiar privileges. They have the right to estovers and emblements the same as their lessor would have, if he occupied the premises himself. Co. Lit. 55 b. The tenants for years holding under

a life estate have this further rule to protect them, that where their landlord destroys the life estate by his own act, and would thus forfeit the emblements of his own cultivation, they are entitled notwithstanding to take them.

At common law the tenant for term of years under a landlord having the life estate, in case of the death of tenant for life, is at liberty to leave the premises, and cannot be called on for the proportion of his rent incurred since the last day appointed for payment. 10 Coke's reports, 128, William Clun's case, 11 Jacobi, B. R. This is remedied in England by act of 11 Geo. 2, c. 19. § 15, in cases when tenant for his own life dies—but that act does not extend here. See also Jenner v. Morgan, 1 P. Wms. 392, Pilkinton and Dalton, Cro. Eliz. 575, 8 Ves. 311. But where by the terms of the lease to the undertenant, it is expressly limited to expire with the death of the landlord, then a rateable portion of rent till that time will be due. Clarkson v. Earl of Scarborough, 1 Swanst. 354, n. Ex parte Smyth, Ib. 337. Symons v. Symons, Madd & Gildart 297. Thus it is in the power of tenant for life to guard against this inconvenience by attention to the form of the lease to the sub-tenant. While speaking of under leases it may be remarked that sometimes leases are set aside in Equity without disturbing the sub-tenants interests where they have no knowledge or notice of the irregularities which defeat the principal lease. Attorney-general v. Griffiths, 13 Ves. 563, Attorney General v. Backhouse, 17 Ves. 291.

*Estates for life arising by the operation of law.*

There are three kinds of estate for life arising by operation of law in the English jurisprudence, viz. tenancy *apres possibilite*, tenancy by the curtesy, and tenancy in dower.



*Tenancy after possibility.*

When tenements are given to a man and his wife in special tail if one of them die without issue of the marriage left the survivor is tenant in tail after possibility of issue extinct, and where one dies and issue is left—if the issue afterwards die without issue, then the survivor becomes tenant after possibility. And if the tenements be given to a man or his wife in special tail, the donee, if he or she survive the possibility of issue, such as was contemplated in the gift, is tenant after possibility. See Co. Lit. 27. 28. 11 Rep. 80, 2 B. C. 124. This tenancy is not an estate of inheritance, because the prospect of heirs to the entail is gone. It is therefore an estate for life arising by the act of God, and can only thus arise, for a divorce *a vinculo* will not create it. 2 B. C. 125, Co. Lit. 28, and although the parties were ever so old the law will not constitute this estate upon the presumption of impossibility of issue from them until one of them is dead.—*Ib.* This kind of life tenant is not punishable for waste, yet he may, like other life tenants, forfeit by alienation in fee, and he may exchange with another tenant for life, having a greater estate than other tenants for life, as to the quality, but not as to the quantity or duration.

*Tenancy by the curtesy of England.*

According to the laws of England, where a man marries a woman seised of an estate of inheritance (whether fee simple or entail) and there arises issue from the marriage born alive, which issue is capable of inheriting the estate of the wife as her heir, the husband if he survive his wife is entitled to hold the property during the rest of his life to the exclusion of the children or other heirs of the woman, and this life estate in him is called tenancy by the curtesy of England, on the birth of the child who was to

be heir, the interest of the husband is said to be initiate, because he then must be considered as having an interest in the land for his own life time, while before the birth his interest would entirely cease by the death of the wife. Though the learned Commentator speaks of the estate by curtesy, as vesting at the birth of the heir, yet it may be said with much reason, that as long as the wife lives, the husband continues to hold the property in her right and that although his right to this contingent interest, is then established yet as it may never be of any avail to him, (as he may not survive his wife,) that therefore this estate vests fully at her death when the title is consummated, and not before, and this construction is more agreeable to his description of the four requisites, to make a tenancy by the curtesy, viz : marriage, seisin of the wife, issue born during the coverture, and death of the wife. Yet it must be acknowledged that the husband after issue is considered in the old law to be tenant of the freehold of his wife, and that he was then to do or receive homage alone, to which before that event his wife was a party, but then again after the death of the wife, he ceases to do or receive homage, being treated in this respect as other life tenants, see Co. Lit. 29, 30—40, 67. If after issue born, and while the wife still is alive he makes a feoffment in fee, this is no forfeiture of his estate, and the feoffee shall hold the land during the feoffor's life, because he is not as yet tenant for life completely—*ibidem*. And this is an argument against the vesting of the estate till the death of the wife, as if he really had a vested life estate at the time of the feoffment it should, one would think, operate as a forfeiture.

It is necessary that the wife (or the husband for her) should have had actual seisin of the property at some period during the coverture as a constructive possession or seisin in law, such as arise by the mere fact of descent is not sufficient to ground this estate upon, although it is

enough to entitle a widow to dower, and the reason of requiring actual is "because unless the wife be actually seized, the heir shall not make heir to the wife, Co. Lit. 40. Shelley's case, 1 Co. Rep. 94, and tenant by curtesy shall be attendant to the Lord Paramount, which he cannot be because the wife died before she was actually seized." C. J. Belcher's MS. note on Co. Lit. 29 a. See also Payne's case, 8 Co. Rep. 34, to which he also refers. So of a bare right or title, or of a reversion or remainder expectant upon any estate of freehold, unless the particular estate terminate during the coverture, Co. Lit. 29 a. but of a reversion expectant upon an estate for years, both dower and curtesy will arise, Stoughton, v. Leigh, 1 Taunton, 410, for the possession of the tenant for term of years is construed to be the legal and actual seisin of the freeholder in reversion. 3 Atk. 470. 3 Wils 521. In the case of a rent, if the marriage, birth of the heir, and death of the wife, all take place before any of the rent become payable, this is sufficient seisin to establish curtesy, Shelley's case before cited. Keilw. 104 6 pl. 13. Perk, Sec. 469. The foregoing are the chief features of this species of life estate, which is said to have been introduced into England by King Henry the First, and seems to have had an origin strictly feudal, although something very analogous in principle is to be found in the civil law. See Wright's law of Tenures, 106. It may be important to ascertain whether this description of estate is in legal existence in this province, as the intention of the provincial act of wills and distributions. 1758, 32 G. 2, c. 11. 1 P. L. 9 to 13, would at first sight appear to have been that this kind of title should not be confirmed or acted on. It establishes a mode by which intestate estates, real as well as personal, shall be divided, it regulates devises and testaments—it saves the right to dower to the widow by express words in sec. 12; and by sec. 18, directs "that all such estate, real or personal, as is not compris-

“ed in any last will and testament, or is not plainly devised  
“ or given by the same, shall be distributed in the same  
“ manner as intestate estates are directed to be distribut-  
“ ed by this act.” On this point I would refer the student  
to the English Stat. of distribution of personal estate, the  
22 and 23 Car. 2, c. 10, and to the 29 Car, 2 c. 3, s. 25,  
which was made to settle doubts as to the husband’s right  
to administration of his wife’s effects, under the first named  
act of Car. 2.

By the English stat. 5 G. 2, c. 7, sec. 4. lands in the  
plantations are made liable in every way to debts, and are  
assets in our provincial system in the hands of executors  
or administrators for the payment of debts, under the provin-  
cial stat. of wills and distributions destroying the whole  
system of primogeniture and feudal inheritances, divides  
the net estate after debts are paid, either as the deceased  
shall have directed in a legal form, or if intestate, among  
the widow and all the children. Saving the widows  
dower in the lands by express mention made of it. In a  
statute operating so general and complete a change in the  
laws of real estate, it would, I should think, have occurred  
to the talented chief justice of that day, whose information  
was very diversified; that some difficulty might arise res-  
pecting an estate like this by curtesy, which is the crea-  
ture of the law, if it were not recognized in a statute which  
forms in itself a complete code as to inheritances, and we  
know that his mind was closely applied to the formation  
of our earlier provincial acts. I am not aware that any  
decision has been given on this question, or even any strong  
opinion entertained or expressed on it, but it may be desi-  
rable that it should receive an adjudication, or be settled  
by an act as the increasing value of real estate will render  
it soon one of considerable importance in practice. If the  
statute should be held not to supersede or destroy the  
common law principles respecting this estate, there may

be then another difficulty in their application, because no one child can be considered as the heir, while there is a possibility of others arising. In England it is otherwise, but here the whole of the children, (even including a posthumous one,) united compose but one heir under our statute. A man may be tenant by curtesy of his wife's trust estate, 1 P. Wms. 108, 3 P. Wms, 234. By the Scotch law, if the wife had a child of a former marriage, who is (exclusively) to succeed to her estate as heir, the husband is not entitled to curtesy while such child is alive. Erskines institute, 221. It seems that he is considered to have this right as father of the heir, rather than as husband to the heiress. Ibid, & C. Lib. 1, de bon. mat. (In the Massachusetts act of distributions, the estate by curtesy is established by express words)

#### *Tenancy in Dower.*

Where the husband is seized of any estate of inheritance at any time during the coverture, if the wife survive him, she is entitled by common law to the third part of the estate for the remainder of her life. The wife, to be entitled to dower, must be the actual wife of the deceased at the period of his death. For a total divorce, decreed before, destroys the right to dower, and so by the stat. West, 2. 13 E. 1 c. 34, does a voluntary elopement with an adulterer, unless the husband be reconciled to her voluntarily, but a divorce from bed and board under other circumstances does not affect her claim to dower. If an idiot (male or female) be married, the marriage being in the eye of law a nullity, neither dower nor curtesy can arise from it. 2 B. C. 127, 130. At common law the wife could not be endowed if she were an alien by birth, but by an act of 8 Hen. 5, (not printed among the statutes, but

\* Curtesy appears to exist in the U. States 2 Kent, 110.

preserved in the 4th vol. Rot. Parl. pp. 128, 130,) alien women married by Englishmen by license from the king shall have dower. If an alien woman be naturalized she becomes thereby entitled to dower generally, and if only made a denizen, to dower in lands not aliened before her denization. *Merril's case*, 13 Rep. 13, 3. see also *Kitchen-220*, abridgment of the book of assize, 30.\*

By the common law as it was understood by Littleton, and so stood in Lord Coke's time, a female could be endowed if she were above 9 years of age at the time of marriage, but if younger she was excluded from dower. *Co. Lit. 33*. We may conclude that in the present age the marriage of a person so young would be regarded as void, not having the essential requisites of a contract, and consequently neither giving room for the consequences in law that attend a regular marriage. A wife is by English law entitled to be endowed of all lands and tenements of which her husband was seized in fee simple or fee tail, at any time during the coverture, and of which any issue she might have had might by possibility have been heir. Therefore in an estate in special tail, where the wife is dead, who alone could be mother to the heir, the second wife of the donee cannot have dower of these lands. The wife may be endowed where the seisin of the husband was only a seisin in law, and not actual, for which *Ld. Coke* and the learned commentator give a reason that it did not lie in her power to compel him to take actual seisin as he might take in her lands. *2 B. C. 131, Co. Lit. 31*. To this principle which goes to distinguish the estates of dower and curtesy, *C. J. Belcher* affords us another, in his note on *Co. Lit. 31*, viz: that the "tenant in dower shall not be

\* *C. J. Belcher* in a MS. note on *Co. Lit. 30 b.* says, "Dower in lands came in use after the Norman conquest. *Ll. Sax. Lam. fo. 14, Ll Inae, cap. 58*. See *Bacon's Hist. of the Uniformity of the government of England*, p. 104."



“attendant to the Lord Paramount, but to the heir, therefore she shall be endowed of a seisin in law. 3 Co. 36. a. Paine's case.” This estate of dower arises by operation of the law, and is therefore called dower at the common law. There were formerly other kinds of dower in use, arising by local customs or by verbal agreement before marriage, or at the time of its celebration. These are pointed out in the commentaries, 2nd vol, 122. 3, but as they are not in use among us in the colonies, and entirely inapplicable to our situation, there can be little use in dwelling on them here.

The seisin of the husband must be a *legal* seisin to entitle the wife to dower, therefore of an *equitable* estate a wife is not entitled to dower; for instance of a trust estate. 2 Atk 526. Ca. Temp, Talbot 139. Upon this principle if the estate be mortgaged in fee previous to the marriage and the legal estate vested in the mortgagee during the whole period of the coverture or marriage, the wife of the mortgagor has no right to dower because her husband was *not legally seized*, and by a singular construction, the wife of the mortgagee is equally excluded, because her husband held *legal seisin only*, and not the equitable title, the one losing her remedy in the courts of law, and the other being liable to the injunction of a court of equity if she were to seek it. See 2 Jac. & Walk. 200. 1 Br. 326, Cro. Car. 191, 1 P. Wms. 278, 2 Ves. senr. 634, 1 Freem. 43. Neither will an estate in remainder, subject during the whole coverture to an estate for life in another person, be the subject of dower. 1 Lord Raym. 327. Co. Lit. 32. a. Under these restrictions a married woman will at the death of her husband be entitled to her dower out of all his lands, notwithstanding any debts due by him, whether they were incurred before or after her marriage, and no mortgage, judgment, or other incumbrance, arising after marriage, will lessen or affect her rights in this respect, unless she

release her dower in favor of the security before a magistrate in the manner pointed out by the act of the province, of which we shall give a statement particularly in describing the forms of conveyance usual in the province, neither will a gift, lease, or sale of the premises by her husband during the coverture, lessen her claim to dower in his land unless she joins in the conveyance according to the forms of the act. Besides the circumstances before described which may affect the right to dower, which may spring from elopement, divorce, alienage, and the crimes of the husband, or the peculiar nature of the estate in the lands, there are several modes by which a widow may cease to have a right to dower.

We have seen that where the legal estate is out of the husband at the marriage, and during coverture, no dower can be derived. This gives rise to a variety of forms of marriage settlement usual in England, but very rare in the Colonies, and forming an intricate branch of English conveyancing, by which the legal estate is taken from the husband to deprive the wife of dower, and wherein her interests are generally provided for by some particular settlement. In the next class of cases she may be barred of her dower to a certain extent, when she joins in a conveyance to secure a debt by mortgage of the land executed under the forms of the provincial law by examination before a magistrate, and in this case if the personal estate of her husband at his death, should be solvent, she will be entitled to claim that it should be discharged from that fund, leaving her dower in the land free, but in case of an insolvent estate her interest in the land as respects dower, is diminished in the mortgaged land to the dower in the residue after the claims of the mortgagor are satisfied. So if the mortgagee obtains the whole interest through the circumstances of the estate, her claim to dower is gone, and so it is if on a sale by the Court of Chancery of the land to sa-

tisfy the mortgage, it should not produce more than satisfies the mortgage with interest and costs. If she join formally in making a deed which gives or sells the inheritance in the land, her claim to dower in that land is destroyed. If a settlement be made after the marriage in lieu of dower or a devise,\* or legacy be contained in the husband's will, instead of dower; in either case, she has her option after the husband's death, to accept or reject and claim her dower at common law, See 2 B. C. 138.

The English stat. 27 Hen. 8, c. 10, makes certain settlements *before* marriage known by the name of jointures, operate as a bar to the claim of dower. Vernon's case, 4 Rep. 1. 2. These estates are constituted by settling lands use of the husband and his wife for their lives in joint tenancy or jointure, and to make a jointure have its effect to bar the widow of her dower, the estate must vest in her immediately on the death of the husband. It must be for her own life at least and not for another's life, nor for a term of years or other inferior interest. It must be made to herself, and not to another in trust for her. It must be made in satisfaction of her † whole dower, and so stated to be in the deed that creates it. 9 Mod. 152, 3 Atk, 8 Coop. 323, 3 Atk. 435, and if the jointured land should be taken from her through a defect in the original title, she has a right to abandon the jointure and claim her dower. 1 Vern. 428. Jointures have some advantages over dower, the widow can enter at once on the death of the husband

\* "A devise cannot be averred in satisfaction of her dower, unless it be so expressed in the will." Co. Lit. 36 a. "Because a devise implies a consideration in itself, and a devise can't be averred to the use of any other than the devisee, unless it be so expressed in the will, 4 Co. 4 a." C. J. Belchers MS. note.

† For the uncertainty makes it void; as if debtor gives creditor a horse, or any other thing, in satisfaction of part of his debt, it shall be a bar for no part, for the uncertainty. 4 Co. 3 a." C. J. Beicher, MS. note to Co. Lit. 36 a.

into the possession. Crown debts and taxes will not affect them at common law, nor will the jointure land be forfeited for high treason: Co. Lit. 36. 37.

It is directed by Magna Charta, c. 7, that a widow shall be permitted to occupy her husband's chief mansion house for 40 days after his death, and to take reasonable estovers during that time, and the heir is directed to assign her dower land to her before the end of that term; but there is no penalty annexed to his neglect. If prevented from enjoying this use of the house for 40 days, which is termed her quarantine, a writ lay *de quarantina habenda*. If the heir be under age, and he or his guardian assign too much for dower, the error may be rectified by the heirs, bringing a suit by the writ of *admeasurement of dower*. See this more fully treated in Co. Lit. 34 a. \*The provincial stat. 8 Geo. 3, c. 8, 1758, 1 P. L. 141, begins with this preamble, "Forasmuch as some directions in the law are necessary, that women may be enabled to come by their dower." It then enacts in the 1st clause, "then when and so often as the heir or other person having the freehold, shall not within one month next after demand made, assign and set out to the widow of the deceased, her dower or just third part of, and in all houses, lands, tenements, or hereditaments, whereof she is dowerable at the common law, to her satisfaction according to the true intendment of law, then such widow may sue for and recover the same by writ of dower, to be therefore brought against such persons as have, or claim to have right as aforesaid, in the said estate." It then gives the form of the writ of dower to be pursued.

The 2d clause directs "that upon judgement being given for any woman to recover her dower," "reasonable damage shall also be assigned to her from the time

\*Where the right to have dower is admitted, the court of chancery has a concurrent jurisdiction in matters relating to it. See 2 Ves. jun. 129,

"of the demand made," and if then gives the form of a writ of seisin, which also is to include execution for (the damages, if any are given), and costs. The writs of dower and seisin are in this act directed to be executed by the Provost marshal (whose duties have been transferred to the sheriff of each county, by act of 1795, 35 G. 3. c. 1, sec. 1 1 P. L. 344.)

The 3rd clause directs the provost marshal (now the Sheriff) or his deputy, to whom the writ of seisin is directed, "to cause her third part of dower in such estate to be set forth unto her by five freeholders of the neighborhood, upon their oaths, (three at least to agree) who shall be sworn before a justice of the Peace, to set forth the same equally and impartially, without favor or affection, as convenient as may be; which oath every justice of the peace is hereby empowered to administer."

The fourth clause enacts "That of inheritances that be entire, where no division can be made by metes and bounds, so as a woman cannot be endowed of the thing itself, she shall be endowed thereof in a special and certain manner, as of a third part of the rents, issues or profits thereof to be computed and ascertained in manner as aforesaid.\* And no woman that shall be endowed of any lands, tenements or other inheritances, as aforesaid, shall commit or suffer † any strip or waste thereu-

\* This expression "as aforesaid," apparently means by the five freeholders, mentioned in the third clause.

† "Any strip or waste," the legal meaning of these words will be explained in the third volume. The first part of this clause is also to be considered as directory to the heirs in assigning dower under the same circumstances, and dower assigned by them (either by metes and bounds or in a special manner of which the act gives an example,) will be valid without any law proceedings or deed executed, the law confirming the estate. See Co. Lit. 32. The widow holds her dower land of the heir, who is her *seigneur*, being an instance

“pon, but shall maintain the houses or tenements, with the  
 “fences and appurtenances thereof, with which she shall  
 “be so endowed, in good repair during her term, and  
 “leave the same so at the expiration thereof, and shall be  
 “liable to action for any strip or waste by her done, com-  
 “mitted, or suffered.”

*Special Occupancy.*

At common law where an estate was granted to a man to hold it during the life of another person, and no mention was made of the heirs of the grantee in the gift, if he died before the person for whose life he held it, any person who went first into the occupation of the property could hold it until the death of *cestui que vie*, or him by whose life it was holden. This was termed common occupancy. but where the estate was to a man and his heirs during the life of another, when the grantee died his heir was called the special occupant, and took the estate during the rest of the life of *cestui que vie*. See 5 B. C. 259.

The statutes of Car. 2. c. 3 and 14. Geo. 2. c. 20. have reduced this principle of occupancy to almost nothing, and their provisions have been substantially followed in the 11th clause of the Provincial statute of frauds. Act of 1758, 32. G. 2. c. 19. 1. P. L. 26. whereby it is enacted, “That any estate *per autre vie* shall be deviseable by  
 “a will in writing signed by the party devising the same,  
 “or by some other person in his presence, and by express

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where a *mesne seignory* can arise, notwithstanding the statute of 18 Ed. 1 c. 1, called *quia Emptores*, which precludes them generally.

“If Tenant in dower sow lands her executors shall have the emblements. Dr. and Stud. Dia. 1 c. 20, fo 69. C. J. Belcher, MS. note. The wife's dower was early protected in the old colonies. See Virginia acts of 1664, c. 7, and 1673, c. 1, Maryland 11 W. 3, 1699 p. 87.”



"direction, attested and subscribed in the presence of the  
 "devisor, by three or more witnesses; and if no such de-  
 "vise thereof shall be made, the same shall be chargeable  
 "in the hands of the heir, if it shall come to him by rea-  
 "son of a special occupancy, as assets by descent, as in  
 "case of lands in fee simple; and in case there be no  
 "special occupant thereof, it shall go to the executors or  
 "administrators of the party that had the estate thereof,  
 "by virtue of the grant, and shall be assets in their hands,  
 "and shall be subject to the payment of legacies, and  
 "be distributable after payment of debts, in the same  
 "manner as other estates of intestate persons are distri-  
 "butable by the laws of this Province." The heir who  
 could take as special occupant, would, I should conceive,  
 in this Province be the heir under our statute of distribu-  
 tion, and not the common law heir; for the act of 1758. 32.  
 G. 2. c. 11. Sec. 18. 1 P. L. 13. directs all estates not  
 plainly devised by will to be so distributed.—See "title  
 by inheritance," This interest is a freehold of a peculiar  
 nature.—See 4 Kent. Com. 27. It is sometimes termed  
 a descendible freehold.

## CHAPTER IV.



### *ESTATES LESS THAN FREEHOLD.*

#### *Estate for Term of Years.*

This kind of estate is frequently called leasehold by way of distinction from the estates of inheritance, and estates for life, which are all included under the general term freehold.—It exists where a party has the possession of lands for a fixed time, of one or more years, months or days. It may be created by a will, or it may arise from the contract of the parties. This contract must be in writing and signed by the lessor or his agent, appointed by writing, except in case of leases for not above three years, in which the rent shall amount to at least two thirds of the annual gross value of the premises. Provl. act of 1758, 32. G. 2. c. 18. 1 P. L. 25. and by this act all verbal contracts, save those excepted, are to be but leases at will, and the same law annuls *any transfer*

of leasehold interest by the lessee, unless it be made in writing, and signed by the lessee or his agent authorized in writing, or else take effect by operation of law.

An estate of freehold cannot be made to commence *in futuro*, but a lease for a term of years may; and it does not like freehold require livery of seisin, the tenant being entitled by the contract to go into possession and the estate for years, vesting on his entry. His possession is construed by law, to be the actual seisin of the landlord, and upon this principle he is not suffered to dispute the legality of his lessor's title to the premises. Tenant for years is entitled to the same estovers as tenant for life, unless a special agreement exist with him to the contrary. He is not entitled to emblements except where his interest is determined without his own fault, and unexpectedly as by the death of lessor tenant for life.

Where a house or tenement is let by the year, the tenant is bound to leave it on receiving three months warning—when it is let by the month, on a month's warning, and when let by the week on a week's warning. Provl. Stat. of 1779. 19 G. 3. c. 10. s. 3. 1 P. L. 217. where a statute speaks of a month, it is generally held to mean a lunar month, that is four weeks, unless it is expressed otherwise, 2. B. C. 141. but in viewing the Colonial act, just quoted, the words, "three months" may be susceptible of a different construction, especially where the rent is payable quarterly, and is generally understood that the notice should be given before the last quarter of the current year of tenancy begins. If a tenant after due notice under this act does not quit the premises, the landlord may lay his complaint before any two Justices of the Peace, supported by an affidavit of the circumstances, on which they are to issue a warrant to cause the tenant or other person in possession, to be arrested and detained in cus-

tody, until they find sufficient security for personal appearance at the next Supreme Court, to answer the complaint. Same act. 1st clause, 1. P. L. 217. The 2d clause empowers the Supreme Court "to enquire by credible proof into the cause of the complaint;" in the practice under which an action of ejectment is commenced in that Court against the tenant by declaration, in the usual forms.—The 2d clause also directs that "if it shall be found by a jury then and there sworn, to try the same, that a wrongful and illegal detainer, and withholding of such houses, lands and tenements, has been made, after demand and notice as aforesaid, then the said Supreme Court, by writ of *habere facias possessionem*, shall cause the said houses, lands and tenements, to be reseized, and the party complaining to be again put into possession, within ten days after such trial had, and moreover the party grieved, shall, and by action of trespass on the case, recover treble rent and costs of suit against the defendant or defendants." 1. P. L. 217. It would appear by the words of this act "next Supreme Court"—and "then and there sworn," that the defendant should not be entitled to delay the plaintiff by imparlance, from obtaining a judgment in ejectment at the first term of the Supreme Court, after complaint made; and the "ten days" mentioned seem intended to stay the issue of the execution until ten days after trial. The landlord has several modes of enforcing the payment of his rent first by distress, which means a power of taking goods of the tenant, and even those of other persons which are on the premises, and selling them to pay himself the arrears; and this right arises by implication (if not expressed) in all estates in tail, for term of life, years or at will, where the donor or lessor reserves a reversion and a rent. Dr. and Stud. D. 2. c. 9. p. 150. Next by action at law, and when an execution is levied upon the goods of the tenant by a third party, the landlord's claim to rent must be first satisfied. The rules of

Provincial law as to distresses, and the mode of recovering rent, &c. will be found at more length in the 3d vol. where actions at law, and legal process are elucidated.

#### *Tenancy at Will.*

Where lands or tenements are let, to be held during the will of the landlord, and the tenant takes possession, he is called tenant at will. This estate is created by agreement of parties, and it may be terminated by the act of either party. The tenant cannot assign such an interest in real estate. If the landlord puts an end to the tenancy, the tenant is entitled to emblements, and in consequence, to ingress and egress to make his crop and take it away. He is in that case, also, entitled to reasonable ingress and egress, to bring away his goods or cattle from the premises. The death of either party,—notice to quit,—or the exercise of acts of ownership such as making a demise for years, by the lessor,—an assignment, or committal of waste by the lessee—will terminate this estate; whenever there are circumstances sufficient to imply a tenancy from year to year, or month to month, &c. an estate at will is not presumed to exist. Judge Christian in his note 2. B. C. 145. doubts the existence of estates at will, in modern English law; but a contrary opinion is strongly expressed in the case of *Richards vs. Langridge* 4 Taunt. 131. by C. J. Mansfield, but see 2. T. R. 159. 3. Wils. 25, quoted in Christians note.

#### *Tenancy by Sufferance.*

Where one enters into possession of premises lawfully, but continues in possession after his title to hold the property is at an end, he is called a tenant by sufferance—as for example, a tenant for a year, remaining in possession after his term expires. The tenant in this case is not

considered a trespasser or wrong doer until the landlord by notice or entry, puts an end to his legal holding. We have seen the remedy given against tenants overholding, and in the case of a lease for a certain term of years, no notice is necessary, but ejectment lays at common law to turn out the tenant, 1. T. R. 53. 162. The landlord may turn his own cattle on the premises, occupied by an overholding tenant, who cannot distrain them as damage *feasant*, 7. T. R. 431. No estate by sufferance will exist as respects the lands of the Crown, the party being considered an intruder in cases where he would be held to be a tenant at sufferance to a private landlord, Co. Lit. 57.

#### *Estates upon Condition.*

Where a condition is annexed to an estate, whereby its commencement, duration or extent, is made to depend upon some uncertain event, the estate so qualified, is called an estate upon condition,—and in the making a conveyance of lands this condition must be contemporaneous with the creation of the estate; and if expressed in a separate instrument, both must be executed together to give efficacy to the condition, Co. Lit. 236. b. but in the grant of things executory, such as rents or annuities, the condition may be created by compact afterwards, Co. Lit. 237. a.

There are conditions implied in law, where none are expressed in the grant or conveyance—such is, that the grantee of the Crown shall not commit treason and forfeiture follows the breach. Conditions expressed are divided into conditions precedent and subsequent. An estate is said to be upon condition precedent where some event mentioned in the condition must happen, or some act be performed as the condition directs, before the estate can vest or be enlarged. It is said to be upon con-



dition subsequent when the estate vests at once, but, upon the failure of some contingency, or the non performance of some act stipulated in the condition the estate will be divested and defeated. Thus an estate for life, limited to A. upon his marriage with B. is an estate upon condition precedent, and until the marriage take place does not vest in A.

So where an estate is granted subject to a rent to be paid to the grantor, and on condition that if it be not regularly paid the grantor may re-enter and have his former estate in the premises, this is an estate upon condition, subsequent. So an estate for life to a woman provided she continue a widow is an estate on condition subsequent, and defeasible, if she marry again. Of the breach of a condition the grantor or his heirs and assigns may avail themselves by re-entry; but there is also what is called a *conditional limitation*, which is a remainder over to a third party, on failure of the *conditional estate*, which takes effect at once on failure of the condition, without requiring re-entry. [See Woodeson's 24th Vin. Lect. Hargr. Note 1. to Co. Lit. 203. b. For the distinction between conditional limitations, and contingent remainders, see Fearn on Cont. Rem. c. 1. Sec. 3. c. 2. Sec. 6.] The condition subsequent, while it remains unbroken, does not lessen the nature of an estate so as to deprive it of its character of freehold, in case it be in fee or for life. In some cases the grant of the estate will be valid and yet the condition subsequent, annexed to it, will be annulled by construction of law. This is the case where a condition is impossible, unlawful, or inconsistent with the nature of the estate granted. The rule is the same, if the performance of the act conditioned become impossible, or unlawful without any fault in the grantee. But if an estate be granted on a condition precedent of an unlawful or impossible kind, the grant is void entirely. [See seve-

ral examples in 2 B. C. 157.] But much of the ancient learning about conditions is growing obsolete, in consequence of the rules followed in the Court of Chancery, which will generally interfere to prevent the effect of forfeitures, for breach of conditions, wherever a compensation for their infringement is capable of being made. See 1 Vern. 222. 9 Mod. 113. 1 Salk. 156.

There is a class of estates upon condition of great importance in business, and requiring particular observation. This class includes mortgages, and judgments levied on land, which are in effect, mortgages created by operation of law.

There are two modes of pledging an estate in land, as security for a sum of money, spoken of by Judge Blackstone under this head. The first is where the proprietor grants the estate to a creditor, or lender, to be held by him until the sum due be repaid him, out of the rents and profits and then to revert to the owner. This is called in legal phraseology *vivum vadium* or living pledge, because the interest of the proprietor continues and survives the debt. It is also called a Welsh mortgage. This mode of security is fully recognized by the Courts of Equity, and the agreement of the parties will be carried into effect by Chancery, and redemption decreed at any time within twenty years after the debt has been fully paid and satisfied. 1 Vern. 418. Prec. in Ch. 424. 2 Atk. 363. 1 Meriv. 120. 125. 4 Br. P. C. 381. fol. Edn.

The other mode is for the debtor or borrower to grant his land to the creditor or lender in fee, with a condition annexed, that if the debt or loan be repaid on or before an appointed day, the transfer shall be annulled. This is called *mortuum vadium*, dead pledge or mortgage. Before the day appointed the mortgagee holds an estate in mort-

gage, which may be defeated by repayment; but if the term expire and the amount be not paid, then his estate, according to the strict rule of common law respecting conditions, would become absolute and unconditional, and is in the common law courts invariably so considered; but the courts of Equity are enabled to interpose where the estate is of a value beyond the debt charged upon it, and the debtor may file a bill in Chancery, to redeem the property at any time within twenty years after forfeiture. If there be no compact or covenant to the contrary the mortgagee may take possession of the land immediately.

As a mortgage partakes much of the nature of a sale, the rules of law are the same in both classes of conveyance, as to the capacity of the party or his disability, whether in respect of age, mental fitness, freedom of situation, and interest in the subject property, so that minors, *femes covertes*, tenants at will, &c. cannot mortgage. The estate created in the mortgage may be in fee simple, in tail, for life, or for term of years.—In this Province they are usually in fee simple. The proviso for redemption is either that on the payment of the money due, and interest, the estate granted shall be void, or that the mortgagee shall re-convey to the mortgagor. The latter mode is deemed preferable in England, but the former is most usual here. There are two courses pursued on a mortgage being paid off. The one is, by a release and reconveyance of the interest of the mortgage, by deed under hand and seal, either reciting the mortgage, and its being then satisfied, or annexed to, or endorsed on the original mortgage, and referring to it; and this, as well as all documents affecting lands, should be registered under our acts. The other method is pointed out in the Provincial act of 1758, 32 G. 2, c. 2, Sec. 13, 1 P. L. 5, which directs that in case of mortgages registered under the act, on production of a certificate in writing, signed by the mortgagees, or

their executors, administrators or assigns; and attested by two witnesses, stating the full discharge of the mortgage, and the two witnesses swearing before the registrar or his deputy, (who are authorized to swear them) to the payment of the money, and the signing of the certificate, the officer is to enter a minute of the discharge on the margin opposite the registry of the mortgage, and to file the certificate in his office, there to remain of record.

A mortgagor is not permitted to diminish the value of the estate, by waste, such as cutting the timber trees, &c. And the Court of Chancery will grant an injunction to restrain waste, at the instance of the mortgagee. 3 Atk. 723. Dick. 75. 8 Ves. 105. 3 Atk. 210. The mortgagee, if in possession, is also liable to be enjoined, if he commit waste, except when security is scanty, he may cut timber and carry the proceeds to the credit of the interest and principal due. Sel. ca. temp. King 30. 2 Vern, 392. 2 Atk. 723.

The mortgagee unless restrained by covenant may notify the tenants to pay him the rent, and distrain for rent subsequently accruing,—or he may maintain ejectment to obtain possession, without giving the mortgagor notice to quit; but his tenant under lease created before the mortgage is entitled to notice. *Birch v Wright* 1 T. R. 378. 83. *Moss v. Gallimore*. Doug. 266. On failure of payment of the mortgage money, according to the terms of the mortgage, the legal estate vests in the mortgagee, and the remaining interest of the mortgagor, is called his equity of redemption. As long as the mortgage is redeemable in any way, it is considered as part of the personal estate of the mortgagee and is regarded as merely a security, for the amount due on it, the right to redeem is considered as a regular equitable estate, and even the mortgagee is considered as a trustee for support

of it. It may be sold, devised, or mortgaged like any other trust estate. It descends to heirs, may be entailed or *forfeited* to the Crown, though it is doubtful whether it is subject to *Escheat*. 2 Ves. 30. 1 Blackst. Rep. 123. 1 Eden. 255. 256. 1 Bro. P. C. 222. 1 Salk. 85. An equity of redemption upon a mortgage in fee is not subject to dower, though it is to curtesy. 1 Bro. C. C. 325. 1 Atk. 603. 1 Ves. 298. It is also liable to the operation of the bankrupt laws.

All persons having any estate or interest in the premises mortgaged, are entitled in equity to redeem—the heirs—a dowress—and all *pernors of the profits*, that is all who have a claim to receive any rent or profit from the estate—all subsequent incumbrancers as mortgagees or judgment creditors. But where the time for payment named in the mortgage is expired, the mortgagee is entitled to six months notice of the payment, (or what is equivalent, to six months interest) to afford him an opportunity of investing his money at interest. 2 Ves. 678. cases and opinions. vol. 2. p. 51. The equity of redemption may be destroyed, first by lapse of time; secondly by failure to redeem, where a decree for redemption has been sought and obtained, Dick. 56. 249. 2 Bro. C. C. 278 12 Ves. 58. 59. and lastly by foreclosure under a bill in Chancery by the mortgagee or his representatives. Under a bill for redemption, and also a bill for foreclosure, the decree appoints a day for redemption, and on default the mortgagor's interest is foreclosed, that is destroyed in the property. In a redemption bill this time is never enlarged, but the practice is otherwise in a bill for foreclosure. In some cases, though rarely, a sale is sought by the mortgagor in England, instead of a foreclosure,—as where the security is scanty: there, if foreclosure took place, the mortgagee could not sue upon a collateral bond without opening the foreclosure. 2 Atk. 59. 13 Ves. 205. Mosl. 196. 2 Bro. C. C. 155.

Powers of sale being usual in English mortgages, it is not always necessary to foreclose them, or even, to apply for a sale under the authority of the Court. But in Ireland it is the practice to decree a sale, instead of a foreclosure; and if the sale produce more than the debt, the surplus goes to the mortgagor; if less, the mortgagee has his remedy for the difference. The practice in Nova-Scotia has been similar to that of Ireland.—The bill prays both foreclosure and sale, the claim is referred to a master in Chancery, to report the sum due on the security, and an order is made that the mortgagee pay in the sum reported due, with costs, by a certain day: on failure, a decretal order or interlocutory decree is made, foreclosing the equity and directing a sale to be made by a master in Chancery. Notice is given in the Gazette, and the terms are always ten per cent. deposit, and the residue on the delivery of the deed, which is prepared immediately in the name of the master, reciting the proceedings and orders. If there be a surplus, it is paid over to the mortgagor. If a deficiency, which is more frequent, he remains liable under the covenant and collateral bond usually taken with the mortgage. This conveyance is understood to transfer all the right and interest of the mortgagor, at the time of making the mortgage, and also any further interest belonging to him, up to the time of the decree of foreclosure. But if the holder of a mortgage, instead of foreclosing it, enter into possession and hold it above 20 years, then the equity of redemption prescribes through effluxion of time, and the right of the mortgagor is lost, except where the holder of the mortgage has in some way recognized the equity of redemption, as a subsisting right, within the period of 20 years; but this must be an adverse possession. Eq. Ca. Abr. 313. 2 Bro. 399. 2 Ves. Jun. 82. When the proprietor of two estates has mortgaged them both to one person, the mortgagor cannot elect, to redeem one which is valuable, leaving



the other which is scanty security unredeemed. See Amb. 733. 1 Vern. 245. 1 Vern. 29. 2 Vern. 286. 2 Ves. Jun. 366. 7. Where there are several mortgages to different creditors on the same premises, they are entitled each to be paid their principal, interest and costs, in the order of time, in which they have been created, but under the registry acts, a prior mortgage unregistered will be postponed to any subsequent mortgages which have been duly registered : provided the holders of the subsequent mortgage acted *bona fide*, and without notice of the prior incumbrance. If the person, however, to whom an estate is first mortgaged lend a further sum on the estate, without notice of the existence of a subsequent mortgage, he is entitled by the rules of equity to add, or as it is called tack his advances to his first mortgage debt, and claim priority for the whole amount due him ; and this rule applies although the subsequent mortgage was registered before the new advance made by the holder of the first mortgage, provided the first mortgagee had not notice. This decision has been established upon the construction of the Registry acts of Middlesex and Yorkshire, which correspond essentially in this respect, with our acts of Nova-Scotia quoted below. It being held that the act of registry did not operate to make registration equivalent to constructive notice. The Irish acts of registry. 6 Ann. c. 2, 5, 4. directs deeds, &c. to be held good, "*according to the priority of time of registering :*" and the interpretation of that, prevents the power of tacking as against a second mortgage, duly registered. But it would appear that the tacking power exists here as in the register counties in England. See Bedford v. Bacchus, Wm. Kely, 5. S. C. 2 Eq. Ca. Abr. pl. 12. Wrightson v. Hudson, 2 Eq. Ca. Abr. 609. pl. 7. S. C. Rigge on Reg. 6. Ambl. 678. Bushell v. Bushell, 1 Scho. and Lefr. 102. Daly v. Daly. 4 Dow. 436.

There is an English act 7. Geo. 2. c. 20. to prevent the

mortgagee from maintaining ejectment and compelling him to resign his securities, after payment or tender of his principal, interest and costs; but this is not reenacted, or in force here.

The Provincial act of 1758. 32 G. 2 c. 2. Res. of Council, of 3d Feb. 1752. Sec. 1. 1 P. L. 3. directs "that a memorial of all *deeds, conveyances and mortgages,*" shall be registered—the same act directs the instrument to be registered at full length, instead of a memorial. Sec. 12. And every "*deed and conveyance,*" is to be fraudulent and void against any subsequent purchaser, for valuable consideration, unless it be registered before the subsequent conveyance. This act contemplated a Registry at Halifax only, the Provl. act 1789. which established registers in different counties: 29 Geo. 3, c. 9, 1 P. L. 272, enacts that in future "every deed or conveyance, shall be adjudged fraudulent, and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance shall be registered prior to the subsequent purchase and registry thereof."

He who has lent money on a third mortgage not having notice \* at that time, of the existence of the second, may afterwards purchase the first mortgagee's interest, and will then be entitled to tack his interests under the third and first mortgage together; and the second mortgagee can receive nothing out of the estate, until both are first satisfied, 1 Term Rep. 763.

I am not aware that this privilege of tacking has been the subject of any adjudication in this Province, and as it is a principle considered hard and unreasonable by many writers on the subject, it seems desirable that our law

\* If the first mortgagee had notice at that time, it seems doubtful. Mackreth and Symmons, 15 Ves. 335.

should be put on the same footing with the Irish, and that the registration should be made by an act, to have the effect of constructive notice.

It may be worth while to observe that an erroneous opinion is very prevalent among non professional persons, as to the validity of titles to land, purchased at Chancery or at Sheriff's sales. They conclude that, the sale being made by direction of a Court of Justice, the title of the purchaser must be absolutely good.—Now in point of fact let the proceedings be all regular, and the jurisdiction of the court complete, yet a judicial sale does not profess to do more than to convey the rights and interests of the litigating parties, and therefore if their titles be incomplete the judicial sale will not make them substantial. Thus, if A. B. be a minor, a married woman, or absent from the country, or lunatic, and entitled to an estate, and C. D. take possession of this estate, without title, and mortgage it to E. F, and it be sold as the property of C. D, under a decree of foreclosure to pay the debt of C. D, such a sale would not give the purchaser the shadow of a title either in law or justice. A great variety of cases might be stated in which the title conveyed under judicial sales, would be either void or defective, and it is therefore necessary that the purchaser should cause the title to be traced, in buying at these as well as at any other description of sales of land, the judgment or decree of a court generally binding none but the parties to the suit, and those who represent them, and in no case binding persons who were not notified of the proceedings.

The English statute 4 and 5 Wm. and M. c. 16, takes away the equity of redemption where a party mortgages lands already encumbered, without giving written notice to the second mortgagee, (or where a judgment or recognizance exists to the first mortgagee after such judgment,

&c.)—but as this is highly penal and has not been re-enacted or recognized in the Colony, I should conceive it not to be in force here.

*Mortgage by operation of the Provincial Statute of 1758, 32 G. 2, c. 15. 1. P. L. 21, 22.*

This statute is entitled “an act for making lands and tenements liable to the payment of debts,” and by its first clause enacts that in any judgment in a court of record within the Province, for a sum of money or costs of suit, and the party adjudged to pay is “unwilling or unable to satisfy such judgment by money or otherwise, or sufficient personal estate, whereon to levy execution on such judgment shall not be found, then, and in such case, execution shall and may be extended on the real estate of such debtor or debtors,”

The subsequent steps required by this act to be pursued will be more minutely specified when we come to the subject of executions. It may be at present sufficient to state that an appraisement is made of the land taken in execution, and if by the appraisement it appears that the net rents are sufficient to pay off the judgment and expenses, and necessary repairs of the property in two years, the execution is then to be levied on the rents only, and the person in possession must attorn to the creditor, otherwise, by sec. 2, a part of the real estate, if part be sufficient, or if not the whole is taken, and the sheriff delivers both “seizin and possession” to the creditor. In all cases where execution is levied, whether on rents or real estate, the act, sec. 3d, directs the sheriff to execute “a deed of sale of such lands or tenements to such creditor or creditors, in consideration of the value found by such appraisers, to be therein mentioned, who by virtue thereof, or of said return, shall make a good title to such creditor or cre-

"ditors, his or their heirs or assigns in fee : subject nevertheless to an equity of redemption, as is hereinafter prescribed." The equity of redemption is limited to two years after the levying the execution, within which, by sec. 4, the debtor or his representatives may redeem. An action of account is given him against the creditor, who is bound on receiving full payment within the limited time, to surrender up the estate. The legal estate, (when the rents are not appraised as sufficient to pay the debt in two years) appears to vest at once in the creditor on the execution of the deed, and where the land contained in the deed is not appraised above the debt and costs, if the debtor do not redeem in two years the estate seems absolute in the creditor, both at law and in equity. But the 5th section directs that in cases where the estate is appraised at a value beyond the amount of debt and costs, that the estate must be sold after the expiration of the two years at public auction, and until the sale be made, the equity of redemption shall remain open. If it bring more than what is due the creditor, the debtor is to have the surplus, if less, the creditor can have another execution against the debtor for the residue ; and by sec. 6 the creditor may afterwards have execution against other lands or the goods or the body of the debtor, for the remainder unsatisfied after the two years expire. The directions given by this act, and others in amendment of it, are to be strictly adhered to, to confirm a title under it to land, as was held by the Supreme Court, in the case of *Lee. of Mitchel vs. Ring*, in Eastern Term, 1823. see *Lewis v. Bingham*, 4, B. & Ald. 677.

This act directs that in all cases of execution, levied either on land or rents, the persons in possession, whether they be the debtors or tenants, shall attorn and pay rent to the creditors, and the Prov. act of 1763, 3 & 4 Geo. 3, c. 8, 1 P. L. 95, prescribes the form of the attornment,

and subjects the debtors or tenants refusing to attorn, or failing to pay the rent, to the proceedings for wrongful detainer under the Prov. statute of 1758, 32 G. 2, c. 3, 1 P. L. 6. The same act of 1763, empowers the creditor to fix the amount of rent when the execution is levied on the lands, and gives the appraisers the same power where it is levied on the rents only. This authority of course cannot deprive the tenants of the benefit of any fair lease entered into before the judgment was signed. I should suppose a lease entered into, upon fair terms and without collusion, after the signing of the judgment, and before the levying of the execution, would be valid, provided the tenant had not notice of the judgment. In the common case of tenant from year to year, I should conceive the tenant's right to notice under our act of 1779, 19 G. 3, c. 10, 1 P. L. 216, 217, would not be affected or lessened by the levying of an execution, as the general principle of law is that all persons claiming under the lessor or lessee, by grant or assignment, (whether by way of mortgage or otherwise) are bound to give and entitled to receive, the same notice as the lessor or lessee himself. See *Birch v. Wright*, 1 D. & E. 378. I should therefore understand the statute of 1763 as not intended to affect any valid lease subsisting, but giving the authority of fixing the amount of rent in cases where no lease interfered.

The additional act of 1773, 13 & 14 G. 3, c. 4, 1 P. L. 180, gives some additional regulations as to the manner of levying executions on land, and in the third clause saves the title of minors, *femes covertes*, and persons *non compotes mentis*, imprisoned or absent from the Province, whose rights to lands or tenements are not to be barred or destroyed by any proceedings on executions, and they are limited to six years after they are freed from such impediment to commence their suits for the recovery of their property. As the title to land held under the sheriff's



deed or sale is founded upon a statute, in order to make the title valid in law, the statute must be strictly pursued in all the forms it prescribes, and as a judgment at law is the foundation of it, the judgment must be obtained and recorded regularly in order to make a title to the purchaser. The forms of the appraisement, sheriff's deed to the creditor, and deed on subsequent sale to the purchaser, according to the usual form, and the form of attornment in the act, will be given subsequently at the close of this volume. Three kinds of Estate mentioned by Blackstone as estates upon condition, viz. on Statute Merchant, Statute Staple, and by *Elegit*, are unknown to our Provincial law. The two first being grounded on the statute 13 Ed. 1, *de mercatoribus*; 27 Ed. 3, c. 9, which are not applicable or in force here—and the *elegit* arising from the statute of Westm. 2, 13 Ed. 1, c. 18, is superseded by the act of 1758, by which execution is extendible, as we have seen, over all the lands of a debtor—the *elegit* being an execution which gives a similar kind of remedy, but only over half the land. The acts of 23 Hen. 8, c. 6, and 8 Geo. 1, c. 25, also relating to statute staple, are not in force here.

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CHAPTER V.

ESTATES IN EXPECTANCY.

*General and Particular Estates.*

*A general estate* is an estate in fee simple, being the greatest estate as to duration and authority, that a man can have in immoveable property. Noy's compleat Lawyer, 69. This estate may at common law, be absolute, determinable or base.—ib.

*Absolute fee simple* is an estate to a man and his heirs, in perpetuity, having no condition or qualification annexed to it, to narrow the ownership or abridge its duration.

*Determinable*, is such an estate as has a condition, or qualification, by which its perpetuity may be lost, as for instance, an estate in mortgage, under the act of the Province, by levying of an execution until the expiration of the two years of redemption.

*Base.* This class of fee simple estates, is not in use here. Blackstone considers them the same with fees determinable upon qualification; but according to Noy, they are only where there two fee simples exist at the same time, in the same lands, and that which is the inferior of the two, is the base fee.

A *particular* \* estate, is one less than fee simple in point of duration, where there is one person or set of persons, as a man and his heirs, entitled to hold the property for a certain time, or until a certain event, and afterwards it is to go to others. Particular estates may arise by the operation of law, as the estate of tenant in dower, tenant after possibility, &c.; or they may arise by compact or settlement of the parties interested, as where a deed or will settles land, to one person for life, or for 20 years, and the estate is afterwards to go to another and his heirs. Then the estate for life, or years, is termed the particular estate, and the other estate limited to take effect after it, is called the remainder. Where the donor does not convey away the whole fee simple, the property reverts or comes back to him or his heirs, at the termination of the estates he has limited in it, and his interest is called a reversion. An estate at will does not take the estate out of the seizin of the donor, and therefore cannot be a particular estate, whereon a remainder may be limited. All estates are in possession, reversion, remainder or in right.

## POSSESSION.

There are two kinds of possession—possession in fact and in law. Possession in law may be considered to mean a possession by construction of law. Thus, where the father dies in full ownership and possession, his heirs are

\* Derived from the latin word *particula*, a small part of any thing.

by construction of law, considered to be in possession, before they actually enter upon the premises. The same construction holds in the case of settlements, where on the death of a tenant for life, the party entitled to the expectant estate is construed to be in possession instantly. Possession is used in two other senses.—As a general term we have already used it in the last paragraph, and it is thus applicable to the occupation of land, whether for a term of years, for life, or in an estate of inheritance. It has also a restricted meaning, as especially applied to the occupation of land by the tenant for years, in contradistinction from seizin, which means the occupation of lands by a tenant for life, or the owner of the inheritance; or, in other words, possession of a freehold.

#### *Right.*

A right to property may be 1st, to present enjoyment, 2nd, to future enjoyment. A right to present enjoyment when accompanied by possession, is said to be clothed, or vested with possession, and this is the case whether the possession be actual or constructive, and, as well of seisins as possessions of terms. If the person having right to present enjoyment and possession, be dispossessed or put out of possession, (which is also called being disseised) by a stranger, his right is then called a naked or mere right, not being then any longer clothed or vested in possession.

A right to future enjoyment, or estate in expectancy, is by legal construction and inference vested and supported, by the possession of any person, whose occupation is consistent with the expectant title: As in the case of dower, the widow's possession keeps up the right of the heir to the reversion, in case a man grant an estate for life, or years, the possession of his tenant for life, or for years, supports his title to the reversion,—and if he limit in the same conveyance remainders to others, the remainders are

also supported and vested by the possession of the preceding or particular estate, because it is consistent with their title, and has no tendency to defeat it. The possession of the tenant is therefore said to be in law, the possession of the landlord; and the possession of the tenant of a particular or preceding estate, to be the possession of those interested in the subsequent remainders. If therefore the tenant of the particular estate be disseised and put out of possession by a stranger, his interest and the interests of those in remainder also, are reduced to a mere right, and they can only be re-vested by his re-entry, or his recovering the possession by action at law, and judgment, either of which will re-vest his and their interests together. The same distinctions as to the right and possession are applied by the common law, to personal property. See Noy's treatise on tenants and estates, *title*, rights.

*Estates in Expectancy.*

Estates in general admit of a division into such as are in *possession*, and those that are in *expectancy*. The former are also termed estates executed, and the latter executory. The subject of estates in expectancy involves much of the most recondite learning of the English law, and the learned Commentator calls the subject, (of such of them as arise from compact, or act of the parties, including remainders and executory devises,) "the most intricate title in the law." 2 B. C. 163. 175. This branch of jurisprudence, has been closely investigated, by some of the most learned English Lawyers, since the era of Blackstone's Commentaries, and I trust that their works will assist me in the attempt to place the principles which govern the law of remainders, &c. in a clear and intelligible light. There must in every system of law, be matter of much nicety and research: but the complicated settlements of landed estate by marriage contract and by

wills, which are almost universal in the mother country, and the great variety of estates and tenancies there, give this topic an importance in English law, which it does not possess here. Yet as the whole English law of remainders, and executory devises and reversion, is actually in force in this Province, with very slight modification or change, if indeed there is any : it deserves much study and attention on the part of our jurists ; and the increasing value of real estate in the Province, and the tendency arising now to make settlements by devise, will eventually bring it more into use than heretofore.

Estates in expectancy may be first divided into—1st, such as are created by act of the parties,—2d, such as arise from the operation of law. The first kind may be divided into vested remainders, contingent remainders, conditional limitations, and executory devises.

Estates are divided by Mr. Fearné, first into such as are vested, next such as are contingent. *Vested* estates he subdivides, first into such as are vested in possession, which embraces all estates in possession, or estates executed. Next into such as are vested in interest, which subdivision includes reversions and vested remainders, and also, such executory devises, future uses, conditional limitations, and other future interests, as are not referred to, or made to depend upon a period or event that is uncertain. Under the head of *contingent* estates, he embraces all contingent remainders, and all such executory devises, future uses, conditional limitations, and other future interests, as are referred to, or made to depend on an event that is uncertain. An absolute right to the enjoyment of a property, is called a vested estate in it. If the enjoyment of it be postponed until any event which is certain shall happen, the estate is vested in interest, and not in possession ; but if the enjoyment be present and immediate it is vested in pos-



session. Where the right of enjoyment is to arise on an event as yet uncertain, and which may never happen, the estate is not vested, but the interest is contingent. Thus if A. sell and convey land to B. to hold to B. and his heirs forever, then B. takes an estate in fee simple, vested in possession. So if A. make a lease to B. of lands for his own life, or that of another person B. takes an estate for his own life, or that of the other person, vested in possession. So if A. convey land to B. for life, and after B's death to go to C. and his heirs, C. has an estate in fee simple in remainder, vested in interest, though not in possession; and the estate so vested in interest, will descend to the heirs of C. though the death of C. should occur before that of B. If land be conveyed to C. for life, and in case D. should die before C. then the land to go to B. and his heirs: in this case the interest of B. is contingent. If however, the death of D. should take place in the life time of C. the estate will then vest in B. and cease to be contingent, becoming an estate vested in interest, and when C. dies, B. or his heirs will have the estate vested in possession. See Butler's note to Fearné, p. 2. 7th edition.

#### *Remainder.*

Where a conveyance or devise first creates an estate in tail, for life or for years, to one person, in certain lands or tenements, and then proceeds to create another estate of any kind, to another person, in the same property, not to take effect, until the termination of the first estate,—then the first is called the particular estate, and the second the remainder. Several remainders may be limited one after the other. Lord Coke, 1 Inst. 143, defines a remainder to be “a remnant of an estate in lands, or tenements, expectant on a particular estate, created together with the same at one time,” see this definition elucidated in Mr. Butler's note. Fearné, p. 3. Defined by Noy,

to be " a remnant of an estate disposed to another at the " time of creation of such particular estate, whereupon it " doth depend." If a fee simple estate be first created, there can be no remainder limited after it, because the whole estate is parted with. Any number of lesser estates making but one fee simple, are said to be carved out of the fee, and may be created as remainders, and a remainder may be in fee simple ; but no other remainder can be limited after the remainder in fee simple. Fearné 12. As by the rule of the common law, a freehold estate cannot be made to commence in *futuro* because it requires seizin to be delivered.—The common law rule requires that where there is an estate for years created, and a freehold remainder, as for life, in tail, or in fee simple, dependant on it, the seizin of the land, should be delivered to the tenant for years, not for his own benefit, as his estate is good by possession alone ; but to make the remainder good, the seizin of the tenant for years, enuring to the benefit of the remainder man being by construction of law his seizin. Littleton Sec. 69, Co. Lit. 43. a. and b.

A remainder cannot enure to defeat or abridge the preceding estate. The rule of common law is, that every remainder must be so limited, as to wait for the determination of the particular estate, before it is to take effect in possession ; and not to take effect in prejudice or exclusion of the preceding estate. This rule is grounded, 1st, on the nature of a remainder, which is the remnant or residue, after the particular estate is carved out of the inheritance. 2ndly, on the maxim of common law, that none shall take advantage of a condition, but the party from whom the condition moves, that is, the grantor and his heirs, which if they do, the livery of seizin is destroyed, by their re-entry, and as a consequence all the remainders defeated and annulled. Therefore the vesting of a remainder which goes to abridge or destroy the particular

estate, is intercepted and prevented by the intervention of the reversioner's right of re-entry. Fearn. 261.

There are five requisites to make a remainder valid.

1. That it depend upon some particular estate, (which must be greater in quality than an estate at will.)
2. That it pass out of the donor, at the time of the creation of the particular estate on which it depends.
3. That it vest during the continuance of the particular estate or at the instant of the determination thereof.
4. That when the particular estate is created, there be a remnant of the estate left in the donor to be given by way of remainder.

5. That the person (or corporation) to whom the remainder is limited, be either capable at the time of the limitation thereof, or else \* *potentia propinqua*, to be thereof capable during the particular estate. Thus an estate to A. for life with remainder, to the heirs of B.—A. & B. being at that time both in existence, though B. as yet having no heirs—will be good as a contingent remainder. If land be leased to one for life, and if such a thing happen then to remain to B. &c. this will be construed to vest in interest only, on the contingency happening, and in possession when the life estate terminates, so as to make it a valid remainder. Fearn. 263. The feudal inconveniences that attended formerly on the heir's taking land by descent as heir, such as fines to the lord, wardship, &c.—induced the attempt to make him entitled as a purchaser, to avoid the consequences of descent. See Reeve's history of English law vol. 3 p. 319. And for this purpose lands were limited to the father for life, and after his death the heirs of his body.—But the decision and rule laid down in Shelly's case. 1 Co. 104. 93.

\* That is in common possibility, as opposed to the remotest possibility, which rule would render void a remainder limited (after a life estate,) to the heirs of B. if no such person as B. were then existing. Sec. 2, B. C. 169, 170.

—is that when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately, to his heirs in fee or in tail, that always in such cases “*the heirs*” are words of limitation, and not words of purchase. The remainder is said to be executed in the ancestor where there is no intervening remainder, or vested if one intervene. In the first instance it becomes an estate of inheritance in him vested in possession,—in the latter he is tenant for life in possession, with a vested remainder to his heirs; and in both cases the heirs must take by descent from him, and not by purchase.—Ferne. 21. Christian’s note on 2 B. C. 272. which conveys much information. In all cases of this kind, the father or ancestor can bar the heirs by fine or recovery; and the method resorted to, to secure a provision for children, is by limiting the remainders to them, as sons or daughters; without using the word “*heirs*,” and as the remainder to unborn children is contingent, a long term of years is vested in trustees, to hold it from the end of the life estate (which might end by alienation in fee, &c.) until the birth of the children—this trust supporting and preserving the contingent remainders,—and this is called a strict settlement, and is, according to Mr. Christian the only indefeasible manner of securing a provision for unborn children, except in a will where the intention is more regarded. All the remainders and the particular estate are conveyed by one seizin only, and form on feudal principles but one tenure of the lord. Note to Ferne. 298.

#### *Contingent Remainders.*

*First Class.* Where the remainder depends entirely on a contingent determination of the preceding estate itself.

*Example.* As if A. makes a *feoffment* to the use of B. till C. returns from Rome, remainder over to D. in fee, on

such return taking place. C's. return is an event uncertain, on which the particular estate is to determine, and the remainder to vest. Therefore, until he does return the remainder is contingent, and the vesting of the remainder depends on the same contingency, which will determine the preceding estate. This class of contingent remainders is not to be confounded with conditional limitations, the distinction is the subject of much abstruse argument, in Fearné, and the notes of Mr. Butler. See p. 12. and 381 of the 7th edition.

*Second Class.* Where the contingency on which the remainder is to take effect does not depend on the \*determination of the preceding estate.

*Example.* As if a lease be made to A. for life, remainder to B. for life, and if B. die before A. remainder to C. for life.

*Third Class.* Where the remainder is limited to take effect upon an event, which though it certainly must happen at some time or other, may not happen till after the determination of the particular or preceding estate.

*Example.* As if a lease be made to J. S. for life, and after the death of J. D. the lands to remain to another in fee.

An exception to this 3d class arises where land is given to A. B. for 199 years, if he live so long, and a remainder over—there the remainder is vested. Note. Fearné 20.

*Class Fourth,* Where a remainder is limited to a person not ascertained, or not in being at the time, when such limitation is made.

*Examples.* 1. If a lease be made to one for life, remainder to the right heirs of J. S. The heir of a person living cannot be ascertained, as the heirship attaches at his death. The person is therefore uncertain until that

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\* Determination of an estate, as a law term, means its ending or termination.

takes place. It being the maxim of law *nemo est haeres viventis* "a living person hath no heirs."

2. So if a remainder be limited to the first son of B, who has no son at the time : in this case the remainder can only take effect if he should have a son. In the first example, there is an uncertainty, as to the individual in whom the remainder may vest, until that is got rid of by the death of J. S. the remainder depends on contingency. In the second, it is contingent because it is uncertain whether any such person will exist, in whom it can vest.

*Exception.*—The rule of Shelly's case, gives the chief exception to this fourth class, by causing the remainders to children as heirs, to vest in the father, where he has a preceding life estate, and thus to make him tenant in tail, or fee in possession ; and if a different remainder intervene between his life estate and their remainder, their remainder is vested by the same rule. Another exception is when in a devise it is apparent from the words used that the heirs then living are intended to take a remainder. See Fearné 209.

#### *Qualities of Contingent Remainders.*

It is not the uncertainty of its ever taking effect in possession, which makes a remainder contingent, for that degree of uncertainty exists in all remainders in tail or life ; as the death of the remainder man in the last, or his dying without issue, in the first case, will prevent a vested remainder from actually taking effect. A true criterion by which a vested remainder is distinguished from a contingent remainder is,—that in the instance of a vested remainder, if the possession should become vacant by the determination of the preceding estate immediately, the remainder would at once take effect in possession, which would not be the case if the remainder were contingent. Fearné. 216. This quality of a vested remain-



der assimilates it to the interest which the heir at law had at common law, at a very early period, and before persons were permitted to sell or devise their lands. It would be yet uncertain, that the heir apparent would live till the death of the father, should entitle him to a vested estate in possession; but should the father's estate end in the usual way, by his death, it then would vest at once, in possession, except in cases of forfeiture to the lord. The lord's interest where the tenant had no heirs, was vested also in a similar way, in the early law, as the tenant could not alien, and he being the last of his family capable of inheriting, it must on his death, vest in possession, in the lord by escheat. Wherever a contingent remainder in fee absolute is followed by another limitation over, the subsequent limitation will not vest, but remain contingent. As a devise to A. for life, without impeachment of waste, and if he have issue male, then to such issue male, and his heirs forever; and if he die without issue male, then to B. and his heirs forever; in that case the court held that the remainder to B. and his heirs was not vested, because the precedent limitation to the issue of A. was resolved to be a contingent fee; and they took the distinction, that when the intervening estates limited are for life or in tail, the last remainder may, (if it be to a person in existence) vest; but that no remainder after a limitation in fee simple, can be vested. *Fearne*, 225. But a distinction is made where the fee simple remainder contingent, is determinable, and is devised in trust for some special purposes only. See *Ib.* Where estates are subjected to a power of appointment in the first person, who takes an estate under the settlement or devise, with remainders over, in case he should not exercise the power of appointment conferred on him; this power does not suspend the vesting of the remainders so as to render them contingent; but they are considered as vested (in case they are not contingent for other rea-

sons) subject to be divested by the exercise of the appointing power. Sugden on Powers, c. 2. s. 4. Fearné 226. to 23. A contingent remainder is void if it be limited to take effect upon a contingent event, which is an illegal act. The reason is grounded upon a principle already mentioned, viz. : that a remainder is to take effect upon common possibility and not on the most remote possibility ; because, by legal reasoning, it is a most remote possibility to presume that an illegal act will take place. On the same principle, a remainder to a corporation not in being at the time it was limited, was considered void. So where there was a lease for life, remainder to the heirs of J. S. (no such person as J. S. being then in existence) it was considered void, for the remoteness of the possibility,\* as first such J. S. must be born, secondly he must die during the particular estate, which is a chain of uncertainty : or as Lord Cōke says,—a possibility upon a possibility—which is never admitted by *intendment* (supposition) of law. But a remainder to a son of A. who first or alone should attain the age of 21, is held to be good. The meaning of this principle seems to be, that if the ultimate vesting of the remainder be highly improbable, owing to its involving several contingencies, which must concur, the remainder, shall be void, as being inconsistent with the freedom of alienation, and if allowed, operating to prevent the transfer of property, when all persons really interested in it, were desirous to sell it. See Fearné and Butler's note 251. A proviso to make the estate of a tenant in tail cease during his life, is void, and the remainders depending on such a condition, in case of his attempting to *aliene* by fine, &c. are considered as void also. *Ib.* 252 to 256.

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\* So a remainder to G. son of D. when D. has no son of that name is void, because it presupposes, 1st, that he should have a son, and, 2dly, that he should give him the name of G. *ibidem* p. 252.

There are some incidents inseparable from certain estates, for instance the *power of alienation* by fine and recovery, is *inherent to an estate in tail*, and any remainders contingent upon a condition, restraining this power, are void, Fearne, 256, the condition being void in itself; and besides it being the quality of a remainder, that it must await the determination of the preceding estate, and not depend upon a contingency that *abridges* or defeats it. But when the contingency *enlarges* the estate preceding, as when the estate for life, and a contingent remainder in tail, is given to the same person, there is nothing to hinder its taking effect before the determination of the life. *ib.* 265. 279.

It is a general rule that whenever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must support it. This results from the feudal distinction between seizin, i. e. the possession of a freehold, and the possession of a term,—unless the seizin were made to some person who could at once take it, the freehold remained in the donor. See Co. Lit. 217. a. This rule extends to *uses*, since the statute annexed the seizin to the use.\* But a contingent remainder for years, does not require a vested freehold to support it. An estate for life, given by one deed, will not support a remainder appointed by another instrument. The reason of this rule, is to be found in the nature of the transfer by livery of seizin in the feudal forms, which will be pointed out, when alienation is discussed. Remainders are supported by a devise of the legal estate of lands in trust to trustees, and then no particular preceding estate is necessary to support the contingent interests. Fearne. 303. When the event on which a contingent remainder is limited to take effect

\* Uses will be explained in a subsequent chapter.

does not happen by the time at which the preceding estate determines, it never can arise or take effect at all.

*How Contingent Remainders are defeated.*

The tenant in tail making a *feoffment* in fee, destroys the contingent remainders, because he has no remaining right to be revested with the possession, and the estate in contingency has then no estate in possession, or in right to support it. Fearné 316. So may *cestui que trust* in tail; but if he is only for life, he cannot bar or defeat the contingent remainders. *Ib.* 321. But if it be only limited as an use, the tenant for life may by *feoffment* in fee defeat any contingent remainders. *Ib.* 324. Courts of Equity have sometimes interfered to aid the tenant for life of a trust estate, to bar remote contingent limitations; but this has been under very peculiar circumstances. *Ib.* 330. in favor of creditors where the settlement was voluntary, to enable an eldest son to make an advantageous marriage settlement, &c.; but generally equity will go far to support contingent remainders. *Ib.* 336. So where the reversion of the inheritance comes to the tenant of the particular estate, (except where it descends immediately from the donor, or by the terms of the settlement,) the particular estate *merges*, or is lost in the reversion as soon as the latter takes effect in possession; and the contingent remainders are thus destroyed. See 2 Saund. 386. Fearné. 340. 345. Where the remainder of an inheritance is limited in contingency, by way of use, or by devise, the inheritance remains in the donor and his heirs, until the contingency happens, *Ib.* 351. Nor does it seem that when by deed, a lease for life is given to A. and a contingent remainder in fee to the heirs of C. that the inheritance is taken from the donor, while the remainder continues to be contingent. *Ib.* 360. though on this point there are conflicting opinions cited by Mr. Fearné. Contingent re-

mainders are transmissible to heirs or executors. *Ib.* 364. Contingent remainders may be devised. *Ib.* 366. yet they cannot be transferred unless by fine or recovery. Though strictly a remainder in fee excludes any subsequent remainder, yet such a limitation may be good in a will, or in the way of use. In a deed, two or more contingent fees may be limited as alternatives, so that one only may take effect. *Ib.* 373. A contingent remainder to a posthumous child, is good. See 4 Ves. 342. 11 Ves. 139. 2 Ves. and Bea. 367. 18 Ves. 288.

#### *Perpetuities.*

To prevent the perpetual tying up of real estate under settlement, the result of many cases shews it to be the principle of English law, that a man cannot so settle his estate as to make it unalienable, further than for a life or lives, in being, and 21 years after. See this principle explained in *Thelusson v. Woodford.* 4 Ves. 314. 1 B. C. 173. 4.

#### *Conditional Limitations.*

When an estate is limited, so as to give a particular estate, to which an express condition is annexed by which it may be abridged in its duration, and another estate is then appointed to take effect upon the condition attaching, or contingency happening;—the second estate limited is not a remainder contingent, because it does not await the natural termination of the preceding estate; but it is a *contingent right*, and this mode of settlement is called a conditional limitation.

*Example.* If lands be limited to A. for life, with a proviso, that if he marry, his estate for life shall cease, and an estate to B. in tail shall then take effect,—in this case B.

has not a contingent remainder ; but a contingent right, under a conditional limitation. See Butler's note to Fearné. p. 10. These limitations were not valid at common law ; but introduced in consequence of the stat. of uses. 27 Hen. 8. See *Ib.* 384.

### *Executory Devises.*

There is much strictness of construction applied to conveyances in general, and words in deeds are often interpreted by the courts according to certain fixed technical rules, rather than by the real intention of the parties ; because it is a rule, that parties should adhere in their conveyances, to certain established forms of expressing their meaning. In the interpretation of wills greater deference is paid to the intention. A testator is presumed to be less capable of deliberation, and not always accommodated with due legal advice as in the case of an ordinary deed. Such at least, are the alleged reasons on which law decisions have grounded this distinction. 2 B. C. 172. On this principle, estates in expectancy may be created, by a will in which many of the requisites of remainders are wanting ; and such estates are called executory devises. But wherever an estate in expectancy, limited in a will, can be construed to be a legal remainder it will not be considered in the light of an executory devise. Fearné. 386.

### *Qualities of an Executory Devise.*

1. It needs no particular or preceding estate to support it. This arises from the difference between a transfer, by deed and by devise. In the former case *at common law*, livery of seizin, i. e. formal delivery of possession was necessary to pass a freehold interest of any kind, but this livery of seizin was never necessary to a devise, which



originated by statute law, So that by devise, a freehold may commence *in futuro*, and the inheritance in the interim remains in the heir at law, whose possession is constructively the possession of the expectant devisee, being not inconsistent with his title.

2. An executory devise may limit a fee, or lesser estate after a fee, contrary to the rule in case of a deed.

*Example.* If a man devises land to A, and his heirs; but if he dies before the age of 21, then to B. and his heirs.

3. A term of years, limited in a chattel, may be followed by another limitation expectant on the term in an executory devise, which would not be valid in a deed; but the rule respecting perpetuities is also applied to settlements of expectant interests in terms of years. 2. B. c. 174.

Of Estates in expectancy arising from the operation of law i. e.

*Reversions.*—When any estate less than fee simple is granted by a man, there remains to him a right to have the estate again at the termination of the term of life or estate tail which he has granted; and this right to have back his former estate is called a right of reversion. It is an estate in expectancy vested in him, and is descendible and subject to alienation by him or his heirs. In case of a lease for years only; the land does not in the usual language of the law revert,\* because the seizin has always constructively been in the lessor. Nor is the returning of lands to the occupation of the heirs at law or devisees from the death of a dowress or widow called a reversion; because by the feudal law the widow held under the heir, who took seizin from the lord, as well of the land held in dower as of the rest of the inheritance, and the whole was but one holding or tenure. Besides a reversion that is a

\* See 'reversion' used otherwise in 2 B. C. 177.

vested interest, there is a kind of contingent reversion or possibility of reversion, e. g. where a man grants a fee simple, determinable upon an uncertain event. Noy. 77.

The usual incidents at common law to a reversion were fealty and rent. Fealty (never in use with us) was inseparable from a reversion. Rent might or might not be reserved on it—the law remains the same now as to the rent, while fealty has become an obsolete form. The rent might be assigned by grant without transferring the reversion, but if the reversion be granted without a special reservation of the rent, it will pass with it as an accessory. There is an English statute 6 Ann. c. 18, by which persons having expectant interests are entitled to call for the production of persons, on whose lives the preceding estates are limited. It seems to have been chiefly intended to meet the exigencies of the old country, where leases for two or three lives are frequent, and often limited on the lives of persons not connected in interest with the property. In case of non-compliance the persons having expectant rights may take possession of the property till the party is produced, and they may make this demand annually. This act seems inapplicable to our situation, and has not (I should think) been ever acted on or recognised in any of the Colonies. It would therefore seem not to be in force here.

#### *Of Merger.*

It is a rule of English law, whenever a greater and a less estate in the same property, devolve upon the same person in the same right, without any other estate intervening, that the particular or lesser estate, except it be an estate tail, is merged and extinguished, and that he shall hold land in the larger estate.

*Examples.* If A. B. be a tenant of a piece of land for

years, and the fee simple descend to him, or he purchase it, his interest as a tenant for years is merged in the higher estate he has acquired by descent or purchase. But if a man become entitled to one estate in right of his wife, and the other in his own right, or to one estate in right of others, as the executor of a tenant for years, &c.—or a trustee, and another estate in his own right :—then no merger or confusion of interests is suffered by law to arise. A man may have an estate tail and the reversion in fee both subsisting in himself in the same lands, yet the estate tail is not suffered to merge, being unalienable except by fine or recovery, or other extraordinary mode ; and giving therefore a more distinct and protected interest to the heirs than in case of a fee simple. 2. B. c. 178. If the intervening or intermediate estate be a vested interest, it prevents the union and merger of the lesser and greater estates subsisting in the same party. Thus if, in a settlement, the particular estate and the reversion be both in A. yet if there be a vested remainder between, it will sever and prevent the two interests from uniting so as to merge, and sometimes a contingent remainder intervening will have the same effect, but in general it will not, but is destroyed by the re-union ; and this will take place when the reversion is bought in by the owner of the particular estate. See Fearné, 340. 2 Saund. 387.

This doctrine of merger is similar to that of *remitter*, by which if a person have two titles to an estate, he shall hold it by that which is most valid. For instance if A has a good title to a certain piece of land, and yet it is out of his possession and held by B. under a title which is defective,—if the right and possession of B. devolve upon A. by will, inheritance, or otherwise, he has the privilege of fortifying his possession acquired under a defective title, by his own better and older claim, and is in legal phraseology *remitted* or sent back to his better title. Co. Lit.

347, 8. But the principles of remitter will be further entered into hereafter. I have now completed an outline of the chief doctrines of law respecting Estates in Expectancy, and although from the very complicated state of the law in this title, it has been matter of difficulty to be precise, explicit or systematic, yet the reader to whom the subject is familiar will know how to appreciate the obstacles that surround it, and cast obscurity on its features. The younger student will find the references of this chapter have been so adjusted, as to facilitate either a preliminary or a closer study of this highly important branch of our law. I have been solicitous to render the subject intelligible to the general reader as far as in my power. It may be worth while for any, who are not of the profession to give this chapter a second perusal after they have got to the end of this volume, as the subject of uses, trusts, fines and recoveries, livery of seizin and devises are all intimately connected with that of estates expectant. and they must naturally borrow light from each other.

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## CHAPTER VI.



### UNDIVIDED ESTATES.

When any estate in land or goods belongs solely to one individual, he is said to hold it in severalty. It being severed or separated to him. Undivided properties are classed in the English law, into estates in joint tenancy, —in *coparcenary*, and in common.

#### *Joint Tenancy.*

Where lands or tenements are granted to two or more persons, whether for years, life, in fee, or at will, they are joint tenants. This estate can only be created by deed or will, and does never arise by the mere operation of law. Therefore children entitled to shares of an intestate's estate cannot be joint tenants.

*Examples.* If an estate be given to A. and B. and their heirs, without any words being added to imply a different mode of tenure, they will be joint tenants in fee. To con-

stitute a joint estate, it is requisite that the joint tenants should have a community in respect, 1. Of the origin of their title. 2. In the amount of interest, or duration of enjoyment to which they have a right. 3. As to seizin or possession both as regards it's commencement or vesting and it's extent.

1. Their estate must be created by the same act, as by the same conveyance, or (if obtained illegally) by one disseisin.

2. If land be granted to A. and B. for their lives, then they have a community in the duration of enjoyment, viz.—to each for life, and they are joint tenants for life. If lands are granted to A. and B. and their heirs, they are joint tenants of the inheritance. If lands be given to A. and B. for their lives, and to the heirs of A.—A. and B. are joint tenants for life, and A. has a vested remainder in fee in severalty.

3. The possession must commence in law, that is to say, the right must vest in each joint tenant, at one and the same time; therefore, if there be a lease for life, remainder to the heirs of A. and B. and both A. and B. die at different periods, leaving each their heirs, the heirs shall not be joint tenants, because the interest vesting at the death of each in their several heirs, their vested rights to the possession commenced at one date for the heirs of A. and at another for the heirs of B. Co. Lit. 188. a. The possession must also be co-extensive, each being seized or possessed of an undivided portion of the whole premises.

#### *Incidents.*

Where there are two joint-tenants, if their lessee for life surrender to one of them, both will have the benefit of the surrender; but not of a grant of the term made by the lessee for life, to one of them, which,



is good to the grantee alone. Co. Lit. 192. a. Livery of seizin given to one, without deed, as it was used in early times, could not be good for both. Co. Lit. 49. b. because livery cannot pass land to a person absent, and therefore could not create a joint tenancy. The act of one joint tenant may in some cases be binding on both, as if two joint lessees for life be ousted or disseised by the lessor and he enfeoff another, and then one of the joint lessees enter, this operates as attornment, and binds them both to recognize their lessor as such. See Co. Lit. 318. and 319, and where a deed creates joint tenancy, livery of seizin to one enured to both. As each has a general right of occupation, one joint tenant cannot sue another for trespass on their joint lands. Neither can one alone make a valid lease, of any part of the land,—nor can they sue or be sued separately, in any matter relating to their joint property. In case of waste the stat. Westm. 2. c. 22. gives one joint tenant an action for waste, against the other, which he could not have at common law. This ancient and beneficial statute, which perfects what was before a right in conscience, that is to fairness in the using a joint estate (but one of imperfect obligation) may be considered as interwoven with the principles of the common law; and if so, in force wherever it is generally adopted. See Dr. and Stud. Dia. 1. c. p. 64. and on the same principle the Stat. 4. Ann. c. 16. gives an action of account between joint tenants for receiving more than their due shares of the profits of the joint property; but the remedy by bill in equity, (that is in Chancery,) for an account has in practice superseded that statute, so that its applicability is not important.

#### *Survivorship.*

When several persons are joint tenants, either of an estate of inheritance, or of a life estate *per autre vie*, or

joint tenants of a chattel or personal estate, where any of them dies, the whole estate and interest remain to the survivors, and the heir or devisee of the deceased is excluded from any claim in the property. This right of the surviving joint tenant to the whole interest is called, in the early English law the *jus accrescendi*, or right of accumulation. The Crown or a corporation holding undivided property with other persons cannot be considered as joint tenant and of course no survivorship can arise in such cases; nor can one corporation be a joint tenant with another corporation. Co. Lit. 190. In case of partners in commerce, there is no survivorship as respects their stock in trade, debts or other personal property. Co. Lit. 182. a. : but in real property belonging to the partnership, the survivorship exists at common law; but in Chancery, the survivor will be considered as trustee of his legal estate for the benefit of the partnership. Montagu p. 213. The interest of partners, in personal estate, is considered as a joint tenancy, and this extends to the original stock of the firm and also to all subsequently added, but part owners of a ship are tenants in common. 1 Maddock's Ch. 93. Joint tenancy, though originally a favorite of the feudal system, in latter times has been considered as odious, on account of the right of survivorship. The inconvenience of this incident, is, that persons unskilled in law may unwittingly take a joint estate, and not having divided it, on their death their children are deprived of the property; a result which had never been contemplated by the parent.

In the first periods of this Colony, the grants of the Crown were issued to the settlers with little attention to legal form, and often the joining of many grantees in the same patent, without expressing that they should hold as tenants in common, left large townships and tracts of land subject to this inconvenient incident of joint tenancy; so

that, by strictly applying the rules of law interpretation, many families would have been most unjustly deprived of their estates. As it had never been contemplated by the government or the grantees, that survivorship was to arise under these grants, in the year 1791. the Prov. act of 31. Geo. 3. c. 10. 1 P. L. 287. was passed to give relief to those grantees from the effect of the doctrine of survivorship ; and since that time the grants of the Crown have been specially worded, so as to give to every grantee a tenancy in severalty by a plan annexed to the patent, in which each man's lot is designated, and metes and bounds, in conformity to the plan, stated in the body of the instrument. The act of 1758. 32 G. 2. c. 2. 1 P. L. 1. had by its 1st clause, confirmed possessions, notwithstanding defects of legal form. in the instruments of conveyance ; provided that they were registered deeds or wills, the effect of which will be more fully entered on in another part of this volume. The act of 1791, just mentioned purports to be in amendment of that act of 1758, and reciting in its preamble that " great inconveniences may happen to the inhabitants of this Province, from the manner in which townships, and large tracts of land, have been granted ; for remedy" thereof, enacts, in the 1st. clause " that all persons who *now* hold lands, tenements or hereditaments, in joint tenancy, and who have not nor shall, in their, or any of their life times, have parted or divided such joint interest ; that nevertheless, the undivided share or right of such joint tenant, or tenants who may die, shall not be inherited by the surviving joint tenant or tenants ; but shall descend to the lawful heir or heirs of the deceased." Second clause, 2. " And be it further enacted, that when any persons, being either joint tenant, or tenants in common, in lands or tenements, have divided such their interests in the same by survey and plans, such surveys and plans shall be henceforth deemed and taken to be, a legal division of the same, so as to bind the own-

“ers thereof, equally as if the same had been made by deed, or writ of partition.” The 3rd clause imposes a fine, imprisonment, or *whipping*, at the discretion of the court, on persons “wilfully or maliciously” removing or destroying bounds or landmarks set up agreeably to such surveys and plans mentioned in the 2nd clause, and on the accessaries to such offence, on conviction in any court of record in the province. The 4th clause, confirms the previous grants of the Crown, which were defective in point of form. This clause has been already quoted at length in this volume, page 78. It has been thought that this act destroyed survivorship, as an incident to joint tenancy, in all the cases of joint holding that had arisen, or could arise in the province. The idea has led to conjecture, that by the destruction of an incident so inseparable from this estate in the English law, joint tenancy itself was abolished entirely. This impression has been strengthened by several circumstances, viz.

First. Although the preamble of the act is limited to the grants of the Crown, of townships and large tracts, before its date, 1791, yet the first clause relieves all joint tenants then existing, (if its wording is not restricted by the preamble,) from the inconvenience of survivorship.

Secondly. Several Provincial statutes (of which in their proper place,) have established and regulated the partition of real estates. Of this the earliest, is the act of 1767. 7 and 8 Geo. 3. c. 2. 1 P. L. 130. which act was in its terms confined to partition of townships. Now the act of 1797. 37 Geo. 3. c. 4. 1 P. L. 387. reciting that doubts had arisen, whether the act of 1767 extended to enable coparceners, joint tenants, and tenants in common, who did not come under the description of proprietors of townships to make partition of their lands, enacted that the act of 1767, and all acts theretofore “made in amendment thereof, shall be construed to extend to all persons, who do, or shall hold lands in coparcenary, joint

"tenancy, and tenancy in common." This act of 1797, has been supposed to apply as well to extend the act of 1791, as the act it names.

Thirdly. The index of the Province laws, vol. 1st, compiled by the late Attorney General Mr. Uniacke, speaks of survivorship being destroyed in general terms, not noticing the restrictive words of the act of 1791. See Index tit. 99, No. 28, and small-Index annexed to it.

Fourthly. The Provl. statute of distributions, act of 1758. 32 G. 2. c. 11. sec. 18. 1 P. L. 13. before noticed (under the title of estates for life—curtesy,) directs "that all such estate, real or personal, as is not comprised in any last will and testament, or is not plainly devised or given by the same, shall be distributed in the same manner as intestate estates are directed to be distributed by this act." This, it has been suggested, may be construed to take away survivorship generally, for the same reasons that it may be supposed to prevent the husband's curtesy in lands. Such, however, does not appear to have been the view taken by the legislature, when passing the act of 1791, for that seems to recognize the existence of survivorship as a general principle of the common law in force in the province, and to relieve the persons then holding grants in joint tenancy from its operation. I am strongly inclined to think, that joint tenancy is not abolished, nor its incident, survivorship, destroyed in ordinary cases, by the statutes of the province.

The Act of 1791, seems only to have contemplated the mischief of giving to the previous grants of the Crown a literal construction, whereby the grantees would have been joint tenants and subject to the law of survivorship, contrary to the actual intention of the Government at the time of passing their patents, which may be gathered by reading the preamble of that act, and that of the act of 1767 respecting partition, which last details the causes of

adopting the form of those patents. I am therefore led to believe that the act of 1791, is limited in its operation to the interests taken by previous grants of undivided land. One of its clauses confirms partitions of such lands, made by plan and survey; the subsequent clauses confirm irregular patents, and the 1st clause of the act of which it professes to be an amendment, confirms informal deeds and wills,—being a series of enactments to make valid the conveyances of the early settlement deficient in legal accuracy. It cannot be an act in amendment of the law of 1767 for partition of townships, as it is neither stated to be so, nor is it (that is the 1st clause of the act of 1791) in effect connected with the acts to regulate partition. It therefore, cannot come within the scope of the extending law of 1797, already described. Any argument drawn from the manner in which the Index of the late Attorney General abridges the substance of this act, must be inconclusive. The index gives an outline of each act, sufficient to draw attention to its contents; but does not purport minutely or exactly to convey the legal effect of every clause, and in this instance, is not at all inconsistent with my view of the act in question, the only difference being, that it does not quote the words of restriction. Were it otherwise, the respect I entertain for the legal abilities, and great professional experience of Mr. Uniacke, from whom I had the advantage of deriving the rudiments of my legal studies, would lead me to hesitate in coming to a conclusion; but I feel satisfied that the expressions of his index are not to be considered as conveying any opinion on this point. As to any argument drawn from the Provincial Statute of distributions, I think it cannot be considered as valid. The act of 1791 is evidently passed upon the presumption that no such construction could be entertained. The claim of survivorship is not like an estate of curtesy, a new kind of interest arising on the death of the

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wife, in whose right the husband before held the lands ; but merely an extension of the right of individual property, in one's own right ; the possession not being enlarged or extended, but merely the interest enlarged by the death of the joint tenant. It may therefore, I think, be taken as general principle, that except in the construction of grants of the crown land, anterior to 1791, the principles of joint tenancy, with all its incidents, are part of the common law, as it is in force in Nova-Scotia.

*How Joint Tenancy may be Severed.*

Joint tenancy may be reduced into separate estates, by agreement of the parties to divide their lands and hold them in severalty, by which the community of interest and consequent survivorship are destroyed. But this agreement and partition must at common law be by deed. Co. Lit. 178. a. 198. b. In joint tenancy of an estate for years, partition by consent might at common law be made verbally ; but the Provincial statute of frauds act (of 1758: 32 G. 2. c. 18. 1 P. L. 25.) annuls all leases, for above three years, by verbal contract, as we have seen before, and also, in the 3rd clause annuls any *assignment, grant or surrender of any freehold or term of years*, unless it be made by deed or writing signed by the party or his agent authorized by writing also, or by act or operation of law. It may therefore be considered as requisite that partition by consent should be executed by deed, if of freehold interests, and by writing signed at least, if of a term of years. One joint tenant could not at common law compel the others to divide, to which all must consent ; but the acts of the Province, which, in this respect follow the English act of 32 Hen. 8. c. 32 give to each the right to compel a division by writ. Joint tenancy may be destroyed, by *destroying its unity of title*. If one joint tenant conveys his estate to the third person, the tenancy is severed, and the

purchaser holds as tenant in common with the other joint tenant, the community of title being thus ended. But a devise of a joint tenant's interest by will, will be nugatory as the will does not take effect until *after* the death of the testator, and the survivorship vests instantly *at* the death: and thus defeats the intention of the will. Neither will a partition made after executing a will make it good unless the will be republished. 2 B. C. 185. 6. and Christian's notes. It may be destroyed *by destroying unity of interest*. Therefore, if there be two joint tenants for life, and one of them buy or inherit the reversion in fee, they cease to be joint tenants. And generally when the community of interest or of possession is destroyed by any means, the joint tenancy and right of survivorship will be defeated.

Coparcenary resembles joint tenancy in many respects, being the interest which female heirs, or heirs in *gavel-kind* take in the inheritance by descent. This estate in the exact sense annexed to the term in the English law, does not exist here; but it much resembles the interest of the heirs, under the provincial statute of distributions, before division of real estate. Coparceners may sue and be sued jointly, and the entry of one is in some cases considered as the entry of all. They cannot sue each other for trespass, nor waste. They always claim by descent, and their interests may vest at different periods. They have a unity of interest, but only in moieties or shares, and they have no right of survivorship. If one alien to a stranger, the interest becomes a tenancy in common. 2 B. C. 186. 189.

#### *Tenants in Common.*

Those who hold undivided property by different titles, are tenants in common. To constitute this estate a community of possession only, is requisite, there being no necessity of any unity of title, of interest, or of time. One

may be tenant for life, and the other in tail, or in fee simple. One may hold by a purchase from A. the other by inheritance from B. The estate of one may have vested yesterday, that of the other 50 years before. Tenancy in common arises upon the severance of joint tenancy, when the possession remains undivided, as where one joint tenant alienes his share, the purchaser holds as tenant in common, with the other joint tenant, until partition takes place, which destroys the unity of possession. 2 B. C. 192. Tenancy in common may be created by deed. If lands be transferred to several persons in one conveyance, if they are not allotted in severalty, to each one his portion, nor so granted as to make them joint tenants, they must be considered tenants in common. 2 B. C. 193. Land given to two persons, to hold the half to one, and the half to the other, will be construed to be a tenancy in common. *Id.* So if a man by deed grants to another the half of his land, the grantee will be a tenant in common with him. When it is intended in a deed, to create a tenancy in common, it is safest expressly to state that the grantees are "to hold as tenants in common, and not as joint tenants." Wills admit of more favorable latitude of construction; and sometimes are held to create a tenancy in common, if such is the apparent intention, by words that in a deed would leave the estate in joint tenancy.

Every tenant in common has a right to compel partition of the undivided estate, by the Provincial Statutes. Tenants in common are liable under the statute of Westm. 2. c. 22. to an action of waste at each other's suit, and the statute of 4 Ann. c. 16. before mentioned, obliges them (as well as joint tenants) to account to each other, for the profits of the estate; but the remedy by bill in Chancery supersedes the use of this claim of account at common law. Estates in common may be dissolved, 1. by reuniting the several titles and interests in any one of the

tenants in common. 2. By Partition which divides the possession and make each tenant in severalty of his portion.

The possession of an undivided estate by one joint tenant, or tenant in common, is in contemplation of law, the possession of the others, and is never considered an adverse holding unless one actually *oust* the others. It has been held, that 36 years sole and uninterrupted possession by one, without claim or demand on the part of the other, or any account rendered to him of the profits, amounted to an *actual ouster*. Cowp. 217. So on demand made by a co-tenant of payment of his share of profits and a refusal to pay, together with a denial of the claimant's title, and a continuance of sole possession afterwards, this has been held to be an *actual ouster*. 11 East. 49. and so is turning the co-tenant out of possession, or entry under a claim of the whole interest. Vin. Abr. 14. 512. But mere receipt of the profits by one for 26 years, was held not to be conclusive as to adverse possession. 5 Burr. 2604. In case of an *actual ouster* one joint tenant, or tenant in common, may maintain an action of ejectment against the others, for his share. Adams on Ejectment 81. The entry of one co-tenant will avoid a fine for his companions as well as himself. *Ib.* The service of a notice to quit, upon one joint tenant, addressed to all is valid. *Ib.* 116. But not on the wife of one. *Ib.* 209. In ejectment joint tenants may make joint demises, but tenants in common cannot. *Ib.* 183. A tenant in common who has recovered in ejectment, may maintain an action for the *mesne* profits against his companion. *Ib.* 330. The method of obtaining partition by legal proceedings will be described in the third volume.

## CHAPTER VII.

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### *OF USES, TRUSTS, AND POWERS.*

The doctrine of uses and trusts, and that of powers, form in connection a most abstruse branch of English law. The comparative simplicity of our conveyances and the rareness of marriage settlements in this Province, lessen very much the practical utility of this study to a colonial lawyer. I will not undertake to enter largely into the elucidation of it, but give a brief sketch of its chief characteristics, referring the student who has occasion to enter into a more particular enquiry, to Dr. and Stud. Dial. 2, c. 22, and 23, p. 199—to 212. 2, B. C. 327 to 337. 3 Byth. Con. 499, (in notes) to 520. 1 Mad. Chan. under head of Trusts, and to the edition of Gilbert on Uses published by Sir Ed. Sugden. The early civil law of Rome was embarrassed by restraints upon alienation, In order to evade them, persons granted property to those who could legally take it, in trust for others who were to enjoy the profits. This right to the income and benefit of an estate was a right of imperfect obligation, and it was left to honor and

conscience to enforce it. But Augustus appointed and authorized a particular judge to enforce the performance of trusts or *fidei commissa* as they were called, and this officer was called the *praetor fidei commissarius*, or judge of trusts. This ordinance changed the right, not binding before except on the trustee's conscience, into an available claim, which could be demanded in the court of the *praetor, f. c.* The same kind of obstacles occurring in the early law of England, to the transfer of real estates, the principle of the Roman law as established by Augustus, was adopted by the ecclesiastics, who had a particular interest in evading the statutes of mortmain, which were calculated to restrict gifts of land to the church, within narrow bounds. The chancellors being clergymen, considered it their duty, to enforce the equitable rights of parties, against the nominal owners or trustees, and assumed the jurisdiction of the *praetor, f. c.* see Inst. 2. tit. 23, Dr. & St. 200. This conveyance to uses as it was called, was found convenient, as it enabled a person to evade the restraints then in force against alienation by devise. The interest created was free from the feudal burthens, particularly that of escheat, it was not liable to dower or curtesy, nor could it be taken under legal process for the debts of the person entitled to the benefit, who was called the *cestui que use*. These were some of the advantages which attended *uses* in the ancient law,—they were accompanied by certain disadvantages. If feoffee to uses died without heirs, or committed an act implying forfeiture of his estate, or married—the lord, the husband, or wife, became entitled in these cases to the forfeiture, the curtesy, or dower, respectively, without being liable to perform the use; and purchasers for valuable consideration, without notice of the use, held the land free from it. It was also held that incorporeal hereditaments could not be granted to an use, their use and possession being naturally inseparable,—that where a feoffment was made without consideration, the use remain-



ed in the feoffor. Uses were descendible in the same way as inheritances in land in possession, in conformity with the maxim that '*equity follows law*,' which means that it deviates no farther from the rules of the law than is actually required to carry into effect the principles of justice, it undertakes to support. Uses might also be assigned or devised at common law, without any livery of seizin, or act of public notoriety, but the concurrence of the feoffee, or legal tenant of the fee, was necessary to the regular alienation of the use. As uses were not subject to dower or curtesy, it became usual to settle some estate to the use of husband and wife; they became joint tenants for life, by this method, the survivor enjoying the property, and from this originated what are called jointures of married women. The statute law gradually altered the nature of uses, rendering them by degrees subject to most of the legal incidents of other estates. 2 B. C. 331. At length by the *statute of uses*. 27. H. S. c. 10—it was enacted, that the person entitled to the use, should be seized and possessed of the land itself, in the same estate as he had at common law in the use. The effect of this act was to give the legal estate to the *cestui que use*, who before had only an estate in equity, and could not pursue his right to it in the courts of law, but in a court of equity only, before this act passed; thus the estate of the feoffee was annihilated, and became nothing more than a mere form.—The statute vesting the legal possession, as well as the beneficiary ownership, in the person to *whose use* the conveyance appeared to have been made. The land was no longer liable to forfeiture, or escheat, as the property of the feoffee, nor to dower or curtesy, in favor of the feoffee's wife or husband. On the other hand it became subjected to all the usual incidents of other real estate of *cestui que use* himself. But although it was subject generally to these incidents, as to dower, curtesy, escheat, &c. yet the rules of the law were relaxed in some instances, in

favor of uses, so as to admit of the same facilities in arranging estates which they furnished before the statute of uses. It was accordingly established, that a use could be limited to commence *in futuro*, although the interest in it should be in fee or of a freehold character, the use unappropriated remaining in the interim in the grantor, and the seizin of the feoffee supporting the future use:—as if lands are conveyed to the use of A. and B. after their intermarriage, or to the use of A. and his heirs, till B. should pay him a sum of money, and then to the use of B. and his heirs,—estates so limited in a will are termed executory devises. Contingent or *springing uses* resemble executory devises, but require the estate of the feoffee to be preserved until the contingency happens, its previous forfeiture or alienation preventing the use from being executed by this statute, and the interest of the *cestui que use* from vesting. (A fee can also be limited to take effect after a fee, in a use.) Contingent uses resemble contingent remainders, in requiring a preceding estate to support them, and in taking effect on the determination of the preceding estate.

*Future uses* may be divided into, 1. Shifting uses, 2. Springing uses, 3. Contingent uses.

1. *Shifting uses* are such as take effect in derogation of some other estate, and are either limited expressly by the deed, or authority is thereby given to some person to create them. A common instance is the usual method in marriage settlements, where the first use is given to the owner *in fee* until marriage, and after marriage to other (shifting or secondary) uses. So if an estate be limited to A. and his heirs, with a *proviso*, that if B. pay to A. 100 dollars by a given time, the use to A. shall cease, and the estate go to B. in fee; the estate is vested in A. subject to a shifting or secondary use in fee in B. So if the proviso be that C. may revoke the use to A. and limit it to B. then A. is seized in fee with a power in C. of revocation

and limitation of a new use. These uses must not lead to a perpetuity or they will be void. 5 Bro. P. C. 592. But a shifting use may be created after an estate tail, to take effect at ever so remote a period; because the tenant in tail for the time being, may by recovery defeat the shifting use.

2. *Springing uses*, are limited to arise on a future event, where no preceding estate or use is limited, and do not take effect in derogation of any preceding interest, other than that which results to the grantor and remains in him during the interim. 3. *Contingent uses*. These are limited to take effect as remainders, for instance, an use to the first unborn son of A. after a previous limitation to him for life is a contingent use. So if land be granted to A. in fee, to the use of B. on his return from London, it is a future contingent use, on account of its uncertainty in taking effect. Whenever a limitation of an use can be construed to be a contingent use in the nature of a remainder, no different construction will be suffered by which it might be considered a springing use 1 Mod. 226. 7. 2 Mod. 207 Dougl. 758. In the interpretation of the statute of uses, it was held that an use could not be limited on an use. Accordingly the common law courts decided, that if land were given by feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs; the statute only executed the first use, viz. to B. and his heirs, and that the subsequent limitation of trust to C. and his heirs was a nullity. So where land was granted by *bargain and sale* for money (whereby an implied use was derived to the bargainee) the limitation of a further use to another person, was repugnant and void.—Again as the statute of uses referred only to persons *seized* to the use of others, they held it not to apply to estates for term of years, or chattel interests. Shifting uses are held to be executed by the statute, and not considered in the light of an use upon an use, which

is only esteemed a trust, and must be enforced in equity. Preston on Abstracts. v. 1. 307. to 310.

### Of Trusts.

These decisions not affecting the equitable rights of the parties, the courts of equity have ever since supported uses thus limited, under the name of trusts and they now form a most important part of equity jurisdiction. Trust estates are subject to the same rules of descent as other real estate. They are capable of being limited in the same manner as other property. By a singular anomaly curtesy has been adopted in trust estates and dower excluded. Executed trusts are subject to the same modes of alienation and devise as if they were legal estates, and the *cestui que trust*, that is, the beneficial owner may dispose of them in any way without the intervention of the trustee whose interest is merely a form, except where some discretion or control is given him by express words in the deed or devise creating the trust. In the contemplation of a court of equity the *cestui que trust* is seized of the freehold. The trust interest is in equity regarded as the land itself, and the declaration of trust as the disposition of the land. The trust estate may be assigned or conveyed without the technical words necessary for the transfer of legal estates, if the intention be evident. No particular form of words is necessary to raise a trust. Generally a trust means a right in the *cestui que trust* to receive the profits and dispose of the property. But there are special trusts for particular purposes, for instance, of the accumulation of the rents, sale of the lands, &c. where the *cestui que trust* has no right to interfere, until the specific object is accomplished.

The provincial statute of Frauds act of 1758, 32 G, 2, c. 18, Sec. 6, 7, 8, 9, 10. 1 P. L. 26. requires sec. 6. all declarations or creations of trust to be proved by some

writing signed by the party legally enabled to declare the trust or by his last will in writing, otherwise they are void. 7. The act provides that where by implication or construction of law a trust is created, transferred or destroyed by the operation of a conveyance, this rule shall not apply. 8. It also requires all conveyances of trust interests to be in writing, signed by the party making them, or by last will in writing. 9. The act also authorises the levying of executions against *cestui que trust* upon the trust estate. 10. And it makes the fee simple trust interest, assets by descent in the hands of the heir who is chargeable with the obligation of his ancestor, as if they had devolved on him by a legal and not an equitable title. His own separate estate not to be affected by any such execution. A trust need not under this act be *created* by writing but it must be evidenced by writing. 3 Ves. 707. The clauses of our act above mentioned are transcribed with no material alteration from the English stat. of Frauds. 29 Car. 2. c. 3. Sections 7 to 11 inclusive. The English law connected with the statute of uses and that of frauds may be considered as adopted generally in this province by the act of 1758.

*Resulting trusts, or trusts by operation of law.*

1. Where an estate is purchased in the name of A. and the purchase money is actually paid at the time by B. there is a resulting trust by implication of law in favour of B.
2. Where a trust is declared only as to part and nothing said as to the residue, the part undisposed of remains as a resulting trust in favor of the heir at law. In no other cases but these two, or such as are within their analogy can there be a resulting trust, except there be fraud. If a purchase be made by a trustee with trust monies a trust interest in the property so purchased will result in favor of the beneficial owner of the monies un-

der the first rule.—Prec. in Chan. 84. Ambl. 413. So if part of the consideration be paid by B. in the case in 1st rule, there will be a resulting trust in his favor *pro tanto*. 1st Atk. 59. 2 Ves. and Beam. 338.

*Implied trusts.* There are very many cases in which a trust will be implied in equity. 1. Executors and administrators are considered trustees in equity, and courts of equity will enforce and assist the execution of their duties in the administration of the estate, according to law and equity. See 1 Maddocks on Chancery 577. 2 Mad. on Chan. 126. 2. All persons coming into possession of trust property with notice of the trust, are considered as trustees and bound with respect to that special property to the execution of the trust 2 Mad. on Chan. 125. 16. Ves. 249. 1 Sch. and Lef. 262. But disseisors, abators or intruders not being in privity with the estate to which the use was annexed are not within this rule. *ibidem*. 3. Where a vendor conveys his estate to the vendee without receiving all or part of the consideration money, he has as against the vendee and his heirs, and all persons claiming under a voluntary conveyance and all purchasers for a valuable consideration, with notice, a lien on the estate for the purchase money or so much thereof as is unpaid; although a receipt may be endorsed on the deed, and the money stated in the deed to have been paid. 2 Maddocks on Chan. 128—9, and the purchaser is thus trustee for the vendor by implication. 4. If the purchaser of an estate prematurely pays the consideration money, before the estate is conveyed to him, the vendor will be a trustee for the vendee, and if he die, his (the vendee's) personal representatives will have the benefit of the lien. *ib.* 129. 15 Ves. 345.

*Merger of equitable estate.* It has been decided that when the legal and the trust estates meet in the same person the trust interest is merged in the legal estate. Doug. 741.



*Of Powers.*

The powers by which previous uses and estates are altered, and shifting or secondary uses limited are always in effect, powers of revocation and new appointment.

1. Where they are unconnected with any present interest in the land and only enable the appointer or donee of the power to revoke and make a new appointment, they are called *collateral* powers. 2. When a power is granted in connection with a particular estate, or reserved with it, and unless it be executed during the continuance of that estate and by the holder of the estate it does not take effect, is called an *appendant power*, as if an estate be limited to a man for life with power to make leases during his life estate. 3. *Powers in gross*, are such as are vested in a person having an estate in the land, but which he may execute notwithstanding the determination of his estate. *A general power* is one which may be exercised in favor of any one the appointer chooses. *Particular powers*, are only to be exercised in favor of specific objects. The *creation of powers* require no particular form of words in a deed or will. It is sufficient that the intention appear. A devise of land to executors to sell, passes the interest in it, but a direction that they shall sell, or that the lands shall be sold by them gives them only a power, Year book, 9 Hen. 6. 13. b. 24. b. Lit. Sec. 169. Co. Lit. 113. a 181 b. Cro. Car. 382. 2 P. Wms. 308. 4 Kent, Com. 315. See Sugd. on Powers. 104. 108.

*Execution of powers.*—Every one capable of disposing of an estate actually vested in himself may exercise a power. An infant also, may execute a power which is *collateral only*. A *feme covert* may execute any kind of power and it may be given to her while she is married or before, but if it be coupled with and appendant to an interest, she cannot it seems, unless the power is expressed

to be independant of coverture. The concurrence of her husband is not necessary in the execution of it, unless directed by the terms of the instrument creating the power. See Prest. Watk. Conv. 252. At common law if there were several executors authorised to sell and one died, the power did not subsist in the survivors, the stat. 21 Hen. 8. c. 4. authorised the executors who accepted the office, to sell without the rest. This statute has been re-enacted in many parts of the United States, but not here. It is precedent in every deed of appointment under a power. 1. To express that it is made in the exercise of the power; and 2. of every other authority enabling the donee to appoint or convey; 3. to shew distinctly in the body of the instrument that the formalities required in the exercise of the power are complied with; 4. to state in the attestation that the proper formalities have been attended to. See Sugden. Power's 2. Ed. 184. 3, Ed. 193. See post '*Execution of deeds.*'

*Reserving powers of revocation and new limitation in deed of appointment.* Under a power of appointment, the donee may either appoint absolutely or in the deed of appointment may reserve a power of revocation and new appointment, although not expressly authorised to do so in the deed conferring the power, and this may be done over and over again. Cowp. 651. Sugd. Powers, 3d ed. 311. 690. 2 Bythe. Conv. 513. note g. The donee may regulate the mode of revocation, but the new appointment must pursue the forms directed by the original power which the revocation revives. 2 Pres. Abs. 274. 277. When the power is executed by deed, unless a power of revocation be reserved in the deed of appointment, it cannot be revoked. 3 Meriv. 256, and this applies to personal, as well as real estate. Sugd. Pow. 3d. ed. 324. but if executed by a will no express power of revocation need be reserved, as a will is always revocable until the death of

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the testator. 2 Byth. Con. 513, in notes. Although the original settlement reserves only a power of revocation, yet a power of new appointment will be inferred, but this does not apply to a deed executing a power which must be strictly construed. Therefore if the appointer in making the deed of appointment reserve to himself a power of revocation, this will not authorise him to make a new limitation of uses, unless he has also expressly reserved such an authority. *ibid.* 514.

*Powers to be strictly pursued.* "When the mode in which a power is to be executed, "is not defined, it may be executed by deed, or will, or "simply by writing." 4 Kent. Com. 324. The form and manner prescribed must be strictly pursued, even in matters apparently unessential as directed in the deed originating the power. Sugd. Pow. 205. 229. 252. Therefore a power to appoint *by deed*, is not well executed by a will, and *vice versa*. This is founded on a general rule of law, which requires all delegated authorities to be strictly pursued,\* and is applicable also to common powers of attorney. From this principle it also follows, that a power cannot be exercised by anticipation, before the time when it was the intention of the grantor that it should be acted on. See Co. Lit. 113. a. 13. East. 118.

*Powers may be executed in separate acts.*—It is also a rule that powers may be partially executed and again further acted upon. The power given may be exercised at different periods, over different parts of the property separately, or over the whole in a degree lesser than the full extent of the power. A mortgage therefore is considered only partial appoint-

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\* Yet the rule that a delegated power cannot be delegated again except under express power of substitution which governs powers of attorney, appears to be relaxed in the case of powers of appointment of a general kind, and the appointment may be to such uses as another person may appoint. See Sugd. on Powers 3d ed. 199.

ment to the extent of the sum charged, and if the power goes further, it may be subsequently acted upon to a further extent. 1 Vern. 84. 97. A power may be executed without actually reciting it, if it appears clearly that it was intended by the donee to do so. 1 Atk. 559. *Claims of Creditors against appointments.*—If a person has a *general* power of appointment, and actually makes an appointment by deed or will, the court of chancery will set aside the rights of the appointee in favor of his creditors considering his interest under such a power as part of his assets, and the court will aid the defective execution of the appointment for this purpose, but if he has made no appointment equity will not interfere. See 2 Ves. 640, 2 Vern. 465, 3 Atk. 269, 7 Ves. 506, 12 Ves. 206.

*Exclusive Appointments.*—In some cases power is given to appoint an estate among a number of persons in such proportions as the appointer thinks fit. Power again may be given to appoint the estate to such of a number as the appointer may select. Where there is any ambiguity the courts appear to favor that construction which will give all a share in the appointment. Thus “to all and every the child and “children.” 1 Bro. C. C. 450. “unto and among” the children of different persons, 2 Ves. Jun. 324. 553. “unto and among *such* children begotten between us and in “such proportion” as the wife should appoint. 2 Ves. Sen. 640. and “amongst the children as the donee shall “think proper,” and in an early case upon a gift to the wife “upon trust and confidence that she would not dis-“pose thereof, but for the benefit of her children.” 1 Som. 66.—have been, in each of the cases referred to, construed not to leave room for the exclusion of any one of the children from the benefit of the appointment.

*Illusory Appointments.* Although at law any share however minute would be sufficient to satisfy the power. 1 Dwanf. and East. 438. n.5 Ves. 861. Yet equity requires should be followed and not the letter only of the authority

should be followed, and appointments, have been annulled in chancery when clearly illusory in their nature. A proportion of only 1-16 of the whole fund to one of four children, was not considered illusory, 2 Ves. Jun. 356. In another case, (5 Ves. 849.) there were three entitled to a share each, and the appointer gave to one 1-38 of the whole fund, to another 1-190, and to the third the whole residue. The share of 1-190 was decided to be an illusory appointment by Lord Alvanley, 12 Ves. 125. In another case, (9 Ves. 382) above there were nine persons to share, and to several not 1-122 of the whole fund was allotted. This was not held to be illusory. (See also, 10 Ves. 31, 12 Ves. 123, 126, 16 Ves. 15, 1 Ves. & Bea. 79, 96, 97, 9 Ves. 398.) The doctrine of illusory appointments extends to personal as well as to real estate. (1 Bro. C. C. 441. 5 Ves. 861. 1 Ves. and Bea. 99.) The objection, that an appointment is illusory, may be met by the appointer's providing in some other way for the object of the appointment; the principle of collation of goods, or advancement being applied. (2 Ves. Jun. 349. 5 Ves. 368. 12 Ves. 124. 4 Ves. 785. 2 Scho. and Lefr. 152. 16 Ves. 25. 1 Ves. and Bea. 95. 5 Ves. 861.) Appointment to grand children is not supported by powers to appoint in favor of children. (1 Bro. C. C. 451. 2 Ves. Sen. 640. 1 East. 442. 7 Ves. 382. S. C.) A power to appoint to '*relations*,' will embrace all who are capable of taking within the statute of distributions. Sugd. on Pow. 514. 515.

#### *Extinguishment of powers.*

A total alienation of the estate, will put an end to a power appendant or a power in gross; as where a tenant for life, has power to grant leases in possession, if he convey his life estate, the power of leasing is extinguished, and if he mortgage it, it has the same effect. Doug. 292. 4 Kent. Com. 341. So if the donee of a power appendant make a lease, he cannot exercise the power in derogation

gation of his lease. 4 Kent. 340. Doug. 477. Powers may be released to one having a freehold estate in the land, and generally they may be extinguished by recovery, fine or feoffment. 4 Kent. 342.

The subject of uses, trusts, and powers, may be studied to advantage, with the aid of Sugden on Powers, a work of great celebrity. I have availed myself much of the learning on this topic, in 4th Kent. Com. and in the notes to 1st and 2d, Bythewood. If there be a want of fullness in this chapter, my excuse must be that in *this* province we have had very little inducement to enter minutely into the subject, as conveyances in the complicated form of English settlements are most rarely known among us; and I thought it would not be judicious to enter too minutely on a part of the law, in little use here, and much better understood by English writers.—Mr. Kent may be most confidently referred to on this and every other branch of equity law that he touches, when we consider his high standing as a scientific lawyer, and his long experience in presiding over the Chancery Court of the State of New-York. Many of the rules, and constructions of English law on this and other branches of the law of property, are not affected by our local statutes, and have their source in the common law, and therefore upon general principles seem to form a part of our Provincial code; still this difficulty attends them, that they have not been legislatively or judicially adopted here, and recognized as in force, or applicable to our own situation. This leaves a certain degree of vagueness about our system, that can only be removed by a series of decisions and enactments, the result of time and deliberation. I have felt this as an inconvenience, for instance, when describing the English doctrine of tacking mortgages, which has been rejected by judicial decisions in the United States, and has never come into question judicially here.

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## CHAPTER VIII.

### OF TITLE TO PROPERTY IN GENERAL.

The title to all property real or personal may be divided into two classes 1. that which is derived by *inheritance* and 2. that which originates by *contract*.

I. Under the first head we may include 1. the succession of children or kinsfolk to the lands and goods of their parents and relatives, which is the proper meaning of inheritance.—2. The succession of an adopted heir or devisee or legatee to any property. The former inheritance being regulated in every respect by the statute law of the province. The latter being created and restricted by the will or testament of the deceased.

II. Under the head of contract may be included, 1. all titles arising from contracts of sale,—of lease,—of marriage—of partnership, and the like—to real or personal property, being all transfers of property by the act of the parties for some equivalent in money or other value.—2. All titles arising by gift or voluntary transfer, which differ from sales, as no equivalent is given to the person who makes the gift. The title derived by the crown to pro-

erty when there are no heirs to the former owner, and to property for which no owner can be discovered, may be classed under titles by inheritance, the government being in these instances the heir appointed by the law, and taking the property, incumbered by the same liabilities it would be subject to, in the hands of the heir by nature or by will. The title given to property forfeited by any improper or criminal conduct of the owner, whether vested in government or elsewhere, may be considered as originating in an implied contract, by which every man is bound in society to conduct himself according to its laws, and is therefore referable to the second head of title—or to the penal laws. The title gained by accession, prescription, &c. being incidental to the possession of property under some other title, does not form any distinct class. This classification having its original in the Roman law is necessary to a clear understanding of our provincial titles as they correspond in general rather with the civil than the feudal law.

#### *Of title to Real Estate.*

A complete title to real estate exists where the right of property, the right of possession, and the possession itself, are united in the same person.

Actual possession of itself confers no title, although if much time be suffered to elapse, without diligence on the part of the owner of land to turn out an intruder from his property, the length of possession will eventually confer a title on the occupier, and destroy that of the former owner, being considered as presumptive evidence of a title. This principle is carried very far in our provincial enactments. Rights suffered to lie dormant, ought not to deprive innocent holders and purchasers of lands, of their investments and improvements. The provincial

statute of 1758, 32 G. 2, c. 24, 1 P. L. 34, prevents any suit at law or in chancery for the recovery of real estate, where it has been held adversely for twenty years, with a saving for minors, married women, and persons out of the province, imprisoned, or deranged; and ten years are allowed to such persons after the disability is removed to commence their suits. (See 3. vol. Limitation of suits.)

Actual possession is always considered to be *prima facie* evidence of title, and the owner of lands when seeking to recover his occupation against a stranger in possession, is bound to prove a title in himself before he can succeed. At least he must give evidence that he, or those under whom he claims, were seized, that is possessed actually, as ostensible owners of the freehold, within 20 years before (except where the term is extended under the saving for minors, &c.)—On this proof by the claimant the person in possession must make out a better title in himself or lose the suit. Now if a party without right, by error, fraud, or force, or by accident, obtains the actual occupation of land, the owner may at any time put him out at any time, within 20 years after. The law however abhors violence and the wrongful possessor may not yield peaceably. It would then be extremely hard an owner should be driven into proof of his title in the generality of cases of intrusion, as that would be both difficult in many cases, and in all expensive. For these reasons the Prov. statute of 1758, 32. G. 2. c. 3. 1 P. L. 6. gives a remedy in a summary way against those who forcibly *take* possession of real property, and also against those who forcibly *retain* possession. The owner is precluded from this course, where the possession has been held for three years before the remedy is sought, and by act in amendment, act of 1761. 1. G. 3. c. 2. P. L. 66. there is a saving for minors, &c. giving them 5 years to sue in after disabilities removed,

See 3d vol. This act precludes the necessity of going into proof of title, but if the time be suffered to elapse beyond the three or five years mentioned, the owner must resort to his action of ejectment.

The right of possession is naturally annexed to the right of property, but there are exceptions to this rule.

1. Where a party not having the actual right of property in lands, has yet recovered a judgment in some action at law, in which the right to the possession was contested. In such cases the decision of the possessory action does not annihilate the right of property, but it fixes the present right of possession to belong to him in whose favor the action was decided. 2 B. C. 198. 2. If a tenant in tail alienates his lands to a stranger in fee and dies, so that the estate tail is discontinued, the right of possession is, by the English law, taken from the heir, who has merely the right of property. Sec. 2 B. C. 198. Co. Lit 327. a. 3. If the owner is disseised and neglects to bring his action for the possession, or to take any other steps to reinvest his estate, the right of possession is lost to him for the present by the effect of the acts which limit the time for bringing possessory actions. The English law gives a remedy, by writ of right, which is limited to 60 years; this writ can be there brought when the right to possession is separated from the right of property by lapse of time. But as our provincial act of limitations, forbids the bringing of *any actions or suits* at law, or in equity, for lands after 20 years, no writ of this kind it would appear, can *after* that time be brought, and as such a writ has never been in use in any case in this province, it may be considered a fair construction of the act that it takes away the writ of right entirely. If such be the intention of the act, it may also be perhaps inferred from it, that the right to bring the possessory ac-

tion, of ejection for example, was intended to be inseparably annexed to the right of property during the 20 years, without any exceptions,—but these are new and important questions, and belong more particularly to the subject of the 3rd vol. which will treat of courts of justice, and actions. The law on this topic as it exists in England, is very lucidly abridged in 2 B. C. c. 13

## CHAPTER IX.

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### *TITLE BY INHERITANCE.*

The English law in considering real estate, under the several modes by which it may be acquired, divides all titles into those derived by *descent*, and those acquired by *purchase*. It calls by the name of *descent* the title "whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law," while the term *purchase*, is used in contradistinction to descent, and includes all other modes of acquiring real property, 2. B. C. 201. and Christian's note. This classification is of importance in England, because property derived by purchase is governed by different rules of inheritance from that which comes by descent, but it is not so in this province. As real estate is inheritable here by the parent or ancestor from the child, it may be said to ascend as well as descend to heirs, contrary to the principle of inheritance in England. The English law of descent is essentially different from that of this Colony. Nova-Scotia, guided by the example of the older English Colonies in America, abandoned primogeniture and the feudal system of inheri-



tance. The efficacy of colonial laws of this kind, were, it appears, once contested, and they were decided to be valid, upon an appeal from the then province of Massachusetts Bay, to his majesty in council, in the cause of Phillips and Savage, in the year 1735. See C. J. Belcher's note 1 P. L. 12.

In the English law there are seven rules of descent, or canons of inheritance to real estate. 1. That estates shall descend to the children, &c. but never ascend to the parents or ancestors. 2. That the male issue shall be preferred to the female. 3. That where there are two or more males, as sons, uncles, &c. the eldest of them alone shall be heir, but if there be only females they shall equally inherit. 4. That lineal descendants *ad infinitum* shall represent their ancestor. 5. That if lineal heirs fail, the collateral heirs of the blood of the first purchaser, or gainer of the lands shall take. 6. The collateral heir of the person last seized, must be his next collateral kinsman of the whole blood. 7. That in collateral inheritances, any kindred of the blood of the male ancestors, however remote; shall be preferred to those from the blood of the female ancestors, however near, except the lands in fact descended to the deceased from a female. As none (except perhaps the 4th) of these rules are in force as to lands in Nova Scotia, refer to 2 B. C. c. 14. for fuller explanation.

*Liens on estates of deceased persons.*

At the death of any person possessed of property either real or personal, his debts of every description have, according to the province laws, the first claim, and take precedence over the rights and interests of his family, or those to whom he has willed his property. The widow's dower is an exception, by which her interest in the real estate is secured, unless she has assigned it during the marriage by acknowledgment before a magistrate; and settlements

regularly made before the debts were incurred, may interfere with the claims of creditors. The rights of mortgage creditors have a preference, because the legal estate is transferred to them by the nature of their security, and so will judgments, and attachments, which have been so conducted as to form a lien on the property. In order to settlement of the estate, the moveable property is first to be applied to the payment of debts, and in case that is insufficient, the real estate or part of it, may be sold, mortgaged, or let, to complete the payment of the debts ; but in case the deceased has made a will, the directions it contains may lawfully vary this arrangement, as far as to direct which part of the property shall be first sold. The statutes which direct the settlement of estates by the executors or administrators will be explained under another title. We may remark that the whole property of a deceased person, whether it devolve upon his relatives under the provincial law—revert to the crown for want of heirs, or is devised or willed to any person by the deceased—is in all those cases charged and incumbered with the payment of all his debts, and the satisfaction of all his covenants and contracts, and is in a situation very like that of an estate which is mortgaged—the debts and contracts (under our statute) being what the law calls a lien, or incumbrance on all the lands and goods.

*Distribution of intestate estates among the heirs.*

The funeral expenses, and the just expenses of every other kind, incurred in settling the estate, having been deducted, as well as the debts, from the estate of the deceased, the dower or third of the land (free of deduction or charge for debts or expences) is to be set apart to the widow, (if there is one,) and then the surplusage of all the estate, both real and personal, is, by provincial stat. 32, G. 2 c. 11. 1 P. L. 12, to be distributed by the judge of probate as follows :

One third of the personal estate to the widow, in perpetuity, over and above her dower in the land.

A double share of the residue to the eldest son then surviving, except where his eldest or elder brother deceased has left offspring, and a single share of the residue to each other child, the representatives of deceased children taking the shares their fathers or mothers were entitled to.\*

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\* Prov. act of 1758, 32 G. 2, c. 11, sec. 12, " And be it  
 " further enacted, that when and so often as it shall hap-  
 " pen, that any person dies interate, upon application of  
 " the widow or next of kin to the intestate, within thirty  
 " days after the death of such intestate, the said judge of  
 " probate shall grant letters of administration to such widow  
 " or next of kin; and in case they neglect to apply within  
 " the said thirty days, upon first citing such widow or next  
 " of kin, and their refusal to accept the same, such judge  
 " of probate shall grant administration to such person or  
 " persons as he shall judge fit, and he shall thereupon take  
 " bond with sureties in manner as is directed by the sta-  
 " tute of the twenty-second and twenty-third of Charles the  
 " Second, chapter the tenth, entitled, an act for the better  
 " settling intestate estates; and shall and may proceed to  
 " call such administrators to account, for and touching the  
 " goods of the intestate: and upon due hearing and con-  
 " sideration thereof, (debts, funeral, and just expences of  
 " all sorts, being first allowed) the said judge shall, and  
 " hereby is fully empowered, to order and make a just dis-  
 " tribution of the surplusage, or remaining goods and estate,  
 " as well real as personal, in manner following: *that is to*  
 " *say*, one third part of the personal estate, to the wife of the  
 " intestate forever, besides her dower in the houses and  
 " lands during life, where such wife shall not be otherwise  
 " endowed before marriage; and the said judge, having ap-  
 " pointed guardians in manner as hereafter may or shall  
 " be by law prescribed for all minors, shall then, out of  
 " all the residue of such real and personal estate, distribute  
 " two shares or a double portion to the eldest son then sur-  
 " viving, (where there is no issue of the first born, or of  
 " any other elder son) and the remainder of such residue  
 " equally to and amongst his other children, and such as  
 " shall legally represent them; *Provided*, that children ad-  
 " vanced by settlement, or portions not equal to the others  
 " share, shall have so much of the surplusage, as shall make  
 " the estate of all to equal, except the eldest son then sur-

*Collation of Goods.*

Children advanced in the life time of the intestate by settlement or portions, will not be entitled to a full share of the remaining estates, but the advance is to be considered *pro tanto*, as part distribution made by the intestate himself. This rule respecting advancement appears to have been derived originally from the *collatio bonorum* of the Roman law. It was in some respects imitated in the old English law, by the customs of London and York, by the law called Hotch pot, and finally introduced to a certain extent as a general rule into the English statute of distributions in the reign of Charles the Second,—by which personal property is divisible among all the children, and the widow of an intestate, and advances made to the children are to be deducted before they receive their share. Sec. 2 B. C. 516. 517. Toller on Executors and Administrators. 378. 394. 5. 6. Under the English statute, money expended in the education or maintenance of a child is not generally speaking considered advancement, nor are small presents. A provision by will, is also an exception ; if the estate be partly intestate such bequest will not be considered as advancement. *Id.* 380. Our act of distributions, following in most respects the statute of distributions in England, but extending its provisions to real estate, which is the chief difference,—has thence de-

“viving, (where there is no issue of the first born or of any other elder son) who shall have two shares, or a double portion of the whole.”

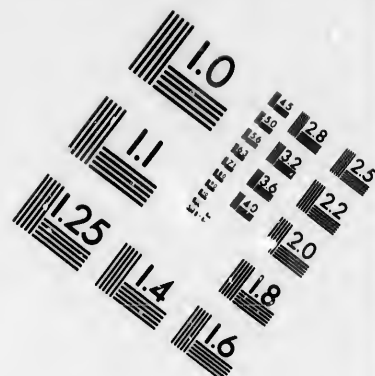
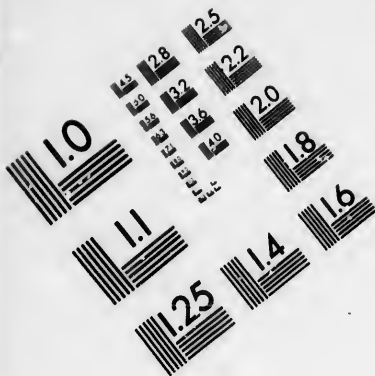
Sec. 13, “*And be it further enacted*, that such estate wherewith such child or children, have been advanced in the life time of the intestate, shall be accounted for upon the oath of such child or children, before such judge of probate and wills, and for granting letters of administration, or by other evidence to the satisfaction of the judge ; and in case of refusal to account upon oath, such child or children, so refusing, shall be debarred of any share in the estate of the intestate.” 1 P. L. 11 & 12.

rived this principle of advancement or collation of goods. The reasoning on which this rule is established seems to be, that with a view to a fair division of the estate, the portion advanced to any of the children is estimated and added, in calculation, to the remaining estate of the intestate parent, as if it had been part of the property of the deceased, at the time of his death; and the distribution is then made of the whole estate, including the advance as part of it—because it is presumed that the parent did not mean to give one child an undue advantage over the rest; but that he intended to go on with the distribution to others, as occasion required, and as they became old enough to manage their several portions. Where, however, his intention appears to have clearly been, that one child should have a larger share than the rest, as where the advancement to a child, has been beyond his distributable share under the statute, or where the father by will, gives part of his property to a child, leaving intentionally the rest of his estate to the operation of the statute, in either case the ordinary presumption will be overruled, by his manifest intention, as it is the rule of law, that an expressed intention shall prevail over any implied or inferred meaning.

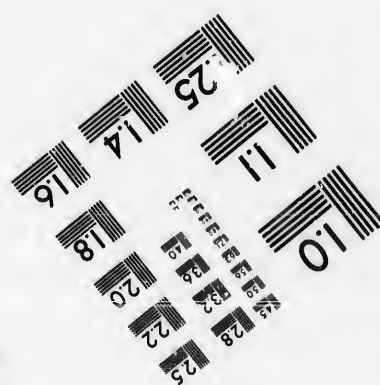
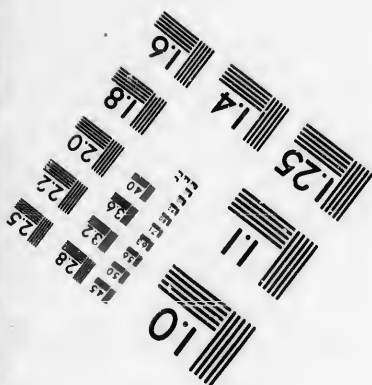
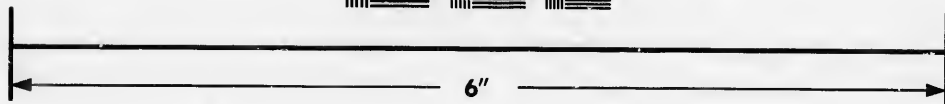
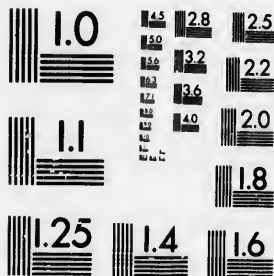
✓ The right given to the eldest son surviving, to a double share of the inheritance, appears to have been established by some of the old New-England colonies, from whom our colonial code has adopted it. Its utility is much doubted among us, however plausible the reasons for it may seem. We find it becomes the source of much mischief in families. The eldest son often expresses a disposition to share equally with the rest, and afterwards draws back from his first intention, and acts upon his legal rights. This creates irregularity in settling the estate, and dissatisfaction among brethren. It sometimes induces an eldest son to undue expense, after his father's death, and he thus acquires habits that affect his future prosperity. Upon the whole,







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we would be better without this preference, and we have the experience and example of the Greeks and Romans, among whom this distinction did not at any time prevail, as well as the opinion of the older colonies of Great Britain (now the United States,) in few of which there is any difference among the children, to fortify this view of the subject. The right of a double share of the inheritance given to the eldest son, is derived apparently from the Jewish law of inheritance, which resembles in most respects the law of this province. (See Genesis, chap. 25, v. 31 to 34. Numbers, chap. 27, v. 1 to 11. Deuteronomy, chap. 21, v. 15, 16, 17. Josephus's Antiquities of the Jews, book 4th, chap. 8, sec. 23. See also 2 Bl. Com. 214, who quotes a work by the learned Selden on the inheritances by the Jewish laws, *de successu Ebraeorum*.)

It may be a question of considerable moment whether the act of distribution gives the double share to the issue of the first born, or other elder son, who dies before the death of his father. To read the words of the act literally would induce the conclusion that the double share was only to the eldest surviving son, where there were no children of a brother older than him, and in case there were such children, then each share to be equal; but it may be thought that the legislature intended to form the lineal heirs at common law, and that the representatives of the eldest branch would be entitled by implication to the double share. However, if we refer to the Hebrew law, there seems little reason to extend the double share, beyond the precise instance expressed in the statute i. e. to an eldest son surviving, and having no elder brother's children to take precedence of him in the family. See Toller 374. We have seen that when the child has received more than his share under this act, during the father's lifetime, he has no claim to any addition out of the remaining estate of his intestate parent; and by the 13th section of the act, if he refuses to account upon his own

oath before the judge of probate, and disclose the amount received by him, he is debarred from any share, it being reasonably presumed by the law, that his share must be less than the amount he has received before, on account of his unwillingness to give a fair statement of it,—it being also the *dictum* of the civil law, that he who seeks a division and share of his father's property, should be willing to collate and divide what he himself has received from his parent; and another idea of the Roman lawyers is, that equal and fair division has a strong tendency to support peace and amity among the members of a family.

It has been thought that the wording of our act gave the eldest son not only a double share, but also that he was not to deduct advances, as the other children are; but the words at the end of the 12th clause of the 32 G. 2, c. 11, "*double portion of the whole*," do not, I think, bear out this inference. The *whole* there meant, seems to be the whole estate, after the advanced portions are brought in and added to its amount by the *collatiobonorum*; and if so, there are no other words in the act to exempt the eldest son from the rule of advancement. The words "except the eldest son, &c." naturally refer to and limit the words immediately preceding, viz. "shall make the estate of all to equal," and not to the word "children" in the first part of the *proviso*.—I would therefore suggest the *proviso* to be understood, as if it were thus written—"Provided that children advanced by settlement or portions not equal to the others share, shall have so much of the surplusage as shall make the estate of all *the children to be equal*, (where except *the estate of the eldest son then surviving*, (where there is no issue of the first born, or of any other elder son) who, *including any advancement he may have received*, shall have two shares, or a double portion of the whole."

The words in italics are not in the act itself, but would give it a meaning consistent with the principle of both the English and Roman law of advancement. As to the rea-

son of the thing, it would seem more appropriate that the deduction should be made from the double share, than from any of the single shares ; and the general spirit of the act following that of the civil law, is to equalize the interests of the members of a family . Unless the exception were express and distinct, so as to admit of no other air construction, we should be inclined to give the general principle of equalization its full efficacy. Under the *English* statute of distributions, the heir at law is not obliged to collate the lands he inherits, but if he has received money or other personal property, he must bring them into the mass before he can receive his distributable share of the personalty. On the subject of collation of goods, we refer the student to Domat's civil law, book 2, title 4, Dr. Strachan's translation, 2nd edition of 1737, vol. 1 p. 663, 4, &c. where he will find a very clear and methodical account of both the Roman and French law on this head, which ours substantially follows ; and he will also, under title Hotchpot in the old English abridgments, find a similar regulation as to female coheirs in lands where they have received advancement. The original text of the civil law on this subject will be found in the first volume of the *Corpus Juris Civilis*, Digests book 37, title 6. The editions of Domat, and the *Corpus J. C.* referred to, are both in the library of the Bar Society at Halifax, N. S. where the student will also find very many valuable authors of the civil law, original and translated.

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*Partition of lands among the heirs of an intestate estate.\**

The judge of probate is directed to appoint five freeholders, and to swear them to make division of the lands and tenements of an intestate estate. The decision of a majority of the five, (that is three) is to be valid. If, however, all the parties interested are of full age, and all unite in making a division of the landed estate by deed, signed and sealed by them all, and also, acknowledged by them all before the judge of probate, and entered on record in the probate office, such division is made valid. If it be made to appear by evidence to the judge of probate, that the real estate of an intestate, would be materially injured and

\* Act of 1758. 32 G. 2. c. 11, sec. 14 and 15. 1 P. L. 12: Sec. 14. "And it is hereby enacted, That the division of such lands or tenements, shall be made by five sufficient freeholders, upon oath, or any three of them, to be for that purpose appointed and sworn by the Judge. *Provided nevertheless*, that if all the parties interested in such lands or tenements, being of lawful age, shall, by deed, agree to a division, such agreement being acknowledged before the Judge, by the parties subscribing and sealing the deed, the said deed being entered on record in the Probate office, shall be deemed a legal and valid partition and settlement of such estate, as effectually to all intents as if the same had been divided and settled by writ of partition, and be received and allowed in evidence, on any trial against the parties so interested in the said lands and tenements." Sec. 15. "*Provided nevertheless*, That where any estate in houses and lands cannot be divided among all the children, without great prejudice to the whole, the said Judge may, on evidence of the same, order the whole unto the eldest son, or, upon his refusal, to any other of the sons successively; he paying unto the other children of the deceased, their equal and proportionable parts or shares of the true value of such houses and lands, upon a just appraisement thereof, to be made by three sufficient freeholders upon oath, to be appointed and sworn as aforesaid, or giving good security to pay the same in some convenient time, as the said Judge shall limit, making reasonable allowance in the meantime, not exceeding six pounds by the hundred in the year."



its value much lessened, by its being divided among the children, he has authority to offer the whole of it to the eldest son, on condition of his paying the other children the value of their shares in it; or giving security to do so in a convenient time, appointed by the judge. If the eldest son refuse to accept it, the judge may make the same offer successively, to any other of the sons. The value, in case any of the sons take it, is to be estimated by three freeholders sworn by the judge; and if time be given on security for paying the others' shares, the judge may direct the son who takes the real estate, to pay the children an allowance in the nature of interest, not to exceed six per cent. on the value. See title. Partition. 3d volume.

*Of Posthumous Children.* Posthumous children are liberally provided for by the provincial act in the note, being entitled to a full share of the parent's estate, even where he has disposed of it by will, it being thrown open, and treated as an intestate estate, so far as the posthumous child is concerned.\*

*Portions of minor children dying unmarried.* Where a child dies under age, and also unmarried, the portion it was entitled to, of the parent's estate, is to be *equally* divided among the surviving brothers and sisters.† It has

\* Act of 1758. 32. G. 2. c. 26. Sec. 9. "And for as much as it can happen, that children are not born till after the death of their fathers, and also have no provision made for them in their wills, Be it therefore further enacted, by the authority aforesaid, That as often as any child shall happen to be born after the death of the father, without having any provision made in his will, every such posthumous child shall have right, and interest, in the estate of his or her father, in like manner as if he had died intestate, and the same shall accordingly be assigned and set out as the law directs for the distribution of the estates of the intestates." 1 P. L. 39.

† Act of 1758. 32, G. 2. c. 11. Sec. 15. 1 P. L. 12, "And if any of the children happen to die, before he or she come of age, or be married, the portion of such child deceased,

been decided by our Supreme Court, that the children of an intestate take a vested estate in their shares both of real and personal property, at the time of the parents decease; of course they may transfer it and devise it; and

“ shall be equally divided among the survivors.—And in case there be no children, or any legal representatives of them, then one moiety of the personal estate shall be allotted to the wife of the intestate for ever, and one third of the real estate for term of life. The residue both of the real and personal estate, equally to every of the next of kin of the intestate in equal degree, and those who legally represent them. No representatives to be admitted among collaterals after brother's and sister's children. And if there be no wife all shall be distributed among the children, and if no child, to the next of kin to the intestate in equal degree and their legal representatives as aforesaid, and IN NO OTHER manner, whatsoever,—and every one to whom any share shall be allotted, shall give bond with sureties before the said Judge of Probate, if debts afterwards be made to appear, to refund and pay back to the administrator, his or her rateable part thereof, and of the administrators charges.” Sec. 16. “ *And it is hereby enacted*, That the lands and tenements wherewith any widow shall be so endowed as aforesaid, shall after the decease of such widow, be divided in like manner, as by this act is directed.” Sec. 17. “ Saving to any person aggrieved at any order, sentence or decree, made for the settlement and distribution of any intestate estate, their right of appeal unto the Governor and Council: Every person so appealing, giving security to prosecute the appeal with effects. Provided that such appeal be made within thirty days after sentence by the Judge of Probate.” Sec. 18. “ *And be it further enacted*, That all such estate, real or personal, as is not comprised in any last will and testament, or is not plainly devised or given by the same, shall be distributed in the same manner as intestate estates are directed to be distributed by this act.” Act of 1829, 10 G. 4. c. 11. Sec. 2. “ *And be it further enacted*, That if after the death of a father, any of his children shall die, intestate, without children, and in the lifetime of the mother of the intestate, every brother and sister of the intestate and the representatives of them, shall have an equal share with the mother of the intestate in the distribution of the estate, real and personal, of such intestate, and the assets thereof remaining after the share of the intestate's wife, if any shall have been set off to her, any thing in any act to the contrary notwithstanding.”

it will go to their legal representatives, except in the case of a child unmarried dying a minor, where the act makes the foregoing provision. See case of Cochran and Cochran, reported in the appendix, and see Toller on Exors. 386.

*Distribution where the intestate has left no descendants.* If there be no children or legal representatives of the children of an intestate, the wife is to have half of the personal property in perpetuity, besides her dower, or third of the lands for life ; and where there is not a widow, but children, the latter divide the whole estate. If there is a widow and no children, after giving the widow her dower, and half the personalty, the next of kin of the intestate in equal degree, and those who represent them, take the residue in equal portions. If there be neither widow nor offspring, the whole estate goes to the next of kin. No representation is admissible by that act, beyond that of the children of the intestate's brothers and sisters.

Every person who receives a share under this act is to give security that he will refund, if debts should afterwards appear against the estate of the intestate. The dower lands are to be divided in the same way as the rest of the estate after the widow's death.

An appeal is given to the Governor and Council, who may revise the orders and decrees of judges of probates, at the instance of any party who thinks himself aggrieved. The party appealing must make his appeal within 30 days after sentence, and give security to prosecute it with effect. An exception is made to the general right of the next of kin, by which the mother of an intestate is not to take the whole estate, (where the father is dead) as next of kin, but is only to share equally with the brothers and sisters, and their representatives,—this is in conformity with the English act of 1 James 2. c. 17. S. 7.

*Of Consanguinity and representation among kinsmen.*

Consanguinity or kindred is the connection between persons descended from the same ancestor. This is divided into lineal and collateral consanguinity. Lineal consanguinity is that which subsists between any persons and their ancestors, or between ancestors and their descendants. Thus father and son are in the first degree of lineal consanguinity to each other, grandfather and grandson in the second degree,—each generation being called a degree. Collateral consanguinity is that which subsists between other relations by blood, collateral relations descending from the same ancestor, but not from each other.

The mode of calculating consanguinity under the English statute of distributions which regulates there the succession to personal property is that of the civil law, and our statute which directs inheritances both in landed and personal estate is interpreted by the same rule. We refer the enquirer who wishes to understand the differences between this system and the rule of the canon law to Blackstone's Commentaries. The civil law computation is, as far as I can discover ; the only one at all in force for any purposes in this Province. The principle on which it is regulated, is as regards lineal consanguinity, to reckon each generation a degree, and in this respect the civil, canon, and common law agree. See Toller on Exor's. 87. 381 As to collateral kindred, the civil law rule is to count upwards from either of the parties related to the common stock or ancestor, and then downwards again to the other party, reckoning one degree for each individual in ascending and descending both—or in other words to take the sum of the degrees, in both lines to the common ancestor. Thus a man is related to his cousin german in the fourth degree. We ascend first to his father, which is one degree or step,—from him to the

grand-father, the common ancestor of both parties ; which is the second degree,—then we descend to the uncle, which is the third degree, and from him to the cousin german, which is the fourth step or degree. There is no difference, under our statute, between relations of the whole or half blood, as respects inheritances between collateral kindred. Neither does it signify whether property was derived by the intestate from the father or mother, or from the families of either, or from his own industry. See. 2 B. C. 516. Christian's note 23.

Where there are children of the intestate, we have seen that they take the estate after the creditors are satisfied, and the widow provided for legally ; and this rule is grounded on the principles of our nature, which induce man to honorable industry, to provide for the beings, of whose existence he is the secondary cause, and conformable to the instinctive feelings of our nature. The law of *primogeniture*, is a rule of an origin entirely artificial, and a deviation from universal principles. It may possibly have been justified by the peculiar state of society in Europe in the middle ages ; but in general, must be regarded as infringing the rules of natural equity, and retarding by its effects, the progress of civilized society. Reason and instinct both concur in supporting the division of property among all the children, all having a just claim upon the aid of their parent. The civil law carried this view so far, that the parent could not by will, disinherit any one of his offspring, without assigning a just and rational motive for so doing, and if he attempted to do so, the will was (in presumption of law,) regarded as the act of a man not perfectly sane. What shall we say then of a law, which would give to one child a large patrimony, and throw all his younger brothers and sisters destitute upon the world !—Children or relatives entitled to inherit must be legitimate themselves, and must generally speaking deserve their consanguinity through persons legitimate,

an illegitimate person not being considered legally of kin to any one, but his own legitimate offspring. If there be no children of the intestate or heirs of his children, (as grand-children or great grand-children) to take the estate, it then goes to the next of kin under the act.

The father and mother are, if living, the next of kin, and will take the whole estate both real and personal, to the exclusion of brothers and sisters, or other collateral kindred of the intestates.\* But if the mother only be living, she must share it by the act of 1829, with the brothers and sisters of the intestate, and those who represent deceased brothers and sisters; and this is to prevent the mother from giving it all to a second husband. But if there be no brother or sister or child of any, the statute will not interfere, and the mother (being the only person of kin to the deceased in the first degree) will take the whole residue of the estate. The representation under this act is not to be carried beyond brother and sister's children. Toller. on Exors. 381. 2.

Representation is admitted *ad infinitum* in lineal consanguinity; thus the son, grand son, and great grand-son, &c. represent their progenitor; but the act excludes representation among the collateral heirs, except in case of brothers and sisters of the intestate. The children of a deceased brother or sister have a right to the share with the surviving brothers and sisters, which their parent would have taken if living; but the grand-child of a brother or sister cannot claim this right of representation although (where there are none nearer of kin) the grand-nephews and nieces may take as the nearest. (See Toller on Exors. 383. 4.) Where a number of relatives in equal degree, are entitled to take as next of kin, each takes an

\* No joint tenancy can arise between the parents, as to such an inheritance, because the terms of the act contemplate "equal division and distribution and allotment of shares to every the next of kin in equal degree."



equal share and they are then said to take *per capita* i. e. by heads—making as many shares as there are individuals ; but where some take as children or as next of kin, and others as representing deceased children or kinsmen, they who take by representation, are said to take *per stirpes*, that is by branches, the representatives, however numerous, of any one child or kinsman deceased, taking his share only, which is subdivisible among themselves.

*Examples.* Thus if A. have three sons, B. C. and D. and B. die leaving four children, and C. die leaving two. On A's. dying intestate, one third shall be allotted to D. one third to B's. four children, and the remaining third to C's. two children,—the grand-children not being counted with the surviving son ; but the number of surviving branches of the family being reckoned, and a share given to each. So if A. leave his next of kin, two brothers, B. and C. and three children of a deceased sister. B. and C. will each take a third and the remaining third will belong to the sister's children. But if there be grand-children only, of the intestate, as for instance, five children of his first son, and one child of his second, in that case each grand child takes an equal share, they being entitled to take *per capita*, as next of kin. So—if the only next of kin are nephews and nieces of the intestate, each one will have an equal share without reference to what *their parents* would have been entitled to.

*Exception.* Under the construction of the English statute of distributions, though a grand-father and a brother are in the same degree of kin, yet the brother takes all, to the exclusion of the grand-father. This is an exception to the general rule, but grounded on the ancient common law. See Toller on Exors. Relations by marriage are plainly excluded from taking any part of an intestate estate, as kinsmen, their connexion is called in the law affinity, to distinguish from consanguinity or blood relationship.

*Of the domicile of an intestate.*

The real estate is to be distributed in every country in conformity with the laws of inheritance there in force, but the personal estate is subject to distribution according to the laws of that country, where the domicile of the intestate was in his lifetime.

*Examples.*—If an intestate was an inhabitant of this province, and at the time of his death had debts due to him or goods belonging to him abroad, they must be distributed according to the laws of this province, and not according to those of the country wherein they are found: on the other hand if a foreigner (or a British subject of some other part of the empire) die intestate leaving goods or debts due him in Nova-Scotia, they must be distributed according to the laws of the country or province, where the deceased was domiciled at the time of his death, and not according to the rules of our law.

Domicile is understood to mean a stationary and not an occasional residence, the fixed home and not the place of a temporary sojourning. The domicile of children is taken to be that of their parents. If a widow take up a new abode with her family in a settled and permanent manner, it will be considered her domicile and theirs also.—Toller on Exor's. 387.

*Of intestates who have no natural heirs.*

As our provincial law admits relations of the half blood to share the inheritance, as well as those of the whole blood, it can rarely happen that an individual dies leaving none capable of inheriting his property, except in the case of illegitimate persons who are not in the eye of law akin to any one but their own lawful offspring. In such cases, however, as may arise where a person possessed of property dies without having made a will, and there are none

who can show a connection with him by blood, the king is entitled to his whole estate. To the real estate his claim is grounded on the law of escheat which will be hereafter more specially noticed, and to the personal estate, he succeeds as the heir in the last resort to his subjects, the law considering the crown the common guardian and parent of society. This rule tends to preserve the rights of heirs who may by distance of abode or other causes, be prevented from making their claims known early, by placing their property in hands of the government where it will be secured for the benefit of dormant claims. See 2 B. c. 246 Toller on exor's. 106. 386.

he king  
state his  
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## CHAPTER X.



### OF TITLE BY DEVISE.

The title to landed estate, derived under a devise in a will, bears a close analogy, in our provincial system, to a title by inheritance. The statute of distributions has been considered frequently in the light of a will, made by the legislature for a deceased person, who had not opportunity of disposing of his own property before his death. The Roman code called him who took the property, by the rules of inheritance in case of intestacy, the *haeres natus*, or heir by birth :—and the devisee who took the estate, under the testator the *haeres factus* or *haeres institutus*, or heir appointed. In both cases they stand alike in this respect under our provincial law ; that they must take the estate burthened with the payment of every class of debts, the fulfilment of all pecuniary contracts of the deceased, and with the expenses of administering and settling the estate. The power of willing real estate, was under much restriction in the early English law ; but the acts of 32. Hen. 8. c. 1. explained by 34 Hen. 8. c. 5. and amended by 29

Car. 2. c. 3. gave a general power of devising to the tenant in fee simple, establishing, by the last mentioned act, a more solemn form of will for lands; but still restrictions were inserted to check the devise of lands, to corporations. In the English law a title to lands under a will is considered rather in the light of a title by a conveyance, than the interest of an heir; but under our acts the devise conveys an estate subjected to every debt and contract of the deceased, and does not thereby confer any absolute interest in the land; but only an uncertain possession until the affairs of the deceased are adjusted. We may therefore be justified in arranging this kind of title in conjunction with that of inheritance, which it resembles in so material a feature; and besides, as the devisee is often one of the natural heirs of the testator, we may fairly adopt the civil law expression and call him the heir appointed, in contradistinction from the natural heir, or heir by birth, especially as no difference is made in our law as to the inheritable qualities of estates by descent or purchase: it being with a view to that rule that devised estates are spoken of in English law, as estates under a conveyance and by purchase. No restriction exists in our law on the alienation of fee simple property by will, except the necessity imposed upon the testator of adhering to a certain solemn form of executing the instrument.

The provincial act of 1758. 32 G. 2c. 11. Sec. 1. 1 P. L. 9. enacts, " That every person shall have power to give and  
" devise by his or her last will and testament in writing,  
" and signed by the party so giving and devising, or by  
" some other person in his presence, and by his express  
" directions, and attested and subscribed in the presence  
" of the devisor, by three or more credible witnesses, any  
" lands, tenements, or hereditaments, whereof he or she  
" shall, at the time of his or her so giving or devising the  
" same by such will, be lawfully seized, either of a sole

" estate in fee simple, or of any estate in coparcenary, or  
 " in common in fee simple, in possession, reversion, or re-  
 " mainder, as much as in him of right is, to the said lands,  
 " tenements, and hereditaments, or in like manner to de-  
 " vise any rents or profits out of the same at his pleasure.  
 " *Provided*, that wills made of any lands, tenements or  
 " hereditaments, or any rents or profits out of the same,  
 " by any woman covert, or person within the age  
 " of twenty-one years, idiot or of unsound mind, shall  
 " not be good in law." Sec. 2. "*And be it further*  
 " *enacted*, That no devise in writing, of any lands, te-  
 " nements, or hereditaments, shall be revocable, other-  
 " wise than by some other will or codicil in writing,  
 " or other writing signed in the presence of three or more  
 " witnesses, declaring the same, or by burning, cancel-  
 " ling, tearing, or obliterating the same by the testator  
 " himself, or in his presence, and by his directions and  
 " consent." This act re-enacts in the foregoing terms the  
 substance of the 5th and 6th clauses of the English statute  
 of frauds, 29 Car. 2 c. 3.

*Capacity of disposing by devise.*

Although a *married woman* is disabled by the act from  
 making a will, yet by settlement made of her estate, *before*  
 marriage, a power may be reserved to her of making an  
 appointment in the nature of a will. 3 Bro. P. C. 308. So  
 if the husband contract before the marriage to consent to  
 his wife's disposing of her property by will, her disposi-  
 tion of the estate will be supported in a court of equity.  
 1 Bro. C. C. 486. Ambl. 565. and these rules apply to real  
 as well as personal estate. A married woman by the Eng-  
 lish law cannot dispose of her separate real estate,  
 (where she has no power under settlement or contract of  
 permission from the husband,) except by the operation of  
 a fine or a recovery. But by the Provincial act of 1794.



34 G. 3. c. 3, conveyances made by the husband and wife jointly, of the wife's real estate, are made valid, as much as if she were a single woman, provided she acknowledges before a Judge, that she voluntarily joined in making them. Under this act which we shall again revert to, in a subsequent chapter, the land of the wife may, after marriage, be easily conveyed in trust for the benefit of the wife's will, if the husband concur in the arrangement. *Infants* under 21 years of age, are expressly excluded from making wills by the act, persons whose *minds are affected* by insanity, imbecility or exhaustion, or by intoxication, as well as idiots, are excluded by the words of the act, as they have been judiciously construed, 6 Rep. 23. 8. Ves. 65. 9 Ves. 478. 12 Ves. 445. But a lunatic in a lucid interval, having a calm and undisturbed state of mind, at the time, may make a valid will. The rule of law in England is stated by Sir William Wynne, in Cartwright against Cartwright, 1 Phillim. 90. to be "the rule of the civil law, as laid down in the second book of the Institutes. *Furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur.*"\* Witnesses subscribing a will, are not allowed to impeach the sanity of the testator. 2 Phillim. 499. If a person be induced by force or deception to make a disposition of his property by will, the will is void. Swinb. 475. Styles 427. 1 Roberts on Wills. 41. Joint tenants cannot devise their lands—nor can aliens.

Persons convicted of treason under the English law, forfeit their lands and goods to the Crown, and therefore their heirs or devisees are excluded; and such forfeiture may be attached to that and some other crimes by construction of our statute. 32 Geo. 2. c. 13. P. L. 15. which

\* "Lunatics who make their wills during an intermission of their lunacy, are considered as having made their wills legally."

will be more closely considered in the general title of criminal law. Lands cannot be disposed of by a will made before they are purchased by, or come into the seisin of the testator, unless he republish his will after he obtains the property : and this rule will apply, although he devises them and expresses his intention of making the purchase. See 1 Roberts on Wills 43.

*Capacity of taking.* No restrictions as to corporations or religious establishments exist here. Illegitimate children will not be entitled to take, under a will, by the term, 'children,' except the will itself clearly shews who are meant, nor can they generally speaking, be devisees, except they have a name by repute under which to take, therefore children of this class cannot be provided for before their birth by means of a will. 1 P. Wms. 529. 2 Meriv. 419. but legitimate children unborn may take by executory devise. 1 Roberts on Wills. 87. An alien may take land by devise, and hold it during his life if not disturbed by the Crown. 1 Roberts on Wills, 82.

*Execution of a will of lands.* A witness may be sufficient though he make his mark to a will, not being able to write his name. 8 Ves. Jun. 185- 504. It is not necessary that the witnesses should actually see the testator make his signature, it is sufficient if he acknowledge it to them. 2 Ves. 455. 1 Ves. Jun. 11. 8 Ves. Jun. 504. Such acknowledgement constitutes the publication of a will. The witnesses must subscribe the will in the presence of the testator ; but each may do it at a different time. Roberts on Wills. 1 vol. 106. Persons convicted of infamous crimes cannot be "*credible*" witnesses under the act. Willes. 665. Persons interested as legatees or devisees in a will, cannot be witnesses to prove its execution while their interest in supporting the will continues ; but it

would appear that if they release their interest (either gratuitously or for a certain sum,) being no longer interested, they may be witnesses. A statute in England. 25 Geo. 2 c 6 annuls all legacies to a subscribing witness, and thus prevents any question arising there, but it was a subject much disputed before ; and as we have no such act, may be difficult to decide here. See 1 Roberts on Wills. 112 to 118\*. Generally persons interested in supporting a will cannot be accounted good witnesses, to make it valid, and there is a doubt whether the ceasing of this interest will render them good witnesses, to make the will valid. It is therefore, most prudent in executing a will, to have three witnesses respectable as to character, and not named either as executors or legatees in the will. The will should be executed in the presence and with the knowledge of the testator. The Roman law Code. 6. 23. 21. required the attestation and other forms of the publication, to be made by the testator, and witnesses at one and the same time, in the same place, and in sight of each other, without breaking off until the whole form was finished. Our law which is founded on the Roman is not so very strict ; but yet the Roman law allowed in formal wills to stand good in many cases, where the

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\* The British statute of 25 G. 2. c. 6. passed in the year 1752, by its 10th clause extends all its clauses to such of the colonies in America as had re-enacted the statute of frauds as respects the alterations of wills, or had received it for law by their usage. Now as the Prov. act of 1758 was passed 7 years after and did not re-enact the 25 G. 2. c. 6. but only the provisions of the statute of Charles, it may be perhaps assumed that it was not the intention of our legislature that the act of George should take effect here. This colony not having re-enacted or received by usage the statute of frauds in 1752, does not come within the class of provinces to which the extending clause directly refers. However, as that clause may admit possibly of a large interpretation, the question seems one for judicial decision.—See Roberts on Frauds, 314. note. 2 P. Wms. 74. 8 Vez. June 4. 81. See C. J. Belcher's note, 1. P. L. 13.

exigence of the case, the ignorance or rusticity of the testator, or other circumstances demanded a relaxation of the rules which governed the formal and solemn testament. Our law then is not so strict in what it demands to make a formal will ; but it is much more rigorous in not dispensing with a formal attestation under the act, to pass real estate, in cases where it is hardly possible to expect regularity. This difference results from the peculiar strictness of the common law in all matters relating to real estate, and it sometimes appears to operate with great hardship, when a parent for example has willed his lands in a manner calculated to benefit his offspring ; and yet being ignorant of the forms, has not obtained three witnesses' subscriptions, but two only. In such a case notwithstanding every variety of testimony and circumstance should prove with the highest degree of certainty, the intention of the testator, it is still defeated for want of a third witness's subscription.

It may be generally recommended, in practice, to follow the extreme strictness of form of the civil law just mentioned, by causing the will to be signed, acknowledged and attested, at one time, in one place, and without interruption. It is prudent to have all the witnesses present with the testator, from the beginning to the end of the ceremony ; and it is usually proper that he should state the instrument to be his last will, though it is seldom desirable, and never necessary that the witnesses should know its purport or contents. If necessary to use more than one sheet of paper in writing it, it is best to affix a separate attestation and signature to each sheet, and connect them carefully with a ribband, carried under a seal or by some other method, to prevent any dispute about the identity of each sheet of the will. It may be also advised, that the whole should be in the hand writing of one person, and be written out at once, to prevent suspicion of inter-

polation : and if possible all erasure, interlineation or indistinct writing, should be sedulously avoided. Wills, where the expense is not an obstacle, should be executed in duplicate or triplicate, to lessen the risk of their being lost or surreptitiously destroyed.

*What may be devised.*—Equitable estates may be devised as well as legal ; so may equitable interests in shares of a public company : so may contingent and executory interests. Blackstone, 30. 34. 1. Blackst. 605. 639. So may estates conditional or determinable.

*Election.*—It is a rule that any person who takes under a will, by acceptance of the legacy or devise, is precluded from using any rights he may possess in derogation of the testator's intentions, and is bound to support the whole will as far as he is able. 1 Bl. 377. 2 Ves. Jun. 367r Thus a widow, if she accept a legacy in the will, cannot afterwards claim the dower, if it appears to have been the intention of the will that she should not have dower.—1 Roberts on Wills 313. to 326. She has her election and may refuse the legacy and insist on her dower.—See 1 Ld. Raym. 438.

Estates for the life of another person are not devisable under our act.—See 1 Roberts on wills, 326. n.

#### *Rules of construction of wills.*

I. Wills are construed to refer to the time of making them, unless circumstances point out the time of the death to be in contemplation of the testator. 1 Ves. 295. II. The heir is favored so far, that unless the attention of the testator plainly appear to the contrary, he shall not be disinherited. Willes 141. III. Words or sentences may be transposed in order to make a will intelligible. 2 Meriv. 386. Willes. 1. 2 P. W. 384. and the intention is more to be regarded than mere grammatical forms. 11 Ves. Jun. 148. 3 Bro. C. C. 404. 6 East. 486. 6 Ves. Jun. 10,

IV. If words have a legal meaning they are *prima facie* to be construed accordingly. 5 Ves. Jun. 401. 2 Ball and Beat. 204. V. If words admit two constructions, that giving efficacy is preferred to that which frustrates the will. 3 Burr. 1634. VI. Words copulative and disjunctive may be substituted for each other, if such change of meaning is necessary to give effect to a clause.—6 Ves. Jun. 341. 12 Ves. Jun. 112.—3 Ves. Jun. 450 6 Ves. Jun. 311. 7. Ves. Jun. 459. VII. Leasehold estates will not pass under a general devise of lands and tenements; but the word farm would carry both freehold and leasehold, if connected by possession. Cro. Car. 292. 6 T. R. 345. VIII. *Messuages* have been in some cases, held to include lands as well as houses. 3 Wils. 141. Hargrave's Co. Lit. 5. 6. note 21. IX. The word *house*, generally is held not to carry with it the land adjoining. 2 T. R. 498. 3 Bos. and Pull. 375. 1 P. Wms. 600. but appurtenances will enlarge the meaning, and carry the land usually occupied with the house. 2 Blackst. 1148. 1 Bos. and Pull. 53. X. A bequest of a sum on mortgage, will not by implication entitle the legatee to the arrears of interest due. 2 Atk. 113. XI. A devise of the occupation or of the rents and profits will be construed as a devise of the land itself. Plowd. 539. 542. XII. By a devise of the ground rent, the reversion will pass. Strange. 1020. XIII. An unrestricted devise of the interest of stock, will carry the capital. 4 Ves. Jun. 51. XIV. The word 'estate,' without mention of heirs, will pass a fee simple in a will. 7 East. 259. so will the word 'inheritance,' Hob. 2. Ld. Raym. 834. 7 East. 97.—but the word 'hereditament' will not pass the fee. 5. T. R. 558. XV. Words may be construed to have more or less extent of meaning, according to other words used in conjunction and classed with them. Cro. Car. 447. 6 Mod. 106. XVI. The word 'effects' is usually held to extend only to personalty. 3 East. 516. XVII. If a devise be made to the testator's



relations, they will be interpreted as his next of kin, under the statute of distributions. 2 Ves. 527. if 'to be equally divided among his relations,' it must go to them *per capita*, and not *per stirpes*. 1 Bro. C. C. 31. XVIII. A devise to A. and B's. families, will entitle the children (exclusively of the parents) to the property devised. 9 Ves. 604. Sed vide 13 Ves. Jun. 46. XIX. A devise to his next of kin, will exclude those who would, (under the statute,) take by representation. 14 Ves. Jun. 372. 19 Ves. Jun. 404. XX. A devise to the *issue* of a certain person will entitle all his descendants to take *per capita*, each an equal share. 1 Ves. 157. 3 Ves. J. 232. 3 Ves. Jr. 258. XXI. The will of the testator is to be carried into effect according to his real intention; therefore, if it appears that he intended to give the inheritance, it is not necessary that he should use the same strictness of form required in deeds; because the law makes allowance for the exigency under which persons expecting to die, are placed in making their wills. Thus a devise to a man and his successors (2 Roll. Rep. 399.) to a man and his blood (Co. Lit. 96.)—will give an estate in fee simple. So a devise to a man and his seed will create an estate in tail.—2 Freem. 268. So a devise of all his "right and interest," or a devise of lands to one "to dispose of at his free will and pleasure" or words tantamount, will pass the fee simple. 1 Roberts on Wills, 448. So if the will says "I make my cousin G. B. my sole heir and executor," a fee simple in all the lands passes, although they are not mentioned. Style 307. 383. XXII. If lands are devised generally, and the devisee is directed to pay out of them a certain sum or an annuity, he will be entitled to the fee simple by construction.—6 Rep. 16. Cro. Eliz. 744. 2 Blackst. 1041. XXIII. If there be a devise to A. for life, and after A's. decease the remainder of the lands to B. it was held that a remainder in fee simple passed, and this has never been doubted.—1 Lut. 755. XXIV. A devise to A. and his heirs

male, will import an estate in tail male.—Co. Lit. 20 b. XXV. When the testator appears to have entertained a general intention and also a secondary intention, and they clash, the general intention must prevail.—1 East. 229. XXVI. The word issue in a will is equivalent to “heirs of the body.” XXVII. Any words indicating an equal division of property will make an estate in common to devisees, as “to A. B. and C. and their heirs” respectively for ever. Style 434. or to several persons and their heirs and assigns, “all of them to have part and part alike.”—Het. 29. Bur. 1883.

*Ademption of legacy by advancement.*

It is a settled rule of presumption in our courts of equity, borrowed from the civil law, that if a father gives a legacy to a child, and afterwards advances the same amount to the child, such advancement annuls the legacy; but parol evidence will be admitted to disprove the inference.—1 Ves. Jun. 100. 2 Br. C. R. 165. But a stranger is not included in this rule, and the father of an illegitimate child is considered so unless he expressly treats the legacy as a portion.—2 Br. C. R. 165. 4 Bro. C. C. 494. A brother will be considered in the place of a parent under this rule, but the uncle or grandfather will not be so esteemed as a mere consequence of their connection. 3 Atk. 183. 1 ed. 140. It is also a rule that a legacy to a creditor, if equal or greater than the debt, is in satisfaction of the debt, but a legacy to a servant will not lessen his right to wages.—See 1 Roberts, on Wills 540.

*Ambiguities in a will.*—Those which are perceptible on the face of the instrument, are called patent, and parol evidence is not usually allowed to explain them; but a latent ambiguity may be explained; thus, where the testator leaves his estate to his son John having two of that name, this latent ambiguity may be explained by parol proof.

*Revocation of Wills.*

A will may be revoked under the statute by a "writing signed in the presence of three witnesses" but if it be revoked by another will or codicil under the act, it must be by a will or codicil executed strictly under the forms of the act.—1 Ves. J. 11. 218. A will like a letter of an attorney, is in its very nature revocable and ambulatory, and it is the same though made under a power. Revocation may be implied.—1. By the due execution of a subsequent will inconsistent in its provisions with the first, and irreconcilable. 1 Show. 265. 2 Salk. 591. but this revocation may be partial, as that part of the first which is not inconsistent with the second is not revoked by implication.—2 Roberts on Wills, 11. An intention to revoke, though expressed in a codicil, will not be a revocation,—2 East. 488. Cancelling, &c. are modes of revocation but evidence may be let in to show that it was not the intention of the testator to revoke.—2 Bl. Rep. 1043. In the case of a duplicate will, cancelling one copy is a sufficient revocation. Cowp. 49. If a will be partly erased, it will be so far revoked.—1 Phil. 375. 406. but if altered to make any new gift or disposition, it must be re-executed.—See 4 East. 419. If a revocation be made under a mistake as to a fact: as for instance on a false opinion, that testator's son, &c. was dead, the revocation will be annulled.—3 Ves. J. 321. A will may be revoked by circumstances, when from surprise and accident no regular revocation took place; as where the testator died suddenly before he could see his attorney for whom he had sent to draw a new will. Sec. 5. T. R. 49. 2. A will may by implication be revoked, where the testator afterwards conveys the land; because he must be seized of the land at the time of making the will, and so continue until his death, Sec 2 Roberts on Wills, 49. but mortgages only revoke to the extent of the sum charged.—ib. 68. 3. A will may

be revoked by a partition of the undivided property devised, if the partition be for any additional purpose or intent; beyond the mere division of the possession.—ib 73.

4. if a man after making his will marry and become father of a child, (even though it be posthumous,) by the marriage, this revokes the will. 5. If a woman marry this alone will revoke her will.—1. Roberts on wills, 80. 89.

*Republication of a will.*—A will cannot as regards real estate be republished by implication, except the inference arises out of a subsequent codicil, which will amount to a republication; but it must otherwise be re-executed according to the statute, and then it has effect from the time of re-execution.—ib. 151. 157.

CHAPTER XI.

OF TITLE BY DEED—PART I.

We have already considered the legal titles derived to land on the death of the owners. First, where no will has been made, and there the provincial statutes have made careful provision for the interest of the relatives of the deceased; and thereby fulfil the natural engagements of the deceased: and likewise the creditors are protected; so the formal contracts made by the deceased are enforced.—Secondly, where the deceased owner has personally distributed his estate by will in the forms prescribed by law, (the law presuming him to be the best fitted to do justice to his family and friends,) and the creditor is also protected in this case, lest the natural bias of the testator might induce him to do injustice in this respect in favor of his family. We now come to another leading division of titles to land, that of titles derived by deeds. A deed transferring real estate, may be generally described as a written instrument, signed, sealed and delivered, by the party transferring the estate, and containing a statement of the contract or gift under which it is so transferred. It is the formal expression of the act of transfer.

*Deeds may be divided into two classes.*—1. Deeds made by the owner of land. 2. Deeds made by direction of courts of justice, to which the owner's consent or act is not necessary.

Deeds made by the owner include all deeds of gift, and of voluntary sale. Under the general idea of sale may be included leases, and every description of transfer of real estate, for a valuable consideration or equivalent.

Deeds made by directions of a court of justice, include—1. Sales by order of Council for the payment of an intestate's debts.—2. Sale of mortgaged lands by a master in Chancery.—3. Sales by a Sheriff under a judgment.—4. Sales under statute for non-payment of taxes.

In order that a deed should have its full effect as a conveyance of lands in this province, it is an essential requisite, that the deed should be made by persons capable of contracting, and to persons capable of being contracted with, according to the intended purposes of the conveyances, and that they should be sufficiently described.

1. *Parties.*—The party transferring the property must be capable of contracting: therefore if an *idiot* make a deed, the king on his behalf may set it aside.—Co. Lit. 247.—So if a *lunatic* make a deed, his committee, or his heirs after his death may set it aside. Sugden on Powers 395. 6. So if the lunatic recover his senses, he may impeach the deed on this ground, if it be not a feoffment with livery of seizin, a fine or a recovery; but in those excepted cases, a court of equity will relieve him against its effects, and compel the parties holding the estate to reconvey.—11 Ves. 230. 1 Vern. 205. 2 Vern. 307. 14 Ves. 234. 1 Roll. Rep. 115, 116. 2 Atk. 339. 4 Br. P. C. 92. Toml. ed. 2 Hovenden on Frauds, 488. If an *infant* sell or purchase, his act is voidable, and on his arriving at full age, he may either confirm or annul it, and if he should die without doing either, his heirs will have the same right. Co.



Lit. 2. So a deed made by a married woman is void, unless it be made jointly with her husband, and acknowledged before a judge under the provincial statutes. But a purchase made by her will be good, until dissented from by her husband. Yet after his death she may dissent, and if she die before him her heirs may dissent.—Sec 2. B. C. 292. Persons convicted of treason, murder, &c. are disabled from conveying lands or taking a conveyance. Aliens, as we have before seen, may purchase, but their title will be subordinate to that of the crown, except in the case of a lease of a place of abode, or warehouse occupied by an alien whose nation is in amity with our government. 2 B. C. 293. The parties (in order to make the transfer of land valid) must be free from the influence of force or fraud, because all contracts made under the effect of such influence are void. The courts of equity will set aside conveyances, in which gross injustice has been done to a person in distressed circumstances, by advantage taken of his ignorance, or of his wants.—5 Ves. 70. 1 Ves. Jun. 220. and especially in the case of persons selling estates in expectancy, even in case of vested reversions, it is a rule that the purchaser should be bound to prove the fairness of the price given, or to reconvey, 17 Ves. 24. 2. Swanst. 139. In cases of deeds of gift, if any fraud have been used to obtain them, a court of equity will interfere to set them aside.—9 Price 183. 1 Br. 560. Jacob's Rep. 178. Wilmot's notes, 61. 2 Cha. Ca. 103. 2 Ball. and Beat. 472. 18 Ves. 313, 127. 2 Ves. Sen. 550. So where a man, in habits of intoxication, has been very grossly imposed on in a sale, equity will give him relief, 2 Ves. See 307, 2 Ball and Beat 287.

The parties moreover must be capable of contracting, according to the intended purposes of the conveyance. It is therefore necessary, that the donor or vendor should have a complete title to the property intended to be conveyed, that is to say—that in addition to his right, he

should also have the possession. This may be either the actual or constructive possession, and therefore a vested interest, in reversion or remainder, may be conveyed by deed; but wherever the land is held adversely by another person, or where from the abandonment of the actual possession for a length of time, (if the original title depends on continued possession,) the party is constructively out of possession, in either case the sale will not be valid, because the change of possession is the very essence of a contract of sale, which properly takes effect, by the full and legal delivery of the thing sold, whether it be land or a moveable. This doctrine is one of very general use in all systems of law. See 2 B. C. 290. Eng. stat. 32 Hen. S. c. 9. Co. Lit. 214. a. 4 Kent's Com. 438.

“ It seems to be the general sense and usage of mankind, that the transfer of real property should not be valid, unless the grantor hath capacity, as well as the intention to deliver possession.” 4 Kent. 440. as the conveyance in such a case is a mere nullity, and has no operation, the title continues in the grantor; so as to enable him to maintain an ejectment upon it; and the void deed cannot be set up by a third person to the prejudice of his title. But as between the parties to the deed it might operate by way of *estoppel*, and bar the grantor. This is the language of the old authorities, even as to a deed, founded on champerty or maintenance,” *ibidem*. “ It is the settled doctrine in England, and in New York, and probably in most of the other states, that the purchase of land pending a suit concerning it, is champerty, and the purchase is void, if made with a knowledge of the suit, and not in consummation of previous bargain. The statutes of Westm. 1. c. 25. Westm. 2, c. 49, and particularly the statute of 28. Edw. 1, c. 11. established that doctrine, which became incorporated into the common law.—*Ibid* 441.

2. The *property* to be transferred. This must be real estate in possession, or else a vested remainder or vested reversion; for contingencies, and mere possibilities cannot be conveyed by deed, unless coupled with some present interest, though in some instances they may pass by devise in a will. 2 B. C. 299. The property must be described in the deed. If property intended to be transferred is so far described that it may be certainly ascertained, this is sufficient; as when a lot of land is sold by the letter and number, which distinguish it upon a plan annexed to a grant from the crown; but in general it is best that the property intended to be conveyed be specified with the utmost certainty in the deed, by metes and bounds, by a statement of the quantity of land it consists of, and by reference to the former grants and conveyances in which it is mentioned. *A plan annexed* to the deed is also of much value and convenience. In conveying lands in new countries discrepancies are of frequent occurrence, between one part of the description and another; and it is difficult to reconcile them, owing to the haste and imperfection attending on surveys of wilderness land. In the United States the rule established is, that known and fixed monuments control courses and distances,—and generally that the least certain and material parts of a description must yield to those which are more fixed. They hold the mention of the quantity of acres contained, not to be conclusive, nor to amount to a foundation for an action of covenant, unless connected with fraud. 4. Kent. Com. 455. 456.

3. The *estate* to be transferred. This must be stated so as to express what interest the grantee takes, whether for life, for years, in fee, or in fee tail. If the land be not conveyed to the grantee “and his heirs” expressly, he will have but an estate for life at the utmost.

4. The *consideration*. A consideration is essential to every deed, but a deed of gift. An equivalent in lands, money, or other property, is called a *valuable* considera-

tion. So marriage about to take place is accounted to be a *valuable* consideration, and so are services performed, 2 B. C. 296. 4 Kent. 453. 454. It has been held sufficient in the American courts, if the deed purports to be for money, or value received, without expressing the amount. *Ibid.* The *receipt* of the consideration is usually expressed in the deed, and it is also the practice throughout Nova-Scotia, to have a *separate receipt* for it on the deed, either at the foot of the last page, or on the back of the instrument; and the want of this receipt would be presumptive evidence, that the money had not been paid. See Preston on Abstracts. vol. 1. p 72. 299. v. 3. p. 15. Consanguinity between near relations is called in English law a *good* consideration. Although deeds of gift without consideration and those made on consideration of relationship or *after* marriage in favor of one's wife, are valid between the parties; yet when the person making the gift or settlement is indebted at the time of making it, the conveyance is liable to be impeached by the creditor, as having the effect of a fraud upon him. In England a subsequent purchaser for a *valuable* consideration may set aside all previous deeds made upon *good* consideration or without consideration, that is to say all deeds made without an equivalent.

The statute of 13 Eliz. c. 5. declares all gifts, conveyances, and alienations of *real or personal* estates, whereby *creditors* may be delayed or defrauded, void as against such creditors; and it has been judicially limited in its effects, to such creditors only as had existing demands at the time of making the conveyance. 8 Ves. 200. 1 Swanst. 113. 1 Mad. 419. Turn. and Russ. 293, but if the deed were actually made by collusion, with a view to incur debts, and defraud the subsequent creditors, it would be fraudulent. 2 Atk. 480, 602. 19 Ves. 92. This law has not been re-enacted here, but as it simply confirms a principle of natural justice and equity, it may be presumed that our

courts would not hesitate to recognise the same rules. The statute of 27 Eliz. c. 4. enacts that all conveyances of *real* estate, made with intent to deceive or defraud purchasers, shall be void; and this act is in England construed to give a purchaser for *valuable* consideration a good title, notwithstanding any deed of gift, or voluntary settlement for *good* consideration, previously made, and such is the rule although the purchaser had notice of the prior deed.—18 Ves. 110. 1 Ves. and Beames. 183, but see Cowp. 705. Had this statute been re-enacted in Nova-Scotia, it might be made a question whether the hard construction given to it in England, did not arise from the want of a general registry act. Indeed the reasoning in 18 Ves. 110, will afford room for such an opinion. Under our laws, which make every unregistered deed void, as against purchasers for valuable consideration on record although of later date, there can be no reason to presume the possibility of a recorded deed of gift operating any fraud upon a subsequent purchaser. As neither of these English statutes have been re-enacted among us, I should conclude that our courts would act upon the general rule that fraud is not to be presumed but proved by the party making the imputation; and that deeds would be good without consideration, unless they interfered with the existing rights of creditors, or could, from other circumstances, be proved to have originated in an attempt to defraud other parties. It would perhaps be a serious objection in equity to the validity of a deed of gift, if it went to deprive the donor of the means of doing justice to his wife and family, but it must be then objected to, on the ground of lunacy or weakness of intellect. It is also essentially requisite, that the deed should be legally executed and properly recorded. It will be good against the grantor and his heirs, though unrecorded, but not against a subsequent purchaser for value.

*The Form of a deed.*

1. A deed must be written or printed, on paper or parchment. 2. It is usually cut at the top in a waving or indented line, but if not indented, it is properly a *deed poll* though the word *indenture* be used in it. By the rule of English law a deed poll is construed more strongly against the grantor; when there is an ambiguity in it, which cannot be explained by any other rule of construction: but this rule is of very rare operation, and generally it is of little consequence whether a deed be indented or not. 2 B. C. 380. 3. The date is usually set out in the beginning of the deed, and again referred to in the conclusion; but a false or impossible date, or the absence of a date, will not destroy the effect of a deed.—2 B. C. 304. But it may become an important circumstance, where questions respecting priority or fraud are involved. 4. Next to the date it is usual to state the names, places of abode, and rank or occupation of the parties respectively. The grantors are first named and then the grantees. 5. Next in order come the recitals, if any are necessary, of such other deeds, agreements or matters of fact, as may serve to explain the circumstances under which the deed is made. 6. Then the consideration for which the deed is made is stated. 7. Then come the words of granting, 8. next the description of the property granted, and the nature of the estate conveyed, whether for life, in fee simple, &c. 9. The *habendum*, is usual but not absolutely necessary. It is intended to limit, lessen, or enlarge the estate granted. It cannot destroy an estate given by the premises, or foregoing part of the deed. It is therefore now useless, unless where the estate is not sufficiently defined. 2 B. C. 298. 4 Kent. 456. 10. If the conveyance be a lease for a term of years, the *habendum* is followed by what is called the *reddendum*, which states the term and amount of rent to be paid. 11. Conditions, if inserted to make the



the estate defeasible upon any contingency, are usually next in order. 12. Then the covenants and warranty follow, which in sales of land are intended to make the seller and his heirs responsible for the goodness of the title. Lastly come the formal words of attestation. 13. The signatures and seals of the parties. 14. The subscription of the witnesses. 15. The receipt for the purchase money. 16. The certificate of the justice of peace where any married woman entitled to dower is a granting party. 17. The certificate of a judge, where a married woman conveys her own lands with her husband, and 18, finally the certificate of the Register of Deeds, for the county in which the lands lie, stating that the deed was duly recorded.

*The execution of a deed.*

The law demands greater form and solemnity in the conveyance of lands than in that of moveables (except in the case of ships). On account of this solemn form a gift of land by deed is good without consideration, while in every other class of contracts, unless there be an equivalent, a promise is not legally binding. In ancient times in England, land could be transferred by livery of seizin i. e. delivery of the possession, without writing; but that rule was finally abolished by the English statute of frauds.—29 Car. 2, c. 3.

Our provincial statute of frauds (passed in conformity with the statute of Charles 2.) act of 1758, 32, G. 2, c. 18. 1 P. L. 25, enacts in sec. 1, “ That from and after the first day of May, in this present year 1759, all leases, estates, interests of freeholds, or terms of years, or an uncertain interest of, in, or out of any messuages, lands, tenements or hereditaments, made, or created by livery and seizin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing,

" shall have the force and effect of leases, or estates at will, only  
 " and shall not, either in law or equity, be deemed or taken  
 " to have any other or greater force or effect, any con-  
 " sideration for making any such parol leases or estates,  
 " or any former law or usage to the contrary notwithstanding."  
 " ing." Sec. 2. " Except nevertheless, all leases not ex-  
 " ceeding the term of three years from the making thereof,  
 " whereupon the rent reserved to the landlord, during such  
 " term, shall amount unto two third parts at least, of the full  
 " improved value of the thing demised." Sec. 3. " And  
 " be it also enacted, that no leases, estates or interests, either  
 " of freehold, or term of years, or any uncertain interest of,  
 " in, to or out of, any messuage, lands, tenements or here-  
 " ditaments, shall, at any time after the said first day of  
 " May, be assigned, granted or surrendered, unless it be  
 " by deed or note in writing, signed by the party so as-  
 " signing, granting, or surrendering, the same, or their  
 " agent thereunto lawfully authorised by writing, or by  
 " act and operation of law." Sections 6, 7, and 8, re-  
 " quire all trusts or confidences to be created by writing  
 " and also to be assigned by writing only, in both cases to  
 " be signed by the proper party. But trusts by implica-  
 " tion or operation of law are excepted. By the com-  
 " mon law the *freehold interest* in lands could be trans-  
 " ferred by livery of seizin, (that is to say, a formal  
 " transfer of the possession) with or without a deed. See  
 " Lit. Sec. 59. Co. Lit. 48, a. As livery of seizin is  
 " not in use in this province, the common law principle as  
 " adopted by our usage, will require a deed under seal to  
 " transfer an estate of freehold. Such also is the recognized  
 " principle in the United States arising out of the common  
 " law as there received.—4 Kent. 443, 4. See also 8 East.  
 " 167, when it is said by Mr. Justice Lawrence, that an es-  
 " tate for life can be created by *deed* only, and 14 Ves. 158,  
 " where Lord Eldon intimates the same opinion. Here where  
 " the recording has superseded, and stands in the place of

livery of seizin, there can hardly be a doubt that a regular deed is necessary to convey the freehold. At common law a deed is also necessary to effect a *partition between joint-tenants*. Roberts on frauds, 285. So it is equally necessary for the conveyance of any incorporeal hereditaments, and for the assignment of expectant estates.—*ibid.* 1, 2. So *leases by the king* for any term, however short, must be by patent under the great seal, (or in England the Seal of the Exchequer.) 2 Rep. 17. So all *leases by an incorporated association* must be under the corporation seal.—Carth. 390. Lord Raym. 136. So *leases made by husband and wife* (under the enabling statute) of the lands in fee simple or fee tail *belonging to the wife* must be by deed, or they are void, and cannot be confirmed by the assent of the wife after the husband's death. See "Estates in tail" *supra*. Dyer 91. Cro. Eliz. 656.

*Corporations* cannot make any conveyance or mortgage but by deed under seal, 4 Bingham 283. *Leases for lives* being freeholds should, it seems, be by deed as we have noticed above, but leases for ever so long a term of years, would appear to be valid if created by writing signed as directed in the statute of frauds. *Mortgages* will be governed by the same rule as if they were absolute conveyances, therefore a *mortgage in fee* will require a deed under a seal and a *mortgage of a term* of years will apparently be good if written and duly signed. It is usual and prudent however, to make all leases for a long term—especially where the property is valuable in the regular form of deeds under seal and mortgages of terms also. A *mortgage* may, under certain circumstances be created *by deposit of the title deeds*.\* This is a settled principle in England, though much disliked by Lord Eldon and Sir William Grant, as an infringement upon the provisions of the statute of frauds.—See 4 Kent Com. 144, 5. A *mortgage* even of the fee

\* See Appendix.

simple may be assigned or released without writing or deed, because as it is regarded in equity as a pledge for a debt; whatever will assign the debt or release it, will by consequence convey the interest in the pledged property.—Roberts on Frauds, 272, 276, but Mr. Roberts questions whether an assignment by parol would, if without an equivalent or valuable consideration.—*ibid.* Under the statute of frauds a *Partition* by tenants in common must be written and signed by the parties.—*ibid.* 285, and an exchange must be in writing, if the interest exchanged be more than a lease of 3 years.—*Ibid.* 285, 286. *A lease for one year cannot be assigned without a writing* signed according to the statute, although no writing is necessary to its creation.—1 Campb. 318. A deed is well defined by Lord Coke as “an instrument at common law, consisting of three things, viz: writing, sealing and delivery, and comprehending a bargain or contract between party and party, man or woman.”—Co. Lit. 171, b. This is the general idea of a deed at common law including bonds and other instruments not regarding land as well as deeds of conveyance. In a preceding place Co. Lit. 35, b. Lord Coke describes a deed thus “This word (Deed) in the understanding of the common law is an instrument written in parchment or paper, whereunto ten things are necessarily incident, viz. *First*, writing; *Secondly*, parchment or paper; *Thirdly*, a person able to contract; *Fourthly*, by a sufficient name; *Fifthly*, a person able to be contracted with; *Sixthly*, by a sufficient name; *Seventhly*, a thing to be contracted for, *Eighthly*, apt words required by law; *Ninthly*, sealing; and *Tenthly*, delivery. A deed cannot be written upon wood, leather, cloth, or the like; but only upon parchment or paper, for the writing on them can be least vitiated, altered or corrupted.” The form of a deed then, requires it to be a written document, and 1st, The law requires *sealing* as the *first requisite of the execution*. 2. The statute of frauds adds

*signing*, which is a *second* requisite. It was at one time surmised that sealing would stand for signing also, but that opinion is contradicted in 1 Vesey, Jun. 11, 13, and 1 Wilson 313, on the authority of Ld Chief Justice Willes. See also Roberts on Frauds, 381 to 387, and 4 Kent Com. 442. 3. *Delivery* is another requisite to the regular execution of a deed. Until the grantor deliver the deed to the grantee it does not take effect, 2 B. C. 307. Therefore, whatever date may be inserted in the deed, the time of delivery is accounted the true date. If the seal be affixed by another person, (as is generally in practice the case) the delivery by the grantor is a sufficient recognition and adoption of the seal as his own.—Perkins, Sec. 130, and Blackstone 2 Com. 307, extends this doctrine to the signature as well as the seal. Delivery may be made to the grantee himself, or to any person authorised by him to receive it. In either case it gives immediate effect to the deed, although it afterwards continue in the custody of the grantor.—5 Barn. and Cress. 671. Delivery made to a stranger will be good, if the grantee accept it from him, and it takes effect as a valid deed from the beginning.—See Perkins. 143, 144, 6 Mod. 217. 2 Dyer 167, b. 3 Co. 26 b. 4 Kent. Com. 447. A delivery of a deed may be absolute or conditional. A deed delivered to a third person to keep until some condition be performed on the part of the grantee, is called an *escrow* or scroll, not being a deed until the condition be performed. Co. Lit. 36, a. In the interim the estate remains in the grantor. See Perkins, Sec. 137, 138, 142. 4 Kent. Com. 446, and the deed takes effect only from its subsequent delivery after the condition is performed. But this rule admits of exceptions, where it would otherwise defeat the intention of the parties. Therefore if a *feme sole* deliver her deed as an *escrow*, and marry before the second delivery of the instrument, it will (by relation to the time of the first delivery) be held as well executed. A deed may be delivered

without words, or it may be delivered by words only.—  
 Co. Lit. 36, a. 49. b. 9 Co. 37. 4. *Subscribing witnesses.*  
 The attestation of witnesses was not originally necessary  
 to a deed, nor do I suppose that a deed without witnesses  
 could be set aside by the grantor himself or his heirs; but  
 they are rendered essentially necessary to make a title as  
 against subsequent purchasers by our acts of registry. The  
 original act of Council 1 P. L. 4. Sec. 6, speaks of wit-  
 nesses, "in the plural number as necessary; and the act of  
 32, G. 2, c. 2. 1 P. L. 2 Sec. 12 Anno. 1758, requires the  
 oath of "one credible subscribing witness," to enable the  
 grantee to have the deed put upon record; add to this,  
 that it is the universal practice to have two subscribing  
 witnesses to a conveyance of land, and we may conclude it  
 to be the safe course to consider two subscribing witnesses  
 essentially necessary to a valid conveyance. If a deed be  
 made in pursuance of an authority, derived under a power  
 in any will or deed which requires it to be *attested* by wit-  
 nesses, the form of attestation must contain the words  
 "*Signed*," as well as "sealed and delivered in presence  
 of" or the execution will be insufficient.—17 Ves. 454. 4  
 Taunt. 213. 2 Maule and Selw. 576. 3 M. and S. 512. 3  
 East, 410. English Stat. 54 George 3. c. 168. 1 Mad. Rep.  
 516. 7. Taunt. 355. 6 Taunt. 402. 2 Marsh 102. But the  
 donee of the power, may, if living, re-execute the deed  
 properly or a new one in better form. 3 East. 410. 3 Prest.  
 Abs. 75. 5. *Reading.* It is to be recommended that a con-  
 veyance should in all cases be read to or by the parties  
 making it. If any person desire it and it be not done, the  
 deed is void as far as he is concerned. If he can, he ought  
 to read it for himself, but if he be blind or illiterate it  
 should be read distinctly in his hearing. If read false-  
 ly it will be void, as far at least as it is mis-read, except  
 the false reading be a trick, to which the grantee is a party  
 with intent to defraud some one else, and in that case,  
 it will be binding on him.—2 B. C. 304. It has been



determined that it is not necessary to the validity of the execution of a will by a blind man, that it should be read over to him in the presence of the attesting witnesses. 2 Bos. and Pull, N. R. 415, but there seems stronger cause to require the reading of a deed in such a case, as wills are made often in the exigency of a death-bed. It has been suggested as a prudent course to state in the alteration of a deed, made by an illiterate person or a blind person, that the instrument was read to him. 2 Bythewood on conveyancing, 659, note a. Although persons be deaf, dumb, or blind, yet if the nature of the conveyance is well understood by them, they may by signs signify their assent, and the execution by them will be valid.—Co. Lit. 42. b. If persons be both deaf and dumb it is prudent that they should, in any case where they are to execute a deed, be brought before a judge of some superior court to acknowledge it. 2 Bythewood on Conveyancing 658. Persons who have neither sight, hearing, nor speech, from their birth, will of course be disabled from making any valid deed.—Ibid. It has formerly been doubted whether making a mark be a sufficient signing or subscribing, under the statute of frauds, but the alteration of a will, where one of the witnesses made his mark, has been decided to be sufficient; 8 Ves. 185, 504, but it is extremely desirable that the witnesses to a deed or will should be able to write, on account of the difficulty of proving their attestations after their death.—2 Bythewood Conv. 660. 6. *Recording.* The Registry acts in England, extend to but a small portion of the kingdom. Yorkshire, Middlesex, and the tract called the Bedford level, come under their operation. In Scotland all deeds are put on record. 2, B. C. 242. In Ireland there is a general registry act passed in the reign of Queen Anne, and throughout the United States the same law prevails, and is established by statute in every State of the Union 4 Kent, 448. [The acts respecting Registry of Deeds in this Province, are the act of 1758,

32, G. 2, c. 2. 1 P. L. 1—6. 1760, 34 G. 2, c. 4. 1 P. L. 57, 58, c. 8, Sec. 3, 1 P. L. 61, 1765, 5 G. 3, c. 8. 1 P. L. 115. 1772, 12 G. 3, c. 5, 1 P. L. 173, 174. 1789, 29, G. 3, c. 9, 1 P. L. 272, 273, 1822, 3 G. 4, c. 1, 3 P. L. 121, 122, 1828, 9 G. 4, c. 6. Sec. 2, 1832, c. 51, 57.]

All deeds, conveyances and mortgages, affecting land, are required to be recorded immediately after they are executed. If not recorded, they are made void as to subsequent purchasers or mortgagees for a valuable consideration, whose deed or mortgage shall be first recorded. 1 P. L. 3272, 273. Every deed is to be registered in words at full length, "upon proof of one credible subscribing witness to the due execution of such deed or conveyance." 1 P. L. 3. The Register or Deputy is to endorse a certificate on the deed with the hour, day and date of registry mentioned in it, and this certificate is to be proof of registration, and he is to insert the date of registry on the margin of his entry also. 1 P. L. 4, 5. If the original deed shall be lost the registry is made good evidence.—1 P. L. 3, Sec. 13. The registration must be made in the township or settlement where the lands lie, if there be a register office in it, if not, at the county town where the Sessions of Peace are held.—Act of 1822. The act of 1789, had directed the registry to be made at the nearest registry office in the County where the lands lie. The act of 1772, authorised the register of deeds to appoint deputies in each county as the Governor and Council should direct. The act of 1822 authorises the appointment of deputy registers in any township, place or settlement, as directed by the Governor and Council, and provides that the deputies commissions shall mark the limits of their respective districts. The register or his deputy, is empowered to swear the witnesses, and false swearing is made perjury as in a court of record.—1 P. L. 4, 5. Previous to 1758, see 1 P. L. 3, 4, 5. a memorial only was required to be entered, which contained the date, names of parties, parcels, &c. The

old act required oaths of allegiance, &c. to be taken, and declared deeds, though registered, to be void if the grantee refused to take them, but the act of 1822, annulled the effect of that clause. See vol. 1, p. 2. Sec. 3. vol. 3, p. 121, 2. Certificates were also required by the act of 1772, 1 P. L. 174 to be returned by the registers in the county to the general registry in the capital, but this also has been annulled in 1822, and no defect in either case will now affect an old deed on record and these rules are abolished in future. Papists were excluded by act of 1758, 1 P. L. 2. from taking under any deed, except by crown grants. This has also been abolished for many years, by the act of 1783, 23 G. 3, c. 9, which makes good also, the titles void under the former, except when they may have litigated upon that ground before 1783. The register is allowed 2s for a deed not exceeding 200 words. If longer, 1s for every 100 words it contains, 1s. for every certificate, and 1s. for every search.—1 P. L. 115. Deeds though not recorded, are yet good against the grantee and his heirs. If a subsequent purchaser or mortgagee have notice of a prior deed, or incumbrance of any legal kind although the prior instrument is not registered, he cannot by putting his deed of conveyance or mortgage on record first, obtain a prior right, as the law was made in favor of the innocent, and not to give advantages to the designing; yet the first grantee must resort for relief to a court of equity, as the legal estate would be vested by the first registry. 1 Ves. Sen. 64, 16, Ves. 430, 5 Barnw. and Ald. 147, 19 Ves. 439. Cowp. 712, 3 Atk. 647, 651. 1 Scho. and Lef. 103, 157. 2 Scho. and Lef. 521. The same rule is said by Mr. Kent to prevail generally in the United States, 4 K. Com. 448. But the fact of registry of deed or mortgage is not in itself such evidence as will alone raise the presumption of notice of its existence to a subsequent mortgagee or purchaser. See Patch. on mort. 356. 2 Scho. and Lef. 66. 1 Cox. 182. 3

Ves. 485. 2 Ball and Beat, 75, 1 Scho. and Lef. 97, 103  
2 Sim. and Stu. 225.

*Recording of deeds executed in Great Britain and Ireland, or  
in another Colony.*

The act of 1760, 34 G. 2, c. 4. 1 P. L. 57, 58, empowers the officers to register "all such deeds and conveyances of lands in this Province, as shall have been made and executed in Great Britain or Ireland, or in any of his majesty's colonies or plantations *distant* from this province (though one of the witnesses thereto should not come before him or his deputy to prove the same as directed by the said act,) Provided the execution thereof shall appear to him, either to have been properly acknowledged by the grantor himself named in such deed or conveyance, or be proved by the oath of one of the subscribing witnesses thereto, before some, or one of H. M. justices of the peace, of the place where such deed or conveyance shall have been executed, and duly attested by him; and such attestation being also authenticated (*if in the plantations*) under the hand and seal of the governor, lieutenant-governor, or commander-in-chief of the province, where the same shall be made, or of a public notary there residing; and *if in Great Britain or Ireland*, under the public seal of some corporation there, or by the attestation and certificate of some notary public lawfully constituted, resident there, certifying that such person so subscribing as a justice of the peace is really so, and that all faith and credit ought to be given to his attestations."

The registry of lots on the peninsula of Halifax, entered in an abbreviated form by the number and name of grantee or assignee only, is made valid by act of 1760, 34 G. 2, c. 8, sec. 3, 1 P. L. 60. This act applies to such entries prior to 1760, and has some exceptions. It will be

more particularly noticed towards the close of this work under the title of Local laws. The deeds of trusts for the incorporation of religious congregations and societies under the act of 1828, c. 6,—9, G. 4, are directed by sec. 1, to be signed, sealed and executed in the presence of two or more witnesses, and sec. 2, directs the deed or writing so executed to be registered on the oath of the subscribing *witnesses*, as other deeds are. The usual form of grants of land from the crown requires them to be registered, docketted and audited, and there are offices of registry, &c. where this is done. In point of fact, I believe they are not issued to the grantee until they are first fully registered. The whole of the grants of the crown are registered in one office at Halifax, wherever the lands may lie. It is the practice, if the deed be executed in Halifax and the land is elsewhere, to swear the subscribing witness before the officer in the metropolis, on whose certificate of the oath being taken the deputy in the country enters the deed.

*Execution of a deed by a married woman to bar dower.*

The provincial act of 1771, 11, G. 3. c. 6, 1 P. L. 167, enacted “That where a sale shall be made of lands or tenements by the husband and his wife, before such deed shall be valid and sufficient *to bar the wife* from the recovery of her dower after the decease of her husband, she shall be examined by one of H. M. justices of the peace, whether she hath done the same freely, voluntarily and without compulsion from her husband, and if before such justice she shall declare that she hath freely and voluntarily signed such deed, and therein assigned her right of dower, the justice shall accordingly certify such acknowledgments on the deed, which shall for ever bar her from the recovery of her right of dower to such lands so conveyed. Sec. 2. Provided always, that nothing in this act contained shall any ways affect any deed or conveyance of land heretofore made.”

This is the method always adopted of barring dower in sales and mortgages and was borrowed from the older colonies (now the United States.) Mr. Kent says, 4 Com. 58. "The usual way of barring dower in this country, by the voluntary act of the wife is not by fine as in England, but by her joining with her husband in a deed of conveyance of the land, containing apt words of grant or release on her part, and acknowledging the same privately, apart from her husband, in the mode prescribed by the statute laws of the several States. This practice is probably coeval with the settlement of the country, and it has been supposed to have taken its rise in Massachusetts from the colonial act of 1644."

*Conveyances of a married woman's real estate by her and her husband.*

This also has been a general practice among the old colonies. The commentator says, "This substitute of a deed for a conveyance by fine has prevailed probably throughout the United States, as the more simple, cheap, and convenient mode of conveyance. The reason why the husband was required to join with his wife in the conveyance, was, that his assent, might appear upon the face of it, and to shew that he was present to protect her from imposition." 4 Com. 129. Whether his not joining in the deed will make it entirely void, appears not to be decisively established in the American Courts. By fine (in England) the wife may deal with her property as if she were a feme sole, or single woman. 2 Saund, 177, 1, Mod. 290 and may even thus incur a liability to be sued upon a warranty after her husband's death, and the deed properly acknowledged before a judge, has with us the full validity of a fine as regards her estate.

The provincial act of 1794, 34 G. 3. c. 3, 1 P. L. 332, recites that it had "been usual for married women entitled to real estates in this province, to convey the same



“jointly with their husbands, during coverture, and no  
“inconvenience” had “been found to result therefrom,”  
clause 1st. confirms all previous deeds of that description,  
where the wife had “acknowledged before a justice of  
“the peace, that she did voluntarily make and execute such  
“grant or conveyance, without any compulsion or con-  
“straint of her husband,” as if made by a feme sole.

Sec. 2. “That all grants and conveyances which  
“shall hereafter be made by any married woman, jointly  
“with her husband, of estates to which she is entitled, or  
“in which she may have any present or future interest in  
“her own right, or in any other way, or by any other  
“means whatsoever, shall be good and valid in law; and  
“of the same force and effect as if the same grants and  
“conveyances had been made by a *feme sole*, or by any  
“other person or persons whomsoever, any law, usage, or  
“custom to the contrary, notwithstanding, *Provided*, The  
“deed or deeds, by which such grants or conveyances  
“shall be made and subscribed by such married woman  
“shall have been acknowledged in the presence of a judge  
“of the supreme court of this province, or any justice of  
“the inferior court of *the county, wherein such feme covert*  
“*shall be or reside*, or shall be after the execution there-  
“of, acknowledged by such married woman, before such  
“justice, as her free act and deed, and to have been exe-  
“cuted for the purposes in the said deed or deeds men-  
“tioned, and that the same was done without any force or  
“compulsion from her husband.”

With respect to “*married women not residing within this*  
“*province*,” it enacts in sec 3. 1 P. L. 333, “that grants  
“or conveyances hereafter made by such married women  
“of lands and tenements within this province, shall and  
“may be made agreeable to the mode herein before pre-  
“scribed, and shall be made and subscribed in the pre-  
“sence of some or *one of the justices of a court of record* of  
“the county or place where such *feme covert* may reside at

“ the time of her making such grant or conveyance as  
 “ aforesaid, or by acknowledging the same as aforesaid,  
 “ after the execution thereof.”

The practice is, in all cases of deeds by married women whether of their own real estate, or to bar dower, in their husbands, that they should be *privately examined* by their judge or justice, and apart from the husbands, and the certificates of acknowledgment under these acts are always so worded. This practice (being in fact the contemporaneous exposition of the acts) may be presumed to give such a construction to them, as to render this private mode of examination necessary, though not expressly required by the words of the law. At all events, a deviation from so general and prudent a custom would throw suspicion over the character of a deed, if it would not wholly invalidate it. A married woman having power by law to execute a deed, appears notwithstanding to be precluded from executing it by a power of attorney, see 2 Bythew. on Conv. 666, Yelv. 1, 1 Brownl. 134, Noy 133. Cro. Jac. 617, 2 Leon. 200 Cro Car. 165, but such a faculty might be conferred on her by the express provisions of a settlement before marriage.

*Execution of a deed under a letter of attorney*, A letter (or power) of attorney is an instrument by which a person authorizes another to do certain acts for him as his representative and agent. It is revocable in its nature, and the statement introduced into its form that it is *irrevocable* or not to be revoked, will have no effect to hinder its revocation. However it has been thought that where this authority is meant to secure a debt, due from the principal to the attorney, that it was thereby rendered irrevocable. See 2 Esp. N. P. 565. Lord Ellenborough on several occasions referred to it as settled law that a power of attorney coupled with an interest could not be revoked. See 4 Campb. 274, 2 Stark, 51. This principle has been much doubted, the instrument being

considered revocable in its essential character. It is clear, however, that a court of equity would interfere to prevent the revocation of a power of attorney which had been given as a security, 7 Ves. 28. The court would, it is probable grant an injunction in such a case to prohibit the revocation. It cannot, of course, take place after the act is done. Yet preliminary steps taken under a power will not always hinder revocation while the chief act is not consummated.—See 3 Campb. 127, 2 Stark 50.

The *death* of the principal determines the power, Pre in Chan. 125, 2 Ves. & Bea. 51, and acts done after the principal's death, although the attorney was ignorant of it, will not be supported by the power, and this is the case even when the power is given as a security. 4 Camp. 273. 1 Stark. 121.

A power to do any act includes by implication an authority to do whatever is *incident* to that act, and requisite to effect it. 2 Roll. Rep. 390, but this rule is restricted to that which is necessarily incident. See 5 B. & A. 204, 1 Taunt, 347. When power is given to do particular acts, general words following such as "transact all business," will be limited to authorize only the matters incident to the particular matters contemplated in the power, 3 Smith, 79, 1 Taunt, 349, 7 Barn. & Cress 278. 1 Man. & Ryl. 66.

To authorize a person to execute a *deed* for another, the power of attorney must be a deed executed under the hand and seal of the principal. 6 D. & E. 176. 2 D & E. 209, 6 Barnn, & 355, 8 Dowl. & Ryl, 102. One partner in trade cannot bind the other by deed without a special power, 7 D & E, 207. An attorney must act in the name of his principal. See Combe's case, 9 Rep. 766. It is essential that a power of attorney should be fully explicit and precise in its directions, as no deviation is permitted, and it must be strictly pursued (even in any unessential form or

acter. It is clear, interfere to prevent which had been given, it is probable, it is probable to prohibit the release after the act under a power of attorney the chief act of Stark 50.

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creation an authority, and requisite is restricted to B. & A. 204, 1 particular acts, to affect all business matters incidental in the power, 278. 1 Man.

for another, the under the hand of D & E. 209, partner in trade special power, name of his name is essential to be given in writing and pre- scribed, and it in any form or

direction it may give,) otherwise the act of the attorney, will be voidable or void. An attorney executing a deed should properly sign thus, A, B, by C, D, his attorney. Where a deed of land is made under a power of attorney, the purchaser should have the power recorded, and delivered into his own custody with his deeds.

## CHAPTER XII.

### TITLE BY DEED.—PART II.

*The different species of conveyances by deeds at common law.*

Sir Wm. Blackstone, 2 Com. 309, divides these into  
1. Primary, by which an estate or interest originates.  
2. Secondary or derivative which enlarge, assign, restrain or extinguish the estate or beneficial interest originally created. The first kind includes feoffment and grant, gift, lease, exchange, and partition.

*Feoffment.*—This was the most usual and general form of conveyance in the ancient English law, and the freehold was in early times, invariably passed by feoffment. It was the act of delivering the possession that constituted a feoffment and conferred a right to the land, and this was called in words taken from the Norman law French 'livery of seizin.' It was done in the presence of witnesses, and when written characters were introduced they were considered as not essential to the transfer, but as affording a convenient method of preserving the evidence of the fact. The statute of frauds has made a written instrument indispensable, but that will not in

English law operate as a feoffment, without a formal livery of seizin. This form is abrogated,\* in North American jurisprudence, the recording of the deed being substituted, as affording greater notoriety to the transfer. 4 Kent Com. 477. The act of Antigua, anno. 1764, no. 270. sec. 1, declares that livery and attornment were never requisite in that colony. The operating words in a feoffment are *give*, or *grant*, or *enfeoff*. Livery of seizin *in deed*, was given on the premises conveyed, by the delivery of a turf, a twig, the key of a door or something of the kind belonging to the property, in the name of seizin of the whole, in the presence of witnesses. Livery *in law*, was made in sight of the land, the feoffor saying to the feoffee 'I give you yonder land, enter and take possession. Livery in deed could be given or received by attorney or deputy, livery in law could not. If the land lay all in one county, though in scattered parcels, livery of one part was good for the whole, but if it lay in two or more counties, a separate livery in each was necessary. This transaction was usually endorsed as a memorandum with the date and witnesses names on the charter of feoffment.

2. *Gift*. This name was appropriated to a feoffment creating an estate in tail. The feoffor and feoffee in such case being called *donor* and *donee*.

3. *Grants*. Incorporeal hereditaments and estates in expectancy, not being susceptible of transfer by actual delivery (or livery as they called) it, were always necessarily the subject of written conveyances.—Cro. Eliz. 163, 1 Roll's. Rep. 174. 1 Leon. 207. Co. Lit. 9. a. and they are said in the old law phrase to lie in grant, while the corporeal hereditaments lie 'in livery.' They

\* "Laws of Jamaica, act 10, anno. 1681. sec. 1. Deeds registered shall be valid to pass property without livery, seizin, attornment, or any other act or ceremony in the law whatsoever. Maryland, act 11, Wm. 3 p. 93, anno. 1699, "No land to pass except by deed, enrolled in a Court. sec. 4. It shall pass the land from the time of enrolment only."



therefore were transferred by symbolical delivery, (that is by the delivery of the deed.) Seignories, rents, reversions, and remainders, pass by grant. The operative words are "give and grant."

4. *Leases.* A Lease is a conveyance of real estate for life, for years, or at will, by some one having a larger estate in the property. The usual words of operation are "*Demise, grant, and to farm let.*" By this conveyance an estate for life, for years, or at will, may be created either in corporeal or incorporeal property.—Tenant in fee simple may make a lease of any duration, but at common law the tenant in tail could make no leases that would be binding on the issue in tail, or the reversioner. The enabling statute (which we have noticed in the title of estates of inheritance,) authorises him to make leases in a certain manner for 21 years, or for three existing lives. The act 32 Hen. 8, c. 28. which gives this authority, requires. 1. That the lease be by indenture. 2. That it commence immediately. 3. That any old lease in being be surrendered, or within one year of expiring. 4. That it be made either for 21 years or for three lives at furthest, but not for both, yet it might be for a lesser period. 5. That it must be only of corporeal hereditaments. 6. That it be of lands and tenements, most commonly let for the 20 years preceding, that is for the greater part of that time. 7. That the most usual rent for the 20 years preceding be reserved. 8. That the lease must not be made without impeachment of waste. Leases made under this act are in England binding on the issue in tail, but not on the remainder man or reversioner. The husband and wife are authorised also, under the same act, to make similar leases of the wife's fee simple property, but I know no reason for considering any part of the act in force here, except that part which relates to tenants in tail. The act of the province legalizes all conveyances by husband and wife, of the wife's land, if duly acknow-

ledged, which will more than supply the want of that part of the act. The act of Hen. 8, also contains certain provisions respecting leases of Church property, which are authorised on the same terms as those by tenant in tail, but the variety of minute statute regulations by which leases of church property are governed, depending on the acts 32 Hen. 8, c. 28. 1 Eliz. c. 19, 13, Eliz. c. 10, 14 Eliz. c. 11 and 14. 18. Eliz. c. 11. 43 Eliz. c. 29. 18 Eliz. c. 6. 1 Jac. 1 c. 3, 5, Geo. 3, c. 17, and also being grounded on circumstances of a local character, arising out of the situation of the English Church, could hardly be applied to church property in the colonies. I should therefore be inclined to suppose, that our courts would give effect to the leases of church lands only upon common law rules. I know of no decision to establish the right of tenant in tail to make leases under the enabling statute, but think it possible that such a power might be considered as incident to his estate. It can be hardly supposed that the colonial legislature would intend to engraft the estate tail upon our jurisprudence, clogged with a restraint long since removed in English law, the principles of colonial law being generally adverse to all restraints upon the management and alienation of property.

5 *Exchange*. This is a kind of assurance at common law by which two persons exchange equal interests. The word 'exchange' is essentially necessary.—Co. Lit. 51, a. The two subjects must be of the same nature. Thus land may be exchanged for land, but not real for personal estate. The estates must be similar, fee simple for fee simple, and the like of other estates. If either party die before entry, the heir may avoid the exchange. If one party is evicted from the lands he has taken, through any defect in the title, he may re-enter *by the implied warranty*, on the lands he gave in exchange. This is so great an inconvenience in practice, that it has led to the general disuse of this mode of con-

veyance. Mutual conveyances not using the word "exchange," (which should be sedulously avoided,) are not in their legal effects, exchanges, but separate transactions, each property conveyed being governed by the terms of the title and deeds appertaining to itself.—See Bacon, Abr. tit. Exchange, and Viner. Abr. same title. Prest. Sheppard, Touchst. 289.

6. *Partition.* Partition between joint tenants by consent must at common law be by deed, because each being seized of the whole property they could not enfeoff each other by livery of seizin.—Tenants in common could enfeoff each other. At present the proper instrument, to effect a partition between tenants in common, is a regular deed of conveyance of the undivided shares of each to the other. Mutual releases by deed are sufficient between joint tenants.—See Alinatt. on partition. 123 to 136, 2 B. C. 323.

*Secondary or derivative conveyances at common law.*

1 *Release.* This name is applied to a conveyance by which a person having any right or interest in lands, transfers that right or interest to another who has possession.

2. *Confirmation.* This is a conveyance by which one without whose assent an estate created might be voidable, makes the estate good by ratifying it.—Example. If tenant for life lease for forty years, and the reversioner confirms that lease, it will be valid,—otherwise it would have been in the power of the reversioner to avoid it on the death of the tenant for life.

3. A surrender is a conveyance by which one having a lesser estate in possession, transfers it to the person immediately entitled in remainder or reversion. Livery of seizin was not necessary in a surrender, nor in a release or confirmation to tenant at years or will, because there was a privity of estate between

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the parties, but recording will be necessary to affect subsequent purchasers.

4. *Assignment.* This name is usually applied to a transfer of the whole interest in a lease or a mortgage. The assignee of a lease is generally bound to fulfil all covenants, where the covenant expresses the assigns to be bound, and also all covenants which affect the nature, value or mode of occupation of the subject of the demise, (or as they are called sometimes) all covenants, which run with the land,—covenants for quiet enjoyment—further assurance—to pay rent,—to repair—or leave repaired—to renew the lease,—to cultivate the land in a particular manner—not to carry on particular trades—to reside upon the premises, to permit the lessor to have a free passage through certain parts of the demised premises—a covenant to supply the premises with sufficient water, (see 4 Bythew. Conv. 385 where the authorities are all named) have been decided to be covenants running with the land, and binding on the assigns of the parties, whether assigns be named in them or not. Although the assignee be named in the covenant, yet he will not be bound to fulfil a collateral covenant, unconnected with the premises. (ibidem 388) 20 East 139. Assignment will not discharge the original covenantors from their respective liabilities. 4 Bythew, 389. As the liability of an assignee arises from his ownership, so it will cease by his again assigning the land to another, and so ceasing to be owner, and this will discharge him, although he give no notice of it to the lessor, or the second assignee be indigent and unable to perform the covenants. 1 Show. 340, Stra. 1221. 1 Bos. & Pull. 21.

5. *Defeasance.* This is an instrument which defeats the operation of some other deed or estate. A clause in the same deed having this effect is called a condition, if in a separate deed it then takes the name of a defeasance.

A defeasance of a *freehold* estate is a collateral deed, (which must be made at the same time with the conveyance, creating the estate, and form part of the same transaction) containing conditions, upon the performance of which the estate of freehold then created may be defeated or totally undone, Co. Lit. 236 b. A defeasance of an estate for a *term of years*, may be made at the same time with the lease, or at any time afterwards. Byth. Con. 4th vol. 58, 59. When a *power* is future, and to *arise* upon a contingent event, it may be defeated by a separate subsequent deed, 1 Jo. 411, Mose. 146. So generally *all executory interests*, as rents, annuities, conditions, warranties and the like, may be defeated by subsequent deeds, and so may bonds, &c. and other things executory. Co. Lit. 237. The defeasance must be of as high a nature as the instrument it goes to avoid. Therefore a deed cannot be defeasanced by parol. Cro. Eliz. 697, 5 Barnw. & Ald. 187. An error in a defeasance in reciting the date of the original instrument may be material, and therefore the recital should say "on or about" such a date. 4 Byth. Conv. 41, 2, vol. same, 45 n. a. A defeasance must be made between the original parties (or such of them as are concerned in interest or their representatives,) and the terms must be strictly performed by the party who is to avail himself of it. Pres. Shep. Touchst. 397, Cro, Eliz. 142, 3 D & E. 601, Willes. 586. Defeasances of freehold estates are now seldom resorted to, and are discouraged as tending to fraud. See Sel. Chan. Ca. 61. 15, Vin. Abr. 439.

6. *Disclaimer*. Where an estate is conveyed or devised to a person, the grantee or devisee may by deed disclaim and renounce the estate intended to be given him, if he has not previously done any thing to show his assent and acceptance, as no man can compel another to take an estate against his will. This differs so far from a release, that in the view of law the party disclaiming has no right

or interest to transfer, his renunciation rendering the grant or devise to him void, 4 Ves. 97, 3 Barn. & Ald. 36, 2 Swanst. 365, 5 Madd. 435.

*Conveyances which were introduced in consequence of the statute of uses.*

1. *Covenant to stand seized to uses.*—If a man for a consideration of consanguinity or marriage, covenant to stand seized of certain land, to the use of a wife or blood relation, this will operate as a conveyance in their favor under the construction of the statute of uses. The covenantor must have a vested interest in the premises, at the time of making the covenant. A husband cannot covenant with his wife for this purpose, but he may with another for her benefit. A child must be legitimate to be within this rule.—Dyer 375. 2 Roll. Abr. 785, 788. An estate for years may be created by this conveyance, but an estate for years not being within the statute of uses cannot be transferred by it. A stranger cannot take even as a trustee for the family under this conveyance.—1 Leon 195, 1 Co. 15, 4, a. Cro. Car. 529. 1 Sid. 25. The consideration of this conveyance is the foundation of it. Therefore no precise words are required, and a conveyance in the form of a grant, feoffment, release, bargain and sale or surrender, may still take effect as a covenant to stand seized, although it is void in other respects.—3 Lev. 372. Carth. 307. 2 Ventr. 137. 1 Mod. 175, 179. 3 Lev. 291. 4 Mod. 150. 1 P. Wms. 163. Willes 674, 682. 1 Bythe. Conv. 452. 2 Saund. 96. This covenant is disused in England as a form of conveyance, and is not known in our colonial practice. A conveyance by covenant to stand seized, a bargain and sale and a lease and release are what are called *innocent conveyances*, as they will not create a discontinuance, operate as a forfeiture or destroy a contingent remainder (though they may exclude a contingent remainder by uniting the particular



estate with the reversion,) nor destroy a power in gross, appendant or appurtenant.—Lit. Sec. 598, 600, 606, 2 Lord Raym. 778. Fearne. 246, 322. Sugd. Pow. 61. 2 Bythe. Conv. 313.

*Lease and release.*—At common law if there was tenant for years in possession, a release could be made to him of the inheritance without livery of seizin. Under the statute of uses, the possession being transferred by construction to the use, this conveyance was invented by Serjeant Moore. A bargain and sale for a year was first made, and the bargainee by the statute had then the legal possession and the fee was granted to him by release. Thus livery of seizin and enrolment were rendered unnecessary, and the conveyance might be made with the greatest secrecy. It therefore became a frequent and favorite mode of conveyance in England. It has been used in this colony but very rarely. Our registry act requires all deeds to be recorded, and therefore it could not be used here for the purpose of secret conveyance but it is directed to be used under the act of 1815, for barring entail.—55 G. 3 c. 14. 2 P. L. 155.

*3 Bargain and sale.*—This is a contract of sale for a pecuniary consideration, under which before the land is actually transferred in a legal form, the vendor becomes in equity, a trustee for the use of the vendee.—1 Co. 121, b. The statute of uses giving the party entitled to the use the constructive possession, was accompanied in the same session, by the statute of enrolment, 27 Hen. 8, c. 16. limiting its effect as to bargains and sales, to such as should be by indenture and enrolled in a particular form. The bargain and sale under these statutes has not been adopted in this colony; but our ordinary deeds of sale partake of the character of a feoffment and also of a bargain and sale, and the registration operates in the same way as the enrol-

ment. Our ordinary deeds are in form like the deed of release in fee (used in England with the lease for a year,) but they also contain a clause of warranty borrowed from the ancient feoffment, and use the word 'enfeoff' as well as 'grant, bargain, sell, alien, release and confirm.'

*Private acts of parliament*, are classed by Sir W. Blackstone among modes of alienation by matter of record. They appear to be resorted to in England, to aid persons who find their titles too complicated for ordinary conveyances, and are afraid of latent claims. They have not come into common use as yet, amongst us, but transfers and arrangement of the real estate of the crown, or the province, have been made the subject of enactment occasionally, Act of 1802, 42, G. 3, c. 7. 1 P. L. 461, act of 1815. 55, G. 3, c. 19, sec. 2, 8. 2, P. L. 150, 152, c. 16, s. 2, 3. 2 P. L. 157, act of 1827. 8, G. 4, c. 27, sec. 1 & 2, 1830, 11, G. 4, c. 8. and lands of a lunatic were authorized by private act to be sold, act of 1809. 50, G. 3, c. 16, 2 P. L. 59. See also act of 1814, 54, G. 3, c. 18, 2 P. L. 126, and 1815, 55, G. 3, c. 5, 2 P. L. 148. When private acts of parliament are made, affecting property of individuals, all parties interested are required to consent, and the legislature will not interfere with the just rights of any one, without his concurrence, unless in case of unreasonable perversity, by which a party would put others interested to great inconvenience without any advantage to himself, 2, B. C. 345.

*Grants of the crown lands.* The king's grants are matters of record. The dignity of the crown is given as a reason in Dr. and Student, why no freehold can pass to or from the crown, but by matter of record. Dial. 1, c. 8, p. 34. "The king's excellency is so high in the law, that no freehold may be given to the king, nor be derived from him, but by matter of record." It is also there stated as a

maxim, that the king may disseise no man, and no man may disseise the king, or pull any remainder, or reversion out of him. The usual method of obtaining grants of crown land has been as follows. The person wishing to obtain a tract, first filed a written petition in the office of the provincial secretary, addressed to the governor, pointing out the property he wished to be given, and stating his circumstances and means of improving and settling upon it. He was also required to shew (on oath I believe) that he was not seeking the grant with a view of selling the land immediately after getting it, but with a real intention of improving it. His petition then came along with others of the same kind, before the governor and council, and if there approved of, a minute was made in the journal of executive business, ordering so many acres to be allotted to him. The number being usually restricted to 500 acres as a maximum to one grantee, 200 being the ordinary allotment to a settler who was possessed of the average means of cultivation. A warrant was then signed by the governor, directed to the surveyor general of the province, authorizing him or his deputies to survey to the applicant so many acres of land; sometimes it was general, at other times it pointed out in what county, township, or tract it was to be allotted. On the survey taking place, the settler usually took possession of his lot, and sometimes many years would intervene, before he could meet the further expenses of a grant. When however the surveyor general made a return of his survey to the governor, the next step was a reference to the surveyor general of woods and forests for the province, or his deputy, who reported that the tract surveyed was not included in any of the reservations under his care. The return of the survey and this certificate were then sent to the provincial attorney-general, who prepared from them the draught of a grant. From this the grant was fairly written out, in the secretary's office, signed by the governor at the left and upper corner

of the first page, and the great seal affixed to it by the secretary. It was then recorded at full length in the secretary's office, and a plan signed by the surveyor-general annexed both to the grant and the record. It was then sent to the office of the receiver-general of quit-rents and the auditor of grants, in each of which it was entered or docketted, and a certificate was signed on it by the register of its being recorded, and by the receiver and auditor severally of their having docketted it. It was then given to the grantee as complete, on his paying the fees of office, which were considerable. If there were several grantees it was usually arranged amongst them who should have the custody of it, generally it was kept by the largest proprietor or by the most respected individual.

Much of this method was dependant on the king's instructions, which underwent several variations in minor points, greater and more laudable strictness having been latterly introduced. It was found in an early period, when the governors were less restricted in granting land, that influential persons obtained immense tracts of land under various pretensions, which they did not afterwards improve. Thus the land was kept out of the reach of settlers in many places, who would have cultivated it, but could not buy it (except at extravagant prices) from those the crown had entrusted with it, and who had got it for nothing upon promises of making settlements. Recently the crown has put a stop to granting land upon petition, and now crown lands are from time to time sold at auction in small lots not exceeding a few hundred acres. The grant must however be passed with all legal formalities, to confer a title on the purchaser. I have given the former method of procuring grants, as the greater part of titles to land have been derived in that way, and it may be often necessary to recur to the usages under which it has been granted, to explain the circumstances of title and possession.

In Cape Breton while it was a separate government, the land was generally allotted to settlers under crown leases, which did not convey the fee simple interest, but the government has intimated to the people of that Island, since its reannexation to Nova Scotia, that it will regard the holders or assignees of crown leases who have settled on their lands, as fee simple owners in every respect, although they should not take out letters patent. Many of these however, have from caution applied for, and been at the expense of regular grants from the government at Halifax. We have seen that the election laws have adopted the tenants of crown-lease-land in Cape Breton, as entitled to vote as freeholders. It is generally prudent to obtain a regular patent, however the circumstances may be, as regularly no title can pass out of the crown without it, and if the owner lose his possession for a considerable time, it is not impossible that he might find difficulties in maintaining his right in the courts against intruders. They are usually on paper, as documents of all kinds may be in Nova Scotia. Parchment is very rarely used, and never required by law. For the manner of passing letters patent in England, which is substantially the same, see 2 B. C. 346, 7.

*Construction of crown grants.*

1. "A grant made by the king, at the suit of the grantee, shall be taken most beneficially for the king, and against the party." 2 B. C. 347. This is the converse of the ordinary rule which interprets grants most strongly against the grantor, and appears to be intended to prevent public interests from being unintentionally infringed by the liberality of the crown. The formula "of our special grace, certain knowledge, and mere motion," negatives the idea of the grants having been obtained by solicitation, prevents this strict rule of construction from

operating. 2. A subject's grant will be construed to include whatever may be necessary to give it its operation. For example, if a man grant the profits of a certain piece of land for a year, a right of ingress, egress and regress in order to take the profits, are granted by implication; but the king's grant will not be extended thus by implication beyond its terms, and a grant to an alien of lands has been held to be useless, as it would not be extended constructively to be also a grant of denization. 3. If the king's grant be founded upon error or deception it is absolutely void. 2. B. C. 348.

*Fines and recoveries.*

1. *Fines*.—This is a mode of conveyance used in England, by which, under the fiction of a law suit amicably compromised, the title to land is transferred. Thus A. being owner of a piece of land which he wishes to transfer to B. B. brings a suit against A. setting up a claim to the land in an antique form of action [either by suit of covenant or *warrantia chartae*.] A. instead of defending his title confesses that B. has a right to the land, and by licence of the court makes an agreement with him to surrender it up; upon which a judgment is given by consent. Thus B. becomes the legal owner. (See the particular forms well explained in 2. B. C. 348.) The importance of a fine in England to the security of titles is very great. By a variety of statutes enacted to give greater solemnity of form and efficacy to fines, a transfer of this description is not only binding on the parties to the conveyance, and their legal representatives, (who are called privies to the fine) but also, if duly formal, it binds all other persons, unless they make their claim within five years after the proclamations made. There is an exception for married women, infants, prisoners, insane and absent persons, but they must make their claims with-



in five years after their incapacity is removed, or they also will be bound. It is called a fine, because a sum of money by way of fine is paid to the crown, for the licence of the Court to make the compromise.

2. *Recoveries*.—This also is a conveyance by means of a fictitious suit concerning the land transferred. The person to whom the legal estate is to be conveyed, brings what is called a real action claiming the land, against the owner, who, (by throwing the defence upon fictitious parties under whose warranty, he states his title to have been derived, and who fail to defend it,) allows the claimant to *recover* judgment for the land, and receive seizin from the sheriff, under a writ of execution (See 2 B. C. 357.) A nominal judgment is also given in favor of the owner, against those who are supposed to have warranted the title to him, which is now set aside as if defective. This is called the recompense or recovery in value, and, on account of this supposed recompense, the heirs in tail are bound by the judgment on the technical supposition that they will have the benefit of it. The effect of the recovery is that the land is transferred from the owner to the recoveror who has now the legal estate. It operates to bar and destroy any entail that may be on the land, and also all remainders and reversions expectant on the determination of such estate tail.

A fine will not be valid, unless the parties or some of them have a freehold interest in the lands. But tenant for years by making a freehold interest by disseizin, may become party.—2 B. C. 357. By stat. 34 and 35 Hen. 8 c. 26. If there be a tenant in tail of the king's gift, with a remainder or reversion in the crown, a recovery cannot take effect, and by "stat. 11, Hen. 7. c. 20. No woman after her husband's death shall suffer a recovery of lands settled on her by her husband, or on her husband and her by any of his ancestors." and by the stat. 14 Eliz. c. 8,—no

tenant for life of any sort, can suffer a recovery so as to bind those in remainder or reversion. Therefore if there be tenant for life and remainder man in tail, both must be parties to make the recovery valid. The restrictions of these statutes are I conclude in force here, under the language of the provincial act, which will be shortly noticed.

Fines and recoveries are in modern times considered as mere forms of conveyance, the theory and original principles on which they were first introduced being little regarded. Christians note 2 B. C. 360. For this reason we find that—1. If levied or suffered without any good consideration or uses declared, they enure only to the use of him who levies or suffers them. No title to the beneficial ownership (or in fact to any ownership) passing by them, unless they are made on sufficient consideration.

2. The usual course is for the owner or tenant in tail who wishes to convey by fine or recovery, to execute a deed pointing out the uses to which he wishes to transfer or settle the land, and the consideration and other circumstances of the transaction. This deed if made before the fine or recovery is in England called a deed to *lead* the uses of it, if executed afterwards it is called a deed to *declare* the uses.

Chancellor Kent informs that fines and recoveries have not been in much use in any part of the U. S. and probably were never adopted or known in practice in most of the states; that recoveries were in use in Delaware and Maryland before the revolution, and that fines had been occasionally levied in New York, for the sake of barring claims—4. Com. 485. Fines and recoveries of West Indian estates, appear occasionally to have been executed in the court of common pleas in England by the additional fiction of supposing the lands to be in the county of Middlesex, and these appear to have been admitted in the West-Indian courts as regular, but in Antigua and the neighboring islands, the deed declaring the uses, &c.

must be *recorded* in the Islands, within two years, by act of Antigua.—No. 270. anno. 1764, 4 Geo. 3. act of Leeward Carribee Islands. No. 32 anno. 1705, 4 Anne. act of Antigua, no. 537, anno. 1799, 39, Geo. 3. See Barnes' notes, 216, 3d ed. Wilson on Fines, 57 4th ed. Stokes on the Cols. 426. There has been no instance however, for many years, of such a proceeding, the facility of barring entails by deed under the colonial acts, rendering it unnecessary. The act of Antigua of 1705, no. 32, in its preamble says, "And whereas such fines cannot be duly levied in these islands for want of proper offices." This objection will apply to Nova-Scotia, many of the offices required by the English law to the formality of a fine not being in existence in this province. Fines have not (that I am aware of) ever been used in Nova-Scotia. The form of action in which they are brought has not been adopted in practice; and their utility, in preventing the revival of dormant claims to land, is in a great degree superseded by the joint effects of our statute of limitations, which prevents the bringing of any suits, real or mixed, for the recovery of land after 20 years, and of our general acts of registry which give notoriety and precision to titles.

Recoveries are rendered unnecessary by the provincial act of 1815, 55 G. 3 c. 14, 2 P. L. p. 155\* by which it is enacted "that whenever, after the publication of this act, any person, being the *tenant in fee tail of any lands, tenements or hereditaments, within this province, and of full age, and entitled by virtue of the laws now in force in England, if such lands were situate in that kingdom, to suffer a common recovery of such lands, shall be desir-*

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\* "An act to provide an easier method than is now used for barring estates tail in lands. Whereas the method now in use for barring estates tail in lands and hereditaments by common recoveries suffered at common law is liable in this province to many objections: Be it it therefore enacted by the Lieut. Governor, Council and Assembly."

"ous of barring the estates tail therein, such *tenant in tail*  
 "shall personally appear before the justices of the *supreme*  
 "court of judicature of this province on some day in *term*  
 "time, in the county where the lands, tenements or heredita-  
 "ments intended to be conveyed, be situate, and then and  
 "there shall cause the said court to be moved for leave to ac-  
 "knowledge the execution of any indentures of lease and re-  
 "lease, whereby the lands, tenements, and hereditaments,  
 "held in fee tail, shall be granted and conveyed to any  
 "person or persons capable by law of holding lands in this  
 "province, for any uses, intents and purposes in such in-  
 "dentures to be expressed; and also for a rule of the said  
 "court that such indentures be enrolled of record therein, for  
 "the purpose of barring the estates tail in such lands; and  
 "shall also then and there exhibit to the said justices, the  
 "said indentures, and prove the deed or instrument whereby  
 "such estates tail were created; and that by force of such gift,  
 "he, the party applying as aforesaid, is *tenant in tail*, and en-  
 "titled as aforesaid to suffer a common recovery of the lands  
 "granted in the indentures so intended to be acknow-  
 "ledged; whereupon the said court shall take the ac-  
 "knowledgegment by the said tenant in tail of the due  
 "and voluntary execution of the said indentures, and  
 "cause an entry of such acknowledgment to be made by  
 "the proper officer: and shall make a rule of the said  
 "court, thereby ordering, that, unless good and sufficient  
 "cause to the contrary be shewn before the last day of the  
 "term, then next ensuing, the said indentures so acknow-  
 "ledged, shall be enrolled of record of the said court, for  
 "the purpose of barring all estates tail in the lands and te-  
 "nements in the said indentures mentioned; and further,  
 "shall direct a copy of such rule and a notice of the applica-  
 "tion for the same, and for all persons interested in the said lands  
 "held in tail, to appear in the said court, and to shew cause, if  
 "any they have against the said rule before the same shall expire,  
 "to be inserted in the newspaper called the *Royal Gazette*, at  
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“*Halifax, continually from the date of the said rule until the time for shewing cause against it shall be elapsed.*”

2. “*And be it further enacted, That if sufficient cause against enrolling the said Indentures for the purpose of barring such estates tail, be not shewn to the said court before the last day of the term next ensuing that in which the rule shall be granted, the same on that day, upon proof being given of the insertion of the notice aforesaid in the said newspaper, shall be made absolute, and the same Indentures, and all the proceedings relating thereto, shall be enrolled of record of the said court, after a docquet of the judgment for such enrolment shall have been signed in the same manner as the docquets of other judgments of the said court in civil cases.*”

3. “*And be it further enacted, that such indentures so enrolled as aforesaid, shall from the time of their enrolment be sufficient and effectual in law to bar all estates tail in the lands, tenements and hereditaments, by the said indentures granted and conveyed with their appurtenances, and all right and title of the tenant or tenants in tail, and of their issue in tail, and of all others claiming under and by force of the original gift or grant which created such estates tail in and to the same lands, tenements and hereditaments; and all reversions and remainders expectant upon the determination of such estates tail; and to pass and to vest the said lands, tenements and hereditaments, in such indentures contained, with their appurtenances to and for such estates, uses and purposes, as shall be limited expressed and declared therein, as fully and effectually as if the party by whom such indenture shall be acknowledged were seized of an estate in fee simple at time of making such acknowledgment, or had suffered a common recovery in his Majesty’s court of common pleas at Westminster in England, for the same lands within its jurisdiction, Provided nevertheless, that the same indentures be also duly registered in the registry of deeds in the county*

" or district wherein the lands thereby conveyed are situate."

The title and preamble both speak of recoveries as the method 'now in use' and 'now used' but I suppose it refers to England, or has been copied inadvertently from the preamble of some old act of one of the former colonies.

In the United States entailing of estates has been little practised and is generally, if not wholly fallen into disuse. In New York fines and recoveries are abolished. The Antigua acts before referred to have substituted an acknowledged deed for fines as well as recoveries. Our act only extends to recoveries, and it requires the tenant in tail to acknowledge the deeds. Where there is a life estate and remainder in tail, it may be necessary to determine the life estate, by a surrender from the tenant for life to the remainderman in tail, to the use of the intended settlement,—in order to have a tenant in tail qualified to avail himself of our statute. The acts requires the deeds to be by lease and release, which is an anomaly in our practice, and does not appear to be productive of any benefit, the Antigua act only speaks of deed or deeds. There have been but two conveyances under this statute, at the Halifax court. I am informed that it has also been acted on in the country in one or two instances, It may become desirable if settlements should come into frequent use that this act should be revised and perhaps simplified in its regulations.

In many of the United States it has been thought beneficial to abolish estates tail altogether. In South Carolina, fees conditional exist as the common law stood before the statute *de donis*, and in some states\* if an estate be granted in tail, the first donee takes a life estate, and the remainder man a fee simple. An estate in tail can not by any ingenuity perpetuate land in a family beyond the length of a life or lives in being and 21 years after, when the pos-

\* Connecticut, Ohio, and Missouri, see 4 Kent. Com. 15.



sessors may dispose of it as they think proper. This kind of estate is entangled with a most tremendous chaos of refinements and difficulties, on some of which the most erudite lawyers differ in opinion occasionally. Some change will be very salutary, as landed property in Nova-Scotia advances in value, to prevent intricacy and uncertainty of title, which are sure to follow the law of entails. The code Napoleon (code civile) art. 896, abolishes entails altogether. Perhaps the Connecticut rule is the best amendment this principle is susceptible of, as it does not increase the power of the parties to alienate the estate beyond the English law, while it relieves the law of real estates of the perplexities which have arisen from this source.

*Rules for the Construction of Deeds.*

1. The construction should be favorable, and as near the intention of the parties as possible, according to legal rules.—2 B. C. 379. 2. When words are free from ambiguity, the literal meaning is to be adopted, but where the intention is clear the words used should not be suffered to counteract it by too literal a reading. Therefore ungrammatical expressions are not to be considered as destroying the effect of a deed.—ibid. 3. In interpreting a deed the whole context is to be considered and no meaning to be affixed to a particular sentence or paragraph, as if it were unconnected, different from that it would have when read in connection with the other parts of the document, and if possible some effect should be given to every expression used.—ibid 380. 4. A construction is made most strongly against the grantor or contracting party where words are dubious. This rule is not applicable to indentures, nor is it resorted to while any other rule of construction will clear up a doubt. 5. If the words are capable of two meanings, one of which would

be against law, that interpretation shall not be used but the party shall be presumed to have intended to act or grant within the limits of legal right and authority.—Therefore if tenant in tail makes a lease to A. B. for life, without saying for whose life, it will be construed to be during the lessor's life and not that of the tenant, as he could not legally make a lease beyond his own life.—*ibid.*

380. 6. If in a deed there be two clauses totally inconsistent and irreconcilable with each other, the first shall be adopted and the last rejected. In a will the rule is that the last shall be adopted and the first rejected. But if possible the clauses should be reconciled.—*ibid.* 380.

7. A devise is so expounded as to pursue the intention of the devisor, as far as it can be possibly understood, and as we have seen under '*title by devise,*' many strict rules of law are dispensed with in wills, in consideration of the exigency under which they are often necessarily made.

## CHAPTER XIII.



### *TITLE BY JUDICIAL SALE.*

This may be considered as a distinct head of title, from that arising by deed, because although the purchaser receives a deed, yet the title depends on the judicial proceedings on which the sale is founded, the deed being but a part of them; while in deeds made by the proprietor himself, his interest passes by virtue of the instrument of conveyance which he executes.

1. The first kind of these sales is that under an execution for the payment of debt. The provincial statute of 1758, 32 G. 2, c. 15. 1 P. L. 21, 22, 23. Sec. 1. which has been noticed before under 'estate upon condition' authorizes an execution to be extended on the real estate of the debtor where there is not personal estate sufficient.

*Appraisement.*—The sheriff or his deputy\* at the request of the creditor† or of his agent or attorney is directed to give a written notice to the debtor† or in his absence to his attorney or agent to name an appraiser, the creditor‡

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\* Provost Marshal in the act, but sheriff substituted for that officer by act of 1795, 35 G. 3 c. 1. Sec. 1. 1. P. L. 344, 345. for creditors, for debtors.

is to have a like notice to name another, and the sheriff or deputy is to name a third. The appraisers are to be freeholders and persons not interested "discreet indifferent men." If on the part of the debtor or creditor there be no appraiser named after three days notice, the sheriff or deputy is to name one for the party failing to appoint, and in like manner if the debtor be absent from the province, and have no known attorney or agent, he is then to name one for him. The sheriff or deputy is to cause the appraisers "to be sworn before some of H. M. justices of the peace *faithfully and impartially to the best of their skill and knowledge, to appraise such real estate as shall be shewn to them.*" The sheriff (or deputy) and the appraisers are then "forthwith" to repair to the premises and on view and examination the appraisers are to decide whether the rent of the property will be sufficient to pay off the debt, costs and "lawful interest" and also to defray all "necessary repairs," within two years." If the appraisers, or two of them, decide that it will, the sheriff (or deputy) is then to extend the execution on the rents only. The sheriff (or deputy) in this case is to cause the person in possession whether he be the debtor or a tenant to attorn and become tenant to the creditor and to pay him rent quarterly; for which if not duly paid the creditor may distrain and the person in possession be removed from the land by the sheriff or deputy on non payment of the rent. The creditor is, when the execution is levied *on the rents*, to receive them until the judgment is paid off with costs and interest. [The explanatory and amending act of 1763, 3 and 4 G. 3, c. 8. 1 P. L. 95, mentioning that doubts had arisen on this part of the act of 1758, concerning parties refusing to attorn, or not paying the rent, enacts that "every such debtor, or debtors, or persons in possession of "the premises on which execution shall be extended, who "shall refuse to attorn, as tenants to the creditor or creditors *at the rent fixed by the appraisers*; or shall neglect

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L. 344, 345.

“ or refuse to pay the rent as it becomes due, then and in  
“ either of these cases, the person or persons in possession  
“ of the said lands or tenements, shall be deemed as guilt  
“ ty of a wrongful detainer; and shall and may be prose-  
“ cuted as directed” by the act of 1758, 32, G. 2, c. 3, 1  
P. L. 6, by which they may be arrested and made find  
security or sent to prison, and on conviction the premises  
are put into the landlord’s possession again, and treble dam-  
ages and costs given against the person who forcibly or  
wrongfully withheld the possession. (See post. under the  
general title of actions, 3d vol.) A form of the attornment  
is also prescribed in 1 P. L. 95.]

Sec. 2. of the act of 1758, 1 P. L. 22, (as amended by  
act of 1773, 13 and 14, G. 3, c. 4. 1 P. L. 180.) directs  
that if on the view and examination mentioned in clause  
first, the appraisers should not think the rents sufficient  
to satisfy the debt with costs, interests and repairs in two  
years, then the execution is to be levied on part of the es-  
tate, which must in that case be appraised by *five apprais-*  
*ers fit and discreet men* two to be chosen by the debtor two  
by the creditor and one by the sheriff or deputy, who shall  
be sworn “ *to do equal justice between debtor and creditor in*  
*“ valuing the same,* and shall set off so much thereof as they  
“ shall think sufficient to satisfy the debt with costs and in-  
“ terest, with as little injury as may be to the debtor and  
“ to the remainder of the said estate” but if the appraisers  
find that this cannot “ conveniently be done” then the  
execution must be levied on the whole real estate of the  
debtor. When the execution is levied on part or the  
whole of the land itself, under the 2d clause as amended;  
the sheriff or deputy is “ *immediately to deliver seizin and*  
*possession* thereof to such “ creditor or creditors,” he is  
also to cause the parties in possession or improvement, to  
attorn to the creditor, [this attornment by the act of 1763,  
3 and 4 G. 3, c. 8. Sec. 2. 1 P. L. 95, is to be in the same  
form with that given when the rents only are levied on,

and the same remedy is thereby given the creditor under the act of forcible entry and detainer, against the parties refusing to attorn, or not paying the rent, as in the case of levy on the rents only; but the rent is to be fixed by the creditor, when the levy is made on the land itself and not on the rents merely.

Sec. 3. In all cases of appraisement made under this Act, whether in lands in whole or in part, or rents only, "the appraisers shall make and *subscribe* a true and impartial *appraisement* thereof"—which, "being annexed to the execution, and duly returned by the (Sheriff) or his deputy, and filed and *recorded* therewith, *by the clerk* of the court from whence the same issued, *in a book* to be kept by him for that purpose, "the (sheriff) or other officer serving such execution, shall immediately execute a deed of sale of such lands or tenements to such creditor or creditors, in consideration of the value found by such appraisers, to be therein mentioned, who, by virtue thereof,\* or of said return, shall make a good title to such creditor or creditors, his or their heirs or assigns in fee. Subject, nevertheless, to an equity of redemption as hereinafter prescribed." A forfeit of £5 is imposed on the clerk of court omitting his duty under this clause, "to be recovered by action of debt by the party grieved."

Sec. 4. A debtor, his heirs, executors and administrators, or assigns, may redeem the property within two years

\* Supreme Court, at Halifax, Easter Term, 1823. Lessee of Mitchell, vs. Ring. This was an action of ejectment. The lessor of the plaintiff set out a title, grounded on an attachment of real estate, followed by judgment, execution and levy on the property; but could not shew an appraisement. The title under the sheriff's deed was decided to be insufficient, as all the requirements of the provincial statute, had not been complied with. The party should follow every minute requisite of the law, where the title of real estate is concerned. *Omnia essent rite acta*. The court was unanimous. Chief Justice Blowers cited Lewis v. Bingham, 4 B. & Ald. 677, as decisive against the title.



after the levying of an execution, may bring an action of account against the creditor or his assigns. Upon payment of the debt, with costs, interest and repairs; (which payment the creditor and his assigns are "obliged to accept,") the creditor or his assigns is immediately to "sur-render all such estate to the debtor or debtors, their heirs, executors, administrators or assigns, and deliver up quiet and peaceable possession thereof." The creditor is prohibited from expending or charging for repairs (though necessary) if they exceed one half of the rents; unless by consent of the debtor. 1 P. L. 23.

Sec. 5. "When any estate shall be found by the appraisers to be of greater value than the debt and cost, the creditor or creditors shall be obliged, at the expiration of thirty days next after the end of the said two years (if not sooner redeemed) to give public notice by advertisement (explained by act of 1773, 13 & 14 G. 3, c. 4, P. L. 180, sec. 1, to be by publication in the Nova Scotia Gazette, or other public newspaper, and in some public place in the township, or other place where the lands lie, at least three several times during three months before such sale.) "that the lands or tenements, so extended, are to be sold at public auction by the (sheriff,) or his deputy, who are hereby empowered to sell the same, and to execute to the person or persons purchasing the same, a deed thereof as of a fee simple, which deed being registered as by law required, shall be good and valid in the law; but in the mean time, and until such sale shall be made, the equity of redemption of such lands or tenements shall be open in favor of such debtor or debtors, their heirs, executors, administrators or assigns, to recover the same." If the land bring more at the auction than will pay the debt, costs, charges and interest," the creditor, his attorney, agent or assignee, is to pay the overplus to the debtor or his representative or assignee. The creditor is also in this case to account to the debtor for all rents and pro-

fits received in the interim, "first deducting for all necessary repairs." If the proceeds of sale prove insufficient to cover the "debt, costs, charges and interest," the creditor, his heirs or assigns, "may have an *alias* execution against the debtor for the residue."

Sec. 6. So where upon appraisement, the estate appears "insufficient to satisfy the judgment, with costs, charges, interest, and needful repairs," or where execution is levied on rents only, there is a deficit unsatisfied at the end of two years after levy, the rents not having paid off "the judgment, cost, charges, interest and needful repairs," in full, "in either case an *alias* execution may issue on the said judgment for the remainder, and be levied on such other effects or estate as can be found of the debtor; or his body may be taken and detained until satisfaction be made of such judgment, with cost, charges and interest."

Sec. 7. Provides that this act is not to be interpreted to deprive a debtor of the benefit of the provincial act in favor of insolvent debtors. The act of 1773, 13 and 14 G. 3 C. 4. sec. 3, 1 P. L. 180. provides that the act of 1758 [32 G. 2 c. 15. 1 P. L. 21 to 23.] shall not affect "the title of any minor, feme covert, or person *non compos mentis*, imprisoned or absent from the province," and gives the parties six years after disability removed, to sue for their property. The effect of this clause will be of course, to annul sales under execution of the property in land, of persons so circumstanced, unless they make the sale good by tacitly acquiescing for six years after they are in a free and independant situation, and suffer under no legal impediment or restraint which would excuse the non-assertion of their right.

## 2. Judgment incumbrance on land.

A judgment, by the common law rules, is considered as if given on the first day of the term in which it is entered,

and, at common law, bound the real property of the debtor from that time, having an effect similar to a recorded mortgage, and the writ of execution bound the goods.—(See Tidd's practice 967, and the authorities there cited.) This general principle has been modified by several statutes in England, and in this province, it is limited by the acts of 1758, 1822 & 1832. By the act of 1758, 32, G. 2, c. 18, sec. 12, 13, 14 and 15. 1 P. L. 27. Sec. 12, it is enacted, "That the first judge on the bench in any of H. M. courts shall sign every judgment without fee, and set down the day of the month and year of his so doing, upon the paper or docket which he shall sign; which day of the month and year shall be also entered upon the margin of the record, where the said judgment shall be entered." Sec. 13. "And such judgment as against purchasers *bona fide*, for valuable considerations of lands to be charged thereby, shall, in construction of law be judgments only from such times as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or to the day of the return of the original or filing the bail." Sec. 14. "That no satisfaction shall, at any time, be entered on the record of any judgment, upon the motion of any attorney, except the said attorney shall prove his warrant for acknowledging such satisfaction, by affidavit of one credible witness in writing, to be filed in the office where such judgment is entered." Sec. 15. "That no *writ of execution* shall bind the property of the goods of the party, against whom such writ of execution is sued forth, but from the time such writ shall be delivered to the sheriff, under sheriff or coroner, to be executed; and the sheriff, under sheriff and coroners, shall, upon the receipt of any such writ, without fee, endorse thereon the day of the month and year whereon they received the same."

The act of 1822, 3, G. 4, c. 1. sec. 6, 3, P. L. 122, enacts "that no judgment obtained in any court of law

" within this province, shall operate as a lien upon the  
 " real estate of any defendant or defendants, beyond one  
 " year from the signing of such judgment, as aforesaid,  
 " unless the plaintiff or plaintiffs shall, within one year  
 " from the signing of such judgment, take out execution,  
 " and have the same extended on the real estate of such  
 " defendant or defendants, unless such judgment shall  
 " have been obtained previous to the passing of this act,  
 " in which case it shall and may be lawful to take out exe-  
 " cution within six months from the publication hereof."

Act of 1832, 2 W. 4, c. 51. Passed 30th March, 1832.

Sec. 1. Where it is intended to bind real estates or rents by a judgment, or to levy an execution on real estate or rents—the judgment is to " be first registered in the office  
 " of the registrar of deeds, for the county or district,  
 " wherein the lands, hereditaments, or chattles real, do  
 " lie, which it is intended to charge and bind," or which  
 " or the rents whereof " it is intended to seize and take in  
 " execution." Sec. 2. directs a *copy of the docket* of the  
 judgment to be produced at the registry of deeds " for the  
 " county or district wherein all or any of the lands, heredit-  
 " aments and real estate," on which it is intended to charge  
 the judgment or levy the execution. This copy is to con-  
 tain names of the parties, amount of the judgment and  
 date of signing it, and to be *certified* " as and for a true  
 copy" under the *signature* of the "*Prothonotary* or clerk of  
 " the court wherein the judgment was recovered, and under  
 " the *seal* of the said court." The register is to mark on the  
 certified copy " the day and precise time" of its being pro-  
 duced to him. He is to " enter and *register* it in the book  
 of registry," and also enter the time of its being produced.  
 He is to "*indorse a certificate of the registry on the said copy*,  
 " and deliver the same to the party." The judgment  
 is to be " deemed to be registered only from the day and  
 " time when such certified copy was so produced for regis-  
 " try as aforesaid." Sec. 3. enacts that no judgment recov-

of the debtor  
 recorded mort-  
 goods.—(See  
 e cited.) This  
 ral statutes in  
 by the acts of  
 . 2, c. 18, sec.  
 is enacted,  
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ered after the passing of the act shall bind real estate or rents in any county or district "but only from the time of the registration of such judgment in the said county or district, in the manner herein before prescribed. Sec. 4. Provided, *any judgment*, obtained after the passing of the act, *registered "within 90 days from the signing of such judgment," shall charge (in the county or district in which it is registered) the real estate of the defendant, "from the "day and time when the docket thereof was signed, and all "such lands, &c. and the rents and profits thereof, shall "be charged and chargeable with the amount of principal "monies, interests and costs, payable under the said "judgment, and may be levied on, seized, and taken in "execution therefor."*

Sec. 5. Judgments obtained before the act "and whereof "execution remains or may remain to be done," are to bind the real estate and rents of defendants, provided they are registered in the county or district where the lands lie "within or before the expiration of one year, "from the time of the signing of the original docket of "such judgment." If not registered within one year, then it is only to bind from the time when it shall be so registered. Sec. 6. This act is not to interfere with the effect of executions which have previously been levied on real estate. Sec. 7. Where writs of *attachment* are "*designed to be levied on real estate,*" a copy of the writ, certified to be a true copy by the sheriff or his deputy, is to be delivered to the register of deeds for the county or district where the estate intended to be attached lies. The register is to mark the day and hour of receiving it on the copy, and enter it "*in the books of registry.*" The description and appraisement being made the sheriff or deputy is to deliver "*a copy thereof*" to the registrar, which "shall be also entered "in the said books, and the said *attachment shall bind "the real estate contained in the description and appraisement, only from the delivery of the said copy of the*

*description of the lands levied on, and only until thirty days after final judgment signed in the cause."*

Sec. 8. Directs "a *double index* to the registry of every "such judgment and attachment" to be kept, in the names of both parties.

Sec. 9 and 10 confirm *previous* judgments and executions where the date of judgment had not been duly entered on the record; and where execution had issued after a year from signing judgment, without a previous execution issued and returned or a *scire facias*. This was done to prevent doubts as to titles to land, taken under judgment and directs the lands to be charged accordingly.

Leasehold interests for terms are not bound by a judgment, but like goods by the execution only. Sugden, Vendor and Purch. 306, 410, 450. Freehold lands are bound at common law from the time of the judgment, so that execution may be levied on them although a *bona fide* sale take place, provided the judgment has been, previously to such sale signed and docketed according to our act, and that a year has not expired since the signing of judgment. Sec. 2, Saund. 7, (5.) It has been held in our supreme court in Easter Term, 1829, at Halifax, in the cause of Mitchell v. Raymur, that the property of goods is not bound by the mere delivery of the writ of execution to the sheriff, unless that delivery be for the purpose of executing it immediately. As our supreme and inferior courts, both sit and have separate and distinct offices in each county, where judgments are docketed and records filed, the question was much talked of, whether the entry of a judgment in any one county, was binding upon real estate in another, but it had not, that I am aware of, come judicially before any court. Indeed the act of 1822, by destroying the claim on the land, where a delay of above a year takes place in levying execution, made this question of smaller moment than it was before. The act of 1832, has now set it at rest.



It will in all cases be prudent for a person purchasing land, or lending money on it, to have a search made for recent judgments, in the inferior and supreme courts for the county wherein the land is situated, and also in the county where the owner resides, if it should be a different one. If he has reason to suspect the owner to have been in debt to any particular person, he should ascertain whether there may not have been a judgment in the county where the creditor resides. A judgment is binding on lands acquired afterwards by the debtor. Mr. Kent thinks that the sheriff's deed may be considered as having relation to the date of sale, although executed afterwards. 4 Com. 427.

### 3. *Attachment incumbrances.*

Before the suspension of the attachment law by act of 1824, 4 & 5 G. 4, c. 7, 3 P. L. 181, land in this province could be taken in the commencement of a suit, by writ of attachment, grounded on a common affidavit of debt. The act suspended the operation of this law for a term of years, which has been prolonged since for a further period, by act of 1829, 10 G. 4, c. 19. Cases of debtors absent or absconding from the province are excepted from the suspension, and their lands and goods may be still taken under attachment. It is necessary, therefore, that a purchaser should attend to this in searching for incumbrances, as the attachment makes the property liable for the amount of any judgment that may be recovered under it.

The act of 1793, 33 G. 3, c. 10, 1 P. L. 321, gives authority to the sheriff in each county, to administer the necessary oaths to appraisers, (or, if they are quakers, the affirmations,) in appraising "goods, chattles, lands or other real estates, by them hereafter to be attached on mesne process or taken in execution."

4. *Existence of suit respecting the property considered an incumbrance.*

Analogous to judicial sales and incumbrances by the direct process of courts of law, is the lien or incumbrance which affects land, the title and ownership of which is in litigation. We have already seen that the seller of the property must have the possession, either actually or by legal construction, in order to convey any title to the purchaser; but although he has the possession, yet if there be a cause pending respecting the property, he who purchases must take the estate, subjected to the rights of the parties, who are prosecuting the cause against the possessor from whom he buys. The existence of a suit in a superior court is of itself sufficient in law to bind the purchaser, who cannot be allowed to allege that he had not notice of it. 3 Atk. 392, 2 P. Wms. 482, 2 Atk. 174. 11 Ves. 194. But the suit must not be collusive, 2 Cha. ca. 116. It must be in full prosecution, 1 Vern. 286. but see 11 Ves. 194, 1 Cha. ca. 150, Sugden on Vend. & Purch. 613, 614. It must relate to the estate itself, and not merely to money secured on it. 3 Atk. 392. See also Patch on Mortgages, 384-5.

5. *Sale of lands of absentee proprietors, for non payment of county or town rates, or non performance of highway labour.*

The act of 1793, 33 G. 3, c. 6, 1 P. L. 317\* sec. 1, directs that when no person appears "to pay the rates and taxes assessed on any tract or parcel of land, or to perform his proportion of highway labor for the same, and

\* There was a former act enabling the lands to be let only, and limited to townships, (excepting Halifax). Act of 1765, 5 G. 3 c. 5, 1 P. L. 110, of which the act in the text is an extension.

“ no goods or chattles can be found on the premises, or “ within the county,” to be distrained or taken in execution for the rates or taxes, or for the fine for non performance of highway labor, the collector of all rates and taxes for the district or the surveyors of highways for the district, to report to the spring sessions such deficiencies.— The justices are then to order the clerk of the peace to advertize for three months, the lands to be let, “ in the most public places in the county and township.” If any one will hire them for one year, at a rent sufficient to pay off the rates or fines due, with the “reasonable charges” of advertizing, they are authorized to let them to the best advantage, by this act, and the previous one of 1765, 1 P. L. 110, but if no bidder appear who will give so much rent, then the clerk of the peace is to make a representation of the business to the supreme court, upon which that court is “ in all such cases to direct a sale to be made at public “ auction, to the highest bidder, of so much of the delin- “ quent’s lands as shall be sufficient to pay the amount of “ his, or their said rates, taxes and fines, together with “ the charges of such sale, and good and sufficient deed “ or deeds of conveyance, of the land so sold to be made “ and executed, by, and in the name of, such clerk “ of the peace respectively, reasonable means having “ been previously used by the said court, according “ to its discrétion, for the ascertaining of the proprietor “ and for the enabling of him by due notice, to prevent “ the necessity of such sale, by satisfying the said charges “ and expenses, with the costs attending such enquiry and “ notice as aforesaid.” (The former act of 1765, 1 P. L. 110, sec. 2. makes the lands “ chargeable” with the taxes unpaid, so that previous to the sale they may be considered as an incumbrance.) If there be a surplus out of the rent, when the land is let, or the price when it is sold under this law, after all the rates or fines due, together with all reasonable costs and charges attending the various

steps of the proceedings required by the act, the surplus is to be paid to the proprietor, "or any person duly authorized" to receive it for him. If unclaimed then, it is to be paid into the county or district treasury, and if not claimed for three years the sessions may apply it "to such public purposes, as they shall think meet." Sec. 2. Imposes a forfeiture of £2, on any collector of taxes or surveyor of highways, neglecting to report delinquents, and a similar forfeiture on any clerk of the peace neglecting to represent it to the Supreme court. The fines go to the poor of the township.

6. *Sale of land for non payment of dyke rates.*

The act of 1769, 9 and 10, G. 3, c. 2, 1 P. L. 155, authorized the sale or letting of lands for payment of dyke rates unsatisfied. The substance of this act has been incorporated in the act of 1823, 4 G. 4, c. 13, 3 P. L. 155, the general act respecting sewers which repeals that of 1769, with all other previous acts on that subject. The general provisions of this law have been noticed in the first vol. Sec. 4th, enables any one justice of the peace to let the lands of those whose assessments are not paid, (when there is not personal property to distrain on, to be found in the county or district,) to a sufficient extent, to pay off their arrears, first giving 20 days notice in the township, or place where the lands lie. The 3th section authorizes the same course to be pursued in case of fines for not attending to the orders for repairing and securing dykes in cases of exigency. The proceeds to be paid over to the commissioners. The 9th section enacts, "That if no person shall appear to pay the proportion of any assessment made according to the provisions of this act"—and no sufficient personal property can be found to distrain upon for it. "The commissioners of sewers shall by advertisement during three months in the Royal Gazette, cause notice to be given for the selling the lands of such per-

“son : setting forth in the said notice the time and place  
 “of such sale, and also, that if no person shall appear with-  
 “in the said three months to pay the said proportion of  
 “such assessment, with the costs of advertising the said  
 “land, that the same will, at the expiration of such notice,  
 “be sold at public auction by the sheriff or his deputy, for  
 “the purpose of paying the said proportion of the said as-  
 “sessment ;” if the rates remain unsatisfied at the end of  
 the three months, the commissioners or the major part of  
 them, are to cause the “sheriff or his deputy at the  
 “time and place set forth in the said notice, to sell at  
 “public auction, to the highest bidder, so much of such  
 “delinquent’s lands, *so dyked, drained or improved* as afore-  
 “said,\* as may be sufficient to pay the proportion of the  
 “sum due as aforesaid with the charges ; and the sheriff  
 “or his deputy is hereby authorised and directed imme-  
 “diately upon such sale, to execute a deed thereof, and  
 “deliver seizin and possession of the lands so sold, to the  
 “purchaser or purchasers, (for which the said sheriff or  
 “his deputy shall receive a fee of ten shillings and no  
 “more).” By sec. 18. lands set off or granted for the use  
 of “schools, glebes or ministerial rights,” are exempted  
 from sale under this act, but left expressly liable to be let  
 out as directed in 4th section. An appeal is given from the  
 proceedings of commissioners of sewers by the 20th clause,  
 to any owner or possessor of land, who thinks himself in-  
 juriously affected by their proceeding, by *certiorari* on secu-  
 rity given for costs. This appeal if interposed before the  
 completion of a sale under the act, would I think legally  
 suspend the operations of sale until it was determined.—  
 See vol. 1. Sewers.

7. A temporary local act affecting the rear blocks  
 of the township of Guysborough, Sydney County, only—

\* That is, land improved by the dams and other works done  
 under the commissioners. See act 1832, c. 7.

authorises the opening of roads, and sale of lands of those who do not pay their assessed rates for the purpose.— The provisions are modelled nearly on the law for selling delinquents' lands for county rates; but this act, 1823, 4 G. 4 c. 22. 3 P. L. 162, which is a temporary law, will be more particularly explained under the general division of laws of local operation.

8. Two local acts authorize the sale of shares or pews in meeting houses, for non payment of assessments, one the Truro act of 1814, 54 G. 3, c. 1 P. L. 126.— The other act of 1830, 11 G. 4 c. 8, respecting the Cornwallis Meeting House. These will be particularized hereafter.\*

9. *Transfer of land to government, when required for military purposes.*

The maxim of law is, that the safety of the commonwealth is the supreme law. It flows as a necessary conveyance from this principle, that when land belonging to a private person, is required as a site of fortresses for the military defence of the country, an option is not to be given to the private owner, whether he shall retain it or give it up to the public; he is obliged to yield it and in return is entitled to a just compensation for its value. The public utility of roads and canals has made it also a general principle in legislation and jurisprudence, that when—

\* There is also a provision for letting and selling the lands of absentee proprietors to pay their share of the costs of a writ of partition, the act of 1773, 13 and 14 G. 3, c. 2. 1 P. L. 179, sec. 3. authorizes any justice of the peace to let out as much of their land as will produce the expenses due, where there are no personal goods, and the act of 1791, provides for sale of the land in the same manner 31 G. 3, c. 1 P. L. 283, as the act respecting sales for non payment of county rates, except that the sheriff is to give the deed. See title Partition next vol.



ever it is necessary to carry them through the lands of private owners, it should not be optional with the owner to refer his concurrence, but he is compelled to sell for a reasonable estimated value. In conformity with these ideas, the act of 1778, 18, G. 3 c. 1, 1 P. L. 208. sec. 1. directs that when "the commander in chief of H. M. troops "troops here shall judge it necessary that certain lands "should be made use of to erect fortifications or other military uses," the governor on application of the commander in chief of the troops (the offices having been sometimes disunited) or at the request of the owner of the land, is "to appoint a special court, to be held by the supreme court," if the lands lie in Halifax county, and the inferior court for the county, if they are situated elsewhere.

Sec. 2. The court when duly appointed is to issue a "precept in the common form, directed to the [sheriff] or "his deputy, to summon a jury of 24 good and lawful men, "freeholders from the town or precinct nearest to which "the lands shall lie, to meet at such time and place as the "judges shall direct by their precept aforesaid, who shall "then and there duly be sworn to estimate and appraise the "same."

Sec. 3. "The jury thus sworn shall view the premises "so demanded, and in their verdict shall prescribe the "metes and bounds, as also the quantity, to whom the "lands belong, and what is the real value thereof, in distinct parcels, according to the number of proprietors, "and shall return their verdict in writing under their hands "and seals, to which at least twelve shall sign their names, "and such verdict being entered by order of the Judges, "with the clerk of the court, thenceforward shall become "a record of said court."

Sec. 4. The money ascertained by the verdict is to be paid to the respective proprietors; if they refuse to accept it, it is to be lodged in the "said court," for their "use,"

“ or if minors or others disabled by law to receive the same, it shall be paid to their guardians or legal representatives, to be by them disposed of agreeable to the laws of this province.” On payment or lodging the money “ the said lands shall be vested in his majesty, his heirs and successors forever : and such record shall be a sufficient bar in law against any action brought by any of the proprietors of such lands, their heirs or assigns, for trespass, or for recovery of the same.”

Sec. 5. enables the act to be applied to land taken up for military uses before it passed. Sec. 6. imposes £20 penalty on the sheriff or deputy failing to execute the precept for summoning the jury under this act, and £5 on every juror failing to attend if duly summoned, or refusing, when in attendance, to be sworn. The judges of the “ courts respectively, may order the same to be levied by warrant of distress, and sale of the offender’s goods.”— This act served as a model for a local act of 1797, 37 G. 3, c. 1, sec. 5 & 6, 7 & 8, 1 P. L. 384.

10. *Transfer of land to form new roads.*

The laying out of new roads, and making alterations in them, were formerly regulated by provincial acts of 1765, 5 G. 3, c. 2, 1 P. L. 108.—1779. 19 G. 3, c. 8, 1 P. L. 216,—1800, 40 G. 3, c. 1, 1 P. L. 419. Under these acts the road was to be laid out and the damages assessed in favour of the proprietor, by a jury acting under the direction of the quarter sessions, which court was to confirm and enrol the verdict, if regularly given; and this transferred the title, the owner receiving compensation out of the county assessments. The consolidating highway act of 1826, 7 G. 4. c. 2. (which repealed the before named acts in its 23d and last clause, 3 P. L. 236, 237.) continued the same mode of laying out and altering roads by a jury and the sessions, by embodying the former provisions to that effect. Sec. 13 to 17, inclusive, 3 P. L. 232, 3, 4. This

method was changed by the act of 1827. 8, G. 4. c. 23 the 2, 3, 4, and 5, clauses of which are in amendment of the 13 to 17, clauses of the general act of 1826. The law now in force on this subject, is as follows, viz : No commissioner is at liberty to begin to lay out any new road or to make any alteration in an old one, by which any purchase money to owners or damages may fall upon the public until he has laid before the governor and council “ a “ plan or admeasurement of such new road or alteration “ of an old road, accompanied by an estimate, made by “ three credible and well qualified persons, of the proba- “ ble expence of purchasing enclosed or improved lands, “ for such road or roads, and also the probable amount of “ any special damage, which it may be necessary to pay “ for carrying such roads through waste and unimproved “ lands, together with an estimate of the probable ex- “ pense of making each and every part of such new road “ and the probable expense of any bridge or bridges, “ causeway or causeways necessary to be made therein ;” The commissioner is on no account permitted to commence work on such new road or alteration, until he receives a copy of an order of the Governor and Council, authorizing the work to go on. Act of 1826, c. 2 sec. 17, 3 P. L. 233. On receiving this order he is immediately to notify all parties interested, that such order has been sent him, and to require them to name an appraiser, on their part, to act in conjunction with one to be named in the order of Council, on the part of government.— The two appraisers are then to sign and swear to a written oath or affidavit, before a justice of the peace, “ faithfully and impartially to lay out such road in the way “ most advantageous to the public, and least prejudicial “ to the owner of the lands, and to appraise and value the “ lands wanted for such road ; the damages to such owner “ or owners ;” after having thus sworn, they are empowered “ to enter upon the lands,” “ to lay out, measure and mark” them, and they are directed to “ value and appraise”

them, "and to assess the damages" to the owner or tenant, according to the value of the land and improvements, and the fencing on the sides of the highway which will be rendered necessary.

This valuation is to be made in writing, and with "the plan and admeasurement" to be returned to the prothonotary or deputy prothonotary, for the county or district in which the lands lie, "who shall lay the same before one or more of the judges of the supreme court, or the senior Judge and one or more of the judges of the inferior court for such county or district, and such judge or judges shall thereupon make an order for the parties interested, to show cause, by a short day, why such plan and valuation should not be established and confirmed. And after hearing the parties, in case they desire to be heard, it shall be lawful for said judge or judges either to confirm or set the same aside (as the case may require) and to order another valuation and appraisal to be made by the same persons; which shall be final between all the parties." In case the appraisers cannot agree, each one may make a separate plan and valuation, and return it to the prothonotary. In this case the judge (or judges) are at once to swear in some fit person as umpire, whose written decision, made in conjunction with one or both of the referees, shall be final. The court may name an appraiser for the party who owns the land, if he neglect or refuse to do it himself.—Act 1827, 8 G. 4, c. 23, sec. 3.

Either the commissioner or the parties interested may apply to set aside the whole proceedings, under the foregoing 3d section, if they think them erroneous. If the court thinks there has been any error in the proceedings they may hear and examine the complaint, and either ratify the proceedings or set them entirely aside, and "nominate and swear three fit and proper persons" to make the plan and valuation, whose decision, or that of any two

of them, shall be final and conclusive, when confirmed by the court and recorded by its order. sec. 4. The returns in all those cases are directed to be made records of the court, with the plans. The damages assessed, and the costs of the proceedings and expenses incurred, are to be assessed on "the inhabitants of the county or district wherein such highway lies," and collected as county rates are,—act of 1826, sec. 15, 3 P. L. 233. But if made on provincial roads, the governor draws by warrant on the Treasury,—act of 1826, sec. 20, 3 P. L. 234. Where compensation is awarded to make fences on the sides of the new line of road, payment is not to be made before the fences are erected. *ibid.* sec. 18, 3 P. L. 234.

Acquiescence of the owner of land in the making of a road through his land, without demanding compensation from the commissioner, it is declared to amount to a surrender to the King forever of the road, to the full width in all cases of 66 feet. If the acquiescing owner have land on both sides, the old road devolves to him in fee simple, in lieu of the new one. Act of 1826, c. 2, sec. 19, 3 P. L. 234. Under the 13th section, the sessions of each county and district were authorized to take steps on application to lay out and alter roads, where necessary, by a jury—The jury is taken away in all cases of the kind by the act of 1827, but the details of the new regulations respecting appraisers, seem to have been drawn only with reference to provincial roads, but it was probably not the intention to take away this authority of commencing new roads and alterations from the sessions. In fact it has been settled as the interpretation of these acts, that the new regulations only apply to the great Provincial roads.

*Particular or private ways,* Where these are required for the use of any township or settlement, on application of the persons interested in having them opened, the Courts of general sessions of the peace for the county or district have power by act of 1826, 7 G. 4, c. 2, sec. 16, 3 P. L.

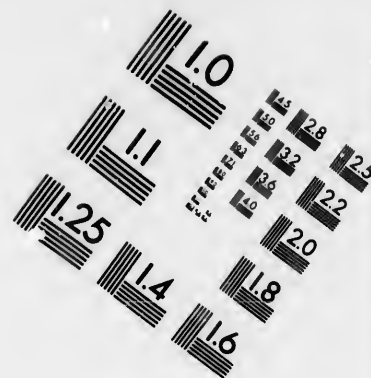
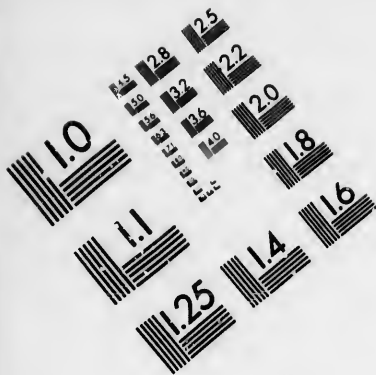
233, to decide whether they are necessary. If the sessions direct them to be made, then the surveyors of highways for the township or settlement are, by the same clause, authorized to lay them out, "either open or pent, with swinging gates." Recompense is to be made for any damage or injury to the owners, in the same way as for highways made over their land, the sum to be levied on the township or settlement, in the same manner as poor rates. The act of 1827, 3 G. 4, c. 23, sec. 2, empowers the sessions to direct the placing and keeping up gates and bars on such ways at their discretion, and to make regulations for enforcing their orders; and the act of 1829, 10 G. 4, c. 45, imposes a fine of not less than 5s, nor above 40s. on any one infringing such regulations, convicted before any one or more justices of the peace, on the oath of one or more credible witnesses. The fine to go to the benefit of the poor of the township or place where the offence was committed.

11. *Title under deed of master in chancery.*

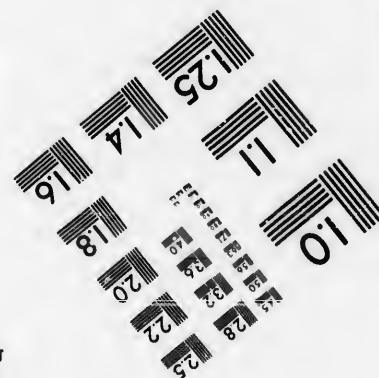
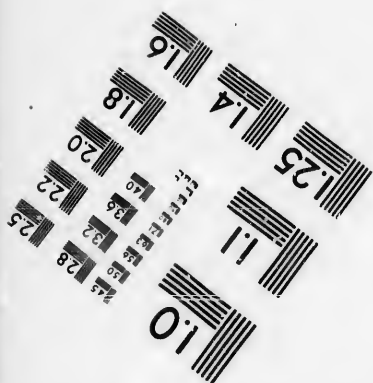
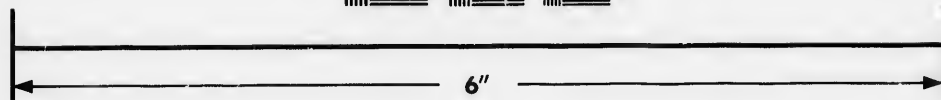
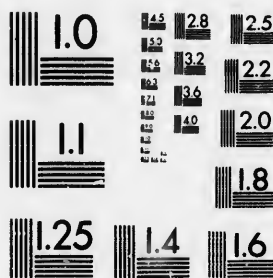
We have adverted to this conveyance in '*Estates upon condition.*' (This vol. p. 116.) The decree of foreclosure in our practice authorizes a sale by a master, who gives a short deed to the purchaser. The deed is in the name of the master, and signed and sealed by him. It must be recorded as any other deed. It is generally considered as conveying to the purchaser whatever interest the party mortgaging the land had in it, at the time he executed the mortgage, and also any interest that may have accrued to him between that time and that of the decree. It is not usual to take any conveyance from either of the parties to the suit, the master's deed being sufficient, but it may be recommended to have enquiry made into the situation of the title, as the decree will not bind previous incumbrancers, nor will give a title if the mortgagor had none at the time of making the mort-







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**gage.** It is not the practice here to make subsequent incumbrancers parties to the suit, although it is usually so in England and the United States, see 4 Kent. Com. 177. Patch. on Mortg. tit. Foreclosure. As the title depends on the suit and decree of foreclosure, it may be proper for a purchaser to see that every thing has been regularly conducted, and the decree properly entered up.

*12 Title under sales by executors or administrators for payment of debts.*

When real estate is devised to executors for the purpose of being sold, or a power of sale given by the will of a deceased person, the title acquired by the purchaser must depend upon the laws which regulate devises and powers. Under the present head then we are confined to sales of the estate of deceased persons, not made by virtue of any powers or directions in their wills, but under the statute laws of the province; which require sales to be made of real estates by the persons legally administering, whenever there are debts undischarged and the personal property is insufficient to effect the object. The first act on this subject is the general statute of wills and distributions, act of 1758, 32 G. 2. c. 11, sec. 19. 1 P. L. 13, which enacted

“ That in case that personal assets shall be deficient for  
 “ the payment of any debts or legacies, and it shall be  
 “ found necessary by any executor or administrator to  
 “ make sale of any part of the real estate of the deceased,  
 “ for the payment of any debts or legacies, such executor  
 “ or administrator shall apply to the general assembly to  
 “ grant a licence for the sale of such part of such real es-  
 “ tate as may be most convenient for the payment of such  
 “ debts or legacies, and before any sale be made of any  
 “ real estate the executor or administrator shall give thirty  
 “ days public notice, by posting up notifications in the  
 “ most public places in the town where the deceased per-

son last dwelt, and in the public prints, if any such there be; and whoever will give most shall have the preference in such sale. And in case the estate of such intestate shall be insolvent, the executor or administrator shall make like application to the general assembly for an inquiry, and for the appointment of commissioners to inquire into such insolvency, and to examine and settle the claims of all creditors, and the amount of the estate of such insolvent, and to authorize such executor or administrator to sell all the lands and tenements of such insolvent, and to divide the produce of the whole of such estates, in due proportion to and among the creditors." The act of 1760, 34 G. 2, c. 5, 1 P. L. 58, 59, reciting that delays arose in carrying the former laws into effect, by the assembly not being in session constantly, transferred by its first clause, the authority given in the 19th sec. of the statute of wills and distributions from the assembly to "the governor or commander in chief, for the time being, and H. M. council of this province."

2nd clause requires every executor or administrator before the sale to "give bond by himself, or his lawful attorney, with two sureties, at the office of the register of the court of probates, in the county where such real estate shall lie, for the just and legal distribution of the monies arising from such sale, in the full value, which, by the report of the commissioners for that purpose appointed, shall be certified to be necessary to be raised by such sale." 3d clause enacts "that all lands, tenements or hereditaments, sold by any executor, or administrator by virtue of this act, shall become\* the absolute and undoubted right and property of the purchaser or purchasers thereof, from and after the time of such sale."

\* This of course cannot be construed to convey any title or interest to the purchaser, beyond the interest which the deceased had in the estate.

A temporary act passed in 1812, (and continued by several acts, the last of which is the act 1832. 2. W. 4. c. 60. which continues it for one year)—52 G. 3. c. 3. 2 P. L. 86, regulates the settlement and division of the insolvent estates of deceased persons—see title ‘administration,’ and the 3d section enacts “That it shall not be lawful to grant licence to any executor or administrator for the sale of real estate, until such executor or administrator shall file, in the secretary’s office, the certificate of judge of probate for the county or district where the lands lie, that full and ample security has been given to account for the proceeds of such sale according to law.”

An act of 1829, 10 G. 4. c. 42, (temporary) directs the governor and council, where they deem it necessary, (when applied to, for order to sell real estate of a deceased person) “to order three good and sufficient freeholders to survey and examine said real estate, and report whether the same can be divided without injury to the whole : and only such part as may be sufficient, sold for the payment of the debts or legacies.” If, by the report it appears that the value of the property would be diminished by dividing it, the governor and council may order the executors or administrators to mortgage the estate, or let it for a term of years, or otherwise pledge it so as to raise the sums necessary to settle the estate, either at once or by instalments as may “appear to be most for the interest of all concerned,” “and also such deeds or writings as may be requisite for effecting the same, where duly executed by the executors or administrators shall be good and valid in law.”

Sec. 2. enacts “that previous to any order being made for sale, mortgaging or leasing of the real estate of any person dying insolvent, the executors or administrators shall give bond with two sureties in a sum not less than the value of said real estate so to be sold, mortgaged, leased or otherwise pledged to the Judge of the Court of



" Probates, in the county or district where such real es-  
 " tate shall lie for the just and legal distribution of the  
 " monies arising from such sale, mortgage or lease, and for  
 " securing and paying to the widow and heirs of the de-  
 " ceased any sum or sums of money which may remain  
 " after payment of all reasonable expenses incurred by  
 " said sale, mortgage, lease, or otherwise."

Under these acts, after the executor or administrator  
 finds that the personal estate is not adequate to settle the  
 debts or legacies, he petitions the Governor and Coun-  
 cil to appoint commissioners to inquire into the accounts  
 and examine the estate. The commissioners are usually  
 three respectable persons of the vicinity, and they examine  
 the executor's accounts and the claims brought by credi-  
 tors against the property. They then report the facts as  
 to the necessity of sale, mortgage, or lease, and recom-  
 mend what they conceive will be most judicious. If the  
 Governor and Council confirm their report in favor of a  
 sale and the executor or administrator gives the proper secu-  
 rity, an order of council is made out and a copy of it from  
 the journal book given to him. It is then his business to  
 advertise the sale for 30 days or more in the newspapers  
 and by handbills posted up. The sale is by a public  
 auction and a deposit of ten per cent made, the residue  
 paid on delivery of the deed (in conformity with chancery  
 sales before a master.) It must be recorded as in the case  
 of all other deeds of real estate in this Province.

The report of the commissioners should be as minute  
 and exact as possible, and copies of all accounts against the  
 estate, and vouchers for all matters previously settled  
 be annexed to it, and also an inventory of the estate.

13. When an *insolvent debtor* is released from confinement, and assigns his property to the creditor under the act of the province, the transfer takes effect principally by the effect of the statute, and is therefore referable to this class of titles, See 'insolvent debtors,' in the next vol.

14. Title under the English Bankrupt law. See Appendix, No. 5.

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## APPENDIX.

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## APPENDIX.

### No. I.—*Crown Grants, &c.*

The conditions in patents of land from the crown not being complied with, the course for resumption as recommended by the attorney and solicitor general Ryder and Murray, in 1752, in the case of a condition of settling the land within three years, and no settlement in fact made, is as follows, viz. that the crown should give the proprietors "a reasonable time to come in and accept of new grants upon terms of settling the lands within a certain time, reserving the old quit rent and pines fit for his Majesty's navy, and in case of their not accepting these terms, his Majesty may resume these lands.—The proper manner of making such resumption after such default is, by making new grants to such as shall be willing to accept them, at such rents, and on such terms as shall be thought most advisable." *Idem.* 151.

It appears that if by fraud a person obtains possession of a greater quantity of land under grant from the crown, than the grant contemplated, the crown may order a resurvey, and the attorney-general of the province may file a bill in a court of equity, there in order to have the real quantity set off, and the excess pared off for the benefit of the crown, but this appears to apply to recent grants only.—*idem.* 159, opinions in 1737. The proper course for the crown, to vacate a grant which is voidable in law, is by an information for intrusion, in the proper court of the province and in case of error there, by appeal to his Majesty in Council.—*Idem.* 160, opinions in 1737.

The Governor has general power to pardon except in cases of high treason and murder.—*idem.* 190.

Prescription cannot be gained in respect to the title to property in the Colonies, because they have been settled within time of memory.—1 Chalmers opin. 131.

*Great Seal.*—It is advisable that all acts of the provincial government should be sealed with the great seal of the province, unless usage in some cases may justify the use of a private seal at arms.—1 Chalm. opin. 242.

*Appeal.*—The King and Council may allow an appeal in cases under £500, if they think there appears great hardship —2 Chalm. opin. 177.

No *fine or recovery, levied or suffered in England* will bar an estate tail in the colonies unless the proceeding be warranted by, and in pursuance of a colonial statute.—2 Chalmers opin. 174.

*No. II.—Marriage register and licence, &c.*

Acts for registering marriages, births, deaths, 1761, 1 Geo. 3, c. 4, 1 P. L. 67. 1782. 22 Geo. 3, c. 3. *ibid.* 226, 227. Sec. 1. "That in every township within this province, where no parish shall be established" the town clerk is to register in a book the names and surnames of all persons that shall be married,—that shall be born,—or that shall die,—also the names and surnames of their parents, and the time of the marriage, birth or death taking place. For each entry he is to receive one shilling fee—to be paid by the married couple,—the parents, kindred, or connections of the dead person or the infant. Fine of 5s. may be recovered by the town clerk, before one justice of the peace from any party neglecting to inform him of a marriage, birth, or death, to be levied by warrant of distress and sale if not paid in 4 days after conviction. Each certificate he is to give for one shilling fee. Sec. 2. makes the registry so kept sufficient evidence in any court of record in the Province. Sec. 2. of the act 1782, c. 3—requires the town clerk to obtain from the clergy, lists of the marriages, births and deaths recorded by them and to enter them in a book kept for that purpose.

<sup>TO</sup> Marriage licence act 1832, 2 W. 4 c. 31.—Directs, sec. 1. "that upon the application of any persons desiring to enter into the marriage state, or of any person or persons authorized to act in their behalf," the governor shall direct licences to the duly ordained and settled ministers of any congregation of christians in this province, dissenting from the church of England, authorizing such minister to solemnize marriage between such persons without publication of banns, according to the forms of the church, or religious persuasion, to which such minister shall be-



“ long, in the same manner as licenses are now granted  
 “ to clergymen of the established church.—PROVIDED  
 “ always, that *the man or woman* so to be married, without  
 “ publication of banns, *shall belong to the same persuasion of*  
 “ *christians to which the minister, to whom they require such*  
 “ licence to be directed, *shall belong.* Provided always,  
 “ that *nothing herein contained shall be of any force or effect*  
 “ *until his Majesty's pleasure be known herein.* The second  
 clause limits the act to three years duration if assented to  
 by his Majesty.

No. III.—Mortgage by deposit.

Extract from 5 Bythewood, 461.—“ A deposit of title  
 “ deeds by the owner of an estate with his creditor,  
 “ whether the object be to secure a debt antecedently due,  
 “ or a sum of money advanced at the time, operates as a  
 “ mortgage in equity, by virtue of which the depository  
 “ acquires, not merely the right of detaining the deeds un-  
 “ til the debt is paid, but an equitable interest in the land  
 “ itself; and a simple delivery of the deeds will have this  
 “ operation, without any express agreement as to the ob-  
 “ ject of the delivery. Thus if A. owing B. £100 deposit  
 “ with him the title deeds of his estate, without saying one  
 “ word, this would amount to a valid mortgage in equity,  
 “ as the court would infer such to have been the purpose of  
 “ the deposit, unless the contrary were shewn, from the re-  
 “ lation of debtor and creditor subsisting between the par-  
 “ ties.” Ex parte Warner, 19 Ves. 202. 1 Rose 286. see  
 also 11 Ves. 398. 2 Anstruther, 432.—Same work 471, 5th  
 vol. “ A cursory glance at the numerous preceding cases,  
 “ which have arisen in regard to deposit securities, will  
 “ strongly demonstrate the inexpediency of the practice  
 “ of relying upon this species of security, which however,  
 “ has obtained to a considerable extent; and it is not a lit-  
 “ surprising, that some large banking and mercantile firms  
 “ are in the habit of invariably taking securities from their  
 “ customers in this manner.” “ As a mortgage may be  
 “ created by deposit, so may a mortgage be assigned or  
 “ submortgaged by deposit.”—Patch on mortgages, 34.  
 “ Matthews v. Walwyn, 4 Ves. 118. 4 Kent Com. 144.—  
 “ A mortgage may arise in equity out of the transactions  
 “ of the parties, without any deed or express contract for  
 “ that special purpose. It is now well settled in the  
 “ English law, that if the debtor deposits his title deeds

“with a creditor it is evidence of a valid agreement for a mortgage and amounts to an equitable mortgage, which is not within the operation of the statute of frauds.—the principle declared is, that the deposit is evidence of an agreement to make a mortgage which will be carried into execution by a court of equity against the mortgagor and all who claim under him with notice, either actual or constructive, of such deposit having been made (145,) nor will such an equitable mortgage be of any avail against a subsequent mortgage, duly registered without notice of the deposit.”

*No. IV.—Forms of deeds.*

Extract from 3 Bythewood's conveyancing 161.—“And it seems that in all conveyances by persons who are merely *cestuis que trust*, the lease for a year is not essentially necessary as part of their assurance; since, at the common law, they could not have conveyed by livery of seizin; and since, also any instrument which expresses an intention to transfer the beneficial ownership from one person to another is effective in a court of equity.” Butler, notes on Coke, Littleton 290, b. (1) xiv. “For equity regards not the circumstance but the substance of the act.”—Francis's Maxims, 53. 3 Byth. 165. “As to lands in Ireland the recital of a lease for a year in the deed of release is sufficient evidence of the lease, and therefore no lease for a year is prepared.”—See Irish statutes 9, Geo. 2, c. 5, Sec. 6, 6 vol. Irish statutes, 192. 1, G. 3, c. 3, 7 vol. Irish stat. 808.

Extract from 4 Kent's Commentaries 452.—“I apprehend that a deed would be perfectly competent in any part of the United States to convey the fee, if was to be to the following effect: I, A. B. in consideration of one dollar to me paid by C. D. do bargain and sell (or, in New-York, grant) to C. D. and his heirs, (in New-York, Virginia, &c. the words, *and his heirs*, may be omitted,) the lot of land, (describe it) witness my hand and seal, &c. But persons usually attach so much importance to the solemnity of forms, which bespeak care and reflection and they feel such deep solicitude in matters that concern their valuable interests, to make ‘assurance double sure,’ that generally in important cases the purchaser would rather be at the expense of exchanging a paper of such insignificance of appearance, for a conveyance surrounded by the usual outworks, and securing

“respect and checking attacks by the formality of its  
 “manner, the prolixity of its provisions and the total re-  
 “dundancy of its language.”

*No. V.—Effect of the Bankrupt laws on estates here.*

Property abroad, as in Ireland, passes under a commission of Bankruptcy.—Goode 114. 1 H. Bl. 132. 9 Ves. 86. 2 H. Bl. 402. 1 H. Bl. 694. Dougl. 161. So does real property by the Bankruptcy act.—6 G. 4, c. 16 S. 64. (But formerly it did not. 1 Cooke, B. L. 338, 8th edition.) This section of the act directs, that the commissioners shall convey by deed indented and enrolled, in any of H. M. courts of record to the said assignees for the benefit of the creditors as aforesaid, “all lands, tenements and hereditaments [except  
 “copy or customary hold in England, Scotland, Ireland or  
 “in any of the dominions, plantations or colonies belonging to h. Majesty\*] to which any bankrupt is entitled,  
 “and all interest to which such bankrupt is entitled, in  
 “any of such lands, tenements, or hereditaments, and of  
 “which he might according to the laws of the several  
 “countries, dominions, plantations or colonies have disposed, and all such lands, tenements hereditaments as  
 “he shall purchase, or shall descend, be devised, revert  
 “to, or come to such bankrupt, before he shall have obtained his certificate, and all deeds, papers and writings  
 “respecting the same, and every such deed shall be valid  
 “against the bankrupt and against all persons claiming  
 “under him [Provided that where according to the laws  
 “of any such plantation or colony, such deed would require registration, enrolment, or recording, the same  
 “shall be so registered, enrolled, or recorded, according  
 “to the laws of such plantation or colony, and no such  
 “deed shall invalidate the title of any purchaser for  
 “valuable consideration, prior to such registration, enrolment, or recording, without notice that the commission has issued.”]

*No. VI.—Supreme Court at Halifax—Sittings after Michaelmas Term, December 11, 1823.*

*Cochran vs. Cochran.*—This was a case sent down from the Court of Chancery for the opinion of the judges, as to the estate of the Hon. Thomas Cochran who died in

\* The words in brackets were not in the former acts.

1801, leaving a widow and ten children some of whom had died since, and the rest had come of age. Mr. Johnston (counsel for the widow of the intestate, and mother of the children) said, "the question he wished to bring before the court; was, *whether the share of a child under the provincial statute of distributions, is a vested interest at the death of the intestate, or remains a part of the intestate's estate.*" He cited 4 Burn. 413, 427. 3 P. Wms. 49. He considered this point as settled, as respects the personal property, and thought no distinction could be made as to the real. Thomas Cochran, the eldest son, died before distribution, and on behalf of the mother he claimed his share. Anciently, in the reign of Henry I. the father or mother could take the estate of their child; that would be seen by Glanville; but in Henry 2nds. time, the law was altered. Under the statute of Charles and the common law, the construction he contended for would hold. Now, as we have reenacted the statute of Charles, and not the statute of James, (as a colony can make its own laws) and if the share of a child is a vested interest; as under this statute, the mother in England could take the personal estate, the mother's claim here would extend to the shares of children dying after the intestate and before distribution, both as to real and personal property." —Quoted 1 Salk. 251. Viner's Abr. Z. 12.

Mr. Archibald, (now Att. Gen.) "This if your lordships please is a new question on our statute. I appear for all the children except Major Cochran, (the oldest son surviving at the time of the argument.) The provincial act 32, G. 2. c. 11—directs the judge of probate how to make distribution. Perhaps the legislature, in passing our acts, had reference to the statutes of distribution in England without reenacting them. The words of the statute of James, in the preamble, are to *explain* what share the mother should be entitled to. The court may presume that the legislature meant to refer to all the English statutes, *in pari materia*, as a body of laws on a particular subject. (1 Burr. 427. per Lord Mansfield.) As to the common law before the conquest, see Selden, 134 Glanville, 7, c. 3. Lamb 202, 203. Our Province law embraces subjects that the statute of Charles did not contemplate at all. Our statute has embraced *real* estate also. It has been decided by your Lordships that

“ wherever the personal estate goes, under our statute, the real estate goes also. If you should be of opinion, that the statute of James is not adopted with us, we must turn back to the Provincial statute, and gather from it, if possible, the meaning of its framers. Under the 15th section, I think they have excluded the mother more than the English statutes have done. The judge of probate has power to convert the real estate into money, where it cannot be divided without great prejudice to the whole, and if any of the children happen to die before coming of age or marriage, their share shall be divided. Cites 2 P. Wms, 442, 446. It appears to me to have been the intention of the framers of this statute, to exclude the mother from the shares of all the children dying under age or unmarried. In the absence of marriage, or last will or testament, it appears to me that this section excludes the mother; and this may be a reason why they did not go on to follow the words of the statute of James.”

*Judge Stewart.* “ Do you not think that the fact of the children having come of age destroys that point

*Chief Justice Blowers.* “ Do you conceive, that this section of our statute militates against the statute of Charles in England ?

*Judge Stewart.* “ Take the case of a woman of 30.— Would her estate go into the general fund ?

*Mr. Archibald.*—“ Yes, my Lord, if she made no will and left no children.”

*Judge Halliburton.*—“ They certainly meant that the widow, as widow, should have no part of the real estate.”

*Mr. Archibald.*—“ By the statute it is declared, that the widow shall have a third part of the real estate for life, and all the rest goes to the children.”

*Judge Stewart.*—“ The events looked to in the statute, are the coming of age, or getting married.”

*Mr. Archibald.*—“ The statute of New York follows the words of the statute of James. I have been very desirous to see the original roll of our statute.

*Mr. Bliss.*—“ I appear here for the eldest son, and claim for him two shares. I might be called upon to show that the estate did not vest, if our statute were worded as the statute of Charles is; but it is worded very differently, and your Lordships will not at once suppose that the estate vests here. I have merely to argue upon the meaning of words, because there never was a sta-



“tute worded exactly like this, and there can be no case applicable to it. It is *res integra*, and depends altogether upon construction. That which is given to the eldest son in the English statute, is given to him absolutely, and therefore it vests in him immediately. In our act this is not done. There is a time fixed at which to make distribution. It says ‘shall then distribute.’ ‘Then’ is a time fixed. ‘Then’ is a relative word, says Johnson’s dictionary. ‘Then’ at that time. If the words “then surviving” were struck out, the same meaning would be given, that the learned counsel would give to it with these words in. If ‘eldest son’ would mean the eldest son at the time of his death, then the words ‘eldest son’ would mean the eldest son then surviving. That construction should be given to every word that would give it an use in the sentence.—Why does the law give to the eldest son more than to the other sons? Does it favor primogeniture? It is the remnant of the old feudal law.”

*Mr. Johnston.* The eldest son would not take the real estate under the laws of England; but the eldest surviving at the time of the father’s death.

*Mr. Bliss*—“It does not vest under the provincial act, where the child dies under age.”

*Chief Justice Blowers*—“Take it as an exception, it does not alter the general rule of the estate vesting.”

*Mr. Bliss*—“What general rule? Supposing that those shares do vest, how are they to go? The statute points to ‘next of kin.’ One person is next of kin as to real property, and another as to personal property. This statute was passed in the first statute of this province.—Quotes 5, T. R. 201 “By all nations the mother is excluded. See Lord Hale’s remarks in *Collingwood* and *Par.* as to the Jewish law.”

*Mr. Johnston*—“The old English law is different.”

*Mr. Bliss*—“The doctrine of vested interests can only apply to personal property. If real and personal estate were alike, they could be taken in the same manner under execution.”

*Chief Justice Blowers*—“Our statute makes the real and personal estate the same for distribution, and the act of *Geo. 2* for paying English creditors.”

*Judge Stewart*—“It has been decided that an administrator could take possession of real estate, and confirmed on an appeal from New Brunswick.”

*Chief Justice Blowers*—“I believe we borrow the double share of the eldest son from the Hebrew law.”



*Mr. Archibald.*—"The eldest son, living at the father's death, would have obtained the real estate in England, it then vesting in him," Cites Stanley and Stanley, 1 Atk. 549.—Grice vs. Grice.—Viner tit. Exor. 196. Carth. 51, 52, 1 Shower 225, 226, 2 P. Wms. 442, 446. "We should have several eldest sons in Mr. Bliss's way of construing it—your lordship in Moore vs. Moore, Truro 1816, decided that real and personal estate go together, and the same principle was held in an appeal from New-Brunswick."

*Mr. Bliss.*—"The statute in New Brunswick copies that of James."

*Chief Justice Blowers.*—"We are all of opinion, that the present eldest is not the eldest son intended by the statute, but that Thomas, the deceased, was. We are all so of opinion that the statute of James is not in force here. This province was part of Massachusetts, and was conducting itself by their law formerly—I do not think the 15th section makes any difference.—So it strikes me; and I do suppose that we shall certify to the chancellor, that he is not eldest son, and that the mother is the heir of those children who are dead."

*Mr. Justice Halliburton.*—"The children had a vested interest. The eldest son, Thomas, in two shares,—the others in one share each. The law contemplates the time of death, and expedition in settling the estate, although delays sometimes occur. Had there been a grandchild, it appears to me he would have come in, for there is a clause in his favor. The shares were vested at the death of the intestate. Thomas Cochran, the eldest son, might have made a will. If then, the present eldest could claim another double share, we should be led into absurdities. The deceased children having made no will, (and Thomas entitled to two shares) the mother is entitled, as their next of kin, to the whole of their shares."

*Mr. Justice Stewart.*—I am of the same opinion with my lord and my brother Halliburton, and they have so ably delivered their opinions, that it may be unnecessary for me to say any thing further; but the case in Burns, cited by Mr. Johnston, fixes the law that the estate is vested. Our legislature has not re-enacted the statute of James, and we must consider it not in force here."

*Mr. Bliss* stated that the counsel who had argued this case had all entertained the same opinion, with that now

“ expressed by the court,—and that it was an amicable  
“ suit brought to obtain the decision of the judges.”

*Chief Justice Blowers*—“ The question only goes to the  
“ distribution of the elder son’s estate.”

*No. VII.—New Brunswick Acts respecting deeds.*

In New Brunswick, the act of 26 G. 3, c. 8. s. 20, 1. P. L. 34, 35, gives to all deeds containing the words “ grant bargain and sell” the same efficacy as if all the usual covenants for title, enjoyment, freedom from incumbrances and further assurance, were contained at full length. To bar dower in lands situate in that province, the wife of the vendor must be examined before a member of council or a judge of the supreme court or common pleas, unless the consideration do not exceed £200, in which case a justice of peace or register of deeds of the county may take her acknowledgment, 1787, 27 G. 3, c. 9. 1 P. L. 189, 1793, 33, G. 3, c. 5, 1 P. L. 254. The deed of a feme covert of her own real estate in that province requires the acknowledgment before a member of council or a judge of the supreme court or common pleas, 32 G. 3, c. 2. s. 2, 1 P. L. 240, (1792 ) If a married woman reside in another colony her deed to bar dower or convey her own land is to be acknowledged before a judge of the supreme court whose certificate must be authenticated under the hand and seal of the Governor. Act of 1792, 32, G. 3, c. 2, 1 P. L. 238 to 240. Registry is expressly declared to transfer lands without livery of seizin, by act of New Brunswick, 1812, 52 G. 3, c. 20, sec. 2 1 P. L. 522.

*Upper Canada.*—The acts of Upper Canada are very similar to those of New Brunswick, as to the acknowledgments to bar dower, or convey estate of a married woman, and their requirements are precisely similar where such acknowledgment is made in another colony, 1803, 43, G. 3 c. 5, Prov. Laws p. 168, 169, act 1808, 48 G. 3, c. 7, P. L. 238. 239, act 1819, 59, G. 3, c. 3, P. L. 448, 449, See also act of 1797, 37, G. 3, c. 7, P. L. 97.

It was my first intention to have given a number of forms in this appendix, and one or two were referred to ; but as the volume has already much exceeded its intended limits, they will be published at the close of the whole work.

ERRATA—Page 8, line 12, for *tempoire* read *tempore*, P. 14, line 24, for 1 *Kent*, read 2 *Kent*. P. 19, line 27, for *thrice* read *three*. P. 21, line 7, for *of* read *in*. P. 21, line 9, for *township* read *townships*. P. 37, line 12, for 1 *Kent* read 2 *Kent*. P. 40, line 28, for 1 *Kent* read 2 *Kent*. P. 60, line 16, for *is* read *are*. P. 76, line 10, for *by express* read *by his express*: P. 121, line 29, for *Eastern* read *Easter*. P. 184, line 7, for *air* read *fair*. P. 202, line 22, for *are devisable* read *are not devisable*

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