A TREATISE

ON

THE LAW OF REAL PROPERTY,

FOUNDED ON

LEITH & SMITH'S EDITION OF BLACKSTONE'S COMMENTARIES

ON

THE RIGHTS OF THINGS.

BY

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PREFACE.

The editing of a third edition of Leith & Smith's Blackstone was originally undertaken at the request of the late Mr. Leith. But a long time has elapsed since the publication of the last edition, during which many radical changes in the statute law, as well as a great advance in case law, have been made, and it was found impossible to adhere to the text and make efficient emendations of it.

While adhering to the general scheme of the book, however, the greater part has been entirely re-written, and every portion of the retained text has been carefully edited—to such an extent as to constitute the book a new work, though founded on the text of Messrs. Leith & Smith. The new matter preponderates to such an extent over the old, that in the opinion of Mr. J. F. Smith, Q.C., one of the editors of Leith & Smith's Blackstone, it justified a new title, and it is with his permission that the change has been made.

The text of Blackstone upon the Feudal Law, and Ancient and Modern Tenures, has been retained, both for the use of students, and because the principles still exist as living principles in our law, and should not be lost sight of in any case. There have been added to the chapter on Incorporeal Hereditaments a few pages on Ways; to the chapter on Estates less than Freehold, the cases under the modern portions of the Landlord and Tenant Act; to the chapter on Estates of Freehold not of Inheritance, the obligations of life tenants, including the law of Waste; to the chapter on Estates upon

Condition, the modern cases on Conditions Void for Repugnancy; and Blackstone's archaic arrangement of Mortgages under the head of Estates upon Condition has been abandoned, and a new chapter devoted to Mortgages. Dower, Curtesy, and Separate Estate are dealt with anew; the chapter on Deeds has been largely added to; and the chapters on Inheritance and Succession, Wills, the Statute of Limitations, and Conveyances by Tenants in Tail, have been completely re-written.

It is, of course, not to be expected that every subject should be treated in detail, but an endeavour has been made to elucidate with sufficient particularity all the principles of each subject; and it is hoped that the book will be found acceptable to the practitioner.

The Index and Table of Statutes have been prepared by Mr. W. Martin Griffin, Barrister-at-law.

E. D. A.

Toronto, January, 1901.

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OF THE RIGHTS OF THINGS.

CHAPTER I.

OF PROPERTY IN GENERAL.

(1). *General Remarks.*
(2). *Origin of Property.*
(3). *Individual Property.*
(4). *Transfer of Property.*
(5). *Inheritance.*
(6). *Wills and Testaments.*

1. *General Remarks.*

The former book of the Commentaries having treated at large of the *jura personarum*, or such rights and duties as are annexed to the persons of men, the objects of our inquiry in this book will be the *jura rerum*, or those rights which a man may acquire in and to such external things as are unconnected with his person, and appertain unto real property. These are what the writers on natural law style the rights of dominion, or property; concerning the nature and original of which I shall first premise a few observations, before I proceed to distribute and consider its several objects.

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest

satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature, or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field, or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These enquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

2. *Origin of Property.*

In the beginning of the world, we are informed by Holy Writ, the all-bountiful Creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth" (*a*). This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them, had it been possible for mankind

(*a*) Gen. i. 28.

to have remained in a state of primeval simplicity; as may be collected from the manners of many American nations when first discovered by the Europeans; and from the ancient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times, wherein "*erant omnia communia et indivisa omnibus veluti unum cunctis patrimonium esset.*" Not that this communion of goods seems ever to have been applicable, even in the earliest ages, to aught but the *substance* of the thing; nor could it be extended to the *use* of it. For, by the law of nature and reason, he who first began to use it acquired therein a kind of transient property, that lasted so long as he was using it, and no longer; or, to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet, whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force; but the instant that he quitted the use or occupation of it, another might seize it without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own.

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious and agreeable; as, habitations for shelter and safety, and raiment for

warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession—if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one and to wear the other. In the case of habitations, in particular, it was natural to observe, that even the brute creation, to whom everything else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and homestall; which seem to have been originally mere temporary huts or moveable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt but that the moveables of every kind became sooner appropriated than the permanent substantial soil; partly because they were more susceptible of a long occupancy which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use till improved and meliorated by the bodily labour of the occupant, which bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

The article of food was a more immediate call, and therefore a more early consideration. Such as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds, in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of *water* also a very important point, and therefore the book of Genesis (the most venerable monument of

antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells, the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, "because he had digged that well" (*b*). And Isaac, about ninety years afterwards, reclaimed this his father's property; and after much contention with the Philistines, was suffered to enjoy it in peace (*c*).

All this while the soil and pasture of the earth remained still in common as before, and open to every occupant; except perhaps in the neighbourhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations, that have never been formed into civil states, like the Tartars and others in the East; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages, and which, Tacitus informs us, continued among the Germans till the decline of the Roman Empire. We have also a striking example of the same kind in the history of Abraham and his nephew Lot (*d*). When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was, that a strife arose between their servants, so that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compose: "Let there be no strife, I pray thee, between thee and me. Is not the whole land before thee? Separate thyself, I pray thee, from me. If thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left." This plainly implies an acknowledged right in either, to occupy whatever ground he pleased, that was not pre-occupied by

(*b*) Gen. xxi. 30.
(*c*) Gen. xxvi. 15, 18, etc.
(*d*) Gen. xiii.

other tribes. "And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well watered everywhere, even as the garden of the Lord. Then Lot chose him all the plain of Jordan, and journeyed east; and Abraham dwelt in the land of Canaan."

Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants; which was practised as well by the Phœnicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert, uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out and massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilizing mankind.

3. *Individual Property.*

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants; and, by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce destroyed, without any provision for a future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture; and the art of agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities without the assistance of tillage. But who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour? Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey, which, according to some philosophers, is the genuine state of nature; whereas now

(so graciously has Providence interwoven our duty and our happiness together), the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its *rational* faculties, as well as of exerting its *natural*. Necessity begat property; and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants, states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labour, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and lay the foundations of science.

The only question remaining is, how this property became actually vested; or, what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to everybody, but particularly to nobody. And, as we before observed, that occupancy gave the right to the temporary *use* of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the *substance* of the earth itself, which excludes every one else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property; Grotius and Puffendorf insisting that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy alone, being a degree of bodily labour, is from a principle of natural justice, without any consent or compact sufficient of itself to gain a title. A dispute that savours too much of nice and scholastic refinement! However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.

4. *Transfer of Property.*

Property, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to a

declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shews an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So, if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth, or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary; and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such a case the property still remains in the loser, who may claim it again of the finder. And this is the doctrine of the law of England, with relation to treasure trove.

But this method of one man's abandoning his property, and another seizing the vacant possession, however well founded in theory, could not longer subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these, it was found, that what became inconvenient or useless to one man, was highly convenient and useful to another; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor. Thus, mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance; which may be considered either as a continuance of the original possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amounts to a transfer of the property; the proprietor declaring his intention no longer to occupy the thing himself; but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property; and Titius, being the only or first man acquainted

with such my intention, immediately steps in and seizes the vacant possession. Thus, the consent expressed by the conveyance gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides.

5. *Inheritance.*

The most universal and effectual way of abandoning property, is by the death of the occupant; when, both the actual possession and intention of keeping possession ceasing, the property, which is founded upon such possession and intention, ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion; else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him; which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society; for then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion. And, further, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be formed.

The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much

earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil*, right. It is true that the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society; it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined, and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They become, therefore, generally the next immediate occupants, till at length, in process of time, this frequent usage ripened into general law. And therefore also, in the earliest ages, on failure of children, a man's servants, born under his roof were allowed to be his heirs, being immediately on the spot when he died. For, we find the old patriarch Abraham expressly declaring, that "Since God had given him no seed, his steward, Eliezer, one born in his house, was his heir" (*e*).

6. *Wills and Testaments.*

While property continued only for life, testaments were useless and unknown; and when it became inheritable, the inheritance was long indefeasible, and the children or heirs-at-law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of dis-

(*e*) Gen. xv. 3.

posing of one's property, or a part of it, by *testament;* that is, by written or oral instructions properly *witnessed* and authenticated according to the *pleasure* of the deceased; which we therefore emphatically style his *will.* This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his moveables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry the Eighth; and then only of a certain portion; for it was not until after the Restoration that the power of devising real property became so universal as at present.

Wills therefore, and testaments, rights of inheritance, and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid; neither does anything vary more than the right of inheritance under different national establishments. In England particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state. In general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance; in real estates males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed (*f*).

This one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son, by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice; while others so scrupulously adhere to the supposed intention of the dead, that if a will of lands be attested by only *one* witness instead of *two,* which

(*f*) In Ontario the law is different. The land descended to all equally by virtue of the statute 14 & 15 V, c. 6, from 1st January, 1852 to 1st. July, 1886, since which date it devolves upon the personal representative, by the Devolution of Estates Act, but, by subsequent enactments shifts into the beneficiaries if not required by the personal representative. See *post,* chapter on descents.

the law requires, they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon very erroneous principles, as if, on the one hand, the son had by nature a right to succeed to his father's lands; or as if, on the other hand, the owner was by nature entitled to direct the succession of his property after his own decease. Whereas the law of nature suggests, that on the death of the possessor the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society. The positive law of society, which is with us the municipal law of England as altered by our local statutes, directs it to vest in such person as the last proprietor shall by will, attended with certain requisites, appoint; and in defect of such appointment, to go to some particular person, who, from the result of certain local constitutions, appears to be the heir at law, or otherwise entitled to succeed thereto. Hence it follows, that where the appointment is regularly made, there cannot be a shadow of right in any one but the person appointed; and, where the necessary requisites are omitted, the right of the heir is equally strong and built upon as solid a foundation, as the right of the devisee would have been, supposing such requisites were observed.

But after all, there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills and other conveniences; such also are the generality of those animals which are said to be *ferœ naturæ*, or of a wild and untameable disposition; which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

And thus the Legislature of England has universally promoted the grand ends of civil society, the peace and security

of individuals, by steadily pursuing that wise and orderly maxim, of assigning to everything capable of ownership, a legal and determinate owner (*g*).

(*g*) Some of the views expressed by Sir Wm. Blackstone in this chapter, have not received the sanction of modern writers of repute; see Maine's Ancient Law, Chapter 8. Parkman, the historian, relates of the Huron Indians that "among these tribes there was no individual ownership of land, but each family had for the time exclusive right to as much as it saw fit to cultivate. . . . At intervals of from ten to thirty years, when the soil was exhausted, and firewood distant, the village was abandoned and a new one built." Jesuits in North America, Ed. 1885, p. xxix.

CHAPTER II.

OF THE ENGLISH LAWS IN FORCE IN ONTARIO.

(1). *General Remarks.*
(2). *Mode of acquiring Colonies.*
(3). *Laws in force in Colonies—Occupancy.*
(4). *Conquest.*
(5). *Treaty or Cession.*
(6). *Introduction of English Law into Canada.*
(7). *Re-Introduction of French Law.*
(8). *Upper and Lower Canada.*
(9). *English Law in Upper Canada.*

1. *General Remarks.*

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

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

2. *Mode of acquiring Colonies.*

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

A colony is acquired by occupancy when British subjects take possession of and settle in an uninhabited, or uncivilized country; in which case the right is not only founded on the law of nature, but may be upheld as spreading throughout

the world the growth of Christianity and civilization. Of such colonies New South Wales is an instance (*h*), for although not originally uninhabited, the assent or dissent of the uncivilized aborigines, so sparsely scattered in an immense continent, cannot be considered, or deemed of sufficient account to class that colony among those acquired by conquest; and the same may be said of the earliest French possessions in this country.

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

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

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

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

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

As regards colonies acquired by *occupancy*, Blackstone says (*i*), "It hath been held that if an uninhabited country be discovered and planted by British subjects, all the English laws then in being, which are the birthright of every subject, are immediately in force there; but this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situations and the condition of an infant colony; such, for instance, as the general rules of inheritance and of protection from personal injuries. The artificial refine-

(*h*) *Cooper* v. *Stuart*, 14 App. Cas. at p. 291.
(*i*) 1 Comm. 107; see also 2 P. Wms. 75.

ments and distinctions incident to the property of a great and commercial people; the laws of police and revenue (such especially as are enforced by penalties); the mode of maintenance for the established clergy; the jurisdiction of spiritual courts; and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times and under what restrictions, must in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the King in council; the whole of their constitution being also liable to be new modelled and reformed by the general superintending power of the legislature in the mother country."

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

But when the sovereign has once established a legislature

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

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

in the colony his prerogative right to exercise any legislative authority in the colony thereafter is gone (*l*).

The power to enact laws in colonies acquired by occupancy before the establishment therein of local legislation, resided formerly in the sovereign, but might have been exercised by the King in council. But by the Act 23 & 24 V. c. 121, which recites that divers of Her Majesty's subjects had occupied, or might thereafter occupy, places being possessions of Her Majesty, but in which she had established no government, it was enacted that the provisions of 6 & 7 V. c. 13, by which the Crown was empowered to establish, by Order in Council, laws, institutions and ordinances for the government of her settlements in Africa should extend to all her possessions not acquired by cession or conquest, nor "except in virtue of this Act" being within the jurisdiction of the legislature of any of her possessions abroad. At the settlement of a colony, as before remarked, those laws which are in force in England and are applicable to the new situation are in force; but such laws as are thereafter made by the British Parliament do not apply to the colony unless expressly mentioned, or unless they are of such general import that it can clearly be inferred that they are intended to apply to all British subjects (*m*).

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

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

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

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

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

4. *Conquest.*

In conquered colonies, the laws existing at the time of the conquest, except, says Blackstone, "those contrary to the law of God," remain in force till altered by the Sovereign, who, as conqueror, can impose on the conquered, such laws, British or otherwise, as he or any legislative council appointed by him may please (*p*). And this power may be exercised either by proclamation, letters patent or order in council (*q*). But this is subject to the exceptions stated by Lord Mansfield in *Hall* v. *Campbell*, Cowp. 209, viz., that the power of the King "is subordinate to his own authority in parliament; he cannot make any new change contrary to fundamental principles; he cannot exempt an inhabitant from that particular dominion, as, for instance, from the laws of trade, or from the power of parliament, or give him privileges exclusive of other subjects"; nor can he establish a court to proceed otherwise than by the Common Law (*r*), nor act in many other cases that might be put. It will be borne in mind, however, that after the constitution of a local legislative assembly and a grant to it of authority to make laws, the same consequences follow as above named in the case of such a grant in a colony acquired by occupancy, and the prerogative rights of the Crown to make laws cease (*s*); and it would seem that, even though a constitution has not been given, still if the laws of England have been granted by the Crown, its power to change them is gone (*t*). The inhabitants, at and after the time of conquest, are not to be deemed aliens, but British subjects.

5. *Treaty or Cession.*

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

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

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

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

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

(*t*) *Calvin's Case*, 7 Rep. 14. See *Re the Island of Cape Breton*, 5 Moo. P. C. 259.

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

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

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

(*v*) *Hall* v. *Campbell*, *Supra*.

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

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

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

passed under the control of the French and English alternately. Jamaica was acquired by conquest from the Spaniards; but as they were all driven out of the island, and it was afterwards settled by the English, it is to be classed as a colony acquired by settlement, so far as respects the introduction of the English laws (*z*).

Whether the late Province of Canada was acquired by conquest or by cession would appear to be of little practical importance, in so far at least as the matters are concerned to which this chapter is especially devoted. For, as we have already seen, the rule as to the power of imposing laws is the same in each case. And this was the rule which, in fact, was acted on, or supposed to have been acted on after the treaty.

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

(*z*) *Hall* v. *Campbell*, Cowp. 204.
(*a*) *Wilcox* v. *Wilcox*, 2 L.C. Jur. App., pp. i., *et seq.*
(*b*) 14 Geo. III. c. 83; Houst. Const. Doc. 90.

property and civil rights, and continued in force the criminal law of England, the benefits and advantages of which had been so sensibly felt by the inhabitants, as the Act relates, from an experience of more than nine years (*c*).

As to the second contention based upon the phraseology of the proclamation, it may be said that, if the Sovereign had no prerogative right to impose the laws of England upon the new colony, the proclamation would have merely amounted to an assurance that they would eventually be established by the properly legislative authority. But if the legislative power of the Sovereign be admitted, then, although the proclamation might declare what would be done in the future, it would in that respect differ in no respect from other prospective legislation. And, assuming the validity of the local legislative authority of the Governor and council to pass ordinances which was granted by the proclamation, it was followed on 17th September, 1764, by an ordinance which, as far as its phraseology is concerned, left no doubt that the laws of England were henceforth to be the laws of the Province.

6. *Introduction of English Law into Canada.*

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

Prior to the capture of Quebec by General Wolfe, in 1759, the late Province of Canada belonged to the French. On the surrender of the town, it was provided in the Articles of Capitulation that the inhabitants should be maintained in possession of their goods, houses, privileges, and in the exercise of their religion (*d*).

(*c*) See 2 L.C. Jur. App. at pp. xiii. and xxxix.
(*d*) Houst. Const. Doc. 27.

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

In 1763, by the treaty of Paris (*f*), the French possessions were ceded by that government to the King of Great Britain, "in the most ample manner and form, without restriction." The King of Great Britain agreeing, however, "to grant the liberty of the Catholic religion to the inhabitants of Canada," and to give orders "that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Romish Church, *as far as the laws of Great Britain permit*" (*g*). Afterwards, in the same year, the King, in the exercise of his prerogative right, issued a Proclamation introducing the law of England, civil and criminal, in general terms (*h*), into the ceded territory, then formed into the Province of Quebec; but by some inadvertence, the territory was so described as to exclude the greater part, in regard to which no provision was made for its civil government. The Proclamation declared that powers had been given by Letters Patent to the Governors of the newly acquired territories (which had been erected into four distinct Governments—of Quebec, East and West, Florida, and Grenada) with the advice and consent of the Members of Council to call General Assemblies, and with such consent and that of the representatives of the people to make laws, etc., and in the meantime all persons might confide in the King's protection for the enjoyment of the benefit of the laws of England, for which purpose, it was declared, power had been given to the Governors with the advice of the Councils to constitute Courts for hearing and determining causes, civil and criminal, according to Law and Equity, and as near as might be "*agreeable to the laws of England*," with right of appeal in civil cases to the Privy Council.

Under this Proclamation and the King's Commission and instructions to the Governor, civil government in lieu of the

(*e*) Ibid. 45.

(*f*) Ibid. 61.

(*g*) It is frequently, though erroneously, stated by French-Canadians that "the Treaty accorded to them their religion, language and laws." It has been already shown that their laws remained in force till English law was introduced by the Proclamation. As to the official use of the French language, see Houst. Const. Doc. 162, 183.

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

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

7. *Re-Introduction of French Law.*

The French-Canadian people were dissatisfied with the introduction of the British law, and in 1766, the Attorney and Solicitor-General, to whom the Imperial Government had referred, reported in favour of re-establishing the French law in civil matters; in 1772 and 1773, the Advocate-General, the Solicitor-General (afterwards Lord Chancellor Loughborough), and the Attorney-General (afterwards Lord Chancellor Thurlow), to whom the question had again been referred, reported to the same effect; England became involved in difficulties with the other North American Colonies; and in 1774, the British Statute 14 Geo. III. c. 83 (*i*) was passed, which after reciting the defect in the proclamation of 1763, enlarged the limits assigned by it to the Province of Quebec, and defined those limits (*j*), which included, apparently, with other territory, the whole of what was formerly Upper Canada. By the same Act, after reciting therein that the provisions made by the Proclamation for the Civil Government had, on experience, been found to be inapplicable to the state and circumstances of the Province, the inhabitants whereof, it was further recited, amounted at the conquest to 65,000, professing the religion of the Church of Rome, and enjoying an established form of constitution and system of laws, by which their persons and property had been protected and governed for a long series of years, it was provided that the Proclamation should be revoked, that in all matters relating to civil rights and the enjoyment of property, and customs and usages, resort should be had to the laws of Canada (meaning the French laws in force before the Procla-

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

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

mation), until varied by such Ordinances as might from time to time be passed by the Governor and Legislative Council, to be appointed as set forth in the Act, and the Roman Catholic inhabitants were guaranteed in the free exercise of their religion. It was, however, provided that the Act should not extend to lands granted or to be granted by the Crown in free and common socage; and that the owner of lands, goods or credits might devise or bequeath the same, notwithstanding any law or custom prevalent in the Province to the contrary; and the criminal law of England was retained as introduced by the Proclamation of 1763. The Act took effect on 1st May, 1775.

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

8. *Upper and Lower Canada.*

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

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

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

This Act, however, still left the former French Canadian law and Ordinances of the Governor and Council in force in Upper Canada.

9. *English Law in Upper Canada.*

The first Act of the Parliament of Upper Canada, passed under the authority of the Imperial Act of 1791, recited that Upper Canada had been principally settled by British subjects unaccustomed to the law of Canada (meaning the French law), and repealed the provision made by the Act 14 Geo. III. c. 83, that in matters of controversy relating to property and civil rights resort should be had to the laws of Canada, and it was declared that in such matters "resort should be had to the laws of England as the rule for decision of the same;" and the same with regard to evidence, legal proof and investigation of matters of fact. . The English poor and bankrupt laws were expressly excepted. The Ordinances theretofore made by the Governor and Council were to remain in force however, except so far as necessarily repealed by the above provisions (*l*). The English Statutes of jeofails, of limitations, and for the amendment of the law, and the equitable jurisdiction and powers of the Court of Chancery in England were not introduced till subsequently.

By the second Act of the same Parliament, all issues in fact were to be determined by the unanimous verdict of twelve jurors, conformably to the law of England. This Act was necessitated by the fact that although the Ordinance above-named, of 1785, did introduce trial by jury, still the verdict was not required to be unanimous, a majority of nine governed, and the Ordinance provided that on trial of an issue between a Canadian (*i. e.* French-Canadian) subject and British subject, half the jurors should be Canadian and half British; between Canadians, all Canadian jurors; between British, all British jurors.

From 15th October, 1792, the day on which these Acts were passed, the English laws, *as they existed on that day*, relating to property and civil rights and trial by jury, evidence, legal proof, and investigation of matters of fact, were introduced into Upper Canada, with the exceptions above mentioned; and to these must be added another im-

(*l*) See the effect of the Act of 32 Geo. III. c. 1, fully expressed in the preamble to R.S.O. c. 111.

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

CHAPTER III.

OF THE FEUDAL SYSTEM.

(1). *Origin of Feudal System.*
(2). *Feudum and Allodium.*
(3). *The Norman Conquest.*
(4). *Nature of Feuds.*
(5). *Descent of Feuds.*
(6). *Feuds Originally Inalienable.*
(7). *Instances of doing Homage in Canada.*

1. *Origin of Feudal System.*

It is impossible to understand, with any degree of accuracy either the civil constitution of the Kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feudal law; a system so universally received throughout Europe upwards of twelve centuries ago, that Sir Henry Spelman does not scruple to call it the law of nations in our western world. This chapter will therefore be dedicated to this enquiry. And though, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time misemployed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a scholarlike scientific manner, without having recourse to the ancient. Nor will these researches be altogether void of rational entertainment as well as use; as in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the draughts of the same edifices, in their pristine proportion and splendour.

The constitution of feuds had its original from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who, all migrating from the same *officina gentium*, poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman Empire. It was brought by them from their own countries and continued in their respective colonies as the most likely means to secure their new acquisition; and to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers. These allotments were called *feoda*, feuds, fiefs or fees; which last appellation in the northern languages signifies a conditional stipend or reward. Rewards or stipends they evidently were; and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis*, or oath of fealty; and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.

Allotments, thus acquired, naturally engaged such as accepted them to defend them; and, as they all sprang from the same right of conquest, no part could subsist independent of the whole; wherefore all givers, as well as receivers, were mutually bound to defend each other's possessions. But, as that could not effectually be done in a tumultuous, irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to, and under the command of, his immediate benefactor or superior; and so upwards to the prince or general himself; and the several lords were also reciprocally bound in their respective gradations, to protect the possessions they had given. Thus the feudal connection was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's own several property, but also in defence of the whole, and of every part of this their newly-acquired country; the prudence of which constitution

was soon sufficiently visible in the strength and spirit with which they maintained their conquests.

The universality and early use of this feudal plan, among all those nations, which in complaisance to the Romans we still call barbarous, may appear from what is recorded of the Cimbri and Teutones, nations of the same northern original as those whom we have been describing, at their first irruption into Italy, about a century before the Christian æra. They demanded of the Romans, "*ut martius populus aliquid sibi terræ daret, quasi stipendium; cæterum, ut vellet, manibus atque armis suis uteretur.*" The sense of which may be thus rendered; they desired stipendiary lands (that is, feuds) to be allowed them, to be held by military and other personal services, whenever their lord should call upon them. This was evidently the same constitution, that displayed itself more fully about seven hundred years afterwards; when the Salii, Burgundians, and Franks broke in upon Gaul, the Visigoths on Spain, and the Lombards upon Italy; and introduced with themselves this northern plan of polity, serving at once to distribute and protect the territories they had newly gained.

2. *Feudum and Allodium.*

Scarcely had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valour, alarmed all the princes of Europe; that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all of them, thought it necessary to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly *allodial* (that is, wholly independent, and held of no superior at all), now they parcelled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feudal obligations of military fealty. And thus, in the compass of a very few years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world. Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs; so that the feudal laws soon drove out the Roman, which had hitherto so universally obtained, but now became for many centuries lost and forgotten, and Italy itself (as some of the civilians

with more spleen than judgment, have expressed it) *bellu inas, atque ferinas, immanesque, Longobardorum leges accepit.*

But this feudal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally and as a part of the national constitution, till the reign of William the Norman. Not but that it is reasonable to believe, from abundant traces in our history and laws, that, even in the times of the Saxons, who were a swarm from what Sir William Temple calls the same northern hive, something similar to this was in use; yet not so extensively nor attended with all the rigour that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600; and it was not till two centuries after, that feuds arrived at their full vigour and maturity, even on the continent of Europe.

3. *The Norman Conquest.*

This introduction, however, of the feudal tenures into England, by King William, does not seem to have been effected immediately after the conquest, nor by the mere arbitary will and power of the Conqueror; but to have been gradually established by the Norman barons, and others, in such forfeited lands as they received from the gift of the Conqueror, and afterwards universally consented to by the great council of the nation, long after his title was established. Indeed, from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions; which gave a handle to the monkish historians, and such as have implicity followed them, to represent him as having by the right of the sword seized on all the lands of England, and dealt them out again to his own favourites. A supposition, grounded upon a mistaken sense of the word *conquest*; which, in its feudal acceptation, signifies no more than *acquisition*; and this has led many hasty writers into a strange historical mistake, and one which, upon the slightest examination will be found to be most untrue. However, certain it is, that the Normans now began to gain very large possessions in England; and their regard for the feudal law under which they had long lived, together with the king's recommendation of this policy to the

English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect its establishment here by law. And though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. For we learn from the Saxon chronicle, that in the nineteenth year of King William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside, and no other introduced in its stead, the kingdom was wholly defenceless; which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might coöperate with the king's remonstrances, and the better incline the nobility to listen to his proposals for putting them in a posture of defence. For, as soon as the danger was over, the king held a great council to enquire into the state of the nation; the immediate consequence of which was the compiling of the great survey called domesday-book, which was finished in the next year; and in the latter end of that very year, the king was attended by all his nobility at Sarum; where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person. This may possibly have been the æra of formally introducing the feudal tenures by law.

This new polity therefore seems not to have been *imposed* by the conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security.

In consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our 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." For this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the same

supposition, as a substruction and foundation of their new polity, though the fact was indeed far otherwise. And indeed, by thus consenting to the introduction of feudal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system; and to oblige themselves (in respect of their lands) to maintain the king's title and territories, with equal vigour and fealty, *as if* they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, and well understanding the import and extent of the feudal terms, gave a very different construction to this proceeding; and thereupon took a handle to introduce, not only the rigorous doctrines which prevailed in the Duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations; as if the English had, in fact as well as theory, owed everything they had to the bounty of their sovereign lord.

4. *Nature of Feuds.*

Having given this short history of their rise and progress, we will next consider the nature, doctrine, and principal laws of feuds; wherein we shall evidently trace the ground-work of many parts of our public polity, and also the original of such of our own tenures, as were either abolished or still remain in force.

The grand and fundamental maxim of all feudal tenures is this: that all lands were originally granted out by the sovereign, and are therefore holden either mediately or immediately of the crown. The grantor was called the proprietor, *or lord*; being he who retained the dominion or ultimate property of the feud or fee; and the grantee, who had only the use and possession according to the terms of the grant, was styled the feudatory or *vassal*, which was only another name for the tenant or holder of the lands; though, on account of the prejudices which we have justly conceived against the doctrines which were afterwards grafted on this system, we now use the word *vassal* opprobriously, as synonymous to slave or bondman. The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi* (*m*).

(*m*) This must not be confounded with the modern conveyance by grant, which is purely statutory in so far as it is used for the conveyance of the immediate freehold.

This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals; which perpetuated among them the era of the new acquisition, at a time when the art of writing was very little known; and therefore the evidence of property was reposed in the memory of the neighbourhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own knowledge.

Besides an oath of *fealty*, or profession of faith to the lord, which was the parent of our oath of allegiance, the vassal or tenant upon investiture did usually *homage* to his lord; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sat before him; and there professing, that "he did become his *man*, from that day forth, of life and limb and earthly honour;" and then he received a kiss from his lord. Which ceremony was denominated *homagium*, or *manhood*, by the feudists, from the stated form of words *devenio vester homo*.

When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the *service*, which, as such, he was bound to render, in recompense for the land which he held, and which gave rise to the *tenendum* clause in deeds of conveyance, now useless. This, in pure, proper, and original feuds, was only two-fold; to follow, or do suit to, the lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories; and therefore the vassals of the inferior lords were bound by their fealty to attend their domestic courts baron, (which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants), in order, as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow tenants; and upon this account, in all the feudal institutions, they are distinguished by the appellation of the peers of the court; *pares curtis*, or *pares curiæ*. In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's

presence, and under the direction of his grand justiciary; till, in many countries, the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to themselves (in almost every feudal government) the right of appeal from those subordinate courts in the last resort. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days as were stipulated at the first donation, in proportion to the quantity of the land.

At the first introduction of feuds, as they were gratuitous, so also they were precarious, and held at the *will* of the lord, who was then the sole judge whether his vassal performed his services faithfully. Then they became certain for one or more *years*. Among the ancient Germans they continued only from year to year; an annual distribution of lands being made by their leaders in their general councils or assemblies. This was professedly done, lest their thoughts should be diverted from war to agriculture, lest the strong should encroach upon the possessions of the weak, and lest luxury and avarice should be encouraged by the erection of permanent houses, and too curious an attention to convenience and the elegant superfluities of life. But, when the general migration was pretty well over, and a peaceable possession of the new-acquired settlements had introduced new customs and manners; when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers, a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory. But still feuds were not yet *hereditary*, though frequently granted, by favour of the lord, to the children of the former possessor; till in process of time it became unusual, and was therefore thought hard to reject the heir, if he were capable to perform the services. And therefore infants, women, and professed monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud; which was called a relief, because it raised up and re-established the inheritance; or, in the words of the feudal writers, "*incertam et caducam hereditatem relevabat.*" This

relief was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

5. *Descent of Feuds.*

For, in process of time, feuds came by degrees to be universally extended beyond the life of the first vassal, to his sons, or perhaps to such one of them as the lord should name; and in this case the form of the donation was strictly observed; for if a feud was given to a man and his sons, all his sons succeeded him in equal portions; and, as they died off, their shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation. But when such a feud was given to a man and his *heirs*, in general terms, then a more extended rule of succession took place; and when the feudatory died, his male descendants *in infinitum* were admitted to succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place; and, in defect of them, such of his male collateral kindred as were of the blood and lineage of the first feudatory, but no others. For this was an unalterable maxim in feudal succession, that "none was capable of inheriting a feud, but such as was of the blood of, that is lineally descended from, the first feudatory." And the descent, being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. But this being found, upon many accounts, inconvenient (particularly by dividing the services, and thereby weakening the strength of the feudal union), and honorary feuds (or titles of nobility) being now introduced, which were not of a divisible nature, but could only be inherited by the eldest son; in imitation of these, military feuds (or those we are now describing) began also in most countries to descend, according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest.

6. *Feuds Originally Inalienable.*

Other qualities of feuds were, that the feudatory could not alien or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord. For, the reason of conferring the feud

being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift either from himself or from his posterity, who were presumed to inherit his valour, to others who might prove less able. And, as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection, in return for his own fealty and service; therefore the lord could no more transfer his seigniory or protection without consent of his vassal, than the vassal could his feud without consent of his lord; it being equally unreasonable that the lord should extend his protection to a person to whom he had exceptions, and that the vassal should owe subjection to a superior not of his own choosing; and this restraint on alienation, as regarded vassals, or tenants at least, seems to have continued till the passing of a Statute in the reign of Queen Anne.

These were the principal, and very simple qualities of the genuine or original feuds; which were all of a military nature, and in the hands of military persons; though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle or money, as might enable the chief feudatories to attend their military duties without distraction; which returns, or *reditus*, were the original of rents, and by these means the feudal polity was greatly extended; these inferior feudatories (who held what are called in the Scots law "rere-fiefs") being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords. But this at the same time demolished the ancient simplicity of feuds; and an inroad being once made upon their constitution, it subjected them in the course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession; which were held no longer sacred when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feuda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken; and under that of improper or derivative feuds were comprised all such as do not fall within the other

descriptions; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honourable services, or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual license; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new-created feuds did in all respects follow the nature of an original, genuine, and proper feud.

But, as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject; in pursuance of which the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different structures have been raised; what effect it has produced on the landed property of England will appear in the following chapters.

7. *Instances of Doing Homage in Canada.*

It may be of interest to quote, here, the historian Parkman's account of the rendering of homage under the feudal system as it existed in Canada at and before its acquisition by the British Crown (*n*).

"Faith and homage were rendered to the Crown or other feudal superior whenever the seigniory changed hands, or, in the case of seigniories held by corporations, after long stated intervals. The following is an example, drawn from the early days of the Colony, of the performance of this ceremony by the owner of a fief to the seignior who had granted it to him. It is that of Jean Guion, vassal of Giffard, seignior of Beauport. The Act recounts how, in presence of a notary, Guion presented himself at the principal door of the manor-house of Beauport; how, having knocked, one Boullé, farmer of Giffard, opened the door, and in reply to Guion's question

(*n*) Old Regime in Canada, chap. xviii., Ed. 1885, p. 246. Feudal rights and duties were abolished in Lower Canada by 18 V.C. 3.

if the seignior was at home, replied that he was not, but that he, Boullé, was empowered to receive acknowledgments of faith and homage from the vassals in his name. 'After the which reply,' proceeds the Act, 'the said Guion, being at the principal door, placed himself on his knees on the ground, with head bare, and without sword or spurs, and said three times these words: Monsieur de Beauport, Monsieur de Beauport, Monsieur de Beauport, I bring you the faith and homage which I am bound to bring you on account of my fief Du Buisson, which I hold as a man of faith of your seigniory of Beauport, declaring that I offer to pay my seigniorial and feudal dues in their season, and demanding of you to accept me in faith and homage as aforesaid."

The following instance is the more common one of a seignior holding directly of the Crown. It is widely separated from the first in point of time, having occurred a year after the army of Wolfe entered Quebec. Phillipe Noël had lately died, and Jean Noël, his son, inherited his seigniory of Tilly and Bonsecours. To make the title good, faith and homage must be renewed. Jean Noël was under the bitter necessity of rendering his duty to General Murray, Governor for the King of Great Britain. The form is the same as in the case of Guion, more than a century before. Noël repairs to the Government House at Quebec, and knocks at the door. A servant opens it. Noël asks if the Governor is there. The servant replies that he is. Murray, informed of the visitor's object, comes to the door, and Noël then and there 'without sword or spurs, with bare head, and one knee on the ground' repeats the acknowledgment of faith and homage for his seigniory. He was compelled, however, to add a detested innovation, the oath of fidelity to His Brittanic Majesty, coupled with a pledge to keep his vassals in obedience to the new sovereign."

CHAPTER IV.

OF THE ANCIENT ENGLISH TENURES.

(1). *Nature and Kinds of Tenure.*
(2). *Knight Service.*
(3). *Aids.*
(4). *Reliefs.*
(5). *Primer Seisin.*
(6). *Wardship.*
(7). *Marriage of Wards.*
(8). *Fines.*
(9). *Escheat.*
(10). *Tenure by Grand Serjeanty, and Escuage.*
(11). *Abolition of Military Tenures.*

1. *Nature and Kinds of Tenure.*

In this chapter we shall take a short view of the ancient tenures of our English estates, or the manner in which lands, tenements and hereditaments, might have been holden, as the same stood in force, till the middle of the seventeenth century. In which we shall easily perceive, that all the particularities, all the seeming and real hardships, that attended those tenures, were to be accounted for upon feudal principles and no other; being fruits of, and deduced from, the feudal policy.

Almost all the real property of the kingdom is, by the policy of our laws, supposed to be granted by, dependent upon, and holden of, some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore styled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*. Thus, all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is styled the *lord paramount*,

or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king; and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A., and he granted a portion of the land to B., now B. was said to hold of A., and A. of the king; or in other words, B. held his lands immediately of A., but mediately of the king. The king, therefore, was styled lord paramount; A. was both tenant and lord, or was a mesne lord; and B. was called tenant *paravail*, or the lowest tenant, being he who was supposed to make avail or profit of the land. In this manner are all the lands of the kingdom holden, which are in the hands of subjects; for, according to Sir Edward Coke, in the law of England we have not properly *allodium*; which, we have seen, is the name by which the feudists abroad distinguish such estates of the subject as are not holden of any superior. So that at the first glance, we may observe, that our lands are either plainly feuds, or partake very strongly of the feudal nature.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the most honourable species of tenure, but at the same time subjected the tenants to greater and more burthensome services than inferior tenures did. This distinction ran through all the different sorts of tenure, of which we now proceed to give an account.

There seem to have subsisted among our ancestors four principal species of lay tenure, to which all others may be reduced; the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base* services; in respect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character of a soldier or a freeman to perform; as, to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were only fit for peasants or persons of a servile rank; as, to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were such

as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. The *uncertain* depended upon unknown contingencies; as, to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm, which are free services; or to do whatever the lord should command, which is a base or villein service.

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England, till the middle of the seventeenth century; and three of which subsist to this day. First, where the service was *free* but *uncertain*, as military service with homage; that tenure was called the tenure in chivalry *per servitium militare*, or by knight-service. Secondly, where the service was not only *free*, but also *certain*, as by fealty only, by rent and fealty, etc.; that tenure was called *liberum socagium*, or free socage. These were the only *free* holdings or tenements; the others were *villenous* or servile, as, thirdly, where the service was *base* in its nature, and *uncertain* as to time and quantity, the tenure was *purum villenagium*, absolute or pure villenage. Lastly, where the service was *base* in its nature, but reduced to a *certainty*, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum;* or it might be still called socage (from the certainty of its services), but degraded by their *baseness* into the inferior title of *villenum socagium*, villein-socage.

2. *Knight-Service.*

The first, most universal, and esteemed the most honourable species of tenure, was that by knight-service. This differed in very few points, as we shall presently see, from a pure and proper feud, being entirely military, and the general effect of the feudal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*. And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon; which attendance was his *reditus* or return, his rent or service for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion. And

there is reason to apprehend, that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system.

This tenure of knight service had all the marks of a strict and regular feud; it was granted by words of pure donation, *dedi et concessi*; was transferred by investiture or delivering corporal possession of the land, usually called livery of seisin; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry, viz., aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat; all of which we shall endeavour to explain, and to shew to be of feudal original.

3. *Aids.*

Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress; but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three: First, to ransom the lord's person if taken prisoner; a necessary consequence of the feudal attachment and fidelity; insomuch that the neglect of doing it, whenever it was in the vassal's power, was, by the strict rigour of the feudal law, an absolute forfeiture of his estate. Secondly, to make the lord's eldest son a knight, a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms; the intention of it being to breed up the eldest son and heir-apparent of the seigniory to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion; for daughters' portions were in those days extremely slender; few lords being able to save much out of their income for this purpose; nor could they acquire money by other means; being wholly conversant in matters of arms; nor, by the nature of their tenure, could they charge their lands with this or any other incumbrances.

4. *Reliefs.*

Relief, *relevium*, was before mentioned as incident to every feudal tenure, by way of fine or composition with the

lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant.

5. *Primer Seisin.*

Primer seisin was a feudal burden, only incident to the king's tenants *in capite*, and not to those who held of inferior or mesne lords. It was a right which the king had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir (provided he were of full age) the profits of the lands for a certain time.

6. *Wardship.*

These payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female, the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females. For the law supposed the heir-male unable to perform knight-service till twenty-one; but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service.

The wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy; and also, in a political view, the lord was most concerned to give his tenant suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render.

7. *Marriage of Wards.*

But, before the heirs came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of *marriage* (*maritagium*, as contradistinguished from *matrimonium*), which in its feudal sense signifies the power which the lord or guardian in chivalry had of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without *disparagement* or inequality; which, if the infants refused, they forfeited the value of the marriage to

their guardian; that is, so much as a jury would assess, or any one would *bona fide* give to the guardian for such an alliance; and, if the infants married themselves without the guardian's consent, they forfeited double the value.

8. *Fines on Alienation.*

Another attendant or consequence of tenure by knight-service was that of *fines* due to the lord for every *alienation*, whenever the tenant had occasion to make over his land to another. This depended on the nature of the feudal connection; it not being reasonable or allowed as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord; and as the feudal obligation was considered as reciprocal, the lord also could not alienate his seigniory without the consent of his tenant, which consent of his was called an *attornment*. This restraint upon the lords soon wore away; that upon the tenants continued until the passing of a statute in the reign of Queen Anne.

9. *Escheat.*

The last consequence of tenure in chivalry was *escheat*; which is the determination of the tenure, or dissolution of the mutual bond between the landlord and tenant from the extinction of the blood of the latter by either natural or civil means, if he died without heirs of his blood, or if his blood was corrupted or stained by commission of treason or felony; whereby every inheritable quality was entirely blotted out and abolished. In such cases the land escheated, or fell back to the lord of the fee; that is, the tenure was determined by breach of the original condition expressed or implied in the feudal donation. In the one case, there were no heirs subsisting of the blood of the first feudatory or purchaser, to which heirs alone the grant of the feud extended; in the other, the tenant, by perpetrating an atrocious crime, shewed that he was no longer to be trusted as a vassal, having forgotten his duty as a subject; and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or felon. The consequence of which in both cases was, that the gift, being determined, resulted back to the lord who gave it.

These were the principal qualities, fruits, and consequences of tenure by knight-service; a tenure, by which the greatest

part of lands in this kingdom were holden, and that principally of the king *in capite*, till the middle of the seventeenth century; and which was created, as Sir Edward Coke expressly testifies, for a military purpose, viz., for defence of the realm by the king's own principal subjects, which was judged to be much better than to trust to hirelings or foreigners. The description here given is that of a knight-service proper; which was to attend the king in his wars.

10. *Tenure by Grand Serjeanty, and Escuage.*

There were also some other species of knight-service; so called, though improperly, because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-service proper, and because they were attended with similar fruits and consequences. Such was the tenure by *grand serjeanty, per magnum servitium*, whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special honorary service to the king in person; as, to carry his banner, his sword, or the like; or to be his butler, champion, or other officer, at his coronation. It was in most other respects like knight-service. These services, both of chivalry and of grand serjeanty, were all personal, and uncertain as to their quantity or duration. But, the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it, by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessment, at so much for every knight's fee; and therefore the tenure was called, in our Norman French, *escuage*; being indeed a pecuniary, instead of a military, service, it soon came to be so universal, that personal attendance fell quite into disuse. Hence we find in our ancient histories, that, from this period, when our kings went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops. By statute 25 Edw. I. c. 5, 6, and many subsequent statutes, it was provided, that the king should take no aids or tasks but by the common assent of the realm; hence it was held in our old books, that escuage or scutage could not be levied but by consent of parliament; such scutages being indeed the ground-work of all succeeding subsidies, and the land-tax of later times.

For the present we have only to observe, that by the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and country, the whole of this system of tenures tended to nothing else but a wretched means of raising money to pay an army of occasional mercenaries. In the meantime the families of all our nobility and gentry groaned under the intolerable burthens, which (in consequence of the fiction adopted after the Conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which however were assessed by themselves in parliament, they might be called upon by the king or lord paramount for *aids*, whenever his eldest son was to be knighted or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of *relief* and *primer seisin*; and, if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith feelingly complains, "when he came to his own, after he was out of *wardship*, his woods decayed, houses fallen down, stock wasted and gone, lands let forth and ploughed to be barren," to reduce him still further, he was yet to pay half a year's profits as a fine for suing out his *livery*; and also the price or value of his *marriage*, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value, if he married another woman. Add to this, the untimely and expensive honour of *knighthood*, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *licence of alienation*.

11. *Abolition of Military Tenures.*

A slavery so complicated and so extensive as this called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive Acts of Parliament, which assuaged some temporary grievances.

At length the military tenures, with all their heavy appendages (having during the usurpation been discontinued) were destroyed at one blow by the statute 12 Car. II. c. 24, which enacts "that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemaines, values and forfeitures of marriages, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienations, tenures by homage, knight-service, and escuage, 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, copyholds, and the honorary services (without the slavish part) of grand serjeanty." A statute, which was a greater acquisition to the civil property of this kingdom than even *magna carta* itself, since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour, but the statute of King Charles extirpated the whole, and demolished both root and branches. By the Stat. 31 Geo. 3, c. 31, s. 43, all lands to be granted by the Crown in Canada were to be in free and common socage.

CHAPTER V.

OF THE MODERN ENGLISH TENURES.

(1). *Socage.*
(2). *Petit Serjeanty.*
(3). *Tenure in Burgage—Borough English.*
(4). *Gavel-kind.*
(5). *Feudal Nature of Socage Tenures.*
(6). *Copyhold Tenure.*

1. *Socage.*

Although, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feudal constitution was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside and a new one introduced in its room; since, by the Statute 12 Car. II., the tenures of socage and frankalmoign, the honorary services of grand serjeanty, and the tenure by copy of court roll, were reserved; nay, all tenures in general, except frankalmoign, grand serjeanty, and copyhold, were reduced to one general species of tenure, then well known and subsisting, called free and common socage. And this, being sprung from the same feudal original as the rest, demonstrates the necessity of fully contemplating that ancient system, since it is that alone to which we can recur to explain any seeming or real difficulties that may arise in our present mode of tenure.

The military tenure, or that by knight-service, consisted of what were reputed the most free and honourable services, but which in their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure, or *free-socage*, consisted also of free and honourable services, but such as were liquidated and reduced to an absolute certainty. This tenure has in a manner absorbed and swallowed up (since the statute of Charles the Second) almost every other species of tenure. And to this we are next to proceed.

Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our ancient writers constantly put in opposition to chivalry or knight-service where the render was precarious or uncertain. The service must therefore be certain in order to denominate it socage: as to hold by fealty and 20s. rent; or by homage, fealty, and 20s. rent; or by homage and fealty without rent; or by fealty and certain corporal service, as ploughing the lord's land for three days; or by fealty only without any other service; for all these are tenures in socage.

But socage, as was hinted in the last chapter, is of two sorts—*free*-socage, where services are not only certain but honourable; and *villein*-socage, where the services, though certain, are of a baser nature. Of free socage we are first to speak, and this, both in the nature of its service and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any.

It seems probable that the socage tenures were the relics of Saxon liberty, retained by such persons as had neither forfeited them to the king nor been obliged to exchange their tenure for the more honourable, as it was called, but at the same time more burthensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavel-kind, which is generally acknowledged to be a species of socage tenure; the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in *free and common socage*.

As, therefore, the grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties; and, in particular, *petit serjeanty*, tenure in *burgage*, and *gavel-kind*.

2. *Petit Serjeanty.*

We may remember, that by the Statute 12 Car. II. grand serjeanty is not itself totally abolished, but only the slavish appendages belonging to it; for the honorary services (such as carrying the king's sword or banner, etc., at the coronation) are still reserved. Now, *petit serjeanty* bears a great resemblance to grand serjeanty; for, as one is a personal service,

so the other is a rent or render, both tending to some purpose relative to the king's person. Petit serjeanty, as defined by Littleton, consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. This, he says, is but socage in effect; for it is no personal service, but a certain rent. The tenure on which the Dukes of Marlborough and of Wellington hold the estates granted to their respective ancestors for military services are of this nature, each rendering a small flag or ensign, annually deposited in Windsor Castle.

3. *Tenure in Burgage—Borough English.*

Tenure in *burgage* is expressly said by Littleton to be but tenure in socage; and it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain. It is, indeed, only a kind of town socage, as common socage, by which other lands are holden, is usually of a rural nature. A borough is usually distinguished from other towns by the right of sending members to parliament; and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage, therefore, or burgage tenure, is where houses, or lands which were formerly the site of houses, in an ancient borough, are held of some lord in common socage, by a certain established rent. And these seem to have withstood the shock of the Norman encroachments, principally on account of their insignificancy, which made it not worth while to compel them to an alteration of tenure. Besides, the owners of them being chiefly artificers and persons engaged in trade, could not, with any tolerable propriety, be put on such a military establishment as the tenure of chivalry was. The free socage, therefore, in which these tenements are held, seems to be plainly a remnant of Saxon liberty; which may also account for the great variety of customs affecting many of these tenements so held in ancient burgage; the principal and most remarkable of which is that called *Borough English*; so named in contradistinction, as it were, to the Norman customs, viz., that the youngest son and not the eldest, succeeds to the burgage tenement on the death of his father. For which Littleton gives this reason: because the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors have, indeed, given a much stranger reason for this custom, as if the lord of the fee had anciently a right of

concubinage with his tenant's wife on her wedding-night; and that therefore the tenement descended not to the eldest but to the youngest who was more certainly the offspring of the tenant. But it is doubtful whether this custom ever prevailed in England, though it certainly did in Scotland (under the name of *mercheta* or *marcheta*), till abolished by Malcolm III. And, perhaps, a more rational account than either may be fetched (though at a sufficient distance) from the practice of the Tartars: among whom, according to Father Duhalde, this custom of descent to the youngest son prevails. That nation is composed totally of shepherds and herdsmen; and the eldest sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle, and go to seek a new habitation. The youngest son, therefore, who continues latest with his father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other northern nations, it was the custom for all the sons but one to migrate from the father, which one became his heir.

4. *Gavel-kind.*

The nature of the tenure in *gavel-kind* affords us a stronger argument that tenure in socage is a remnant of Saxon liberty. It is universally known what struggles the Kentish men made to preserve their ancient liberties, and with how much success those struggles were attended (*o*). And as it is principally here that we meet with the custom of gavel-kind (though it was and is to be found in some other parts of the kingdom), we may fairly conclude that this was a part of those liberties, and that gavel-kind before the Norman conquest was the general custom of the realm. The distinguishing properties of this tenure are various, some of which are these:—1. The tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen. 2. The estate does not escheat in case of an attainder and execution for felony; their maxim being "the father to the bough, the son to the plough." 3. In most places he had a power of devising lands by will, before the statute for that purpose was made. 4. The lands descend, not to the eldest, youngest, or any one son, but to all the sons together; which was indeed anciently the most usual course of descent all over England, though in particular places particular customs prevailed.

(*o*) At this day the Kent County Arms are the White Horse of Hengist the Saxon, and the motto *Invicta*.

5. *Feudal Nature of Socage Tenures.*

Having thus distributed and distinguished the several species of tenure in free socage, we proceed next to show that this also partakes very strongly of the feudal nature. Which may probably arise from its ancient Saxon original; since (as was before observed) feuds were not unknown among the Saxons, though they did not form a part of their military policy, nor were drawn out into such arbitrary consequences as among the Normans. It seems, therefore, reasonable to imagine, that socage tenure existed in much the same state before the conquest as after; that in Kent it was preserved with a high hand, as our histories inform us it was; and that the rest of the socage tenures dispersed through England escaped the general fate of other property, partly out of favour and affection to their particular owners, and partly from their own insignificancy.

However this may be, the tokens of the feudal original will evidently appear from a short comparison of the incidents and consequences of socage tenure with those of tenure in chivalry; remarking their agreement or difference as we go along. In the first place, then, both were held of superior lords; one of the king, either immediately, or as lord paramount; and (in the latter case) of a subject or a mesne lord between the king and the tenant. Both were subject to the feudal return, render, rent, or service of some sort or other, which arose from a supposition of an original grant from the lord to the tenant. In the military tenure, or more proper feud, this was from its nature uncertain; in socage, which was a feud of the improper kind, it was certain, fixed, and determinate (though perhaps nothing more than bare fealty), and so continues to this day. Both were, from their constitution, universally subject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant. The tenure in socage was subject, of common right, to aids for knighting the son and marrying the eldest daughter; abolished by the statute 12 Car. II. Relief was due upon socage tenure, as well as upon tenure in chivalry. Primer seisin was entirely abolished by the statute. Wardship was also incident to tenure in socage; but of a nature very different from that incident to knight-service. For if the inheritance descended to an infant under fourteen, the wardship of him did not belong to the lord of

the fee; because, in this tenure, no military or other personal service being required, there was no occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant; but his nearest relation (to whom the inheritance could not descend) was his guardian in socage, and had the custody of his land and body till he arrived at the age of fourteen. At fourteen this wardship in socage ceased; and the heir might oust the guardian, and call him to account for the rents and profits; for at this age the law supposed him capable of choosing a guardian for himself. It was in this particular, of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones. But as the wardship ceased at fourteen, there was this disadvantage attending it; that young heirs, being left at so tender an age to choose their own guardians till twenty-one, might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage tenures, the same statute (12 Car. II. c. 24) enacted, that it should be in the power of any father by will to appoint a guardian till his child should attain the age of twenty-one. The value of marriage and fines for alienation are demolished by the statute of Charles II. And finally escheats are equally incident to tenure in socage, as they were to tenure by knight-service.

The other grand division of tenure is that of *villenage*, as contradistinguished from *liberum tenementum*, or frank tenure. And this (we may remember) is sub-divided into two classes, *pure* and *privileged* villenages; from whence have arisen two other species of modern tenures.

6. *Copyhold Tenure.*

From the tenure of pure villenage have sprung the present *copyhold* tenures in England, or tenure by copy of court-roll at the will of the lord, of which at this day there are many in England. In order to obtain a clear idea of this tenure, it will be previously necessary to take a short view of the original and nature of manors.

Manors are in substance as ancient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day; just as we observed of feuds, that they were partly known to our ancestors even before the Norman conquest. A manor, *manerium*

a manendo, because the usual residence of the owner, seems to have been a district of ground, held by lords or great personages, who kept in their own hands so much land as was necessary for the use of their families, which were called *terræ dominicales* or *demesne* lands; being occupied by the lord, or *dominus manerii*, and his servants. The other, or *tenemental*, lands they distributed among their tenants; which, from the different modes of tenure, were distinguished by two different names. First *book-land*, or charter land, which was held by deed under certain rents and free-services, and in effect differed nothing from the free-socage lands; and from hence have arisen most of the freehold tenants who hold of particular manors, and owe suit and service to the same. The other species was called *folk-land*, which was held by no assurance in writing, but distributed among the common folk or people at the pleasure of the lord, and resumed at his discretion; being indeed land held in villenage which we shall presently describe more at large. The residue of the manor being uncultivated, was termed the lord's waste, and served for public roads and for common of pasture to the lord and his tenants. Each lord or baron is empowered to hold a domestic court, called the court-baron, for redressing misdemeanors and nuisances within the manor; and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number of suitors should so fail as not to leave sufficient to make a jury or homage, that is two tenants at least, the manor itself is lost.

In the early times of our legal constitution, the king's greater barons, who had a large extent of territory held under the Crown, granted out frequently smaller manors to inferior persons to be holden of themselves; which do therefore continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors; and his seigniory is frequently termed an honour, not a manor, especially if it hath belonged to an ancient feudal baron, or hath been at any time in the hands of the Crown. In imitation whereof these inferior lords began to carve out and to grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum*, till the superior lords observed, that by this method of subinfeudation they lost all their feudal profits of wardships, marriages, and escheats, which fell into the hands of these

mesne or middle lords, who were the immediate superiors of the *terre-tenant*, or him who occupied the land; and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superior. This occasioned the Statute of Westm. 3, or *Quia emptores*, 18 Edw. I. c. 1, which directs that upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. And from hence it is clear that all manors existing at this day must have existed as early as King Edward I.; for it is essential to a manor, that there be tenants who hold of the lord; and by the operation of that statute and other statutes, no tenant *in capite* since the accession of that prince, and no tenant of a common lord, since the Statute of *Quia emptores*, could create any new tenants to hold of himself. Hence also it follows that no manors exist in those parts of Canada in which English law is in force. In the Province of Lower Canada, now Quebec, there existed many seigniories, but all feudal rights and duties were abolished in 1854.

Now, with regard to the folk-land, or estates held in villenage, this was a species of tenure neither strictly feudal, Norman, nor Saxon; but mixed and compounded of them all. Under the Saxon government there were a sort of people in a state of downright servitude, used and employed in the most servile works, and belonging both they, their children, and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the folk-land, from which they were removeable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable that they who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition. This they called villenage, and the tenants villeins, either from the word *vilis*, or else as Sir Edward Coke tells us, *a villa*; because they lived chiefly in villages, and were employed in rustic works of the most sordid kind; resembling the Spartan *helotes*, to whom alone the culture of the lands was consigned;

their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

These villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land, or else they were *in gross*, or at large, that is, annexed to the person of the lord, and transferable by deed from one owner to another. They could not leave their lord without his permission; but if they ran away, or were purloined from him, might be claimed and recovered by action like beasts or other chattels. They held indeed small portions of land by way of sustaining themselves and families: but it was at the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein service, that is, to carry out dung, to hedge and ditch the lord's demesnes, and any other the meanest offices; and their services were not only base, but uncertain both as to their time and quantity. A villein could acquire no property either in lands or goods; but, if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity. The children of villeins were also in the same state of bondage with their parents.

Villeins, by many means, in process of time, gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good as, in others better than, their lords. For the good-nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords; and, on performance of the same services, to hold their lands in spite of any determination of the lord's will. For though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the customs of the manor; which customs are preserved and evidenced by the rolls of the several courts-baron in which they are entered: or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And as such tenants had nothing to shew for their estates but these customs, and admissions in pursuance of them, entered on these rolls,

or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court-roll*, and their tenure itself a *copyhold*.

Thus copyhold tenures, as Sir Edward Coke observes, although very meanly descended, yet came of an ancient house; for, from what has been premised, it appears, that copyholders are in truth no other but villeins, who, by a long series of encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will. And these encroachments grew to be so universal, that when tenure in villenage was virtually abolished (though copyholds were reserved) by the Statute of Charles II., there was hardly a pure villein left in the nation. For Sir Thomas Smith testifies, that in his time (and he was secretary to Edward VI.) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining, were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times of popery. For he tells us, that "the holy fathers, monks and friars, had in their confessions, and especially in their extreme and deadly sickness, convinced the laity how dangerous a practice it was for one Christian man to hold another in bondage; so that temporal men, by little and little, by reason of that terror in their consciences, were glad to manumit all their villeins. But the said holy fathers, with the abbots and priors, did not in like sort by theirs; for they also had a scruple in conscience to impoverish and despoil the Church so much, as to manumit such as were bond to their churches, or to the manors which the church had gotten; and so kept their villeins still." By these several means the generality of villeins in the kingdom have long ago sprouted up into copyholders; their persons being enfranchised by manumission or long acquiescence; but their estates, in strictness, remaining subject to the same servile conditions and forfeitures as before; though, in general, the villein services are usually commuted for a pecuniary quit-rent.

As a farther consequence of what has been premised, we may collect these two main principles, which are held to be the supporters of the copyhold tenure, and without which it cannot exist:—1. That the lands be parcel of, and situate within, that manor, under which it is held. 2. That they have been demised, or demisable, by copy of court-roll,

immemorially. For immemorial custom is the life of all tenures by copy; so that no new copyhold could in England strictly speaking, be granted at this day.

Thus much for the ancient tenure of *pure* villenage, and the modern one of *copyhold at the will of the lord*, which is lineally descended from it.

Thus have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both ancient and modern, in which we cannot but remark the mutual connection and dependence that all of them have upon each other. And upon the whole it appears, that whatever changes and alterations these tenures have in process of time undergone, from the Saxon era to the 12 Car. II., all lay tenures are now in effect reduced to two species: *free* tenure in common socage, and *base* tenure by copy of court-roll, the former alone existing in the Province of Ontario.

CHAPTER VI.

OF CORPOREAL HEREDITAMENTS.

(1). *Lands, tenements, and hereditaments.*
(2). *Land, what it includes.*

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

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

1. *Lands, tenements and hereditaments.*

First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. *Land* comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large (*p*). *Tenement* is a word of still greater extent, and though in its vulgar

(*p*) For interpretation of the term *land* for the specific purposes of the various statutes following, see R.S.O. c. 31, s. 1, s.-s. 2; c. 37, s. 1, s.-s 2; c. 119, s. 1, s.-s. 1; c. 121, s. 1, s.-s. 2; c. 122, s. 1; c. 123, s. 2, s.-s. 1; c. 124, s. 1, s.-s. 1; c. 126, s. 1, s.-s. 1; c. 127, s. 22, s.-s. 1; c. 128, s. 2; c. 133, s. 2, s.-s. 1; c. 136, s. 2, s.-s. 2.

acceptation it is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies every thing that may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial, ideal kind. Thus *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like; and, as lands and houses are tenements, so is an advowson (*q*) a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are, all of them, legally speaking, tenements. But an *hereditament*, says Sir Edward Coke, is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal, or incorporeal, real, personal or mixed. Thus, an heir-loom, or implement of furniture, which by custom, in England, descends to the heir with an house, is neither land nor tenement, but a mere moveable; yet, being inheritable, is comprised under the general word hereditament; and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament.

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

2. *Land, what it includes.*

Corporeal hereditaments consist wholly of substantial and permanent objects; all of which may be comprehended under the general denomination of land only. For *land*, says Sir Edward Coke, comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable meadows, pastures, woods, moors, *waters*, marshes, furzes, and heath. It legally includeth also all castles, houses and other buildings; for they consist, sayeth he, of two things; *land*, which is the foundation, and *structure* thereupon; so that, if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of

(*q*) For the purpose of the Act respecting assurances of estates tail, R.S.O. c. 122, s. 1, an advowson is included in the term *land*.

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

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

(*r*) For the purpose of conveyance in Ontario *land* has an extensive signification; see R.S.O. c. 119, ss. 1, 12; c. 124, s. 1, s.-s. 1. In *Winfield* v. *Fowlie*, 14 Ont. R. 102, a building floating in the waters of Georgian Bay, and approached by a sort of tramway leading from a piece of land to which the parties had a title, and commonly used therewith, was held to pass under a conveyance of the land made in the statutory short form, on account of the very wide signification given to the conveyance by the statute.

CHAPTER VII.

OF INCORPOREAL HEREDITAMENTS.

(1). *General remarks.*
(2). *Advowsons.*
(3). *Ways, generally.*
(4). *Ways by Express Grant.*
(5). *Private Way Along Highway.*
(6). *Roads and Streets on Plans.*
(7). *Ways by Implied Grant.*
(8). *Ways of Necessity.*
(9). *Ways by Prescription.*
(10). *Right to deviate from Ways.*
(11). *Annuities.*
(12). *Rents.*
(13). *Rent-Charge.*
(14). *Rent-Seck.*
(15). *Franchises.*

1. *General Remarks.*

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

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

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

2. *Advowsons.*

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

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

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

3. *Ways, generally.*

A species of incorporeal hereditament is that of *ways*; or the right of going over another man's ground. We are speaking not here of the public highways, nor yet of the common ways dedicated to the public, or lanes; but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil. This may be grounded on a special permission: as when the owner of the land grants to another the liberty of passing over his grounds, to go to church, to market or the like; in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and if the grantee leaves the country, he cannot

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

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

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

assign over his right to any other (*u*); nor can he justify taking another person in his company.

A way may be also by prescription in England; as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose; for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses may clearly be created. But in Ontario no such right founded on alleged custom or immemorial usage could probably arise (*v*). But a right of way may arise in favour of individuals by prescription, and since 10 & 11 V. c. 5, R.S.O. c. 133, ss. 34 et. seq., immemorial usage is no longer requisite; and under ordinary circumstances, open, known, uninterrupted enjoyment, as of right, for twenty years, will prevent such prescription from being defeated by shewing that the way was first enjoyed at some time prior to such twenty years, and therefore not immemorially.

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

4. *Ways by Express Grant.*

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

(*u*) *Ackroyd* v. *Smith*, 10 C.B. 164, explained in *Thorpe* v. *Brumfitt*, 6 Ch. App. 650.

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

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

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

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

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

grantor; and on the other, that the servient tenement is not to be burdened beyond the limits expressed in the deed (*a*). It has been said that when no limit is set in the grant the way may be used for all purposes (*b*); but this case and others of this kind (*c*) were cases in which large quantities of land were laid out with ways through them for the general use of the purchasers, and would perhaps correspond to the laying out and sale of lands by plans shewing streets thereon. On the other hand where a lease reserved a "right of way on foot and for horses, cattle and sheep," it was held that it did not include a right of way to lead or draw manure over it (*d*); and a grant of the "free liberty and right of way and passage, and of ingress, egress and regress to and for [the lessee] and his workmen and servants, and all and every persons and person, by their or his authority, etc." gave a right of way for foot passengers only (*e*).

A grant of a right of way over a piece of land or a road does not necessarily carry with it the right to use the whole parcel (*f*). A grant of a right of way over and along "the roads or intended roads and ways delineated in the plan" according to which sales were made, in a deed which provided for the laying out and maintaining of roads, was held to give the grantee the right to a reasonable use of the road only, and not a right to use every square inch of it: and consequently a slight encroachment on the road made by the covenantor in the deed was held not to be an interference with the right of user of the road (*g*). It would have been otherwise if the grant had been of a road of a specified width. But where premises were demised to a wood carver for a workshop by reference to a plan on which the demised premises were shown, together with a right of way over an adjoining parcel coloured green on the plan, and it was shown that large loads of lumber were taken in by the lessee and the whole parcel was necessary for the convenient use of the demised premises, it was held that the lessee had the right to

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

(*b*) *United Land Co.* v. *G.E.R. Co.*, 17 Eq. 158; 10 Ch. App. 586.

(*c*) *Newcomen* v. *Coulson*, 5 Ch. D. 135; *Finch* v. *G.W.R. Co.*, 5 Ex. D. 254.

(*d*) *Brunton* v. *Hall*, 1 Q.B. 792.

(*e*) *Cousens* v. *Rose*, 12 Eq. 366.

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

(*g*) *Clifford* v. *Hoare*, L.R. 9 C.P. 362.

use the whole parcel (*h*). And where a demise of a dock included rights of way and passage over a roadway or passage twenty-three feet wide adjoining the dock, it was held that the lessor could not fence off fourteen feet of the way (*i*). Probably this case can be reconciled with *Clifford* v. *Hoare*, only on the ground that the disturbance in the former substantially interfered with the use of the way, while in the latter case there was no appreciable interference.

The extent of user of a way may be determined by the state of the dominant tenement taken in connection with the words of the grant. Thus a right of way to a wicket to be made in a garden was held to entitle the grantee to use it for carts; and although the wicket was not made, but the grantee, instead thereof, built a cartshed, it was held that he did not exceed his rights (*j*). But where a right of way was reserved on a grant to a place "now used as a woodhouse," while it was held that on the construction of the grant these words were merely descriptive of the locality, and gave a right of way to the locality, they did not authorize the dominant owner to use the way for cottages which he subsequently built on the place described. The change was a change in substance of the purpose, not a mere change in quality of the same purpose (*k*). So in *Henning* v. *Burnett* (*l*) a grant of a right of way to a dwelling house, coach-house and stable, did not entitle the grantee to build up the way and use it to enter a field, the way having been granted for a specific purpose. And in *South Met. Cem. Co.* v. *Eden* (*m*), a grant of a way to certain lands, or any part thereof, was held to give a right of way to the lands in any condition and for any purpose. Jervis, C.J., distinguished the case from *Henning* v. *Burnett*, which was a grant for a specific purpose or to a specific point, and said, "If I grant a way to a cottage which consists of one room, I know the extent of the liberty I grant; and my grant would not justify the grantee in claiming to use the way to gain access to a town he might build at the extremity of it."

(*h*) *Knox* v. *Sansom*, 25 W.R. 864.

(*i*) *Cousens* v. *Rose*, 12 Eq. 566.

(*j*) *Watts* v. *Kelson*, 6 Ch. App. 169, note.

(*k*) *Allan* v. *Gomme*, 11 Ad. & E. 759; doubted in *Henning* v. *Burnett*, 8 Ex. 187.

(*l*) 8 Ex. 187.

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

Nor can a way be put to a more burdensome use than was originally intended. The nature of the enjoyment of an easement at the time of the grant is the measure of enjoyment during the continuance of the grant (*n*).

A private way should have a *terminus a quo* and a *terminus ad quem*. And the way cannot be used for the purpose of going to a place beyond, or other than the dominant tenement. Nor can a merely colourable use of the dominant tenement be made for the purpose of going beyond it—as by carting building material to the dominant tenement and depositing it there, and subsequently taking it to another place, its original and real destination (*o*).

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

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

5. *Private Way Along Highway.*

In England, it is held that a private right of way may co-exist with the right of the public to use the same land as a highway, the public right being acquired subsequent to the grant or other acquisition of the private way. The owner of the soil, having granted a way, or allowed it to be acquired by prescription against him, cannot afterwards dedicate the land absolutely to the public as long as it remains subject to the private right. He can only dedicate it subject to the

(*n*) *Heward* v. *Jackson*, 21 Gr. 263; *McMillan* v. *Hedge*, 14 S.C.R. 736.

(*o*) *Howell* v. *King*, 1 Mod. 190; *Colchester* v. *Roberts*, 4 M. & W. at p. 774; *Skull* v. *Glenister*, 16 C. B. N. S. 81; *Telfer* v. *Jacobs*, 16 Ont. R. 35; *Purdom* v. *Robinson*, 30 S. C. R. 64.

(*p*) *Woodyer* v. *Hadden*, 5 Taunt. at p. 132.

(*q*) *Berridge* v. *Ward*, 2 F. & F. 208.

(*r*) *Colchester* v. *Roberts*, 4 M. & W. 769.

(*s*) *Semple* v. *Lon. & B. R. Co.*, 9 Sim. 209.

existing right (*t*). The owner of the way is not bound to justify his user as one of the public on what might be conflicting evidence of public user; and he consequently may maintain his title by the private right (*u*).

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

The question must be considered with reference to the provisions of the Municipal Act. No doubt, the proposition is true that a grant or a dedication cannot affect a pre-existing right, but must be subject to it. But in England the fee in the soil remains the property of the person dedicating, the public acquiring the right to use the land for the legitimate purposes of a highway only (*x*). By the Municipal Act "the soil and freehold of every highway or road altered, amended or laid out according to law, shall be vested in Her Majesty, Her heirs and successors" (*y*); and it is further provided that "every public road, street, bridge or other highway, in a city, township, town or incorporated village shall be vested in the municipality, *subject to any rights in the soil which the individual who laid out such road, street, bridge or highway reserved*" (*z*). As to all original road allowances, the fee having never passed from the Crown, there could not be a private right of way

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

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

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

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

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

(*y*) The Mun. Act, R.S.O. c. 223, s. 599.

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

thereon, nor a dedication of a public way (*a*). But, as to land dedicated to the public for a highway, though it ultimately becomes a highway to the same extent as an original road allowance (*b*), there is a special saving of rights reserved by the owner, dower being excepted (*c*). If a private right existed before dedication, it would apparently continue to exist after the dedication and vesting in the municipality of the public way, as a right in the soil reserved, or incapable of conveyance or dedication by the individual who laid out the road. And the owner of the private right might justify his user on that ground, if the public right were doubtful, or notwithstanding the public right. The municipality could acquire by the grant or dedication only such right as the owner could grant, *i.e.*, a public right of user subject to the private right. It could, however, acquire the private right of way by expropriation. Such roads, are, however, equally with original road allowances, subject to be closed by the municipality (*d*), under the authority of the Municipal Act (*e*). But "no council shall close up any public road or highway, whether an original road allowance or a road opened by the quarter sessions or any municipal council, or otherwise legally established, whereby any person will be excluded from ingress and egress to and from his lands or place of residence over such road, unless the council, in addition to compensation, also provides for the use of such person *some other convenient road or way of access* to the said land or residence" (*f*). The provision as to supplying other means of access was first enacted in 1893 (*g*), after *Johnson* v. *Boyle* (*h*) was decided, but before *Re Vashon & East Hawkesbury* (*i*). The section in question postulates the non-existence of any means of access to the land served by the highway on its being closed, and requires such access by a convenient way to be made, if it does not already exist in another place (*j*); and the municipality is authorized, on

(*a*) *Rae* v. *Trim*, 27 Gr. 374.
(*b*) *Re Trent Valley Canal Co.*, 11 Ont. R. 687.
(*c*) The Mun. Act, R.S.O. c. 223, ss. 601, 602.
(*d*) *Moore* v. *Esquesing*, 21 C.P. 277.
(*e*) The Mun. Act, R.S.O. c. 223, s. 637.
(*f*) The Mun. Act, R.S.O. c. 223, s. 629.
(*g*) 36 V. c. 48, s. 422.
(*h*) 11 U.C.R. 101.
(*i*) 30 C.P. 194.
(*j*) *Re McArthur & Southwold*, 3 App. R. 295.

closing a road, to offer the land for sale, first to the owner of the adjoining land, and if he refuses then to any other person. This is not conclusive, however, that the private right is extinguished by closing the highway. It is quite possible that on closing a highway the municipality might refuse to provide "some other convenient road," on the ground that the private right of way still existed, the dedication of the road having been subject to it, and the closing of the highway being the withdrawal of the public right only which the municipality acquired by the dedication. And although the conveyance of the land to the person owning the private way would extinguish it, there is no reason why, on the conveyance of the land to another person, the private right should not still be exercised.

6. *Roads and Streets shewn on Plans.*

Roads and streets laid out upon a plan stand in a peculiar position. At one time the registration of such a plan did not constitute a dedication to the public of the streets laid out thereon (*k*). And in townships, including hamlets and unincorporated villages, that is still the law (*l*). The owner of the lands has, however, still a controlling interest in the streets, and is not bound by the plan until he has made a sale under it (*m*). Upon a sale being made, the purchaser becomes entitled to an easement, in common with other purchasers, of all those streets abutting on his land, which are necessary for the material enjoyment of his property, but not in any other streets unless he expressly stipulates for it (*n*). His rights are still, however, subject to the control of the County Judge, who may, upon notification of all parties concerned, alter the plan and even the streets (*o*). In cities, towns and incorporated villages all the streets, roads and commons shewn on a plan become public highways, subject, however, to the same control as in other cases, but the municipality is not bound to keep them in repair until it accepts them by by-law (*p*), and if the

(*k*) *Re Morton & St. Thomas*, 6 App. R. 323.

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

(*m*) *Re Chisholm & Oakville*, 9 Ont. R. 274; 12 App. R. 225.

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

(*o*) R.S.O. c. 136, s. 110; *Roche* v. *Ryan*, 22 Ont. R. at p. 109.

(*p*) R.S.O. c. 181, s. 39.

municipality does not assume a street laid down on a plan, then if it is closed by order the land belongs to the owners of the lands abutting thereon (*q*).

7. *Ways by Implied Grant.*

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

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

8. *Ways of Necessity.*

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

(*q*) 63 V. c. 17, s. 22.
(*r*) Ante, p. 71 ; see also *Rossin* v. *Walker*, 6 Gr. 619
(*s*) *Cheney* v. *Cameron*, 6 Gr. 623.
(*t*) *Harding* v. *Wilson*, 2 B. & C. 96.
(*u*) *Adams* v. *Loughman*, 39 U.C.R. 247 ; *Espley* v. *Wilkes*, L.R. 7 Ex. 303.
(*v*) *Wood* v. *Stourbridge*, 16 C.B.N.S. 222.
(*w*) *Roberts* v. *Karr*, 1 Taunt. 495.
(*x*) *Fitchett* v. *Mellow*, 29 Ont. R. 6.

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

A way of necessity can exist only when a grant can be implied (*a*). So, where a parcel which was landlocked escheated, it was held that no way of necessity passed to the lord of the fee (*b*); and as such a way can only arise upon a grant of the soil, an equitable owner was held not entitled to maintain an action for such a way without joining the holder of the legal estate as a party (*c*). But a way of necessity will pass where the landlocked parcel is acquired by devise (*d*). Where a grantee is entitled to a way of necessity, the grantor has the right to assign the way (*e*); but if he neglects to do so, the grantee may select the way himself (*f*). The way, when selected by the grantor, need not be the most convenient one for the grantee (*g*), but it should be reasonably convenient (*h*).

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

A way of necessity is such a way as is necessary or suitable for the grantee at the time of the grant, and the right does not increase with the increase of the necessitous

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

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

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

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

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

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

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

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

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

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

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

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

Secondly, as to ways of necessity by implied re-grant. When the surrounding land is granted, and the landlocked parcel is retained, it is said that the grantor has a way of necessity over the surrounding lands (*m*). This, although apparently established by the authorities, is contrary to the principle upon which a way of necessity by implied grant is alleged to arise. In *Wheeldon* v. *Burrows* (*n*), Lord Justice Thesiger, quoting Baron Martin's words, said, "it no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant; but the law is distinctly laid down to be so, and probably for the reason given in *Dutton* v. *Taylor* (*o*), that it was for the public good, as otherwise the close surrounded would not be capable of cultivation." This does not seem to be the true reason, otherwise the way would have been held to exist in the case of escheated land, and the contrary is held (*p*). It seems to proceed upon the maxim that a man shall not derogate from his own grant, *i.e.*, he shall not grant a landlocked parcel and deny the right to get to it, and so render his grant ineffective. And we have seen that a man cannot, by his own act, as by building up, create for himself a necessity to use another's land (*q*). And an examination of

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

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

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

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

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

(*o*) 2 *Lutw.* 1487.

(*p*) Ante, p. 73.

(*q*) Ante p. 73; see also *Pomfret* v. *Ricroft*, 1 Wms. Saund. 323 *a*, Serjeant Williams' note.

the authorities upon which the modern cases proceed, will shew that they do not support the doctrine.

Where strict pleading is required, a right of way claimed by the grantor of the surrounding land should be pleaded as a re-grant (*r*). Such a way is neither the subject of an exception nor a reservation. The former being of a part of the thing granted, and the latter being properly applicable to something, not *in esse*, but newly created out of the thing granted (*s*).

9. *Ways by Prescription.*

"In the case of proving a right by prescription, the user of the right is the only evidence. In the case of a grant, the language of the instrument can be referred to, and it is, of course, for the court to construe that language" (*t*). In the case of a grant, if there is no clear indication of the intention of the parties, the grant is to be taken most strongly against the grantor. At the same time, as an easement is a restriction on the rights of property in the servient tenement, the owner of it is not to be burdened with greater inconvenience than his grant warrants. In the case of a way by prescription, the evidence of user is the only evidence of the right, and the extent of the user is the measure of the extent of the right. It would seem, therefore, that, as there is no grant to be construed, the servient tenement ought not to bear a greater burden than the accustomed user warrants. Consequently, a right of way of one kind acquired by prescription does not necessarily include a right of another kind. Nor, indeed, does it necessarily exclude it. In *Ballard* v. *Dyson* (*u*), Chambre, J., pointed out that, if that were so, it would be necessary to drive every species of cattle over a way in order to preserve the right of passing with every species of cattle. It is necessary, as Parke, B., said in *Cowling* v. *Higginson* (*v*), to generalize to some extent, otherwise the use of the way would be confined to the identical carriages or cattle that had been driven over it. But, on the other hand, it must be borne in mind that, while a user under a grant is a user as of right, and the grantor must not be allowed to belittle his grant, a

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

(*s*) Shepp. Touch. 77; Co. Litt. 143a; Ibid. 47a. See *Wilson* v. *Gilmer*, 46 U.C.R. 545.

(*t*) *William* v. *James*, L.R. 2 C.P. at p. 581.

(*u*) 1 Taunt. 279.

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

user by prescription is always, until the right is established by the prescription, a user against the right of the owner of the servient tenement. By a modified user for the necessary length of time, the prescriptive owner should not be allowed to claim a greater right or inflict a greater burden on the servient tenement than his user would warrant. And the effect of a trespass is never extended in favour of the trespasser beyond the actual fact. It was held in *Ballard* v. *Dyson*, by the majority of the court, that evidence of a right of way for carriages did not necessarily prove a right of way for cattle. So, proof of user of a way for agricultural purposes will not establish a right of way for mining, or for all purposes (*w*); nor will a right of way for the purpose of carting timber include a right of way for all purposes (*x*). It would be manifestly unfair to increase the burden in some instances, and the situation of and use to which the property is put might have a material effect upon the rights. Lord Abinger pointed out that, if the road lay through a park, the jury might naturally infer the right to be limited; but if it went over a common, they might infer a right for all purposes (*y*). In a locality where private residences of a superior class were situated, an owner might well submit to the acquisition by his neighbour of a right to drive a private carriage in and out over his land; but should a business, requiring the use of a large number of heavy drays, be established, after the right to drive a carriage had been acquired, it would materially increase the burden on his land, and depreciate his tenement to a large extent.

10. *Right to deviate from Way.*

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

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

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

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

(*z*) *Carrick* v. *Johnston*, 26 U.C.R. 65. As to roads incumbered with accumulations of snow, and rights and duties of adjoining proprietors, see R.S.O. c. 240.

(*a*) *Arnold* v. *Holbrook*, L.R. 8 Q.B. 96. And see the Municipal Act, R.S.O. c. 223, s. 601.

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

11. *Annuities.*

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

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

12. *Rents.*

Rents were at common law another species of incorporeal hereditaments.

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

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

(*c*) R.S.O. c. 170, ss. 4 *et seq.*

(*d*) R.S.O. c. 170, s. 3. See this enactment further considered post Chap. X.

The word rent or render, *reditus*, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance. It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit*; yet there is no occasion for it to be, as it usually is, a sum of money; for spurs, capons, horses, corn, and other matters may be rendered, and sometimes are rendered, by way of rent. It may also consist in services or manual operations; as to plough so many acres of ground, to attend the king or the lord to the wars, and the like; which services in the eye of the law are profits (*dd*). This profit must also be *certain*; or that which may be reduced to a certainty by either party. It must *issue out* of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always part of the thing granted. It must, lastly, issue out of *lands and tenements corporeal*; that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain. Therefore a rent cannot be reserved out of an adowson, a common, an office, a franchise, or the like. But a grant of such annuity or sum must operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt; though it doth not affect the inheritance, and is no legal rent in contemplation of law.

There are at common law three manner of rents:—rent-service, rent-charge, and rent-seck. *Rent-service* is so called because it hath some corporal service incident to it, as at the least fealty or the feudal oath of fidelity. For, if a tenant holds his land by fealty and ten shillings rent; or by the service of ploughing the lord's land, and five shillings rent; these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or in arrear, at the day appointed, the lord might at common law distrain of common right, without reserving any special power of distress; provided he had in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee was expired. And also since the statute referred to, the landlord may probably distrain though he has no reversion left in him at the time of making the lease, for the statute does not

(*dd*) Cleaning a church and ringing the church bell at certain times, held to be rent: *Doe d. Edney* v. *Benham*, 7 Q.B. 976.

require that a reversion shall be necessary to create the relation, as it was at common law. And if the lessor had at common law parted with his reversion, though the rent was due before, still he could not *distrain* (*e*), for the privity of *estate* was gone; he might, however, sue for the rent on the covenant to pay. And since the statute referred to, if a landlord should make a lease leaving no reversion in himself, and then afterwards should assign his right to receive the rents, he probably could not distrain for rent due before the assignment by analogy to the case at common law, though he might sue for the arrears then due to him.

The assignee of the landlord could neither distrain nor sue in his own name prior to 35 V. c. 12 (*f*), for rent *overdue before assignment*, though expressly assigned to him, for at the time it fell due there was no privity of estate between him and the lessee, and as regards any transfer of the right to sue for the breach of the covenant, it was void at law on the common law principles of maintenance (*g*), and though a statute of 32 Hen. VIII. c. 34, gave to the assignee of a reversion many of the rights of a reversioner, it did not transfer to him any chose in action, and rent in arrear was merely a chose in action (*h*). Since the modern statute just referred to making choses in action assignable, it is competent for the landlord to assign rent in arrear, and the assignee having an express assignment may recover it as a debt (*i*).

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

To remedy the want of authority at common law, it was, by 32 Hen. VIII. c. 37, enacted that the personal representatives of any lessor seised of *a freehold* might distrain for arrears of rents service, charge, or seck due him in his life-time, so long as the land was in possession of the tenant who ought to

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

(*f*) R.S.O. (1887) c. 122, s. 7; R.S.O. (1897) c. 58, s. 5.

(*g*) *Wittrock* v. *Hallman*, 13 U.C.R. 135.

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

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

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

have paid, or of any *claimant* from him by purchase gift or descent.

By R.S.O. c. 129, ss. 13, 14, the executors or administrators of any lessor or landlord may distrain upon the lands demised for any term, or at will, for arrears due the lessor in his life-time; but the distress must be made within six months after the determination of the lease, and during the continuance in possession of the tenant from whom the arrears are due. This, of course, was an infringement on the common law rule above laid down, that the distrainor must have in himself the reversion to warrant a distress; for in the case of a freehold reversion, it formerly descended to the heirs of the lessor and not to his personal representatives.

There is a further instance in which the person not having the reversion on a lease may nevertheless now by statute have the same remedies and rights as if he were reversioner. Thus, if before the statute A. seised in fee demised to B. for a term, reserving $20 yearly, and B. *sub-let* to C. for part of the term, reserving $100 yearly, with covenants for payment, and to repair, etc.; here A. could not sue C. on the rent reserved or covenants contained in the sub-lease, for there was neither *privity of contract nor privity of estate* between A. and C., which subsists only between B. and C. If B. in such a case assigned his reversion to a stranger, he, as assignee of the reversion, would be in privity with C., both in estate and in contract (so far, at least, as regards covenants running with the land), and so entitled to the rent and benefit of such covenants under the sub-lease. But if B. surrendered his reversion to A. here by the doctrine of *merger*, which is hereafter alluded to, the reversion ceased to exist, being merged or drowned in the greater estate of inheritance of A. The consequence was, that though A. might have purchased from B. under the supposition that he would, as assignee of B.'s reversion, be entitled to the benefit of the whole rent and covenants in the sub-lease, he acquired, in fact, no such benefit, for the reversion had ceased to exist, and therefore he could not claim as assignee; nor, as before explained, could he otherwise sue C., by reason of want of all privity between them; neither could he recover the rent reserved on the lease granted by himself, as the term in respect of which it was payable was merged. The same unpleasant consequences followed, if B. purchased from A., his (A.'s) reversion, for here the greater estate of A.

equally meets and merges the lesser estate of B., which thenceforth ceases, and consequently with it all its incidents. To remedy these and other cases, a statute was passed by which it is enacted that where a reversion is merged or surrendered, the estate which confers, as against the tenant under the same lease, the next vested right to the same land, shall to the extent of and for preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease (*k*).

It will be observed that this enactment deals with cases of merger of estates only, and provides certain artificial rights which did not exist at common law. Whether it will be applicable to cases where there is no reversion, which may now happen since tenure between landlord and tenant is abolished, is very doubtful.

At common law, a lessor could not distrain after the term was ended; the consequence was, that as a landlord could not distrain for rent on the day it was due (the tenant being entitled to the whole day wherein to pay), he could not when the rent fell due on the last day of the term, distrain at all. To remedy this it is enacted by 8 Anne, c. 14, that rent may be distrained for within six months after the end of the term, provided there be continuance of the landlord's title, and possession of the tenant from whom the arrears were due. As the tenant may vacate the demised premises immediately upon the cesser of the term, and so deprive the landlord of his right to distrain under this Act, it is customary in drawing leases to make the last payment of rent fall due before the end of the term.

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

13. *Rent-charge.*

A *rent-charge* is where the owner of the rent hath no future interest, or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee-simple, reserving rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be in arrear or behind, it shall be lawful to distrain for the same. In

(*k*) R.S.O. c. 170, s. 10.

this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-*charge*, because in this manner the land is charged with a distress for the payment of it (*l*).

Such a case as the above varies altogether from the case of a demise at common law wherein the lessor had a reversion, and *reserved* rent, which is a rent-service. When a person grants his *whole* estate, leaving in himself no reversion, and reserves rent, it will not, by reason of the statute *Quia emptores* operate as a reservation of *rent-service* for which distress may be had of common right; but it operates as a reservation of a *rent-charge*, which will be a rent-seck, unless a power of distress be given. It may also be created by conveyance under the Statute of Uses; as if A., seised in fee, should grant to B. and his heirs, to the *use* and intent that A. and his heirs may, out of the lands conveyed, receive a rent-charge; to which is further, sometimes, added further uses, as that on non-payment, A. and his heirs may distrain, or re-enter and hold till payment, etc. The Statute of Uses (ss. 4 and 5) enacts that when any person shall stand seised of any lands, in fee-simple or otherwise, *to the use and intent* that some other shall have yearly to them and their heirs or their assigns, any annual rent, the persons *that have such use* to have the rent, shall be adjudged and deemed in possession and seisin of it, of the same estate as they had in the use of it, and may distrain. A rent-charge may also be created by express grant; as when A. grants to B. a rent-charge out of A.'s lands. Although the general result is the same, there is a substantial distinction as regards title between these two methods of creating a rent-charge. In the first two cases the title to the rent-charge depends upon the title to the land—it takes effect by reason of the assurance of the land. In the last of the three cases, if the title to part of the land fails, the rent-charge remains unaffected. Thus, if A. should grant land in fee to B., reserving a rent-charge, and B. should afterwards be evicted from part of the land by title paramount, the rent is to be apportioned according to the value of the land. But if A., owner in fee, grant a rent-charge to B., and then be evicted from part of the land, he cannot take advantage of the weakness of his own title to defeat, even in part, his grant of the rent-charge, which is therefore not apportioned in that case (*m*).

(*l*) See *Re Gerard & Beecham*, L.R. (1894) 3 Ch. 295.

(*m*) *Hartley* v. *Maddocks*, L.R. (1899) 2 Ch. 199.

At common law, if the owner of the rent released part of the land from the charge, the whole rent was discharged, for the charge was entire, and issued out of and was charged on every part of the land, and was also against what is termed *common right* (*n*). So also, if the owner of the rent purchased, or took by devise (*o*), part of the lands charged, the whole charge was released by operation of law. But if part of the lands were acquired by descent, or by title paramount (*p*), no release would take place. The owner of the rent could always release part of it to an owner of the land.

By R.S.O. c. 119, s. 27, a release from the charge of part of the property charged shall not extinguish the whole charge, but shall operate only to bar the right to recover any part of the charge out of the property released, but without prejudice to the rights of all interested in the property unreleased and not concurring in or confirming the release.

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

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

A rent-charge may be granted in fee simple, or for a less estate; of course it cannot last longer than the estate of the

(*n*) Co. Litt. 148; see also generally, notes to *Clun's case*, Tud. Lg. Ca. 4th ed. 33.

(*o*) *Dennett* v. *Pass*, 1 B.N.C. 388.

(*p*) Co. Litt. 148 *b*.

(*q*) *Hunter* v. *Hunt*, 1 C.B. 300, and cases cited.

grantor; thus, if the grantor have only a life estate, his grant will be commensurate with his estate.

14. *Rent-seck.*

Rent-seck, reditus siccus, or barren rent, was at common law, in effect, nothing more than a rent reserved by deed, but without any clause of distress. It must be understood, however, that by the deed no reversion was left in the grantor, but that he made over his whole estate, for if a reversion were left in him, the rent would have been rent-service. And it would seem that, strictly speaking, there could be no reservation, *quâ* reservation, of a rent-seck; for, if the whole estate of the grantor were made over by deed, the rent-seck reserved or made payable would not enure by way of reservation, but by way of re-grant of the rent; and if the whole estate were not made over, the rent would not be rent-seck but rent-service. A rent-seck might also have arisen on grant of a rent without a clause of distress to a person having no estate or interest in the land; or, as before mentioned, by grant by a lessor or owner of rent-service of *future* rent only without the reversion (*r*). Attention must again be called to the statute which abolishes tenure between landlord and tenant, and renders unnecessary the retention of a reversion by the landlord. Whether a lease granted since that statute, for the whole interest of the lessor, reserving rent to him, would be treated as a re-grant to him of a rent-seck, or as an ordinary lease reserving rent for which he might distrain, it is impossible to say in the absence of any judicial pronouncement upon the Act.

By the Act of 5 Geo. II. c. 28, the like remedy by distress was given to recover rent-seck as existed in case of rent-service reserved in a lease to a reversioner.

By R.S.O. c. 170, s. 2, rent, like interest on money lent, is to be considered as accruing from day to day, and is apportionable in respect of time accordingly, unless it is stipulated in the instrument that no apportionment shall take place (s. 6). Hence, where a tenant was evicted, the landlord was held entitled to recover rent up to the day of eviction only (*s*). And where a garnishing order issues at the instance of a creditor of the landlord, the apportioned part of the rent

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

(*s*) *Barnes* v. *Bellamy*, 44 U.C.R. 303; see also *Boulton* v. *Blake*, 12 Ont. R. 532.

which has accrued up to the date of the attaching order may be ordered to be paid to the creditor on the next gale day, the statute (s. 3) providing that the apportionment shall not accelerate the payment (*t*). It is also enacted (s. 4) that all persons and their representatives, whose interests determine with their own deaths, have the same remedies for recovering the apportioned parts of the rents as they would have had for the entire portion if entitled thereto.

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

15. *Franchises.*

Franchises are another species of incorporeal hereditament. Their definition is a royal privilege, or branch of the Sovereign's prerogative subsisting in the hands of a subject. Being therefore derived from the Crown, they must arise from the grant of the Sovereign. They are of various kinds. Among other franchises are those to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, markets and ferries.

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

CHAPTER VIII.

OF FREEHOLD ESTATES OF INHERITANCE.

(1). *Estates Generally.*
(2). *Fee Simple.*
(3). *Words Necessary to Create a Fee.*
(4). *Limited or Qualified Fees.*
(5). *Base Fees.*
(6). *Conditional Fees.*
(7). *Origin of Estates Tail.*
(8). *What May be Entailed.*
(9). *The Several Species of Estates Tail.*
(10). *Incidents of an Estate Tail.*
(11). *Fines and Recoveries.*
(12). *Estates Tail Not Exigible.*

1. *Estates Generally.*

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

First, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration

(*u*) Co. Litt. 345.

and extent. Thus, either his right of possession is to subsist for an uncertain period during his own life or the life of another man; to determine at his own decease, or to remain to his descendants after him; or it is circumscribed within a certain number of years, months, or days; or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of estates into such as are *freehold* and such as are *less than freehold*.

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

An estate of freehold, *liberum tenementum*, or franktenement, is such an estate as at common law required actual possession of the land; and no other is, legally speaking, freehold; which actual possession could, prior to the Statute 14 & 15 V. c. 7 (R.S.O. c. 119, s. 2), by which the immediate freehold lies in grant as well as in livery by the course of the *common law*, be only given by the ceremony called livery of seisin, which is the same as the feudal investiture. And from these principles we may extract this description of a freehold: that it is such an estate in lands as was formerly only conveyed by livery of seisin; or, in tenements of an incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton that, where a freehold shall pass, it behoveth to have livery of seisin. As, therefore, estates of inheritance and estates for life could not by *common law* be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates were required to be conveyed with the same solemnity, therefore no others were or yet are properly freehold estates (*v*).

(*v*) It is suggested that the above definition, so far as it makes *possession* essential to the existence of a freehold estate, is perhaps at the present day subject to some qualification. If lands be limited to A. for life, remainder to B. for life; or to A. for life, remainder to B. in tail, remainder to C. for life or in fee, these remainders are still now regarded as freehold estates, though the possession is in A.; and A., as the taker of the first of the freehold estates, is said to have the *immediate* freehold: Preston Estates, vol. 1, 214, 215. This distinction is also recognised by R.S.O. c. 119, s. 2, which enacts that corporeal hereditaments shall, as regards the *immediate* freehold thereof, lie in grant as well as in livery. The Act clearly recognises freehold estates other than immediate, and consequently not accompanied by possession; these it does not provide for, as they lay in grant before the Act, since possession could not be given or livery made. Moreover, possession in the strict sense of the word cannot be had in an incorporeal tenement, and yet a freehold estate may exist in it. To this may be added that "such interests only as may continue for the period of a life are estates of freehold; all interests for a shorter period, or, more properly speaking, for a definite space of time, are chattel interests": Prest. Estates, 203.

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

2. *Fee-Simple.*

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

(*w*) Co. Litt. 1.

subject can have by these words:—"he is seised thereof *in his demesne as of fee*." It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs for ever; yet, this *dominicum*, property, or demesne, is strictly not absolute or allodial, but qualified or feudal; it is his demesne *as of fee*; that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides. And hence it is that the holder of lands, though in fee-simple, is still termed *tenant* in fee.

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

Taking, therefore, *fee* for the future, unless where otherwise explained, in this its secondary sense, as an estate of inheritance, it is applicable to, and may be had in, any kind of hereditaments, either corporeal or incorporeal. But there is this distinction between the two species of hereditaments, that, of a corporeal inheritance, a man shall be said to be seised *in his demesne as of fee;* of an incorporeal one, he shall only be said to be seised *as of fee*, and not in his demesne. For, as incorporeal hereditaments are in their nature collateral to and issue out of, lands and houses, their owner hath no property, *dominicum*, or demesne, in the *thing* itself, but hath only something derived out of it, resembling the *servitutes*, or services of the civil law. The *dominicum* or property is frequently in one man, while the

appendage or service is in another. Thus Caius may be seised *as of fee* of a way leading over the land, of which Titius is seised *in his demesne as of fee.*

3. *Words Necessary to Create a Fee.*

At the common law, before 2nd July, 1886, the word "heirs" was necessary in the grant or donation, in order to make a fee, or inheritance. For, if land were given to a man forever, or to him and his assigns forever, this vested in him but an estate for life. This very great nicety about the insertion of the word "heirs" in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness; by which, we may remember, it was required that the form of the donation should be punctually pursued. And, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs.

But this rule of the common law was subject to many exceptions. It did not extend to devises by will; in which as they were introduced at the time when the feudal rigour was apace wearing out, a more liberal construction was allowed; and therefore by a devise to a man forever, or to one and his assigns forever, or to one in fee-simple, the devisee took an estate of inheritance; for the intention of the devisor was sufficiently plain from the words of perpetuity annexed, which were to some extent descriptive of the estate intended to be devised, though he had omitted the technical words of inheritance. In many cases, also, a fee would pass by a will though there were no words of perpetuity; as on a devise to A., coupled with a *personal* duty which might require that the fee should pass, as to settle children in business, or to pay a sum of money to another; but if the duty enjoined were a mere *charge* on the estate, and the acceptance of the devise involved the devisee in no personal responsibility, the fee would not pass (*x*). Now, by 4 Wm. IV. c. 1, R.S.O. c. 128, s. 4, a devise of land contained in a will shall pass all the estate in the land whereof the devisor was seised, unless it appear on the face of the will that the testator intended to devise a lesser estate.

(*x*) *Lloyd* v. *Jackson*, L.R. 2 Q.B. 269.

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

In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs;" for as heirs take from the ancestor, so does the successor from the predecessor. But in a grant of land to a corporation aggregate, the word "successors" is not necessary, though usually inserted; for, albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one. Still it differs from an ordinary fee-simple in this, that if by any means the corporation be dissolved whilst holding the land, the interest it then has will revert to the grantor or his heirs, and not go to the Crown by escheat. On such a grant, therefor, though the word "successors" be named, there is what is termed a *possibility of reverter.*

Lastly, in the case of the king, a fee-simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason

(*y*) *Ruttan* v. *Ruttan*, R. & J. Dig. Col. 3286.
(*z*) 2 Prest. on Est. 2; Shepp. Touch. 101.
(*a*) See Armour on Titles, 4.

similar to the last, because the king in judgment of law never dies. But the general rule is that the word "heirs" was necessary to create an estate of inheritance. The word "assigns" was and is superfluous and has no conveyancing significance (*b*).

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

"(1) In a deed, or other instrument, it shall not be necessary, in the limitation of an estate in fee simple, to use the word heirs; or in the limitation of an estate in tail to use the words heirs of the body; or in the limitation of an estate in tail male or in tail female, to use the words heirs male of the body, or heirs female of the body.

(2) For the purpose of any such limitation it shall be sufficient in a deed, or other instrument, as in a will, to use the words in fee simple, in tail, in tail male, or in tail female, according to the limitations intended, or to use any other words sufficiently indicating the limitation intended.

(3) Where no words of limitation are used, a conveyance shall pass all the estate, right, title, interest, claim and demand, which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same. This sub-section applies only if and as far as a contrary intention does not appear from the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained."

The result of this enactment is that it is not necessary to use technical words of limitation, but words descriptive of the estate intended to be conveyed shall be sufficient, as in fee simple, or by other words sufficiently indicating the quantity of the estate to be conveyed; and if no technical or descriptive words are used, then the whole interest or estate of the conveying party passes, unless the conveyance shews a contrary intention. Thus conveyances *inter vivos* are put upon the same plane as wills. This enactment will be further dealt with in treating of estates tail and life estates.

(*b*) *Milman* v. *Lane*, 16 T.L.R. 568.
(*c*) 49 V. c. 20, s. 4; R.S.O. c. 119, s. 4.

4. *Limited or Qualified Fees.*

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

5. *Base Fees.*

A base, or qualified fee, is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to A. and his heirs, *tenants of the manor of Dale*; in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So, when Henry VI. granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of Barons of Lisle; here, John Talbot had a base or qualified fee in that dignity, and, the instant he or his heirs quitted the seigniory of this manor, the dignity was at an end. This estate is a fee because by possibility it may endure forever in a man and his heirs; yet, as that duration depends on the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee. This estate is to be distinguished from a base fee under the Act respecting Assurances of estates tail, R.S.O. c. 122. The term "base fee" is frequently made use of in that statute, and, as there used, it signifies that estate in fee simple into which an estate tail is converted, where the issue in tail are barred, but those entitled in remainder or otherwise are not barred; as where there is a protector to the settlement who refuses to consent to the disposition by the tenant in tail who conveys in fee simple; here only the issue in tail are barred, and not those in remainder or reversion, and the estate of the grantee is called a base fee. The result is that an estate in fee simple passes which endures as long as there exist issue of the donee in tail, but comes to an end when they fail. It will be seen that such an estate, though of a different origin, is within the definition given above, for it may by possibility endure forever in the grantee and his heirs, viz., if the issue of the donee in tail endure forever, and its duration depends

on that collateral circumstance which qualifies and debases the purity of the grant in fee simple by the tenant in tail.

6. *Conditional Fees.*

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

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

(*d*) Co. Litt. 19.

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

7. *Origin of Estates Tail.*

The inconveniences which attended these limited and fettered inheritances, were probably what induced the judges to give way to this subtle finesse of construction (for such it undoubtedly was), in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the Statute of Westminster the Second, 13 Edward I. c. 1 (commonly called the Statute *De donis conditionalibus*) to be made which paid a greater regard to the private will and intentions of the donor, than to the propriety of such intentions or any public considerations whatsoever. This statute revived in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, "that the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed; so that they to whom the land was given under such condition, shall have no power to

aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert to the giver or his heirs if issue fail."

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

8. *What May be Entailed.*

Having thus shewn the *original* of estates-tail, we now proceed to consider *what things* may or may not be entailed under the Statute *De donis*. *Tenements* is the only word used in the Statute; and this Sir Edward Coke expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments which savour of the realty, that is, which issue out of corporeal ones, or which concern or are annexed to, or may be exercised within the same; as rents, estovers, commons, and the like. Also offices and dignities, which concern lands or have relation to fixed and certain places, may be entailed. But mere personal chattels, which savour not at all of the realty, cannot be entailed; nor even chattels real, as terms of years; and in each of these cases, if the gift be in such terms as would, in case the donor were seised in fee-simple, confer an estate-tail on the donee, such donee will, as a general rule, take the whole absolute interest though without issue (*f*). Neither can an office be entailed which merely relates to such personal chattels; nor an annuity which charges only the person and not the lands of the grantor; that is, if the owner in fee of such an office or annuity (as in the case of grant to a man and his heirs of

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

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

such office or annuity, which, as before explained, would confer an incorporeal hereditament) should give the same to another and the heirs of his body, such other hath still a fee conditional at common law as before the Statute; and by his alienation (after issue born) may bar the heir or reversioner (*g*). An estate to a man and his heirs for another's life cannot be entailed, for this is strictly no estate of inheritance (as will appear hereafter), and therefore not within the Statute *De donis*.

9. *The Several Species of Estates Tail.*

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

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

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

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

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

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

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

his *seed*, or to a man and his *heirs male*; or by other irregular modes of expression descriptive of the estate intended to be devised.

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

10. *Incidents of an Estate Tail.*

The *incidents* of a tenancy in tail, under the Statute Westm. 2, are chiefly these:—1. That a tenant in tail may commit *waste* on the estate-tail, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same. But, tenant in tail after possibility of issue extinct may be restrained on equitable grounds from committing humoursome or malicious waste, such as tearing down the mansion-house of an estate without cause. 2. That the wife of the tenant in tail shall have her *dower*, or thirds, of the estate-tail. 3. That the husband of a female tenant in tail may be tenant by the *curtesy* of the estate tail. 4. That an estate tail might formerly have been *barred* or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir, and may now be barred by a conveyance in conformity with the provisions of the Stat. 9 V. c. 11, R.S.O. c. 122. All which will hereafter be explained at large.

Thus much for the nature of estates-tail; the establishment of which family law (as it is properly styled by Pigott), occasioned infinite difficulties and disputes. Children grew disobedient when they knew they could not be set aside;

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

11. *Fines and Recoveries.*

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

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

recoveries, however clandestinely introduced, became, by long use and acquiescence, a most common assurance of lands; and were looked upon as the legal mode of conveyance, by which tenant in tail might dispose of his lands and tenements; so that no court would suffer them to be shaken or reflected on, and even Acts of Parliament have, by a side wind, countenanced and established them.

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

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

Estates-tail might have been formerly barred by warranty descending with assets to the heir, as well as by a fine or recovery. The operation of fines and recoveries, their abolition, and the mode of barring substituted therefor by 9 V. c. 11, R.S.O. c. 122, is reserved for future consideration in treating of conveyances by tenants in tail. It may now, however, be mentioned shortly, that, by that statute, every actual tenant in tail in possession, remainder, expectancy, or otherwise, except issue inheritable in expectancy to an estate-tail, and tenants in tail after possibility of issue extinct, and those restrained by the before-named Act of 34 & 35 Hen. VIII., or by any other Act from barring their estates-tail, may by proper assurance under seal to be

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

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

registered within six months after execution, convey such estate-tail in fee-simple absolute, or for any lesser estate, and thereby bar the issue in tail, and all in remainder or reversion to the extent of the estate conveyed; but if it should happen that at the time of such conveyance there should be a *protector to the settlement* (generally a person having under the same settlement the first life estate prior to the estate-tail), then the consent of such protector is requisite, otherwise the issue in tail only will be barred, and not those in remainder or reversion.

12. *Estates Tail not Exigible.*

Estates-tail are not liable to execution in Ontario unless they can be brought within the general words of *The Execution Act*, which is perhaps more than doubtful. It is clear that at common law the tenant in tail could not charge more than his own interest, either by voluntary or involuntary charge (*k*), for the heir could oust the creditor of his ancestor under the paramount title derived from the original gift. In England it is enacted (*l*) that a judgment entered up against any person "shall operate as a charge upon all lands . . . of or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seised . . . or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom such judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against *the issue of his body and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion*, or other interest in or out of any of the said lands, etc." Under this enactment, it appears to be the practice for the Court to direct a disentailing deed to be executed (*m*) so as to satisfy the judgment, though the process of the Court may be sufficient without it (*n*).

There is no corresponding enactment here, and the case must remain as at common law unless covered by the words

(*k*) Cru. Dig. Tit. 2, c. 2, s. 33.

(*l*) 1 & 2 V. c. 110, s. 13.

(*m*) *Lewis* v. *Duncombe*, 20 Beav. 398.

(*n*) *Re Anthony*, L.R. (1893) 3 Ch. at p. 502.

of *The Execution Act*. By section 35 of that Act (*o*) it is enacted, under the heading "Contingent interests," that "any estate, right, title, or interest in lands which, under section 8 of *The Act Respecting the Transfer of Real Property*, may be conveyed or assigned by any person, or over which he has *any disposing power which he may, without the assent of any other person, exercise for his own benefit*, shall be liable to seizure and sale under execution against such person, etc." The words in italics are found in the Imperial Act, but there they plainly do not include estates-tail, which have special words inserted in juxtaposition to these to render them liable. The strongest and widest dictum as to the meaning of these words must therefore be understood with that in view. Thus in *Kindersley* v. *Jervis* (*p*), the Master of the Rolls said, respecting these words: "What I apprehend the Legislature meant was this—that the judgment was to operate on all lands and interests in lands over which the debtor might have a disposing power for his own benefit, without committing a breach of duty, that is, over which he had a right at law or in equity to consider himself the beneficial owner." This is explained by the further passage: "It cannot, I think, have been the intention of the Legislature to say that the judgment creditor shall acquire a charge on lands which do not in reality belong to the judgment debtor, but over which, by operation of law, he has such a disposing power that, if he were fraudulently disposed, he might sell them and put the money in his own pocket." The generality of the dictum is thus restricted, and it was of course not intended to cover the case of an estate-tail.

Finding these words, however, in the Ontario Statute, without the contrast that the Imperial Act affords, the question is whether the intention to charge estates-tail is sufficiently shewn.

Ranged, as they are, under the heading "Contingent interests," and having regard also to the fact that the primary and substantial object of the section is to deal with certain defined interests, if the principle that the head-line restricts the meaning of the section, is to apply (*q*), then estates-tail must be excluded.

(*o*) R.S.O. c. 77.

(*p*) 22 Beav. at p. 26.

(*q*) *Wood* v. *Hurl*, 28 Gr. 146, and cases cited; *Lang* v. *Kerr*, 3 App. Ca. 529.

Again, section 8 of *The Act Respecting the Transfer of Real Property* (*r*), provides that "A contingent, an executory, and a future interest . . . may be disposed of by deed; but no such disposition shall, by force only of this Act, defeat or enlarge an estate-tail." In making such interests saleable under *The Execution Act* by reference to the *Transfer of Property Act*, the Legislature necessarily incorporated the exception as to estates-tail contained in the latter Act, and plainly did not intend that estates-tail should be included. And it is reasonable to infer that, having excepted them by this reference from the opening words of the section, it did not intend that they should be included under the dubious words immediately following, viz., "over which he has any disposing power, etc." These words were added to this section by an amendment made in 1877 (*s*), and more explicit words would doubtless have been used had the intention been to include estates-tail.

(*r*) R.S.O. c. 119.
(*s*) 40 V. c. 8, s. 37.

CHAPTER IX.

OF FREEHOLDS, NOT OF INHERITANCE.

(1). *Life estates, Generally.*
(2). *Waste.*
(3). *Emblements.*
(4). *Tenant for Life must keep down Charges.*
(5). *Tenant in Tail after Possibility of Issue Extinct.*
(6). *Tenant by the Curtesy.*
(7). *Marriage.*
(8). *Seisin of the Wife.*
(9). *Issue must be born Alive.*
(10). *Death of the Wife.*
(11). *Dower.*
(12). *Marriage.*
(13). *Dower in Legal Estates.*
(14). *Dower in Equitable Estates.*
(15). *Bar and Forfeiture of Dower.*
(16). *Life Estates by Descent.*

1. *Life Estates Generally.*

We are next to discourse of such estates of freehold, as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional*, or expressly created by the act of the parties; others merely *legal*, or created by construction and operation of law. We will consider them in their order.

Estates for life, expressly created by deed or grant (which alone are properly conventional), are where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one, in any of which cases he is styled tenant for life only; when he holds the estate by the life of another, he is usually called tenant *pur auter vie*. These estates for life

are, like inheritances, of a feudal nature; and were, for some time, the highest estate that any man could have in a feud, which as we have before seen was not in its original hereditary. They were given or conferred by the same feudal rights and solemnities, the same investiture or livery of seisin, as fees themselves; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

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

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

Such estates for life will, generally speaking, endure as long as the life for which they are granted; but there are

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

(*u*) 49 V. c. 20, s. 4 (3); now R.S.O. c. 119, s. 4 (3).

some estates for life, which may determine upon future contingencies, before the life for which they were created expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen.

2. *Waste.*

The *incidents* of an estate for life are principally the following, which are applicable not only to that species of estates for life, which are expressly created by deed, but also to those which are created by act and operation of law.

Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him *reasonable estovers* or *botes*. For he hath a right to the full enjoyment and use of the land, and all its profits, during his estate therein. But he is not permitted to do waste upon the premises (*v*), for the destruction of such things as are not the temporary profits of the tenement, is not necessary for the tenant's complete enjoyment of his estate, but tends to the permanent and lasting loss of the person entitled to the inheritance.

Waste, *vastum*, is a spoil or destruction in houses, gardens, trees or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail. Waste is either *voluntary*, which is a crime of commission, as by pulling down a house; or it is *permissive*, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste. Therefore, removing wainscot, floors, or other things once fixed to the freehold of a house, is waste. If a house be destroyed by tempest, lightning or the like, which is the act of Providence, it is no waste; but otherwise, if the house be burnt by the carelessness or negligence of the lessee; though now, by the statute 6 Anne, c. 31, no action will lie against a tenant for

(*v*) *Clow* v. *Clow*, 4 Ont. R. 355.

an accident of this kind. Other statutes affecting the subject were 12 Geo. III. c. 73, and 14 Geo. III. c. 78, ss. 84, 86. The latter statute was substantially the same as the statute of Anne, but was repealed by 50 V. c. 26, s. 154. There is a great distinction between accidental fire and one arising from carelessness or negligence, and the absence of this distinction is commented on in one case (*w*), wherein the distinction is pointed out between negligence and accident; in the former case the tenant would be liable. If the tenant, however, covenanted to repair, without exception in case of fire, he will be bound to rebuild; so also though destruction happen by the act of God (*x*); and even though such exception be made in the covenant to repair, still, if none be made in the covenant to pay rent, the rent must be paid, notwithstanding the destruction of the thing demised.

Timber is part of the inheritance, and at common law, to cut down such, or to do any other act whereby the timber may decay, is waste; but this must be taken subject to the observations hereafter made. Moreover, in modern cases, waste is said to be of a flexible nature, and variable according to circumstances. Underwood, the tenant may cut down at any seasonable time that he pleases; and may take sufficient estovers of common right, for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions. The conversion of land from one species to another is waste; to convert wood, meadow or pasture into arable; to turn arable, meadow or pasture into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste. For, as Sir Edward Coke observes, it not only changes the course of husbandry, but the evidence of the estate, when such a close, which is conveyed and described as pasture, is found to be arable, and *e converso*. And the same rule was observed for the same reason, with regard to converting one species of edifice into another, even though improved in its value. To open the land to search for mines of metal, coal, etc., is waste; for that is a detriment to the inheritance; but, if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use; for it has now become the mere annual profits of the land. It must be observed, however, that the conversion of the character of the

(*w*) *Filliter* v. *Phippard*, 11 Q.B. 347; see also *Gaston* v. *Weld*, 19 U.C.R. 586.

(*x*) 2 Wms. Saunders, 422 *a*.

land, thereby changing the evidence of the estate, is of little or no weight in modern times, and especially not in Ontario, where a system of registry prevails (*y*).

Then, again, waste may be *meliorating* in its character, and so such as a Court of Equity will not restrain (*z*), and for which no jury would give damages; and thus the mere change from one kind of edifice to another of greater value is not necessarily, *ipso facto*, waste; or, at any rate, is waste for which nominal damages only would be given.

The question of what is waste in this Province has occasioned some controversy. Tapping maple trees, for the purpose of making sugar of the sap, though a cutting of timber in a sense, is not, as a question of law, waste. It has been held to be a question for a jury whether it tends to shorten the life of, and in the end destroy, the trees (*a*). But where an estate is kept for the purpose of producing saleable timber, and the timber is cut periodically, that is considered as the mode of cultivation, and not waste (*b*). And so, if maple trees are kept for the purpose of producing sugar, this mode of user by a tenant for life would probably, on the same principle, not be considered as waste. Clearing wild land in the ordinary course of husbandry, for the purpose of rendering it fit for cultivation, is not waste in this Province (*c*). As to the right of the tenant to dispose of the timber cut, there has been a difference of judicial opinion. In one case it was said that the tenant was at liberty to destroy the timber when cut, without being impeachable of waste; but that if he sold it, he would be guilty of waste as to the timber sold (*d*). But in another case it was said that if the cutting for the purpose of clearing were lawful, and not waste, the subsequent sale of the timber could not render the cutting unlawful, and so waste (*e*). The former, however, seems to be the correct view. "Wood cut for house bote, but proving unfit, must not be converted by the tenant to any other use (22 Viner, p. 456); *qu.*, unless it is required for some other

(*y*) See the observations of Lord O'Hagan, in *Doherty* v. *Allman*, 3 App. Ca. at p. 726.

(*z*) *Doherty* v. *Allman*, 3 App. Ca. at p. 726.

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

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

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

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

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

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

Where a tenant for years of wild land covenanted to yield up any improvements made by him, but refused to be bound to make any, and, accordingly, did not covenant to do so, he was held to the strict legal position assumed by him, and was ordered to pay damages for timber cut and was restrained from further cutting (*k*).

(*f*) *Bowes* on Waste, p. 50.
(*g*) 7 Bing. 640.
(*h*) Com. Dig. Waste (D) 5.
(*i*) Co. Litt. 53 *b*.
(*j*) 2 Roll. Abr. 823, l. 14.
(*k*) *Goulin* v. *Caldwell*, 13 Gr. 493.

Tenant for years is liable for permissive waste (*l*), though his liability is usually defined by express covenant. But tenant for life is not liable to those in remainder for permissive waste (*m*); though he is of course liable for voluntary waste (*n*).

Courts not only interfere to prevent voluntary waste on purely legal grounds, but they also act upon equitable grounds in restraining that species of waste for which there is no remedy at law, and which is therefore called equitable waste. Thus, a tenant for life without impeachment of waste, though not liable at law, will be restrained on equitable grounds from committing malicious, extravagant and humoursome waste, as pulling down a mansion house, or farm houses, felling timber planted or left standing for shelter or ornament of a mansion house or grounds; and so also will a tenant in fee whose estate is liable to be defeated by an executory gift over.

Where it is desired to give a life tenant the right to cut timber and do other acts which would otherwise be waste, he is made tenant for life without impeachment of waste. But a life tenant, who was also executrix with "full and absolute control" over the estate during her life, was held to be punishable for waste (*o*).

3. *Emblements.*

Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain. Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executors shall have the *emblements*, or profits of the crop; for the estate was determined by the *act of God*, and it is a maxim in the law, that *actus Dei nemini facit injuriam*. The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labour and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which, being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and

(*l*) *Hornett* v. *Maitland*, 16 M. & W. 257; *Yellowly* v. *Gower*, 11 Ex. 293.

(*m*) *Patterson* v. *Central Can. L. & S. Co.*, 29 Ont. R. 134; *Re Parry & Hoskin*, L.R. (1900) 1 Ch. 160.

(*n*) *Clow* v. *Clow*, 4 Ont. R. 355, and cases above cited.

(*o*) *Pardoe* v. *Pardoe*, 16 T.L.R. 373.

privilege the law can give. So it is also if a man be tenant for the life of another, and *cestui que vie*, or he on whose life the land is held, dies after the corn is sown, the tenant *pur auter vie* shall have the emblements. The same is also the rule, if a life estate be determined by the *act of law*. Therefore if a lease be made to husband and wife during coverture (which gives them a determinable estate for life), and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*, the husband shall have the emblements in this case; for the sentence of divorce is the act of law. But if an estate for life be determined by the tenant's *own act* (as by forfeiture; or, if a tenant during widowhood thinks proper to marry), in these and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements. The doctrine of emblements extends not only to corn sown, but to other annual products of annual labour, as to roots planted, or other annual artificial profit, but it is otherwise of fruit trees, grass, and the like, which are not planted annually at the expense and labour of the tenant, but are either a permanent, or natural profit of the earth. For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants.

A third incident to estates for life relates to the under-tenants, or lessees. For they have the same, nay greater indulgences than the lessors, the original tenants for life. The same—for the law of estovers and emblements with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place. And greater—for in those cases where the tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate*, her taking husband is her own act, and therefore deprives her of the emblements; but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her. The lessees of tenants for life had also at the common law another most unreasonable advantage; for, at the death of their lessors, the tenants for life, these under-tenants might,

if they pleased quit the premises, and pay no rent to anybody for the occupation of the land since the last quarter-day, or other day assigned for payment of rent (*p*). To remedy which it is now enacted (*q*), that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a rateable proportion of rent, from the last day of payment to the death of such lessor (*r*).

4. *Tenant for Life must keep down Charges.*

As a tenant for life has certain rights, so also he is under certain obligations to the reversioner or remainderman (*s*) with reference to the estate. He must pay all taxes imposed on the land (*t*), and if the estate comes to him subject to a mortgage in fee he must keep down the interest (*u*); but the principal, when it becomes due, must be paid by the reversioner (*v*); and where a dowress had her dower assigned in mortgaged land, she was held bound to pay one third of the interest until the mortgage was paid off (*w*). But if a tenant for life should pay off an incumbrance on the fee, he would be presumed, unless the contrary were shewn, to do so for his own benefit, and not for the benefit of the settlement (*x*). When he pays it off he is entitled to hold it without interest, as a charge on the land as against the reversioner (*y*). The rule also applies to a tenant for life of a term of years, who is bound to pay the rent and observe the covenants (*z*). An equitable tenant for life of leaseholds is not liable for repairs necessary at the commencement of his interest, or for breaches which occurred before that date (*a*).

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

(*q*) 11 Geo. II. c. 19, s. 15.

(*r*) As to apportionment of rent, see ante p. 84.

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

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

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

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

(*w*) Ibid.

(*x*) *Giffard* v. *Fitzhardinge*, L.R. (1899) 2 Ch. 32.

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

(*z*) *Re Gjers, Cooper* v. *Gjers*, L.R. (1899) 2 Ch. 54.

(*a*) *Re Betty, Betty* v. *Attorney General*, L.R. (1899) 1 Ch. 821.

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

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

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring, for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them. A possibility of issue is always supposed to exist in law, unless extinguished by the death of the parties, even though the donees be each of them an hundred years old. A Court of Equity will, however, often act on the contrary presumption; thus, if property be vested in trustees in trust for a married woman for life, with

remainder to children of the marriage, the Court will, for the benefit of the parties, after the wife has attained a certain age, allow the property to be dealt with as they may agree on, if each be *sui juris*, on the assumption that the wife is past child-bearing (*b*).

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

6. *Tenant by the Curtesy.*

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

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

7. *Marriage.*

The marriage must be legal. It was thought at one time that the marriage must be canonical as well as legal (*c*), but it seems reasonably clear that there are no legal degrees of consanguinity or affinity within which a marriage cannot be validly contracted in Ontario. The ecclesiastical Courts acted against the parties, *pro salute animarum*, to punish illegal or uncanonical marriages and to separate the parties; but in the common law Courts, where property rights were involved or personal injuries were sued for, the question of marriage or no marriage *de facto* was the sole issue. Thus, a marriage *de facto* was good at law, though voidable in the spiritual Courts, until it was, in fact, dissolved by one of the latter Courts. The ecclesiastical or canonical law has been held not to be in force in the colonies (*d*), and so there is no law defining the degrees within which it is unlawful to marry. It is sufficient, therefore, in order to found a property right on marriage, to prove a marriage properly celebrated between the contracting parties, without regard to their relationship (*e*).

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

(*c*) *Hodgins* v. *McNeil*, 9 Gr. 305.

(*d*) *The Lord Bishop of Natal's case*, 3 Moo. P.C.N.S. 115.

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

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

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

8. *Seisin of the Wife.*

The seisin of the wife must be an actual seisin or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed (*l*). And, therefore, a man shall not be tenant by the curtesy of a remainder or reversion expectant on an estate of freehold, for it is the tenant for life who is seised (*ll*). But it is otherwise if the remainder or reversion is expectant on an estate for years, as in this case the seisin of the freehold is

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

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

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

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

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

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

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

not in the tenant for years, but in the remainderman or reversioner, and the possession of the tenant is the possession of the reversioner. But of some incorporeal hereditaments, and of mere equitable interests, a man may be tenant by the curtesy, though there have been no actual seisin of the wife; as in case of an advowson, where the church has not become void in the lifetime of the wife; which a man may hold by the curtesy, because it is impossible ever to have actual seisin of it, and *impotentia excusat legem.*

9. *Issue Must be Born Alive.*

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

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

(*n*) *Bowles' case*, Tud. Lg. Ca. 4th ed. 110,

whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin or at the time of the wife's decease, the husband shall be tenant by the curtesy.

10. *Death of the Wife.*

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

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

11. *Dower.*

Tenant in *dower* at law, as distinguished from the right in equity under R.S.O. c. 164, and subject also to the exception created by section 3 of that statute, is where the husband of a woman is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life.

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

12. *Marriage.*

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

By the Statute of West. 2, if the wife commits adultery and elopes, she forfeits her dower, unless the husband condone the offence, and even though the husband adandon the wife, or the wife leave by reason of her husband's cruelty, she forfeits her dower in case she commits adultery.

(*o*) See ante p. 115.

13. *Dower in Legal Estates.*

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

There must, to entitle the widow to dower *at common law*, be seisin in the husband during coverture, and that of an estate of inheritance in possession; but actual seisin is not requisite, and seisin in law suffices. Since R.S.O. c. 164, s. 3, though the husband were disseised before coverture and so continued during coverture till death, the widow would yet be entitled to dower, but it must be sued for and obtained within the same period that the husband's right of entry might be enforced. If, however, the husband were once seised during coverture, his subsequent disseisin and bar by the Statute of Limitations would not operate against his widow (*p*).

It is the necessity for seisin in the husband which excludes the widow *at law* from dower in trust estates of the husband, of which the legal seisin is in the trustee, though in equity she would be entitled. So also, dower does not attach on a remainder in fee expectant on a life estate, if the remainder-man die or alien pending the life-estate (*q*); for the seisin of the freehold is in the tenant for life, and the remainder also is not an estate of inheritance *in possession* (*r*). But if a remainder or reversion be expectant only on a term of years, as the possession of the tenant is the possession and constitutes the seisin of the remainder-man or reversioner, dower will attach.

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

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

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

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

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

Where the seisin of the husband is transitory only, when the same act which gives him the estate conveys it out of him again, the seisin will not entitle the wife to dower; for the land was merely *in transitu*, and never rested in the husband. Thus, the widow of a grantee in fee to uses, from whom the use is immediately executed into possession in the *cestui que use* by the Statute of Uses, is not entitled to dower; as, if A. grants to B. and his heirs to the use of C. and his heirs; here the widow of B. shall not have dower, for the seisin of B. was but transitory, the same conveyance which gave him the estate also immediately took it from him by declaring a use on which the Statute of Uses would operate (*t*). But if the land abides in the husband for the interval of but a single moment, the wife shall be endowed thereof (*u*); as where a vendor executed a deed of conveyance to a purchaser in fee, who in pursuance of a prior agreement, and without his wife joining, immediately after such execution, reconveyed the lands to the vendor by way of mortgage, to secure the unpaid purchase money, it was held the widow of the purchaser was entitled to dower (*v*). But in such a case the dower allotted will be chargeable in favour of the holder of the mortgage with a third of the interest of the mortgage, unless the dowress will pay a third of the mortgage debt (*w*), and the acquisition of the equity of redemption by the owner of the legal estate, or mortgagee, will not cause a merger so as to preclude him as against the dowress from insisting that the mortgage is on foot and unsatisfied (*x*).

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

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

(*u*) Cro. Eliz. 503.

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

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

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

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

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

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

The widow of a trustee is not entitled to dower; and so, where a man before marriage contracts to sell land, he becomes a quasi trustee for the purchaser, and upon marriage his wife is not entitled to dower, unless indeed, the purchaser should forfeit his rights and the husband should again become seised to his own use (*b*).

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

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

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

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

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

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

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

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

(*f*) R.S.O. c. 164, s. 4.

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

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

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

14. *Dower in Equitable Estates.*

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

By this statute it is enacted that, "where a husband dies beneficially entitled to any land, for an interest which does not entitle his widow to dower out of the same at common law, and such interest, whether wholly equitable or partly legal and partly equitable, is an estate of inheritance in possession or equal to an estate of inheritance in possession (other than an estate in joint-tenancy), then his widow shall be entitled to dower out of the same land." It will be observed that in order to entitle the widow to dower the husband must die beneficially entitled. Therefore the husband is free to aliene by his own conveyance *inter vivos* and so deprive his widow of her chance of acquiring dower.

So, where a husband contracts to purchase land and dies before conveyance, the contract still subsisting, his widow is entitled to dower (*j*) and would probably be entitled to call upon the personal representatives to administer and pay the purchase money and complete the contract. Where a purchaser mortgaged his equitable right, and authorized the mortgagee

(*g*) The Mun. Act, R.S.O. c. 223, s. 602.
(*h*) 60 V. c. 15, s. 6; now R.S.O. c. 164, s. 50.
(*hh*) R.S.O. c. 29, s. 24.
(*i*) Now R.S.O. c. 164, s. 2.
(*j*) *Craig* v. *Templeton*, 8 Gr. 483.

to complete the contract on his behalf, and in his mortgage gave a power of sale to the mortgagee, and died; it was held that a sale under the power of sale related back to the creation of it and was, in fact, an alienation of his equitable right by the husband, and therefore that his widow was not entitled to dower, though he died entitled to redeem (*k*). And where a man buys an equity of redemption, his wife is not dowable unless he dies beneficially entitled, and he may therefore aliene without joining his wife (*l*).

The case of a husband having contracted to purchase, and the widow being entitled to dower in equity, proceeds on the principle that, in equity, what is agreed to be done is to be considered as done, the money considered as actually converted into land, and the vendor from the time of the contract a trustee for the purchaser, who is thenceforth deemed beneficially entitled (*m*). So again, a widow may, on this principle be entitled equitably to dower out of what would be personal estate at law; thus, under certain circumstances, money vested in trustees with express injunctions to lay out the same in the purchase of lands in fee-simple or fee-tail for the benefit of the husband and his heirs, even though never so laid out during the husband's lifetime, will nevertheless be looked on in equity as actually converted into lands, and the delay of the trustees in doing what they ought to have done shall not prejudice the widow.

A different rule prevails with regard to lands of which the husband has been seised during the coverture, and which he has mortgaged, his wife joining to bar dower. Before 11th March, 1879 (*n*), the enactment just dealt with being the only Act in force respecting dower in equitable estates, there was some fluctuation of opinion as to the right of the wife to dower unless the husband died beneficially entitled, his estate in the land of which he was seised being by the mortgage converted into an equitable estate with the wife's consent. In *Moffatt* v. *Thompson* (*o*), it was held that he could aliene his equity of redemption without the necessity

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

(*l*) *Gardner* v. *Brown*, 19 Ont. R. 298; *Re Luckhardt*, 29 Ont. R. 111.

(*m*) See, however, *Lysaght* v. *Edwards*, 2 Ch. D. 499; and *Re Flatt & Prescott*, 18 App. R. 1. Notwithstanding these cases, it is submitted that the statement in the text is sufficient for the purpose.

(*n*) See 42 V. c. 22, now R.S.O. c. 164, ss. 7 *et seq.*

(*o*) 3 Gr. 111.

of his wife's joining to bar dower. In *Forrest* v. *Laycock* (*p*), the contrary opinion was expressed. In *Black* v. *Fountain* (*q*), *Fleury* v. *Pringle* (*r*), and *Re Robertson* (*s*), it was agreed that the wife in such a case was dowable of the equity of redemption only in case her husband died beneficially entitled. And in *Beavis* v. *McGuire* (*t*) the same principle was affirmed by the Court of Appeal.

The Act of 1879, however, introduced a different rule. It applied only to mortgages made after it was passed (*u*). It provided that no bar of dower in a mortgage, or other instrument having that effect, should operate to bar the dower to any greater extent than was necessary to give full effect to the rights of the mortgagee (*v*); and that on a sale under the power of sale in such an instrument, or under legal process, the wife should be entitled to dower in any surplus after satisfaction of the mortgage to the same extent as she would have been entitled to dower in the land if the same had not been sold (*w*). Opinion fluctuated as to the construction of this statute. On the one hand it was held that the wife was entitled to dower only in case the husband died beneficially entitled (*ww*). And on the other, that as the bar of dower was effectual only for the purposes of the mortgage, there was a residue in which the dower was not barred, and therefore in any conveyance subsequent to the mortgage it was necessary for her to join in order to free the equity of redemption from the claim for dower (*x*). The question came for the first time before a Divisional Court in *Pratt* v. *Bunnell* (*y*), where it was held that the wife was a necessary party to a conveyance of the equity of redemption. In this case it was also held that the basis of computation of the amount of the dower was the surplus purchase money. In *Gemmill*

(*p*) 18 Gr. 611.

(*q*) 23 Gr. 174.

(*r*) 26 Gr. 67.

(*s*) 25 Gr. 276; affirmed Ibid. 486.

(*t*) 7 App. R. 704.

(*u*) *Martindale* v. *Clarkson*, 6 App. R. 1.

(*v*) R.S.O. c. 164, s. 7.

(*w*) Ibid. s. 7 (2).

(*ww*) *Smart* v. *Sorenson*, 9 Ont. R. 64; *Re Music Hall Block*, 6 Ont. R. 225; *Calvert* v. *Black*, 8 P.R. 255.

(*x*) *Re Croskery*, 16 Ont. R. 207.

(*y*) 21 Ont. R. 1.

v. *Nelligan* (*z*), however, another Divisional Court differed from the reasoning in *Pratt* v. *Bunnell* and held that dower in such a case should be computed on the whole purchase money, and be paid out of the surplus as far as it would extend.

In 1895 another Act was passed (*a*), which declares that in the event of mortgaged land being sold under power of sale or by legal process, the wife shall be entitled to dower in any surplus, and the amount to which she is entitled shall be calculated upon the basis of the amount realized for the whole land and not upon the surplus. But the enactment is not to affect mortgages made before it was passed, 16th April, 1895, nor mortgages for unpaid purchase money of the land.

15. *Bar and Forfeiture of Dower.*

How dower may be barred or defeated. By the Statute of Gloucester (*x*) if a dowress alienes the land assigned her for dower, it is said she forfeits it *ipso facto*, and the heir may recover it by action; by this, however, must be understood the case of a dowress conveying by *feoffment* a greater estate *than for her own life* (*y*); such mode of conveyance prior to 14 & 15 V. c. 7 (*z*), would pass such greater estate *by wrong*, and the penalty was forfeiture of all estate.

Dower may be barred by jointure, as regulated by the Statute 27 Hen. VIII. c. 10, or by ante-nuptial settlement in lieu of dower. A *jointure*, which strictly speaking means a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate limited to the wife only, is thus defined by Sir Edward Coke:—"a competent livelihood of freehold for the wife, of lands and tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least." Before the Statute of Uses the greater part of the land of England was conveyed to uses, and the *cestui que use* then stood in much the same position as a *cestui que trust* after the Statute, and had but an equitable beneficial interest. Now, though the husband had the *use* of lands in absolute fee simple, yet the wife was not entitled to any dower therein,

(*z*) 26 Ont. R. 307.
(*a*) 58 V. c. 25, s. 3, now R.S.O. c. 164, s. 8.
(*x*) 6 Ed. I. c. 7.
(*y*) 2 Inst. 309.
(*z*) Now R.S.O. c. 119, s. 3.

he not being *seised* thereof; wherefore it became usual on marriage, to settle by express deed some special estate to the use of the husband and his wife for their lives, in joint tenancy or jointure, which settlement would be a provision for the wife in case she survived her husband. At length the Statute of Uses ordained that such as had the *use* of lands, should to all intents and purposes be reputed and taken to be absolutely *seised* and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure, had not the same statute provided, that upon making such an estate in jointure to the wife before marriage, she shall forever be precluded from her dower. But then these four requisites must be punctually observed:—1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *pur auter vie*, or for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her. 4. It must be made, "though it need not in the deed be expressed to be" (*a*) in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiæ*, and may either accept it or refuse it, and betake herself to her dower at common law; for she was not capable of consenting to it during coverture (*b*). And if by fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted or turned out of possession, she shall then (by the provisions of the same statute) have dower *pro tanto* at the common law.

A more usual mode, in Ontario at least, of preventing the right of dower in present or future acquired property, is by settlement or agreement before marriage, by which the intended wife accepts any provision in her favour which is declared to be in lieu of dower in such present or future to be acquired property; and if the intended wife were adult at the time of the agreement, the inadequacy, precariousness, or failure of the provision for her will not, as to purchasers from the husband, prevent her from being barred. On this point

(*a*) *Gilkison* v. *Elliott*, 27 U.C.R. 95.

(*b*) *Sed quære* whether this would be so since the Married Women's Property Acts.

Lord St. Leonards (*c*) thus expresses himself:—"If the present were a jointure operating as a bar under the Statute of Uses the case would have been governed by sec. 7 of that statute; but *in equity the bar rests solely on contract*, and my opinion is that in this court, if a woman, being of age, accepts a particular something in satisfaction of dower, she must take it with all its faults, and must look at the contract alone; and cannot in case of eviction come against one in possession of the lands on which otherwise her dower might have attached; this has nothing to do with the performance of covenants or the like. . . . My conclusion is, that the plaintiff has accepted in lieu of dower payment of money at least, and that she is also concluded by the acceptance of the bond, and that, though the bond was not satisfied, she has no right to resort to lands of her husband bought and sold during marriage."

Infants may be barred *at law* by sufficient legal jointure under the Statute of Henry VIII., as already explained. If the jointure be *competent* it will be good though it be not of the value of the dower (*d*); and though at law an infant may not be bound by her ante-nuptial agreement to accept a provision in lieu of dower, still in equity a provision made for an infant on her marriage, at least if with the assent of her father or guardian, and in all respects as certain, secure, and substantially equivalent to a good legal jointure, would be sufficient as a good *equitable jointure*, to restrain her from enforcing her legal right to dower (*e*). A mere precarious and uncertain provision, however, which she might never enjoy, though it might bar an adult on her *contract* to accept it as above mentioned, would not bar in case of an infant (*f*); thus, a settlement of an estate on an infant for life, after the death of the intended husband and of some *third person*, will not be a bar as a good equitable jointure; for the third person

(*c*) *Dyke* v. *Rendall*, 2 De G.M. & G. 209; see also *Earl of Buckingham* v. *Drury*, 2 Eden, 60; *Corbet* v. *Corbet*, 1 S. & S. 612; see also Tud. Lg. Ca. 4th ed. 120.

(*d*) *Earl of Buckingham* v. *Drury*, 3 Bro. P.C., Toml. ed. 492; *Drury* v. *Drury*, 4 Bro. C.C. 506, note; *Harvey* v. *Ashley*, 3 Atk. 607.

(*e*) See cases last note; Tud. Lg. Ca. 4 ed. 120; see also Davidson Conv., vol. 3, 2 ed., p. 728 note *a*, where the law is fully discussed; Sugd. Statutes, 2 ed., 246; but see *Fisher* v. *Jameson*, 12 C.P. 601, in which case, however, the provision made was precarious, insecure, and failed; see also this case in Appeal, 2 E. & A. 242, the remarks of Esten, V.C.

(*f*) *Carruthers* v. *Carruthers*, 4 Bro. C.C. 500, 513; *Smith* v. *Smith*, 5 Ves. 188; *Fisher* v. *Jameson*, 12 C.P. 601; 2 E. & A. 242.

might survive not only the husband, but the wife, who might therefore never take anything.

A conveyance to a husband may be so drawn, that he may reconvey and defeat dower. Thus, a conveyance may be made to the purchaser in fee (the husband), to such uses as he shall appoint, and in default of and till appointment, to him in fee; (the limitations are usually more complex than as above in fee, but it simplifies so to state them) (*g*). Under such limitations, dower does attach, subject to be divested, on exercise of the power of appointment; for the husband, till exercise of the power, is seised of an estate of inheritance in possession; but on execution of the power, the appointee (a purchaser from the husband) comes in as if named in the conveyance to the husband (in consequence of the peculiar operation of such powers and appointments), and so paramount to the right of dower of the wife. The operation and effect of these conveyances is this:—A. conveys by common law conveyance, or by grant, to B. (the husband), in fee, to such uses as he (B.) shall by deed appoint, and in default of and till appointment, to him (B.) in fee. B. sells to C., and conveys and appoints the estate to C. in fee, reciting the power of appointment. The whole transaction is now to be read as though by the first conveyance, A. had conveyed to B. and his heirs, to the use of C. and his heirs; B. thus, in the event, has been a mere grantee to uses, and the Statute of Uses vests the legal estate and fee in C., by virtue of the original conveyance, and so dower is defeated. Of course, if B. dies without exercise of the power, then if the limitation be in the simple form put, the widow of B. would be entitled to her dower, which was never divested (*h*).

(*g*) See for form of conveyance Davidson Conv., 3rd ed., vol. 2, p. 210.

(*h*) There are probably few points in the law of real property which have been the subject of more conflicting weighty authority than that stated in the text. At one time it was supposed that inasmuch as an estate limited in default, or till exercise of a power, is a vested estate, and therefore as dower did attach, that it could not be defeated by subsequent exercise of the power. It seems, however, quite clear that it can be so defeated; see Park on Dower, 186; Sugden on Powers, 8th ed. 194, 479; see also *Ray* v. *Pung*, 5 B. & Ald. 561; s. c., 5 Madd. 310; and as to judgments and executions being thus defeated, *Doe d. Wigan* v. *Jones*, 10 B. & C. 459; *Tunstall* v. *Trappes*, 3 Sim. 300. It was, however, on another point that the chief difficulty arose, viz., whether, where the estate is not limited to some *third person* to uses, but directly to the purchaser himself, as stated in the text, so that he is *in by the common law*, any uses declared in his favour or on his appointment are not void. It was said that a common law seisin and a use or power cannot be co-existent in the same estate in the same person; that the power would be merged in the fee; that the purchaser being in, and

The right to dower may be forfeited by the committing of adultery. If the wife voluntarily lives in adultery apart from the husband, whether she has left him voluntarily, or has been driven from his house by cruelty or violence, or has been deserted, she forfeits her right to dower, unless there has been a reconciliation (*i*). And where to a demand for dower, it is pleaded that the demandant detains the title deeds, and she takes issue thereon, and the issue is found against her, she shall lose her dower in the lands of which she detains the deeds (*j*). A sale of land for taxes operates as an extinguishment of every claim upon the land, and in fact forms a new root of title, and therefore extinguishes the right to dower therein (*k*). But a sale under an execution against the husband is a sale of the husband's interest only, and does not affect the right to dower (*l*).

Inasmuch as dower is the property of the widow, any benefit given her by the will of her husband is *prima facie* in addition to her dower, and any disposition by will of lands subject to dower is *prima facie* a disposition thereof subject to the widow's right to dower therein. But the husband's will may indicate an intention, either expressly or by implication, that the benefits given by the will are to be in

having the whole fee, as at common law, any further uses declared in *his* favour or on his appointment were simply nugatory and void; that in order that any such uses should have any effect, it would be requisite to separate the seisin and the use, as by conveyance to some *third person* to such uses as the purchaser should appoint, and till appointment to the use of the purchaser. These views were strongly advocated by men as eminent as Mr. Sanders and Mr. Preston; see Sanders on Uses, Vol. 1, p. 155; Preston Conveyancing, Vol. 2, p. 482; Vol. 3, pp. 265, 271, 494: see also the *first* part of the note to Watkin's Conveyancing, 9th ed., p. 281; and *Goodill* v. *Brigham*, 1 B. & P. 192. This constitutes a formidable array of authority against the doctrine in the text; on the other hand, there is no less weighty and more modern authority in its favour. Lord St. Leonards (Sugden) in his work on Powers, 8th ed., p. 93, reviews all the authorities, and comes to the conclusion that an estate under an appointment created as named in the text, can well take effect; and of this opinion also is Mr. Coventry: see his note in brackets to the first part of the note in Watkin's Conveyancing above referred to: see also per Draper, C.J., in *Lyster* v. *Kirkpatrick*, 26 U.C.R. 228. The conveyancer may avoid all question by limiting the estate by common law conveyance, or by grant under R.S.O. c. 119, s. 2, to some third person in fee to such uses as the purchaser may appoint, and in default of and till appointment to the use of the purchaser and his heirs. It is submitted, however, that this precaution is quite unnecessary: see also *Gorman* v. *Byrne*, 8 Ir. C.L. Rep. 394.

(*i*) *Woolsey* v. *Finch*, 20 C.P. 132; *Neff* v. *Thompson*, 20 C.P. 211.

(*j*) Park on Dower, p. 227.

(*k*) *Tomlinson* v. *Hill*, 5 Gr. 231.

(*l*) *Walker* v. *Powers*, R. & J. Dig. 1125.

lieu of dower, and in such cases the widow must elect between her dower and the testamentary gift. The acceptance by a widow of what is thus given to her in lieu of dower is a bar to her claim for dower. Where the gift is not expressed to be in lieu of dower, but is left to inference or implication, "it is not enough to say that on the whole will it is fairly to be inferred that the testator did not intend that his widow should have dower in order to justify the Court in putting her to her election; it must be satisfied that there is a positive intention to exclude her from dower, either expressed or implied" (*m*).

The rule is that where the demand of dower by metes and bounds would be inconsistent with or repugnant to the disposition by the will, the widow is put to her election (*n*).

Parol evidence of the intention of the testator to exclude dower is, of course, not admissible.

In order that the widow be barred by acceptance of the provision in lieu of dower, there must have been an opportunity to elect, and a knowledge of all the facts necessary to a choice, and the acceptance must not have been in ignorance of the provision being in lieu of dower (*o*).

Where a widow is entitled to dower, she may also elect between her dower and her distributive share in her husband's undisposed of realty, under the Devolution of Estates Act (*p*). Presumably this applies to cases of intestacy. She is not limited as to time by the enactment, but may elect within any time allowed by the exigencies of the administration (*q*). Possibly she might elect at any time within the period of limitation under the Real Property Limitations Act; but the point is not clear. She is entitled to know, before electing, what the estate will produce; for, as the distributive share is a portion of the estate which remains after payment of debts, while her dower, being her own property is not subject to her husband's debts, she cannot make a fair choice until she can compare the values of the two interests (*r*). If

(*m*) *Gibson* v. *Gibson*, 1 Drew. 51; see also generally *Baker* v. *Baker*, 25 U.C.R. 448; *Walton* v. *Hill*, 8 U.C.R. 562; *Pulker* v. *Evans*, 13 U.C.R. 546; *Parker* v. *Sowerby*, 4 DeG.M. & G. 321; *Baker* v. *Hammond*, 12 Gr. 485; *McLennan* v. *Grant*, 15 Gr. 65; *Fairweather* v. *Archibald*, 15 Gr. 255.

(*n*) This being a matter which falls more properly within the interpretation of wills, the subject is not pursued further.

(*o*) *Sopwith* v. *Maughan*, 30 Beav. 235.

(*p*) R.S.O. c. 127, s. 4, s.-s. 2. See *Re Reddan*, 12 Ont. R. 781.

(*q*) *Baker* v. *Stuart*, 29 Ont. R. 388; 25 App. R. 445.

(*r*) See *Re Rose*, 17 P.R. 136.

she has released her dower by settlement, for a consideration, she is not entitled to elect under this Act (*s*).

The election is to be made by deed or other instrument in writing, attested by at least one witness (*t*), and therefore it may be made by her will (*u*).

By the R.S.O. c. 133, s. 25, "no action of dower shall be brought but within ten years from the death of the husband of the dowress, notwithstanding any disability of the dowress or anyone claiming under her."

When the husband's interest was a mere right of action, the time which would bar the husband will also bar the wife, notwithstanding her coverture; and if the bar against the husband be not complete on his death, the time which has run against him will count as against the widow; for the R.S.O. c. 164, s. 3, which in such case gives her dower in virtue of such right in her husband, limits the period of suit for dower to that within which such right might be enforced.

By R.S.O. c. 133, s. 16, "no arrears of dower or damages on account of such arrears shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit."

Before the Act, 43 V. c. 16, now R.S.O. c. 133, s. 26, if a dowress remained in possession of the land out of which she was dowable to the exclusion of the heirs, the Statute of Limitations began to run against the heirs at the expiration of forty days from her husband's death, and at the end of the period of limitation they were barred (*v*). And being then solely seised in fee she could not be also dowress.

By that statute it is enacted that where a dowress is in possession, either alone or with heirs or devisees, the period of ten years within which her action of dower must be brought is to be computed from the time when her possession ceased. It is not quite clear what was intended by this statute. If the widow remained in exclusive possession, there seems to be no reason why the heirs or devisees should not be barred as before the statute; and if she thus gained a title in fee she could no longer be dowress. If the Legislature

(*s*) *Tor. Gen. Trusts Co.* v. *Quin*, 25 Ont. R. 250.

(*t*) *Re Galway*, 17 P.R. 49. But she might by her conduct estop herself.

(*u*) *Re Ingolsby*, 19 Ont. R. 283.

(*v*) *Johnston* v. *Oliver*, 3 Ont. R. 26; *Hartley* v. *Maycock*, 28 Ont. R. 508.

meant that the statute should not run against the heirs or devisees under such circumstances, it certainly has not said so. If, however, the widow occupied the land with the heirs or devisees, the possession would be attributed to them and not her, and in that case she would gain no title by possession, but could at any time leave the land and bring her action for dower within ten years thereafter.

Dower may also be barred by deed of the married woman executed as required by the statutes authorising this mode of bar.

Dower may be barred by deed made by the wife alone (*w*), and if the wife be under twenty-one by a deed in which she joins with her husband for that purpose (*x*). And it is not essential that there should be a clause in the deed barring dower (*y*).

Where a wife is a lunatic confined in a public asylum, the husband may, during her confinement in the asylum, sell or mortgage free from dower any land acquired by him during that period (*z*). In other cases of lunacy of the wife an order may be made by the court to convey free from dower (*a*).

And where a wife has been living apart from her husband for five years or more, and the husband sells or mortgages to a purchaser or mortgagee without notice that the vendor was married, such purchaser or mortgagee may obtain an order to free the land from dower as in the case of a lunatic wife (*b*). And so, also, where the husband is living with a woman who is not his wife, an innocent purchaser, or mortgagee, or anyone claiming under him, may have the like order (*c*).

And where the personal representatives of a deceased person desire to sell free from dower the lands of the deceased, provision is made for applying to the court for leave (*d*).

(*w*) R.S.O. c. 165, s. 3; R.S.O. c. 164, s. 22, s.-s. 2.
(*x*) R.S.O. c. 165, s. 5.
(*y*) R.S.O. c. 164, s. 22, s.-s. 3.
(*z*) R.S.O. c. 164, s. 11.
(*a*) Ibid. ss. 12, *et seq.*
(*b*) Ibid. s. 17, s.-s. 1.
(*c*) Ibid. s.-ss. 2 and 3.
(*d*) R.S.O. c. 127, s. 11.

16. *Life Estates by Descent.*

Lastly, amongst estates for life created by operation of law must be included certain estates acquired by descent. Where, under the Inheritance Act (*e*) the person last seised dies without any descendants, the land descends to his father, if living, or to his mother, if living, according to circumstances, for life, and after his or her death then to the brothers and sisters or their descendants, if any.

And where the locatee of free grant land dies, either before or after issue of the patent, all his interest descends to his widow, if any, *durante viduitate*; but she may elect to take her dower instead (*f*).

(*e*) Now the Devolution of Estates Act, R.S.O. c. 127, ss. 45, 46.
(*f*) R.S.O. c. 29, s. 24.

CHAPTER X.

OF ESTATES LESS THAN FREEHOLD.

(1). *Estates for Years.*
(2). *Leases Required to be by Deed.*
(3). *Division of Time.*
(4). *Incidents of Estate for Years.*
(5). *Emblements.*
(6). *Estates at Will.*
(7). *Tenancy from Year to Year.*
(8). *Estate at Sufferance.*
(9). *Overholding Tenants—Remedies.*
(10). *Re-entry and Forfeiture.*
(11). *Forcible Entry.*

1. *Estates for Years.*

Of estates that are less than freehold, there are three sorts:—1. Estates for years; 2. Estates at will; 3. Estates by sufferance.

An estate for *years* is a contract for the possession of lands or tenements, for some determinate period; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon. If the lease be but for half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of.

In 1895 and 1896 two Acts were passed which may have an important bearing upon this subject, and may render it doubtful whether the interest created by a lease can now be said to be an estate for years. The first Act (*g*) declared that "the relation of landlord and tenant shall be deemed to be founded in the *express or implied contract* of the parties, and not upon tenure or service, and a reversion shall not be

(*g*) 58 V. c. 26, s. 4.

necessary to such relation, which shall be deemed to subsist in all cases where there shall be an agreement to hold land from or under another in consideration of any rent." The second Act repealed this enactment, and substituted the following therefor, declaring that the repealed section was intended to express the same meaning as the new section (*h*):—"The relation of landlord and tenant is not hereafter to depend on tenure, and a reversion or remainder in the lessor shall not be necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation; nor shall any agreement between the parties be necessary to give a landlord the right of distress;" and in this form it appears in the Landlord and Tenant Act (*i*). It will be noticed that the present enactment contains no affirmative declaration that the relationship is to depend on contract, but contains simply four negatives, of which one is that the relationship of landlord and tenant is not to depend on tenure. The notion of an estate in land being inseparable from tenure, it may be that the consequence of the abolition of tenure in this connection reduces the relationship of landlord and tenant to a contract of hiring of land, and that there is no such thing, properly speaking, as an estate for years in land arising from the making of a lease. It was held in *Harpelle* v. *Carroll* (*j*), however, that the first enactment did not abolish the relationship of landlord and tenant and make the bargain a mere contract, but merely altered the mode of creating the ancient relationship. If this be the effect of the enactment, then it worked no change in the law, except that the relationship may probably now exist where the so-called landlord parts with his whole interest in the land, retaining no reversion, thus extending the whole law of landlord and tenant to such a case. The question still remains unanswered, however, has the tenant an estate for years under such circumstances (*k*)? This enactment must be borne in mind as perhaps qualifying what follows as to estates for years.

Another very important question is, how the law of distress is affected? "The right of distraining seems to have originated as follows: When the tenant did not perform the

(*h*) 59 V. c. 42, s. 3.
(*i*) R.S.O. c. 170, s. 3.
(*j*) 27 Ont. R. at p. 249.
(*k*) See further 17 Can. L.T. p. 253.

feudal service due to his lord he might have been punished by the forfeiture of his estate. But these feudal forfeitures were afterwards turned into distresses according to the pignory method of the civil law; that is to say, the land set out to the tenant was hypothecated, or as a pledge in his hands, to answer the rent agreed to be paid to the landlord; and the whole profits arising from the land were liable to the lord's seizure for the payment and satisfaction of it: (Gilbert on Rents, 4). Afterwards the severity of the law came to be mitigated to a seizure of everything found on the land, and the distress was substituted for the *seizure* of the feud, so that we may easily account for the fact that the power of distraining always attended the fealty, and was inseparably incident to the reversion; for as fealty could not have been demanded by a stranger from the tenant, nor, consequently any forfeiture have been incurred by a refusal of it, so likewise a stranger could not distrain the goods of another person's tenant for non-payment of rent" (*l*). The abolition of *tenure*, the fact that the tenant should no longer hold from or under his landlord, and consequently could owe no service or fealty to him, would necessarily have ended the right of distress, but that the legislature seems to have assumed that the law on that subject remained unaffected, inasmuch as the Landlord and Tenant Act still deals with restrictions upon the right of distress. But if a lease should, since this enactment, be made of the whole interest of a landlord, so that he would retain no reversion, the statute not positively giving a right of distress, but negatively declaring that no agreement shall be necessary to give the landlord the right of distress, it seems reasonably clear that no right of distress would exist in that case. Opinion on this enactment, however, is purely speculative, and as hazardous as it is speculative.

2. *Leases Required to be by Deed.*

By the Statute of Frauds it was enacted that all leases or terms of years (except those not exceeding three years on which a rent equivalent to two-thirds of the full improved value was reserved) should be in writing, otherwise they should have the effect of estates at will only. But if entry were made under a lease within the statute and rent were paid by the year, or with reference to the aliquot part of a

(*l*) *Clun's Case*, and notes, Tud. Lg. Ca. 4th ed. at p. 40.

year, it was held that the tenant became tenant from year to year. By another statute (*m*) it is enacted that "a lease, required by law to be in writing, of land . . . shall be void at law, unless made by deed." At law this was interpreted to mean that a deed was merely substituted for the signed writing required by the earlier enactment, and that the imperfect document created only an estate at will (*n*). But in equity, if there was an agreement for a lease, or if a lease in form failed as such for want of a seal, and the circumstances were such that specific performance would be decreed, the tenant was not held to be tenant at will, but was held to be entitled to the term called for by the writing. Since the Judicature Act came into force in England it has been uniformly held that where there is an agreement for a lease (and a lease wanting a seal would fall within this), and possession has been taken under it, and the circumstances are such that specific performance would be adjudged, the parties are, for some purposes, treated exactly as if a formal lease had been executed, and the landlord may distrain for rent (*o*).

In *Manchester Brewing Co.* v. *Coombs* (*p*), Farwell, J., said: "Although it has been suggested that the decision in *Walsh* v. *Lonsdale* takes away all difference between the legal and the equitable estate, it, of course, does nothing of the sort, and the limits of its applicability are really somewhat narrow. It applies only to cases where there is a contract to transfer a legal title, and an act has to be justified or an action maintained by force of the legal title to which the contract relates. It involves two questions:—(1) Is there a contract of which specific performance can be obtained? (2) If yes, will the title acquired by such specific performance justify at law the act complained of, or support at law the action in question? It is to be treated as though before the Judicature Act there had been, first, a suit in equity for specific performance, and then an action at law between the same parties, and the doctrine is applicable only in those cases where specific performance can be obtained between the same parties, in the same court, and at the same time as the subsequent legal question falls to be determined. Thus, in

(*m*) R.S.O. c. 119, s. 7.

(*n*) See *Hobbs* v. *Ont. L. & D. Co.*, 18 S.C.R. at p. 498.

(*o*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Lowther* v. *Heaver*, 41 Ch. D. at p. 264; *Crump* v. *Temple*, 7 Times L.R. 120.

(*p*) 16 Times L.R. at p. 302.

Walsh v. *Lonsdale*, the landlord under an agreement for a lease for a term of seven years distrained. Distress is a legal remedy and depends on the existence at law of the relation of landlord and tenant, but the agreement between the same parties, if specifically enforced created that relationship. It was clear that such an agreement would be enforced in the same court and between the same parties. The act of distress was therefore held to be lawful."

Though the parties to such an agreement are for some purposes treated as landlord and tenant, they are not so considered for all purposes, *e.g.*, the agreement is not a lease within the meaning of the enactment requiring notice to be given before re-entering for "breach of any covenant or condition contained in the lease" (*pp*). These cases treat the Judicature Act as impliedly repealing the enactment in question, and the practical result is that, except for certain purposes, and in the conditions mentioned, an agreement for a lease, or a lease in due form but wanting a seal, puts the parties to it for many purposes in the same position as if a proper lease had been duly executed. The matter, however, remains somewhat uncertain in Ontario. In *Hobbs* v. *Ont. L. & D. Co.* (*q*), Strong, J., thus explained the combined effect of the two statutes: "The later statute is to be read and construed merely as substituting a deed for the signed writing required by the earlier enactment, and the avoidance of the lease has reference only to its nullity as a lease of a term; the tenancy at will arising in such a case is not created by, nor is it dependent on, the lease, but is a creation of the statute, a statutory consequence of the attempt to create a lease by parol for more than three years, and of the nullity of such a proceeding declared by the statute. . . . In other words, it is apparent that the tenancy at will in such a case did not arise from the agreement of the parties, but was the effect of the statute which has never been repealed." And Mr. Justice Patterson in the same case said, "I am not prepared to hold, without more direct authority than is furnished by the cases cited, that the enactment of the Judicature Act that, in matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail, has so completely done away with

(*pp*) R.S.O. c. 170, s. 13; *Swain* v. *Ayres*, 20 Q.B.D. 585; 21 Q.B.D. 289.
(*q*) 18 S.C.R. at p. 498.

distinction between a lease and an agreement for a lease as to render lands which are the subject of an agreement only 'lands or tenements which are or shall be for life or lives term of years at will or otherwise'; which are the words of the statute." This case was decided in 1890 after the English decisions already referred to; and the legislature of Ontario has, since passing the Judicature Act, in the revisions of the statutes, twice re-enacted the clause requiring the leases in question to be by deed; thus indicating very clearly, that it did not consider that it had been impliedly repealed by the Judicature Act. In this uncertain state of the law it is hazardous to express an opinion as to the effect of an imperfect document. But there would seem to be no doubt that the courts, on equitable grounds, would, in a proper case, specifically enforce any document which amounted to an agreement to grant a lease, and in this would probably be included a written lease wanting a seal.

3. *Division of Time.*

The reference to the term of a year may not improperly lead us into a short digression concerning the division and calculation of time by the English law.

The space of a year is a determinate and well known period, consisting commonly of 365 days; for, though in bissextile or leap-years it consists properly of 366, yet by the statute 21 Hen. III., the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only. That of a month was at common law more ambiguous, there being in common use two ways of calculating months—either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year; or as calendar months of unequal lengths, according to the Julian division in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve. A month in law was a lunar month or twenty-eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for "twelve months" was only for forty-eight weeks; but if it were for "*a* twelvemonth," in the singular number, it was good for the whole year. For herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases; it being generally understood that by

the space of time called thus, in the singular number, a twelvemonth, is meant the whole year, consisting of one solar revolution (*r*).

The word "month" now universally means a calendar month (*s*). In the space of a day all the twenty-four hours are usually reckoned, the law generally rejecting all fractions of a day in order to avoid disputes; therefore, if I am bound to pay a certain sum of money "within ten days," I discharge the obligation if I pay before twelve o'clock at night of the last day. And the general rule is that Acts of the Legislature and judicial proceedings take effect from the earliest moment of the day on which they originate or come into force (*ss*). Thus a writ of execution issued and tested at four in the afternoon of the first day of January, was held not to remain in force till a corresponding hour on the first day of January following, but the whole of the day of its issuing was included, and consequently the whole of the first day of January following excluded, and at midnight of the thirty-first day of December the writ expired unless acted on (*t*). As to this the language of the former Execution Act, R.S.O. (1887) c. 66, s. 11, was that the writ "shall remain in force for one year *from the teste*," etc. The law does not reject the consideration of a portion of a day in any case in which it is requisite to consider it, as for instance in determining the priority of delivery of executions to a sheriff. The rule, as stated in a recent case, that judicial proceedings are, where it is necessary to sustain them or to preserve their priority, to have relation to the earliest hour of the day, is a fiction not to be extended or applied when it is not necessary for these purposes (*u*).

4. *Incidents of Estate for Years.*

But to return to estates for years. These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the

(*r*) See *Manufacturers' Life Assurance Co.* v. *Gordon*, 20 App. R. 309.
(*s*) R.S.O. c. 144, s. 3; R.S.O. c. 1, s. 8, s.-s. 15.
(*ss*) *Converse* v. *Michie*, 16 C.P. 167; *White* v. *Treadwell*, 17 C.P. 488.
(*t*) *Bank of Montreal* v. *Taylor*, 15 C.P. 107.
(*u*) *Barrett* v. *The Merchants Bank*, 26 Gr. 409.

will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own, and from this has sprung the principle of law that the possession of the tenant is the possession of the landlord or reversioner.

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited and determined; for every such estate must have a certain beginning, and certain end. But *id certum est, quod certum reddi potest;* therefore, if a man make a lease to another, for so many years as J.S. shall name, it is a good lease for years; for though it is at present uncertain, yet when J.S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease. A lease for so many years as J.S. shall live, is void from the beginning; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease; but possibly if on such a lease, livery of seisin were made by a lessor seised of the freehold, it might operate as a feoffment for the life of J.S. (*v*); or, if livery were not made, it would be construed as a contract to grant an estate for the life of J.S. by a proper conveyance. But a lease for twenty years, if J.S. should so long live, or if he should so long continue parson, is a good lease for twenty years; for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J.S., or his ceasing to be parson there.

We have before remarked, and endeavoured to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance; observing, that an estate for life, even if it be *pur auter vie*, is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate. Hence it follows, that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas

(*v*) Co. Litt. 45b, n. 2, by Hargrave.

next for the term of his natural life, is void. For no estate of freehold can commence *in futuro*; because it could not be created at common law without livery of seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter.

The statement that no estate of freehold can be created to commence *in futuro*, must however, be considered as confined to the direct effect of a common law conveyance; for by deed of bargain and sale or other conveyance operating under the Statute of Uses, wherein livery of seisin or prior possession in the grantee is not required, a freehold estate can be limited to commence *in futuro*; thus A. can bargain and sell to, or covenant to stand seised to the use of, or grant to the use of, B. and his heirs, from a future day, on the arrival of which the estate will vest, the seisin of the freehold in the meantime remaining in the bargainor, covenantor or grantor.

And because no livery of seisin is necessary to a lease for years, such lessee is not said to be *seised* or to have true legal seisin of the lands, nor indeed does the bare lease vest any estate in the lessee, but only gives him a right of entry on the tenement, which right is called his *interest in the term*, or *interesse termini*. When, however, he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is *possessed*, not properly of the land, but of the term of years; the possession or seisin of the *land* remaining still in him who hath the freehold. Thus the word *term* does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire during the continuance of the *time*; as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A. for the term of three years, and after the expiration of the said *term* to B. for six years, and A. surrenders or forfeits his lease at the end of *one* year, B.'s interest shall immediately take effect; because the term is at an end (*w*); but if the remainder had been to B., from and after the expiration of the said *three years*, or from and after the expiration of the said *time*, in this case B.'s interest will not commence till the time is fully elapsed, whatever may become of A.'s term.

(*w*) *Wrotesley* v. *Adams*, Plow. 198. See *Hall* v. *Cornfort*, 18 Q.B.D. 11.

5. *Emblements.*

With regard to emblements, or the profits of lands sowed by tenant for years, there is this difference between him and the tenant for life; that where the term of tenant for years depends upon a certainty, as if he holds from Midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before Midsummer, the end of his term, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of. But where the lease for years depends upon an uncertainty; as, upon the death of the lessor, being himself only tenant for life, or if the term of years be determinable upon a life or lives, or on notice by either party, and the lessor give the notice (*x*); in all these cases the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, or of the lessor, the tenant, or his executors, shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. Not so, if it determine by the act of the party himself; as if a tenant for years does any thing that amounts to a forfeiture; in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default.

Estates less than freehold are chattels only in the eye of the law, yet inasmuch as they savour of the realty, they are sometimes termed *chattels real*. They devolve on death to executors and administrators, and never went to the heir; and the proper limitation in a lease for years is to executors, though it will be sufficient if such limitation be omitted, as the law in such case will cast the estate on the executors or administrators. It follows also that these estates are not saleable by the sheriff under a writ against lands, but are under a writ against goods.

6. *Estates at Will.*

The second species of estates not freehold are estates at *will*. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession. It may perhaps be laid down, that wherever a person is in possession of land in which he has no freehold interest, or

(*x*) *Campbell* v. *Baxter*, 15 C.P. 42.

tenancy for a term certain, and which he nevertheless holds by the mutual consent of himself and the true owner, such person is tenant at will, and as such is liable to pay for his occupation (*y*); but, as will presently appear, if rent be paid, *quâ* rent with reference to a year or any aliquot part of a year, the law will usually construe the tenancy as one from year to year. Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; for the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant, so that either of them may determine his will, and quit his connection with the other at his own pleasure. Yet this must be understood with some restriction. For, if the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits. And this for the same reason upon which all the cases of emblements turn; viz., the point of uncertainty, since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will, for in this case the landlord shall have the profits of the land.

What act does or does not amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer, which must either be made upon the land, or notice must be given to the lessee) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber, or making a feoffment, with livery of seisin, (in which case notice to the tenant is presumed), or making an ordinary conveyance, or lease for years of the land, to commence immediately, coupled with notice to the tenant of such conveyance or lease is a sufficient determination by the lessor of the tenancy.

It is requisite that the landlord should give the tenant *notice* if the act relied on be done *off* the premises; where

(*y*) See *Clayton* v. *Blakey*, 2 Smith Lg. Ca., 10th ed. 124, and notes.

the act is done *on* the land it is presumed the tenant is there and knows of it (*z*). As regards acts done by the landlord on the land, it has been laid down that "if he do any act on the lands for which he would otherwise be liable to an action of trespass at the suit of the tenant, such act is a determination of the will, for so only can it be a lawful and not a wrongful act" (*a*). Any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with the tenure (*b*); or, which is *instar omnium*, the death of either lessor or lessee, puts an end to or determines the estate at will (*c*). It would seem, however, that where the tenant *by his own act*, as by assignment of his estate, does that which, if coupled with notice, would be a determination as against the lessor, still if the latter have no notice of such act, the tenancy is not thereby to be deemed determined so as to deprive the lessor of his remedies as landlord. Thus if a tenant at will at a rent should assign, the lessor, having no notice of the assignment, may distrain for the rent (*d*).

7. *Tenancy from Year to Year.*

The law is, however, careful that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of emblements before mentioned; and, by a parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils. And, if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half year, but if the lessor determines he loses the rent (*e*). And, upon the same principle, courts of law have of late years leaned as much as

(*z*) *Pinhorn* v. *Souster*, 8 Ex. 770, per Parke, arguendo. See also *Doe d. Davies* v. *Thomas*, 6 Ex. 856; *Richardson* v. *Langridge*, Tud. Lg. Ca. 4th ed. 4, and notes 17.

(*a*) Per Denman, C.J., *Doe d. Turner* v. *Bennett*, 9 M. & W. 646.

(*b*) *Richardson* v. *Langridge*, *supra*.

(*c*) Blackstone adds that taking a distress for rent and impounding it on the premises would be a determination by the landlord of the tenancy; and this formerly was so, because formerly the landlord could not impound on the premises, but now he can so impound, by 11 Geo. II. c. 19, per Martin, B., *Doe d. Davies* v. *Thomas*, 6 Ex. 858.

(*d*) *Pinhorn* v. *Souster*, 8 Ex. 856.

(*e*) *Richardson* v. *Langridge*, Tud. Lg. Ca. 4th ed. 19.

possible against construing demises, where no certain term is mentioned, to be tenancies at will, but have rather held them to be *tenancies from year to year*, so long as both parties please, especially where an annual rent is reserved; in which case they will not suffer either party to determine the tenancy, even at the end of the year, without reasonable notice to the other, which is to be, under ordinary circumstances, half a year at least prior to the expiry of the current year of the tenancy. Thus, if the tenancy commenced on the tenth day of July, 1871, a notice to quit given on the next tenth day of January would be too late, and the tenant be entitled to hold for another year from the tenth day of July, 1872, and be entitled further to a proper notice, to be given him half a year at least prior to such last named day. The notice is to be half a year, not six months, and the difference is material if February happen to be one of the months included in the period, in which case the period would not comprise half a year, which must be a full half year, and thus not 182, but 183 days. The mode of computation is to exclude the first and include the last day of the time covered by the notice, and the day of quitting mentioned in the notice may be the day after the expiration of the term. Thus a notice given on 17th November, 1893, to quit on 19th May following, the tenancy having begun on 19th May, 1890, was held good (*f*).

In tenancies from week to week or month to month, respectively, a week's and a month's notice to quit, respectively ending with the week or month, suffices to determine the tenancy (*g*).

Service of a notice to quit need not be personal; a notice by parol to the tenant is good; it must be positive and not in the alternative, thus notice to quit "or that you agree to pay double rent" would be bad (*h*).

The leaning of the courts against uncertain tenures at will in favour of the more certain tenures from year to year has caused the latter to be of no unfrequent occurrence. It may be stated, as a general rule, that wherever there is a tenancy, and a payment of rent with reference to a year, or some aliquot part of a year, and there is no evidence from which it can be shewn that a tenancy of another nature was agreed on, the law will assume the tenancy to be one from

(*f*) *Sidebotham* v. *Holland*, L.R. (1895) 1 Q.B. 378.

(*g*) R.S.O. c. 170, s. 18.

(*h*) *Doe d. Matthew* v. *Jackson*, per *Lord Mansfield*, 1 Doug. 176.

year to year; and where a tenant, having no certain interest, pays rent, with reference to a year, or aliquot part of a year, this unexplained is evidence of a tenancy from year to year. But the payment must be with reference to a certain period of holding; for if there be an agreement without reference to any certain period of holding, and the rent reserved accrue due, or be paid *de die in diem*, or without reference to any fixed portion of a year, thereby alone a tenancy from year to year will not arise. And if the intention of the parties be express and apparent to create a mere tenancy at will, even the fact of the rent being reserved payable with reference to a year, or aliquot portion, as for instance quarterly, or yearly will not create a tenancy from year to year, and override the clearly expressed intention of the parties (*i*). Though payment of rent with reference to a year, or aliquot portion, unexplained, gives rise to an implication of a yearly tenancy, still both payer and receiver may shew the circumstances under which payment was made for the purpose of repelling the implication (*j*). And where a tenant for a term certain holds over after the expiration of the term, and pays rent, or agrees to payment at the previous rate, a presumption is raised that a new tenancy from year to year is created upon all of the same terms and conditions as are contained in the expired lease, which are applicable to and not inconsistent with a yearly tenancy (*k*). This presumption is founded upon the assent of both parties to the continuance of the relationship, and may be rebutted by evidence of mistake or want of knowledge of facts which would have prevented the assent (*l*). There is this peculiarity, however, in the case of a tenancy created by payment of rent after entry under a void lease, or agreement for a lease, viz., that although it was considered a tenancy from year to year during the continuance of the term proposed to be granted by the lease, and during that time could only be put an end to by the landlord after the usual notice, yet it was determined at the expiry of that term without any notice to quit.

(*i*) *Richardson* v. *Langridge*, 4 Taunt. 128; see *Clayton* v. *Blakey*, 2 Smith Lg. Ca. 10th ed. 124, and notes.

(*j*) Ibid.; *Doe d. Rigge* v. *Bell*, 2 Smith Lg. Ca. 10th ed., notes at p. 121.

(*k*) *Bishop* v. *Howard*, 2 B. & C. 100; *Hyatt* v. *Griffiths*, 17 Q.B. 505.

(*l*) *Mayor of Thetford* v. *Tyler*, 8 Q.B. 95; *Doe d. Lord* v. *Cerago*, 6 C.B. 90; *Oakley* v. *Monck*, 4 H. & C. 251.

8. *Estate at Sufferance.*

An estate at *sufferance*, is where one comes (*m*) into possession of land by lawful title, but keeps it afterwards without any title at all; as if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate.

In actions of ejectment, it is frequently necessary to determine whether the defendant is tenant at will or by sufferance: for if he be tenant at will, he cannot be ejected without a determination of the tenancy by notice to quit, or demand of possession, or other act sufficient for that purpose; but if he be a tenant at sufferance, or overholding tenant, there is no necessity for any such steps prior to the action. And in reference to this question of some practical importance, Richards, J., remarks (*n*): "As a general rule where a party is let into possession as purchaser he becomes tenant at will, and cannot be turned out of possession without a previous demand, but many cases in our courts go to the extent that where a party enters agreeing to pay by a certain day, and makes default, then he may be ejected as having forfeited his right. Where parties, after the expiry of the time for payment in a mortgage or agreement, or after a forfeiture in a lease, remain on premises without being recognized as lawfully in possession, they are tenants at sufferance, and not entitled to a demand of possession" (*o*).

Tenants at sufferance are not entitled to emblements (*p*). The tenancy can only arise by implication of law, and it cannot be created by contract.

9. *Overholding Tenants—Remedies.*

Remedies are afforded to landlords as against their tenants, who hold over after the determination of their leases, by various statutes presently referred to. The determination (among other modes, as by surrender or merger) may be by efflux of time and the expiry of the term granted; by forfeiture, as where the landlord has the right to re-enter on non-payment of rent; or by notice to quit by either party, as in cases of tenancies at will or from year to year. As

(*m*) 2 Inst. 134; 1 Inst. 271.
(*n*) *Lundy* v. *Dovey*, 7 C.P. 40.
(*o*) *Doe d. Bennett* v. *Turner*, 7 M. & W. 225.
(*p*) *Doe d. Bennett* v. *Turner*, 7 M. & W. 225.

above stated, a tenant merely holding over after determination of his term becomes tenant at sufferance.

The landlord, if he have acted so as to raise a presumption of continued tenancy, may sue the tenant for his use and occupation of the land from the time of the determination of the original tenancy.

By Statute 4 Geo. II. c. 28, in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of the term, and demand made and notice in writing given by him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof, such person so holding over or keeping the other out of possession, shall pay for the time he detains the lands at the rate of double their yearly *value*. And, by Statute 11 Geo. II. c. 19, in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former *rent* for such time as he continues in possession.

The latter statute was passed inasmuch as the former (4 Geo. II.) only took in cases of the landlord giving notice to quit. The Statute 11 Geo. II. extends to cases of a tenant giving notice and not quitting, and the double rent given by it may be distrained for as well as sued for, whilst the double value given by 4 Geo. II. can only be sued for; and such double value cannot be recovered unless the holding over be wilful, and not under a mistake without a fair and reasonable claim of title (*q*); nor does 4 Geo. II., from its language, apply to weekly tenancies, or, it would seem, to tenancies from quarter to quarter (*r*).

Where the term created by a lease or agreement in writing expires, or is put an end to by regular notice to quit, and where a demand of possession is made in writing, and is served personally upon the tenant or any person holding or claiming under him, or is left at his usual place of abode, and the tenant or other such person refuses to deliver up possession, security for the costs of an action to recover possession may be ordered (*s*). This enactment does not apply where

(*q*) *Swinfen* v. *Bacon*, 6 H. & N. 846.
(*r*) Foa, L. & T. 590.
(*s*) R.S.O. c. 170, s. 26, *et seq.*

the tenancy is determined by forfeiture, as on a right of re-entry by a landlord for breach of covenants (*t*).

And, by The Overholding Tenants' Act (*u*), when a tenant, after his lease or right of occupation, whether created by writing or verbal agreement, has expired or been determined by a notice to quit, or notice pursuant to a proviso in any lease or agreement in that behalf, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses upon demand made in writing to go out of possession, his landlord or the agent of the landlord may apply to the county judge of the county in which the land lies, who, on a proper case made out as required by the statute, is to appoint a time and place to inquire and determine whether the person complained of was tenant to the complainant for a time or period which has expired or has been determined by a notice to quit, or for default in payment of rent, or otherwise, and whether the tenant holds the possession against the right of the landlord, and whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise. If it so appears to him, the judge may order a writ to issue to place the landlord in possession.

Mere non-payment of rent or breach of covenant by the tenant does not *per se* determine the lease, unless determined under a right acted on expressly reserved to the landlord to re-enter thereon; but in all leases made after the 25th March, 1886, there is deemed to be included, unless otherwise agreed on, an agreement that if any rent remain unpaid for fifteen days after it is due, the landlord may re-enter without any formal demand for the rent (*v*). So much does the law lean against forfeiture, that to determine a lease for forfeiture for non-payment of rent, great nicety formerly existed, unless, as was usual, the proviso for re-entry dispensed therewith. Thus, a demand must have been made of the rent; on the very day when due; for the precise sum—a penny more or less made the demand bad; a convenient time before sunset; on the land, and at the most notorious place on it; and this, though no one were on the land ready to pay. In one case (*w*) it

(*t*) *Doe d. Cundy* v. *Sharpley*, 15 M. & W. 558; *Doe d. Tindal* v. *Roe*, 1 Dowl. P.C. 146.

(*u*) R.S.O. c. 171, s. 3.

(*v*) R.S.O. c. 170, s. 11.

(*w*) *Alcocks* v. *Phillips*, 5 H. & N. 183.

was held that a demand at half-past ten in the morning was too early, and not a good demand, as not being a convenient time before sunset; and the Court referred to Co. Litt. 202*a*, where it is said that the demand must be such a convenient time just before sunset as to admit of the money being numbered and received. To obviate the difficulties of such a demand, the proviso for re-entry usually dispensed expressly with its necessity; and by statute (*x*), where half a year's rent is in arrear, and no sufficient distress is found on the premises, and the landlord has the right to enter, he may, without a formal demand, issue a writ for the recovery of the premises. The tenant is entitled after judgment to proceed for equitable relief within six months after execution executed (*y*), but if he fail to do this he is barred.

And by the same statute (*z*), where a landlord has a right to enter for non-payment of rent, it shall not be necessary to demand the rent on the day when due, or with the strictness required at the common law, and a demand shall suffice notwithstanding more or less than the amount really due is demanded, and notwithstanding other requisites of the common law are not complied with. But it is provided that the demand must be made fifteen days at least before entry, unless the premises are vacant.

In cases where the above statutes do not apply by reason of the absence of the clause of forfeiture and re-entry in the lease, a remedy is afforded by 11 Geo. II. c. 19, in cases of tenants at a rack-rent who are in arrear one year's rent and *desert the premises*, leaving the same uncultivated or unoccupied, so that there is *no sufficient distress* to countervail the arrears. In such case it shall be lawful for two or more justices of the peace of the county, having no interest in the demised premises, at the request of the landlord or his bailiff (which request or complaint need not be upon oath) to go upon and view the same and to affix or cause to be affixed on the most notorious part of the premises notice in writing what day, at the distance of fourteen clear days at least, they will return to take a second view thereof, and if upon such second view the tenant, or some person on his behalf, shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the said justices

(*x*) R.S.O. c. 170, ss. 22, *et seq.*

(*y*) See *Bowser* v. *Colby*, 1 Ha. 109, as to the mode of obtaining relief.

(*z*) S. 35.

may put the landlord into possession of the demised premises, and the lease thereof to such tenant shall from thenceforth become void. To avail himself of this Act, the landlord does not require a right in the lease to re-enter for non-payment (*a*).

10. *Re-entry and Forfeiture.*

A right of re-entry or forfeiture under a provision therefor contained in a lease cannot now be enforced without notice (*b*) to be given in the manner to be presently mentioned. This enactment does not apply to conditions against assigning or parting with the possession of the land leased, nor to conditions for forfeiture on bankruptcy, or on the taking of the lessee's interest in execution; nor to mining leases, nor to re-entry or forfeiture or relief in cases of non-payment of rent (*c*); nor does the enactment apply to the case of an agreement for a lease which, in all other respects, constitutes the parties thereto landlord and tenant (*d*), nor does it apply where there is an equitable assignment only (*e*). With these exceptions, where there is a right of re-entry or forfeiture for breach of a condition or covenant contained in the lease, it shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy it, and, in any case, requiring the lessee to make compensation in money for the breach. Then, in case the lessee fails, within a reasonable time after such service to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach, the lessor may proceed.

"The object of the notice," said Lord Russell of Killowen (*f*) "seems to be to require in the defined cases (1) that a notice shall precede any proceeding to enforce a forfeiture; (2) that the notice shall be such as to give the tenant precise information of what is alleged against him and

(*a*) *Huskinson* v. *Lawrence*, 25 U.C.R. 496.

(*b*) R.S.O. c. 170, s. 13.

(*c*) Ibid. s.-s. 6.

(*d*) *Swain* v. *Ayres*, 20 Q.B.D. 585; 21 Q.B.D. 289; *Coatsworth* v. *Johnson*, 55 L.J.Q.B. 220.

(*e*) *Gentle* v. *Faulkner*, L.R. (1900) 2 Ch. 267; *Matthews* v. *Usher*, 16 T.L.R. 493.

(*f*) *Horsey Estate* v. *Steiger*, L.R. (1899) 2 Q.B. at p. 91.

what is demanded from him; and (3) that a reasonable time shall, after notice, be allowed the tenant to act before an action is brought. The reason is clear: he ought to have the opportunity of considering whether he can admit the breach alleged; whether it is capable of remedy; whether he ought to offer any, and, if so, what compensation; and, finally, if the case is one for relief, whether he ought or ought not promptly to apply for such relief. In short, the notice is intended to give to the person whose interest it is sought to forfeit the opportunity of considering his position before an action is brought against him."

The giving of the notice is indispensable in order to enable the lessor to maintain the action (*g*) and if no notice, or an insufficient one, be given, the action will be dismissed (*h*). The enactment does not take away any right of re-entry or forfeiture which the lessor may have; it only postpones his right to re-enter until after he has served on the lessee a notice specifying the particular breach complained of (*i*). The notice may be addressed to the original lessee and all others whom it may concern, and it is sufficient if left with the occupant of the premises demised and ultimately reaches the person liable (*j*). It should specify with particularity what the lessor complains of. In *McMillan* v. *Vannatto* (*k*), the notice was, "I hereby give you notice that you have broken the covenants as to cutting timber, etc." This was held to be sufficient. But in England greater particularity is required. In *Fletcher* v. *Nokes* (*l*), the notice was, "I hereby give you notice that you have broken the covenants for repairing the inside and outside of the house, etc." This was held to be insufficient because no particular breach was specified; and the court held that the notice should be as precise as particulars delivered of a breach assigned in an action. Subsequent cases are to the same effect. In *Penton* v. *Barnett* (*m*), it was said that the expression "particular breach" in the statute refers to the particular condition of the premises which the tenant is required to remedy, and the

(*g*) *North London, etc., Land Co.* v. *Jacques*, 49 L.T.N. S. 659.
(*h*) *Greenfield* v. *Hanson*, 2 T.L.R. 876.
(*i*) *Creswell* v. *Davidson*, 56 L.T. 811.
(*j*) *Cronin* v. *Rogers*, Cab. & El. 348.
(*k*) 24 Ont. R. 625.
(*l*) L.R. (1897) 1 Ch. 271.
(*m*) L.R. (1898) 1 Q.B. 276.

tenant is to have full notice of what he is required to do. And in *Re Serle* (*n*) a notice that "he has not kept the said premises well and sufficiently repaired, etc.," was held insufficient. The notice ought also to refer to the particular covenant alleged to have been broken (*o*). The weight of authority is therefore in favour of a notice specifying what the tenant is required to do in order to comply with the landlord's demand and save forfeiture.

The notice must further require the lessee to remedy the breach, if it is capable of being remedied (*p*), but it need not contain a demand for compensation unless there is something to compensate for and the lessor desires it (*q*). A notice which is bad in part for want of particularity in specifying some one breach complained of, is not saved because it contains a good specification of another breach also complained of. "The notice cannot be saved as a whole because a part of it is good (*r*)." But where a notice sufficiently specifies two or more breaches, and the plaintiff proves some of them, but fails to prove others, the notice remains good for those proved (*s*). The remarks of the Lord Chief Justice in *Horsey* v. *Steiger* (*t*) seem to indicate the contrary, but the case proceeded really on the ground that a reasonable time was not given after the notice as pointed out in the case cited.

The notice is not bad because it demands something which the plaintiff is not entitled to get, *e.g.*, the costs of employing a solicitor and surveyor to advise (*u*).

Finally, a reasonable time must elapse between the service of the notice and the bringing of the action. What is a reasonable time must be determined according to the facts of each particular case. Three months within which to make repairs was held reasonable in one case (*v*);

(*n*) L.R. (1898) 1 Ch. 652.

(*o*) *Jacob* v. *Down*, L.R. (1900) 2 Ch. 156.

(*p*) *North London, etc., Land Co.* v. *Jacques*, 49 L.T. 659; *Lock* v. *Pearce*, L.R. (1893) 2 Ch. 271.

(*q*) *Lock* v. *Pearce*, L.R. (1893) 2 Ch. 271; *Skinners' Co.* v. *Knight*, L.R. (1891) 2 Q.B. at pp. 544, 545.

(*r*) *Re Serle*, L.R. (1898) 1 Ch. at p. 657.

(*s*) *Pannell* v. *City of London Brewing Co.*, L.R. (1900) 1 Ch. 496.

(*t*) L.R. (1899) 2 Q.B. at p. 92.

(*u*) *Skinners' Co.* v. *Knight*, L.R. (1891) 2 Q.B. 542; *Lock* v. *Pearce*, L.R. (1893) 2 Ch. at p. 280.

(*v*) *Cronin* v. *Rogers*, Cab. & El. 348.

four months in another (*w*); but two days was quite unreasonable (*x*).

By the same enactment the lessee is entitled to relief against forfeiture in certain cases (*y*). Where the lessor is proceeding, by action or otherwise, to enforce his right, the lessee may, in the lessor's action, or in an action brought by himself, apply to the court for relief, and the court has power to relieve upon terms. This Act does not affect the liability of an under-lessee for breach of covenants, nor create any privity between the original lessor and the sub-lessee which did not exist before; and a sub-lessee of part of the demised lands is not entitled to relief against forfeiture (*z*). The proceedings for relief must be begun before the re-entry has taken place; if the re-entry has been made it is too late (*a*). The enactment applies to breaches committed before the Act and to proceedings pending when the Act was passed (*b*).

The right of entry for condition broken is indivisible at common law; consequently, if the owner of the reversion conveyed away a portion of the demised land, he destroyed the condition. And that is still the law except as to re-entry for nonpayment of rent, which is regulated by statute (*c*). Where the reversion on a lease is severed and the rent is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent allotted to him, be entitled to the benefit of all powers of re-entry for non-payment of the original rent, in like manner as if the power had been reserved to him as incident to his part of the reversion, in respect of the apportioned rent allotted to him (*d*). The severance of the reversion here spoken of is not a conveyance of the whole land for part of the reversion, but a conveyance of the reversion of part of the lands demised. The rent or other reservation must be legally apportioned, either by agreement of all the parties, lessor, assignee and tenant, or

(*w*) *Pannell* v. *City of London Brewery Co.*, L.R. (1900) 1 Ch. 496.

(*x*) *Horsey* v. *Steiger*, L.R. (1899) 2 Q.B. 79.

(*y*) R.S.O. c. 170, s. 13, s.-s. 2.

(*z*) *Burt v. Gray*, L.R. (1891) 2 Q.B. 98.

(*a*) *Lock* v. *Pearce*, L.R. (1893) 2 Ch. at p. 274; *Quilter* v. *Mapleson*, 9 Q.B.D. at p. 672; *Rogers* v. *Rice*, L.R. (1892) 2 Ch. 170.

(*b*) *Quilter* v. *Mapleson*, 9 Q.B.D. 672.

(*c*) *Baldwin* v. *Wanzer*, *Baldwin* v. *Can. Pac. R. Co.*, 22 Ont. R. 612.

(*d*) R.S.O. c. 170, s. 9.

by act of law, *i.e.*, by judgment of a Court (*e*). Rights of entry for condition broken are not assignable by instrument *inter vivos* (*f*). The rights of entry which are made thus assignable by Statute (*g*) are rights of entry on a disseisin (*h*). But, a right of entry for condition broken, as well as other rights of entry, is capable of being disposed of by will (*i*).

Where the reversion in the whole of the demised premises is assigned, the right of the assignee is governed by the Statute of 32 Hen. VIII. c. 34, under which the assignee has the same benefit of a condition in case of a breach subsequent to the assignment as his grantor would have had, provided it relate to the payment of rent, the restriction from waste, or other like object tending to the benefit of the reversion; but the assignee cannot enter for, or take advantage of, a breach occurring before the assignment to him (*ii*).

At common law when a licence was given by the lessor to the lessee to do any act, which, but for the licence, would have occasioned a forfeiture under the right of re-entry reserved to the lessor, such licence destroyed the condition of re-entry; so that thereafter a similar act might be done by the lessee without any danger of forfeiture. By the Act now in review (*j*), such a licence now extends only to the particular act authorized to be done. And similarly, where there has been a waiver by the lessor of the benefit of a covenant or condition in a lease, the waiver is deemed to extend only to the particular breach to which it relates and not to the whole covenant or condition (*k*).

11. *Forcible Entry.*

There remains to be considered the summary remedy of ouster of the overholding tenant by the landlord by force, if necessary. Where the premises are vacant, though the

(*e*) *Bliss* v. *Collins*, 5 B. & Ald. 876.

(*f*) *Baldwin* v. *Wanzer*, 22 Ont. R. at p. 641; *Cohen* v. *Tannar*, L.R. (1900) 2 Q.B. 609.

(*g*) R.S.O. c. 119, s. 8.

(*h*) *Hunt* v. *Bishop*, 8 Ex. 675; *Hunt* v. *Remnant*, 9 Ex. 635; *Bennett* v. *Herring*, 3 C.B.N.S. 370.

(*i*) R.S.O. c. 128, s. 10.

(*ii*) *Cohen* v. *Tannar*, L.R. (1900) 2 Q.B. 609.

(*j*) R.S.O. c. 170, ss. 14 and 18. See *Baldwin* v. *Wanzer*, 22 Ont. R. at pp. 628, *et seq.*

(*k*) Ibid. s. 16.

tenant may have left some chattels thereon, the landlord is constructively in possession of the freehold, and is entitled to break his own door and take actual possession (*l*). And where the tenant still remains in occupation, the authorities are uniform that the landlord may enter forcibly without rendering himself liable to a civil action of trespass or for damages for the forcible entry (*m*). In one case it was said that there is no case in which a party may maintain ejectment in which he cannot enter (*n*). Though the landlord should enter peaceably, if possible, he is not civilly liable even if his entry is attended with such acts of violence as will subject him to a criminal prosecution (*o*). But he may render himself liable to an action of assault if the facts justify it, though the same acts do not subject him to liability for trespass to land (*p*). The result of the cases is thus summed up by Fry, J., in *Beddall* v. *Maitland* (*q*): "The result of the cases appears to be this, that, inasmuch as the possession of the defendant was unlawful, he can recover no damages for the forcible entry of the plaintiff. He can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because though the Statute of Richard II. creates a crime, it gives no civil remedy. But in respect of independent wrongful acts which are done in the course of or after the forcible entry, a right of action does arise, because the person doing them cannot allege that the acts were lawful unless justified by a lawful entry; and he cannot plead that he has a lawful possession. This, as it appears to me, is the result of the cases" (*r*). And so it was held in another case that the landlord had a right to take down a cottage which an overholding tenant obstinately refused to leave, and was not liable in trespass, nor for incidental damage to the furniture of the tenant unavoidably

(*l*) *Turner* v. *Meymott*, 1 Bing. 158 at p. 160.

(*m*) *Pollen* v. *Brewer*, 7 C.B.N.S. 671; *Harvey* v. *Brydges*, 14 M. & W. 442; *Davidson* v. *Wilson*, 11 Q.B. 890; *Beattie* v. *Mair*, 10 L.R. Ir. 208 (1882).

(*n*) *Rogers* v. *Pitcher*, 6 Taunt. at p. 207.

(*o*) *Taylor* v. *Cole*, 3 T.R. 292.

(*p*) *Newton* v. *Harland*, 1 M. & G. 644; *Pollen* v. *Brewer*, 7 C.B.N.S. 371.

(*q*) 17 Ch. D. 174.

(*r*) See also *Lows* v. *Telford*, 1 App. Ca. 414; *Toronto Brewing & M. Co.* v. *Blake*, 2 Ont. R. at p. 183.

occasioned by the operation (*s*). And where a landlord enters he can maintain an action of trespass against the late tenant wrongfully in at the time of entry and continuing in occupation thereafter (*t*), or replevin for distraining on his cattle which were put on the premises by way of taking possession (*u*). For though the tenant may remain in occupation while the landlord enters, the possession follows the title and is attributed to the landlord, and the tenant is therefore a trespasser (*v*). But it is said that if the tenant during his term expressly license the landlord to enter and oust him without process of law during the term, the licence is void as authorizing the landlord to commit a forcible entry, an act made illegal by the Statute of Rich. II., Stat. 1, c. 8, and the tenant may recover damages for the entry (*w*).

On an indictment for a forcible entry and detainer, it is in the discretion of the Court to grant a writ of restitution (*x*), but the discretion would probably not be exercised in favour of a prosecutor whose interest, if any, had determined at the time of the entry.

(*s*) *Jones* v. *Foley*, L.R. (1891) 1 Q.B. 730.

(*t*) *Butcher* v. *Butcher*, 7 B. & C. 399.

(*u*) *Taunton* v. *Costar*, 7 T.R. 431.

(*v*) *Jones* v. *Chapman*, 2 Ex. 803.

(*w*) *Edwick* v. *Hawkes*, 18 Ch. D. 199.

(*x*) *Regina* v. *Smith*, 43 U.C.R. 383; *Regina* v. *Wightman*, 29 U.C.R. 211; *Toronto B. & M. Co.* v. *Blake*, 2 Ont. R. at p. 183.

CHAPTER XI.

OF ESTATES UPON CONDITION.

(1). *Conditions.*
(2). *Implied Conditions.*
(3). *Express Conditions.*
(4). *Conditions, Precedent and Subsequent.*
(5). *Conditions and Limitations.*
(6). *How a Condition is Made.*
(7). *A Condition is within the Rule against Perpetuities.*
(8). *Re-entry on Condition Broken.*
(9). *Conditions void for Repugnancy.*

1. *Conditions.*

Besides the several divisions of estates in point of interest, which we have considered in the preceding chapters, there is also another species still remaining, which is called an estate *upon condition*; being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated. And these conditional estates are indeed more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates then, upon condition, thus understood, are of two sorts: Estates upon condition *implied*; estates upon condition *expressed*, under which last may be included estates held in *vadio, gage*, or *pledge*; estates by *statute merchant* or *statute staple*; estates held by *elegit*; of these, the two latter are unknown here. Estates held in *vadio, gage* or *pledge* will be considered in the following chapter.

2. *Implied Conditions.*

Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably from its essence and constitution, although no condition be

expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition that the grantee shall duly execute his office, on breach of which condition it is lawful for the grantor or his heirs to oust him, and grant it to another person. For an office, either public or private, may be forfeited by *mis-user* or *non-user*, both of which are breaches of this implied condition. By *mis-user* or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. By *non-user*, or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special advantage is proved to be occasioned thereby. For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention; but private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief; upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect.

Upon the same principle proceed all the forfeitures which are given by law of life estates and others, for any acts done by the tenant himself that are incompatible with the estate which he holds. As if tenant for life or years enfeoffed a stranger in fee simple; this was, by the common law, a forfeiture of his estate; being a breach of the condition which the law annexed thereto, viz., that he should not attempt to create a greater estate than he was entitled to. So, if any tenants for years, for life, or in fee, committed a felony; the king or other lord of the fee was, at common law, entitled to have their tenements, because their estate was determined by the breach of the condition "that they shall not commit felony," which the law tacitly annexed to every feudal donation.

The common law doctrine in both the above instances, has been modified by statute; thus, a feoffment, it is apprehended, in the case put will be no longer a forfeiture, since by R.S.O. c. 119, s. 3, a feoffment no longer has a *tortious* operation, *i.e.*, while at common law the feoffment in fee by tenant for life,

accompanied by livery, would convey a fee *by wrong*, and divest the estates in remainder or reversion, the statute declares it shall no longer have such effect. In the other case it is declared by the Criminal Code (*y*) that "no confession, verdict, inquest or judgment of or for any treason or indictable offence or *felo de se* shall cause any attainder or corruption of blood or any forfeiture or escheat; provided that nothing in this section shall affect any fine or penalty imposed on any person by virtue of his sentence, or any forfeiture in relation to which special provision is made by any Act of the Parliament of Canada."

3. *Express Conditions.*

An estate on condition expressed in the grant itself, is where an estate is granted either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition. Or, as defined in the Touchstone (*z*), "it is a *modus*, a quality annexed by him that hath estate, interest, or right, to the land, etc., whereby an estate, etc., may either be created, defeated, or enlarged, upon a certain event. And this doth differ from a limitation, which is the bounds or compass of an estate, or the time how long an estate shall continue." Or, "a condition is a qualification or restriction annexed to a conveyance of land, whereby it is provided, that, in case a particular event does or does not happen, or in case the grantor or grantee does, or omits to do, a particular act, an estate shall commence, be enlarged, or defeated" (*a*).

4. *Conditions, Precedent and Subsequent.*

These conditions are therefore either *precedent*, or *subsequent*. Precedent are such as must happen or be performed before the estate can vest or be enlarged; subsequent are such as, by the failure or non-performance of which an estate, already vested, may be defeated. Thus, if a man make a lease of land for years, and grant to his lessee, that, upon payment of a hundred marks within the term, he shall have the fee, this is a condition precedent, and the fee simple

(*y*) 55 & 56 V. c. 29, s. 965.
(*z*) P. 117.
(*a*) Cru. Dig. Tit. 13, s. 1.

passeth not till the hundred marks be paid (*b*). But, if a man grant an estate, reserving to himself and his heirs a certain rent, and that if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate; in this case the grantee has an estate upon condition subsequent, which is defeasible if the condition be not strictly performed. Whether a condition is precedent or subsequent depends not upon its position in the deed, but upon its operation; and the same words may be construed as a condition precedent or subsequent, according to the nature of the transaction (*c*). However the clauses of the deed may be arranged, the question whether a condition is precedent or subsequent must depend upon the order of time in which the intent and nature of the transaction requires its performance (*d*). "Thus, where a condition must be performed before the estate can commence, it is called a condition precedent. But where the effect of a condition is either to enlarge or defeat an estate already created, it is then called a condition subsequent" (*e*). All conditions annexed to estates, being compulsory to compel a man to do anything that is in its nature good or indifferent, or being restrictive to restrain or forbid the doing of anything which in its nature is *malum in se*, as to kill a man, or the like, or *malum prohibitum*, being a thing forbidden by any statute, or the like, all such conditions are good, and may stand with the estates. But if the matter of the condition tend to provoke or further the doing of some unlawful act, or to restrain or forbid a man the doing of his duty; the condition for the most part is void (*f*). Hence, if the condition be precedent, or such as must be performed before any estate can vest, and require something to be done against law, or public policy, or impossible, both the condition and the estate are void, and the estate will never vest. And if the condition be possible at the time of making it, but became impossible by the act of God, and an estate is to arise on the condition, the estate will not vest (*g*). Where the condition is subsequent, in these and the like cases

(*b*) Shepp. Touch. 117, 128.

(*c*) *Hotham* v. *East India Co.*, 1 T.R. at p. 645.

(*d*) *Jones* v. *Barkley*, 2 Doug. 691.

(*e*) Cru. Dig. Tit 13, c. 1, s. 6.

(*f*) Shepp. Touch. 132.

(*g*) Shepp. Touch. 132, 133; *Graydon* v. *Hicks*, 2 Atk. 16; *Dawson* v. *Oliver-Massey*, 2 Ch.D. 753.

the estate vests, and the condition, being unlawful or impossible, will be void and the estate absolute (*h*). So also, if a condition subsequent becomes impossible by the act of the grantor himself, he would not be allowed to take advantage of the non-performance in order to forfeit or defeat the estate which he had granted (*i*).

If the condition is to enlarge an estate, it is said that there must be these things in the case:—"1. There must be a precedent particular estate, as an estate in tail, for life or years, for a foundation to erect the subsequent estate upon, and the first estate also must be certain and irrevocable, not upon contingency, or with power of revocation. 2. The privity must remain until the time of the performance of the condition, for if the donee or lessee do grant away the first estate, the condition cannot afterwards be performed, to effect and produce the increasing estate. 3. The subsequent estate must vest *eo instanti*, when the contingency upon which the condition dependeth shall happen, or never. 4. The first and second estate must take effect by one and the same deed, or else by two deeds delivered at the same time, for *quæ incontinenti fiunt inesse videtur*. 5. The condition upon which the increase is, must be possible and lawful, for upon an impossible condition it cannot, and upon an unlawful condition it shall not, increase" (*j*).

A condition in defeasance of an estate must defeat or determine the whole estate (*k*). "So that if there be a lease for life made by deed, and not by will, the remainder over in fee, on condition that the lessee for life shall pay ten pounds to the lessor; if the lessee pay not this ten pounds, the estate in remainder is avoided also" (*l*). So also "if a feoffment [or grant] be on condition that upon such an event the feoffor [or grantor] shall enter and have the land for a time; or the estate shall be void for part of the time; or a lease be for ten years, provided that upon such an event it shall be void for five years; these conditions are not good. But if a feoffment be made of two acres of land, provided that upon such an event the estate shall be void as to one acre only, this is a good condition" (*m*).

(*h*) Ibid.
(*i*) Cru. Dig. Tit. 13, c. 2, s. 21.
(*j*) Shepp. Touch. 128, 129.
(*k*) Cru. Dig. Tit. 13, c. 4, s. 13.
(*l*) Shepp. Touch. 120.
(*m*) Cru. Dig. Tit. 13, c. 1, s. 13.

But where the condition might fail as a condition, the leaning of the courts at the present day would be to carry out the contract and give effect to the expressed intention of the parties if possible, and if it did not contravene any rule of law, the condition being now regarded to a great extent as a security for the performance of some act.

When a re-entry takes place by force of a condition, inasmuch as the whole estate is avoided, all incumbrances put on the land after the condition are also avoided (*n*). Where a devise was made to the testator's widow for life, remainder over, and the will contained a proviso that "in case his said wife should sell, release, or charge her said life estate in the the said real estates, or should do, make, or execute, any deed, matter, or thing, whereby, or by means whereof, she should be deprived of the rents and profits of the same, or the power or right to receive, or control over, the same, so that her receipt alone should not at all times be a good and sufficient discharge for the same, then her life estate and interest should cease and determine as fully and effectually as it would by her natural decease," and the widow married again without a settlement, whereby her husband became entitled to receive the rents, her estate was forfeited, and the remainder accelerated (*o*).

5. *Conditions and Limitations.*

A distinction must be made between a condition and a limitation. Thus, if land be granted to A., habendum to him and his heirs until he go to Rome, or until he pays to B. $20, or so long as A. shall live, or for years if A. shall so long live, these are not conditions, but *limitations* of an estate. So also, if land be granted to one *dum sola*, or to a widow *durante viduitate*, these are *limited estates* and not conditional. They show the full period assigned for the duration of the estate, and are not conditions made to defeat or determine estates (*p*). But a condition is where an uncertain event must happen before the estate can vest, or where an estate comes to an end before its expiration in natural course, by the happening of an uncertain event.

The difference between a pure common law condition and a conditional limitation or an executory devise, is that in the

(*n*) Shepp. Touch. 121.
(*o*) *Craven* v. *Brady*, L.R. 4 Eq. 209; 4 Ch. App. 296.
(*p*) Shepp. Touch. 125.

case of a condition the estate is to revert to the grantor or his heirs; in the other cases it is to be limited over to other persons (*q*). And where a condition in defeasance of an estate is broken, the estate nevertheless continues, though the grantor by the breach gets a title to re-enter, which he may waive if he please; but he must enter in order to determine the estate. But in the case of a conditional limitation, or a limitation over on a condition, when the conditioned event happens, the estate shifts without any entry and vests in the person to whom it is next limited on the happening of the condition (*r*). To this class, *i.e.*, limitations, may be referred all base fees and fees-simple conditional at the common law. Thus an estate to a man and his heirs, *tenants of the manor of Dale*, is an estate limited to him and his heirs as long as they continue tenants of that manor. But if a personal annuity be granted at this day to a man and the heirs of his body, as this is no tenement within the statute of Westminster the second, and so not capable of being entailed, it remains, as at common law, a fee-simple on condition that the grantee has heirs of his body.

So when an estate is so expressly confined and limited by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation*, as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made £500 and the like. In such cases the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the £500). And if there be a limitation of the estate over to another upon the happening of the conditioned event, then, upon that happening, the next subsequent estate, which depends upon such determination, becomes immediately vested without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of £40 by the grantor, or *so that* the grantee continues unmarried (*s*), or *provided* he does not go to York,

(*q*) *Re Dugdale*, 38 Ch.D. at p. 179; *Re Machu*, 21 Ch.D. at p. 843.

(*r*) See *Re Machu*, 21 Ch. D. at p. 843.

(*s*) A condition in restraint of marriage generally, which is the case put by Blackstone, is void as against public policy; the consequence is that the grantee would hold the estate discharged of the condition, as being a *condition subsequent* void in its creation; Smith Rl. Prop. void conditions—

etc., the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate.

Words of express condition are not ordinarily construed as a limitation, unless there is a limitation over (*t*). So, though strict words of condition be used in the creation of the estate, yet, if on breach of the condition the estate be limited to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A. to B. on condition that within two years B. intermarry with C., and on failure thereof then to D. and his heirs), this the law construes to be a limitation and not a condition. Because, if it were a condition, then, upon the breach thereof, only A. or his representatives could avoid the estate by entry, and so D.'s remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of B. determines, and that of D. commences, and he may enter on the lands the instant that the failure happens. So also, if a man by his will devises land to his heir-at-law, on condition that he pays a sum of money, and for non-payment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of condition.

6. *How a Condition is Made.*

A condition is usually created by the use of the phrases "provided that," "so as," or "under, or subject to, this condition." But the form is not essential, and may give way to the general sense of the deed. A condition is sometimes confounded with a covenant. If found amongst the covenants

Scott v. *Tyler*, 2 W. & T. Lg. Cas. Eq. 120—the case of a grant to a man *while* he continues unmarried, which is above put as a valid instance of a conditional *limitation*, has been said to depend on a different principle, and to be valid, at least where there is a gift over on the marriage; for that in such case there is nothing to carry the gift beyond the marriage, *id.* 195. A condition subsequent, which would have been void as in restraint of marriage, is yet valid in the case of a testator providing for his *widow*, for the law recognises in the husband an interest in his wife's widowhood: *Lloyd* v. *Lloyd*, 2 Sim. N.S. 263; *Newton* v. *Marsden*, 2 Johns. & H. 356. The latter case, indeed, shews that this exception to the rule as regards widows is not confined to provisions by their former *husbands*; and that even where the restraint is imposed merely by condition subsequent and without gift over, it is not against public policy that *any person* should endeavour to restrain a widow from marrying again.

(*t*) Shepp. Touch. 124, Atherley's note (*t*).

of a deed, it is said that it makes the estate conditional when "these things are in the case:—1. When the clause wherein it is hath no dependence upon any other sentence in the deed, nor doth participate with it, but stands originally by and of itself. 2. When it is compulsory to the feoffee, donee, etc. 3. When it comes on the part and by the words of the feoffor, donor, lessor, etc. 4. When it is applied to the estate and not to some other matter" (*u*). But if the clause be dependent upon another clause, or be the words of the grantee compelling the grantor to do something; or if it be applied to something collateral, and not to the thing granted, then it is a covenant and not a condition (*v*). Between a covenant and a condition there is a difference as to the remedy. A condition broken defeats an estate and gives a right of entry, but a covenant broken gives a right of action only (*w*). A proviso or condition may, however, be both a condition and a covenant. Thus, "provided always, and the feoffee, etc., doth covenant, etc., that neither he nor his heirs shall do such an act, this is both a condition and a covenant" (*x*).

"As to things executed, the condition must be made and annexed to the estate at the time of the making of it; but as to things executory, it may be made afterwards. And if the condition be made in another deed, and not the same deed wherein the estate is made, if it be delivered at the same time, it is as good as if it were contained in the same deed" (*y*). So a deed and defeasance may be made by the one instrument, or by two provided they be delivered together. But if an annuity be granted absolutely, and afterwards the grantee execute a deed conditioned to defeat the annuity, the annuity is conditional, for it is executory (*z*). So also a lease for years might be defeasanced by a condition created after it is granted; and, before the statute permitting a lessor to give a licence to do an act prohibited by the lease, it was customary, in order to avoid the consequences of such a licence (the complete destruction of the condition for re-entry), to have a deed of defeasance executed, when such a

(*u*) Shepp. Touch. 122; Bac. Abr. Tit. Condition (A).
(*v*) Shepp. Touch. 122; Bac. Abr. Tit. Condition (G).
(*w*) Owen, 54.
(*x*) Shepp. Touch. 122.
(*y*) Shepp. Touch. 126; Cru. Dig. Tit. 13, c. 1, ss. 10, 12.
(*z*) *Ibid.*

licence was granted, providing for defeating the lease if the prohibited act were again done without licence (*a*).

A condition cannot be annexed to an estate of freehold except by deed (*b*); and it cannot be made by, nor reserved to a stranger, but must be made by and reserved to him who makes the estate (*c*).

7. *A Condition is within the Rule against Perpetuities.*

An express condition is within the rule against perpetuities, that is to say, it must be such that the event must necessarily take place within a life or lives in being and twenty-one years afterwards, otherwise it will be void, and the estate absolute (*d*). Thus, land was settled upon trust for a hospital, with a proviso that, if at any time thereafter the premises should be employed or converted to or for any other uses, intents or purposes, then they should revert to the right heirs of the settlor, and it was held that the condition tended to a perpetuity and was void (*e*).

8. *Re-entry on Condition Broken.*

As a condition can only be annexed to an estate by him who grants the estate, and reserved to himself, so, no one can enter for breach of the condition but the grantor, or his heirs or executors (*f*) by right of representation, or his devisee (*g*). Rights of entry for condition broken were not assignable at common law by instrument *inter vivos*, nor are they now, though they descend and may be devised by will. In the case of a devise, however, it may be a question arising on the interpretation of the statutes, as to which of the two, the executor or the devisee, may enter for such a breach. By the Wills Act a right of entry for condition broken is expressly made capable of devise. By the Devolution of Estates Act (*h*), not all devisable estates, rights and interests, but only estates

(*a*) See Leith, R.P. Stat. 3.

(*b*) Bac. Abr. Tit. Condition (C).

(*c*) Shepp. Touch. 120; Challis on R.P. 2nd ed. 71.

(*d*) Lewis on Perp. 616; *Re Macleay*, L.R. 20 Eq. 186; *Dunn* v. *Flood*, 25 Ch. D. 629; *Cooper* v. *Macdonald*, 26 W.R. at p. 379; *Willis* v. *Hiscox*, 4 M. & Cr. App. 201, 202; *Re Winstanley*, 6 Ont. R. at p. 320.

(*e*) *Re Hollis' Hospital* v. *Hague*, L.R. (1899) 2 Ch. 540.

(*f*) Shepp. Touch. 149.

(*g*) R.S.O. c. 128, s. 10.

(*h*) R.S.O. c. 127, s. 3 (*a*).

of inheritance in fee simple, or limited to the heir as special occupant, together with personal property, are included in the enactment, and pass to the executor. Therefore, if a testator devise land as to which he has only a right of entry for condition broken, it may well be that the devisee alone can enter, as being capable of taking within the Wills Act, and not the executor, who succeeds by the Devolution of Estates Act only to those interests specially mentioned in it.

At the present day re-entry for condition broken is rare, except in the case of landlord and tenant, which has been already treated of (*i*), and even in those cases forfeiture occasioned by breach can be relieved against in certain circumstances. And in the case of other conditions, if they are to secure the performance of some particular thing, they would probably be construed as trusts, performance of which would be adjudged to prevent a breach of the condition, or as the price (or a portion of the price) of relief against the forfeiture occasioned by the breach (*j*). The Court has a general power to relieve against all penalties and forfeitures upon such terms as to costs, expenses, damages, compensation, and all other matters as the Court thinks fit (*k*).

9. *Conditions void for Repugnancy.*

A condition repugnant to the nature of the estate to which it is annexed is void. Thus, in a grant in fee upon condition that the grantee shall not take the profits, the condition is repugnant and void, and the estate absolute (*l*). So, also, the following conditions are repugnant and void:—A condition annexed to an estate in fee simple that the tenant shall not alien; for a power to alien is inseparably annexed to an estate in fee simple (*m*); a condition annexed to an estate tail that the donee shall not marry, for without marriage he cannot have an heir of his body (*n*); a condition annexed to an estate in fee simple that his heir shall not inherit the land (*o*), or that the grantee shall do no waste, or that his

(*i*) Ante p. 152.

(*j*) See Gray, Perp. s. 282, note. Per. Burton, J.A., *Earls* v. *McAlpine*, 6 App. R. at p. 153.

(*k*) Jud. Act, R.S.O. c. 51, s. 57, s.-s. 3.

(*l*) Cru. Dig. Tit. 13, c. 1, s. 20; Shepp. Touch. 131.

(*m*) Cru. Dig. Tit. 13, c, 1, s. 22.

(*n*) Ibid., s. 23.

(*o*) *Re Willcocks' Settlement*, 1 Ch. D. at p. 231, where it is said that a man cannot create any new mode of devolution by operation of law.

wife shall not be endowed; a condition annexed to a grant for life, "if it shall please the grantor so long to suffer him;" a condition annexed to an estate in joint tenancy, that the survivor shall have the whole, notwithstanding any severance or partition (*p*); a condition annexed to an estate tail that the donee shall not alien (*q*); and all such like.

Amongst conditions of this class must be included conditions imposing restraints on alienation of land (*r*), for, inasmuch as the right of alienation is inseparably annexed to estates in land, every restriction placed thereon is, if not wholly, at least to some extent, repugnant to the nature of the estate. It has been said, that, though a total restraint on alienation is bad, a partial restraint is good, as that the grantee or devisee shall not alien to such an one (*s*), or for such a time (*t*). The authorities upon which this has been asserted have been challenged as not supporting the proposition (*u*), though it was adopted and acted upon in a modern English case (*v*). And in a case from the Province of Quebec before the Judicial Committee of the Privy Council, a condition that a devisee should not in any manner incumber, affect, mortgage, sell, exchange, or otherwise alienate the land for a period of twenty years from the testator's death, was void, not from anything peculiar to the law of Quebec, but on general principles of jurisprudence (*w*).

Following the case of *Re Macleay*, however, the Court of Appeal in Ontario held that a partial restraint on alienation was good, the condition in the devise in question being that the devisees should not sell or transfer the property without the written consent of the testator's wife during her life (*x*). In consequence of this we have a variety of cases in Ontario in which partial restraints have been held to be valid. Thus, the following were held good as partial restrictions:—Not to sell, or cause to be sold during the devisee's life,

(*p*) Shepp. Touch. 131.

(*q*) *Dawkins* v. *Lord Penrhyn*, 4 App. Ca. at p. 64.

(*r*) Upon this subject see 16 C.L.T. 1; and an excellent article by A. H. Marsh, Q.C., 17 C.L.T. 105, 136.

(*s*) Shepp. Touch. 129.

(*t*) Ibid., Atherley's note (*l*).

(*u*) *Re Rosher*, 26 Ch. D. at pp. 811, *et seq.* and 818.

(*v*) *Re Macleay*, L.R. 20 Eq. 186.

(*w*) *Renaud* v. *Tourangeau*, L.R. 2 P.C. 4.

(*x*) *Earls* v. *McAlpine*, 6 App. R. 145.

but with liberty to grant to her children (*y*); a devise to the devisee "and his heirs and executors forever," condition, neither to mortgage nor sell the land, "but that it shall be to his children after his decease" (*z*); not to "dispose of the same only by will and testament" (*a*); not to alien or incumber until one of two devisees should attain forty years of age (*b*); not to be at liberty to sell "to any one except to persons of the name of O'Sullivan in my own family" (*c*); not to sell or mortgage during the devisees' lives, but with power to each to devise to children (*d*); not to be sold during the devisee's life and not after his death till his youngest child is twenty-one years of age (*e*); the land not to be at the devisees' disposal at any time till the end of twenty-five years from the date of the testator's decease, and that the same shall remain free from all incumbrances, and that no debts contracted by the devisees shall by any means incumber the same during the said twenty-five years (*f*).

The following were held to be void as being total restraints:—That the devisee never will or shall make away with it by any means, but keep it for his heirs (*g*); that the land shall not be disposed of by the devisees either by sale, by mortgage, or otherwise, except by will to their lawful heirs (*h*); that none of the devisees should either sell or mortgage the lands devised (*i*).

It is impossible either to reconcile these cases with each other, or to reduce them to any common principle. They arrange themselves in three classes, having regard to the terms of the conditions, namely: 1. Restrictions as to the time during which alienation may or may not take place; 2. restrictions as to the mode of alienation; 3. restrictions as to the persons to whom land may or may not be conveyed.

(*y*) *Smith* v. *Faught*, 45 U.C.R. 484; mortgage not forbidden.

(*z*) *Dickson* v. *Dickson*, 6 Ont. R. 278. This was held to give the devisee an estate for life, remainder to his children for life, remainder to himself in fee simple.

(*a*) *Re Winstanley*, 6 Ont. R. 315.

(*b*) *Re Weller*, 16 Ont. R. 318.

(*c*) *O'Sullivan* v. *Phelan*, 17 Ont. R. 730.

(*d*) *Re Northcote*, 18 Ont. R. 107.

(*e*) *Meyers* v. *Hamilton Prov. L. & S. Co.*, 19 Ont. R. 358.

(*f*) *Chisholm* v. *London & W. Trust Co.*, 28 Ont. R. 347.

(*g*) *Re Watson & Woods*, 14 Ont. R. 45.

(*h*) *Heddlestone* v. *Heddlestone*, 15 Ont. R. 280.

(*i*) *Re Shanacy & Quinlan*, 28 Ont. R. 372.

But they are all opposed to the principle of law that the right of alienation is inseparably annexed to land. We may look elsewhere in vain (except in the case of restraint on anticipation of a married woman's separate estate) for any authority that a private person may impose restraints upon the enjoyment of land inconsistent with the incidents of ownership annexed to it by law, or make any condition inconsistent with and repugnant to the gift (*j*).

A more logical and convenient rule was laid down in *Re Rosher* (*k*), where it was held that inasmuch as every grant or devise in fee simple is upon the tacit or implied condition that the grantee or devisee shall have power to mortgage, lease, or sell the estate, any condition that he shall not do one or more of these things is necessarily repugnant and void.

Of a similar nature are conditions that the devisee or grantee *shall* dispose of the land; because the right of property includes the right to enjoy without alienating as well as to alienate. Consequently, it was held that a devise in fee simple, condition that if the devisee should not live to attain the age of twenty-one years, "or having attained the age of twenty-one years shall not have made a will," then over, was absolute in the devisee; because if he died intestate the law prescribed that his heir should inherit, and the condition was therefore repugnant (*l*). So also an executory devise which is to defeat an estate and which is to take effect on alienating or attempting to alienate, or not alienating, is void (*m*).

(*j*) *Bradley* v. *Peixoto*, 3 Ves. at p. 324.

(*k*) 26 Ch. D. 801.

(*l*) *Holmes* v. *Godson*, 8 DeG. M. & G. 152.

(*m*) *Shaw* v. *Ford*, 7 Ch. D. 669; see also *Ross* v. *Ross*, 1 J. & W. 154; *Bradley* v. *Peixoto*, 3 Ves. 324.

CHAPTER XII.

OF MORTGAGES.

(1). *Welsh Mortgages.*
(2). *Legal Mortgages, Nature of.*
(3). *Right of Redemption.*
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1. *Welsh Mortgages.*

We now come to estates held *in vadio*, in gage or pledge, which are of two kinds, *vivum vadium*, or living pledge, and *mortuum vadium*, dead pledge, or mortgage. *Vivum*

vadium, or living pledge, is where a man borrows a sum (suppose £200) of another, and grants him an estate, as of £20 *per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void as soon as such sum is raised. And in this case the land or pledge is said to be living; it subsists and survives the debt, and immediately on the discharge of that, results back to the borrower. Cases of this kind are very unusual, and are known as Welsh mortgages. In one instance the owner gave a mortgage to one who was in possession, to be void on payment of £75, "at such time when he, the said party of the second part, his etc., shall be dispossessed;" and there was a further stipulation that the mortgagee should retain possession until the sum of £75 was paid. It was held that the general effect was to entitle the mortgagee to retain possession and receive the rents until the amount of the mortgage money had been satisfied, with liberty to the mortgagor to pay the whole amount at any time and "dispossess" the mortgagee; that the instrument was in effect a Welsh mortgage, and that the possession of the mortgagee was not such as to give him an absolute title under the statutes of limitation (*n*).

2. *Legal Mortgages, Nature of.*

Mortuum vadium, a dead pledge, or *mortgage*, is where a man borrows of another a specific sum (*e. g.* £200), and grants him an estate on condition that if he, the mortgagor, shall repay the mortgagee the said sum of £200 on a certain day mentioned in the deed, then the grant shall be deemed void; or, that then the mortgagee shall reconvey the estate to the mortgagor. In this case, the land which is so put in pledge was by law, in case of non-payment at the time limited, for ever dead and gone from the mortgagor, and the mortgagee's estate in the lands was then at law no longer conditional, but absolute.

A mortgage may also be created by depositing title deeds with the mortgagee as security for an advance, either with or without an accompanying memorandum, in which case the property remains in the mortgagor; or, by conveyance to a trustee for the mortgagee; and in these cases it is called an equitable mortgage.

A legal mortgage may then be defined as a grant of land to the mortgagee, with a defeasance clause or proviso for

(*n*) *Re Yarmouth*, 26 Gr. 593.

redemption, whereby it is agreed that the estate granted shall be defeated or become void, or shall be re-conveyed to the mortgagor, on payment of a sum of money, or performance of some other condition. In addition to the grant and defeasance clauses, there are usually inserted covenants by the mortgagor for title, covenants to secure the repayment of the money and observe the terms of the mortgage, to pay the taxes while the mortgage subsists, to insure, if there are buildings on the land, stipulations regulating the rights of the parties on default being made, and a power of sale in case of default. A mortgage is therefore a composite instrument, containing a grant of lands with covenants for title, a defeasance or condition to defeat the grant, and a bond, obligation, or covenant to repay a sum of money borrowed, or to perform some other conditioned act. While a mortgage retains this form, and, for conveyancing purposes, retains also this character, except where it is affected by statute, yet by the current of equity decisions it is now regarded merely as a security for money advanced, or for the performance of some other act (*o*), and, if it contains a covenant to pay, a debt by specialty secured by a pledge of lands. If there is no covenant to pay, or other stipulation importing a debt, the mortgage itself, *i.e.*, the conveyance of the land with a proviso for redemption, is not conclusive evidence of a debt upon which an action will lie (*p*); and in one case evidence was admitted to shew that a mortgage, which did not contain a covenant to pay, had been given in satisfaction of the debt of another who had in consideration of receiving it relieved the mortgagor from all liability, and that in fact no money had ever been advanced on it (*q*).

The liability of a mortgagor may, of course, be regulated by express stipulation. Thus, where a mortgage contained an express stipulation that, before proceeding upon the covenant for payment, the mortgagee was to realize on the lands, and that the mortgagor was to be liable only for $600, or such less sum as would, with the proceeds of sale, amount to the mortgage money, and in no event for more than $600, it was held that no action would lie on the covenant for payment

(*o*) *Jamieson* v. *London and Can. L. & A. Co.*, 30 S.C.R. 14.

(*p*) But by the Mortgage Act, R.S.O. c. 121, s. 5, where a mortgagor conveys and is expressed to convey as beneficial owner, covenants for payment of the mortgage money, and the other short form covenants, are implied.

(*q*) *London Loan Co.* v. *Smyth*, 32 C.P. 530.

until after proceedings for sale had been taken (*r*). And in another case, where it was agreed that the lands only should be liable for the payment of the mortgage, and the mortgagee distrained for interest under a clause to that effect in the mortgage, the mortgagor recovered the amount distrained for (*s*).

A mortgage need not therefore follow any prescribed form, if from the documents it appears that the transaction is in fact a pledge of lands to secure payment of a sum of money, or the performance of some act. And if it further evidences an indebtedness from the mortgagor to the mortgagee an action will lie for the debt as well as for foreclosure or sale. If, however, the informal documents show that a sale was intended with a right to re-purchase, and not a pledge, there is no right of redemption which the Court can equitably deal with, but the contract of re-purchase must be carried out within the time agreed upon (*t*). The test in many cases of redemption is whether the so-called mortgagee has the corresponding right to compel payment. And in cases of informal documents, and of deeds absolute in form, evidence is admissible of the surrounding circumstances in order to lead to a conclusion as to whether the documents in fact constitute a mortgage (*u*).

Since the Judicature Act, an agreement for a mortgage capable of being specifically performed (*v*), would now probably be treated as a mortgage, on the same principle as an agreement for a lease is treated as equivalent to a lease (*w*).

3. *Right of Redemption.*

Whenever it appears that the transaction is one of pledge, constituting the relation of mortgagor and mortgagee, it is a maxim of equity that the mortgagor is completely disabled at the time of the loan or creation of the security from in any way depriving himself of, or hampering himself in, the right

(*r*) *Wilson* v. *Fleming*, 24 Ont. R. 388.

(*s*) *McKay* v. *Howard*, 6 Ont. R. 135.

(*t*) *Barrell* v. *Sabine*, 1 Vern. 268; *Dibbins* v. *Dibbins*, L.R. (1896) 2 Ch. 348.

(*u*) See *Livingston* v. *Wood*, 27 Gr. 515; *Barton* v. *Bank of N.S. Wales*, 15 App. Cas. 379.

(*v*) *Hunter* v. *Langford*, 2 Moll. 572.

(*w*) See *ante*, p. 137.

to redeem. Once a mortgage always a mortgage (*x*). In other words, if it be established that a transaction constitutes a mortgage, that involves and implies that the security is redeemable, and it cannot at the same time be irredeemable. It is an established rule "that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute" (*y*). So, a stipulation that the mortgagor and his heirs male should be entitled to redeem was held to be void, and not to prevent redemption in ordinary course (*z*); nor is a stipulation valid that redemption shall take place only within a certain fixed period (*a*); though a stipulation that redemption shall not take place till after a certain period is valid (*b*); nor will a mortgagee be allowed to obtain any collateral or additional advantage beyond his right to principal, interest and costs, the mortgagor being, by the nature of the transaction, prohibited from clogging or fettering his right to redeem (*c*). So, where a mortgagor of a reversionary interest insured his life with the mortgagees, an insurance society, and stipulated that if he died in the lifetime of his father, the policy of insurance should belong to the mortgagees; and on his death within that time they claimed the policy, it was held that the stipulation was void as a clog or fetter on redemption, and that the policy was redeemable (*d*). And where a mortgagee stipulated in the mortgage for the purchase of the mortgaged property by the mortgagee at a fixed sum in case of the mortgagee's default, it was held to be invalid (*e*). But the stipulation, to fall within this rule, must be one affecting the right to redeem, and it is thus defined in a recent case:—"Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given, is what is meant by a clog or fetter on the equity of redemption, and is there-

(*x*) *Howard* v. *Harris*, 1 Vern. 33, 190; *Spurgeon* v. *Collier*, 1 Ed. 55 at p. 59, note; *Seton* v. *Slade*, 7 Ves. at p. 273.

(*y*) *Vernon* v. *Bethel*, 2 Ed. at p. 113.

(*z*) *Howard* v. *Harris*, *supra*.

(*a*) *Seton* v. *Slade*, *supra*.

(*b*) *Teevan* v. *Smith*, 20 Ch. D. at p. 729.

(*c*) *Field* v. *Hopkins*, 44 Ch. D. 524.

(*d*) *Marquess of Northampton* v. *Pollock*, 45 Ch. D. 190; L.R. (1892) App. Ca. 1. See also *Eyre* v. *Wynn-Mackenzie*, L.R. (1894) 1 Ch. 218.

(*e*) *Fallon* v. *Keenan*, 12 Gr. at p. 394.

fore void" (*f*). So that a mortgagee may stipulate at the time of the loan for a collateral advantage if the right of redemption is not thereby fettered. Thus, where advances were made on a speculative security, a building estate, and the mortgagee stipulated for, and, in fact, deducted commissions on his advances at the times of making them, as part of the mortgage contract, there being no undue pressure on the mortgagor, it was held that he was entitled to do so (*g*). So also a covenant in a mortgage of a hotel to a brewer that the mortgagor would, during the continuance of the security, deal exclusively with the mortgagee for beer, was held to be valid (*h*). And where a mortgage of a theatre to secure a loan contained a stipulation that the mortgagee should, in addition to his principal and interest, receive one-third of the profits, it was held not to clog or fetter the equity of redemption, and that the mortgagor could only redeem by payment of principal, interest, and one-third of the profits (*i*). When a mortgagee is paid off, however, he must reconvey free from any obligation that existed during the currency of the mortgage, not retaining any estate or interest in the mortgaged premises, or any right to interfere with the mortgagor in his enjoyment or user of the premises. And so where a mortgage of a public house contained a covenant to deal exclusively with the mortgagee, it was held that on redemption the mortgagee was bound to reconvey free from the "tie" (*j*).

4. *Foreclosure and Sale.*

As soon as the mortgage is created, the mortgagee may immediately enter upon the lands, but is liable to be dispossessed upon performance of the condition by payment of the mortgage money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till he makes default, upon which the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land now is forever dead. But here again the courts interpose on equitable grounds; and, though a mortgage may be thus

(*f*) Per Lindley, M.R., *Santley* v. *Wilde*, L.R. (1899) 2 Ch. 474.

(*g*) *Maitland* v. *Upjohn*, 41 Ch. D. 126.

(*h*) *Biggs* v. *Hoddinott*, L.R. (1898) 2 Ch. 307.

(*i*) *Santley* v. *Wilde*, L.R. (1899) 2 Ch. 474.

(*j*) *Rice* v. *Noakes*, L.R. (1900) 1 Ch. 213; affirmed, L.R. (1900) 2 Ch. 445.

forfeited, and the estate absolutely vested in the mortgagee at the common law freed from the condition, yet they will allow the mortgagor (within the time allowed by the Statute of Limitations) to recall or redeem his estate, paying to the mortgagee his principal, interest, and costs; for otherwise in strictness of law an estate worth £1,000 might be forfeited for non-payment of £100 or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*; and this enables a mortgagor to call on a mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, while he has been in possession, on payment of his whole debt and interest, thereby turning the *mortuum* into a kind of *vivum vadium*. On the other hand, so that the mortgagee shall not remain in uncertainty as to his security, he may bring an action on the mortgage to compel the mortgagor to redeem, within a time to be fixed, otherwise to be forever debarred or foreclosed. And the Court, allowing the mortgagee a period of six months within which to redeem, will foreclose the mortgage if he fail to do so. Instead of foreclosure the mortgagee may ask for sale by the Court, if the mortgagor does not redeem. These remedies are entirely apart from the remedy afforded by the power of sale, which will be spoken of hereafter. By an old statute, giving a second mortgage without disclosing the first, was punished by the fraudulent mortgagor's forfeiting all equity of redemption whatever. But in consequence of our Registry Act, such a transaction could hardly take place.

5. *Possession and Leases of Mortgaged Lands.*

A legal mortgage being, as we have seen, a conveyance of the land to the mortgagee, either with or without a privilege to the mortgagor to remain in possession until default, it follows that the mortgagor can make no lease of the mortgaged lands, which will be binding on the mortgagee (*k*).

Where the mortgagor has, *after* the mortgage, demised to a tenant, and on default in payment, or otherwise, has become disentitled to the possession, the mortgagee may, by recognizing the possession of the tenant, preclude himself from being able to treat him as a trespasser; and it is said he becomes tenant to the mortgagee on payment to him of the rent reserved by

(*k*) *Keech* v. *Hall*, 1 Sm. L.C. 494; *Moss* v. *Gallimore*, Ibid. 497, and notes thereon.

the mortgagor (*l*). But it would seem that the mere receipt of interest by the mortgagee from the mortgagor will not amount to such recognition (*m*). The mortgagee cannot without some assent of such tenant, express or implied, constitute him his tenant, and cause him to hold of him the mortgagee; and without such assent evidencing a new tenancy between the mortgagee and the tenant, no privity of estate exists between them, and the mortgagee would not, as in the case of a tenant before mortgage, have the rights and remedies of the mortgagor to the rent (*n*). It is said, "that in order to create a tenancy between the mortgagee and the tenant let into possession by a mortgagor, there must be some evidence whence it may be inferred that such relation has been raised by mutual agreement, and that in such case the terms of the tenancy are to be ascertained (as in an ordinary case), from the same evidence which proves its existence; and where the tenant does consent to hold under the mortgagee, *a new tenancy* is created, not a continuation of the old one between him and the mortgagor" (*o*). It would seem, however, that the consent must be of a distinct character to create such new tenancy, at least to have the effect of absolving the tenant from liability to pay the rent to the mortgagor reserved on the lease from him, when the same has not been actually paid under some constraint to the mortgagee, and that mere consent alone to hold of the mortgagee will not have this effect. Thus, *mere notice* by the mortgagee to such a tenant will be no defence to an action by the mortgagor either for rent due before or after the notice. The ordinary principle as to a tenant is that he must pay rent, or for use and

(*l*) *Keech* v. *Hall*, 1 Sm. L.C. 505, *et seq*, 578; *Doe d. Whitaker* v. *Hales*, 7 Bing. 322.

(*m*) *Doe d. Rogers* v. *Cadwallader*, 2 B. & Ad. 473; see, however, *Evans* v. *Elliott*, 9 A. & E. 342, per Denman, C.J.

(*n*) *Evans* v. *Elliott*, 9 A. & E. 342; *Partington* v. *Woodcock*, 6 A. & E. 690, per Patteson, J.

(*o*) *Moss* v. *Gallimore*, 1 Sm. L.C. 505, *in notis*. Of what nature would be the new tenancy between the mortgagee and tenant? For instance, if the demise from the mortgagor were by deed having more than three years to run, with covenants to repair, or cultivate in a particular mode, and all that passed between the mortgagee and the tenant was a verbal consent under threat of eviction to hold of the mortgagee, on payment of the rent reserved by the old lease, it would seem that at the most this could not create a greater interest than from year to year; per Cockburn, C.J., *Carpenter* v. *Parker*, 3 C.B.N.S. 235. If so, would the terms of the old lease as to repairs and cultivation govern and be incorporated into the new tenancy?

occupation, to the person from whom he took, and cannot deny his landlord's right short of eviction, or what is tantamount to eviction by a title paramount to the landlord, or payment under constraint of paramount charges as rent charges, or other claims issuing out of the land (*p*). Applying these principles to the case of the mortgagor's tenant on demise after mortgage, then it is clear if the tenant be rightfully evicted by the mortgagee and let into possession again on a new agreement between him and the mortgagee, that the old lease ceases; so also it would seem to be (though it is by no means clear), that if there be only a constructive eviction, as, for instance, a threat to evict, coupled with an attornment to the mortgagee as his tenant (*q*). And though there have been no eviction, either actual or constructive, and no attornment or new tenancy created between the mortgagee and the tenant, still payment to the former under constraint in discharge of his claims will be a good defence by the tenant in an action for the rent by the mortgagor (*r*). But as before mentioned, *mere notice* by the mortgagee to the tenant who becomes such after the mortgage will not absolve the tenant from liability to his lessor for past or future rent; and there has been some question as to whether notice from the mortgagee, though coupled with payment of the rent, is any defence to an action by the mortgagor if the rent was overdue before notice given (*s*).

It not infrequently happens that the mortgagee permits the mortgagor to receive the rents, and does not in any way interfere with the tenancy, and that the tenant omits to pay rent to either; the question then arises, how the mortgagor can enforce payment. It is clear that where there is *no subsisting re-demise* to the mortgagor, and the mortgagee is the reversioner, the mortgagor is not entitled to sue or distrain in his own name, and so no proceedings can be had unless in the name of the mortgagee. Recent cases go to shew that under such circumstances as above, the mortgagor is "*presumptione juris* authorized," "if it should become

(*p*) Notes to *Lampleigh* v. *Brathwait*, 1 Sm. L.C. at p. 156.

(*q*) *Doe d. Higginbotham* v. *Barton*, 11 A. & E. 315; *Mayor of Poole* v. *Whitt*, 15 M. & W. 571; but see the judgments in *Delaney* v. *Fox*, 2 C.B.N.S. 768; *Carpenter* v. *Parker*, 3 C.B.N.S. 237.

(*r*) *Johnson* v. *Jones*, 9 A. & E. 809. See also *Murdiff* v. *Ware*, 21 U.C.R. 68.

(*s*) *Wilton* v. *Dunn*, 17 Q.B. 295: see also per Hagarty, J., in *Fairbairn* v. *Hilliard*, 27 U.C.R. 111; and *Waddilove* v. *Barret*, 2 Bing. N.C. 538.

necessary, to realize the rent by distress, and to distrain for it in the mortgagee's name as his bailiff" (*t*). It is to be observed that those cases, however, were cases in which there was no re-demise in the mortgage to the mortgagor, and from all that appears in them there was no right of possession in the mortgagor. In any case in which there should be a lease at a rent, and then the lessor should mortgage his reversion with a re-demise to himself, then it would seem that during the right of a mortgagor to the pernancy of the profits, any distress for rent due from the tenant during such subsistence, should be by the mortgagor and in his name only. He would appear then to be the reversioner, not indeed of the whole reversion, but of part, and so entitled to the rent and to distrain. If A. seised in fee demise for a thousand years at a rent, and, pending the lease, demise to B. for five years, B. becomes reversioner and entitled to the rent as to the first lease during the term granted to him, and, instead of enjoying the possession of the land, he takes the rent (*u*). The position of B., the second lessee, and of the mortgagor, in the case above put, appear in principle identical.

Where a lease has been made before the mortgage, the latter has the effect only of conveying the reversion to the mortgagee, and the tenant then becomes the tenant of the mortgagee (*v*).

6. *Possession as between Mortgagor and Mortgagee.*

The right to possession as between mortgagee and mortgagor may be considered under the following heads:—

1. When nothing is said as to possession in the mortgage, or at or after its execution, and no tenancy is created by any implied or express agreement; here the mortgagee's right of possession exists from the time of execution of the mortgage (*w*); and the mortgagor continuing in possession is in the position of a tenant at sufferance.

2. If the mortgage is silent as to possession, and the mortgagee either expressly consent to the mortgagor remain-

(*t*) *Trent* v. *Hunt*, 9 Ex. 24, per Alderson, B.; *Snell* v. *Finch*, 13 C.B. N.S. 651; see also *Dean of Christchurch* v. *Duke of Buckingham*, 17 C.B. N.S. 391, per Willes, J.

(*u*) Preston Conv. Vol. 2, p. 145; Co. Litt. 215*a*; *Harmer* v. *Bean*, 3 Car. & Kir. 307.

(*v*) *Keech* v. *Hall*, 1 Sm. Lg. Cas., notes p. 592.

(*w*) *Doe d. Mowat* v. *Smith*, 8 U.C.R. 139.

ing in possession, or the facts are such that such consent can be implied, then the mortgagor cannot be treated as a trespasser or tenant at sufferance, and so ejected without demand of possession. The position of a mortgagor under these circumstances is like that of a tenant at will, both as regards right to possession and the application of the Statute of Limitations (*x*).

3. If nothing appear as to a tenancy or right to possession beyond a covenant by the mortgagor that *after* default the mortgagee may *enter*, hold, possess, and enjoy, this will not by implication override the effect of the conveyance, which gives an immediate right of entry to the mortgagee; such a covenant may be regarded only as an ordinary covenant for quiet enjoyment, to take effect after default (*y*).

4. If the mortgage contain a positive agreement or proviso that till default in payment on certain named days the mortgagor may remain in possession, as, for instance, when a day is named for payment of principal and prior days for payment of interest, this operates as a re-demise to the mortgagor "for as long as he had time given him to redeem by payment of the mortgage money, unless he make default in any intermediate payment," as being an *affirmative* agreement by the mortgagee for a *definite named* time, and the mortgagee's right of entry will accrue only on default (*z*).

It would seem that where the proviso for possession would give a right to possession exceeding three years, though subject to earlier determination on default by the mortgagor, non-execution by the mortgagee will cause the proviso to be invalid to create the term or right to possession intended (*a*); unless indeed the mortgage can operate to execute the term by way of use. Thus it may well be contended that on a mortgage in fee by way of

(*x*) *Litchfield* v. *Ready*, 5 Ex. 939; and see *Doe d. Higginbotham* v. *Barton*, 11 A. & E. 314. Can such consent be implied so as to create a tenancy at will from the mere fact of silence by the mortgagee and his knowledge that the mortgagor remains in possession? See notes to *Keech* v. *Hall*, 1 Sm. Lg. Ca. 494, and *Evans* v. *Elliott*, 9 A. & E. 342; *Royal Canadian Bank* v. *Kelly*, 19 C.P. 196, per Gwynne, J.

(*y*) *Doe d. Roylance* v. *Lightfoot*, 8 M. & W. 553.

(*z*) *Wilkinson* v. *Hall*, 3 Bing. N.C. 533; *Ford* v. *Jones*, 12 C.P. 358. See remarks under the sixth head.

(*a*) *Swatman* v. *Ambler*, 8 Ex. 72; *Pitman* v. *Woodbury*, 3 Ex. 4; *Doe d. Roylance* v. *Lightfoot*, 8 M. & W. 553; *Wilkinson* v. *Hall*, 3 Bing. N.C. 533; *Ford* v. *Jones*, 12 C.P. 358. See *Trust and Loan Co.* v. *Lawrason*, 6 App. R. 286; 10 S.C.R. 679.

release or statutory grant, wherein the day for payment should be more than three years from execution of the mortgage, with a proviso for possession by the mortgagor till default, it might operate to create a use for the term in the mortgagee for the mortgagor, which the statute would execute (*b*), and as to which the execution by the mortgagee would be immaterial. If, however, the conveyance should be *unto and to the use of* the mortgagee, or otherwise there should be a use on a use, or the mortgage were to a corporation in whom no use can be executed, then no legal estate in the term would be executed for the benefit of the mortgagor (*c*).

Where the term intended to be created cannot be executed in the mortgagor under the Statute of Uses, and assuming, as it would seem to be the case (*cc*), that where it would exceed three years, the non-execution by the mortgagee would prevent its taking effect, the clause as to possession would still be evidence of a tenancy at will. And if there be an attornment clause in the mortgage under which the mortgagor agrees to pay as rent sums equivalent to the interest, and occupation subsequently by him, the position of landlord and tenant will be created at a rent, and the mortgagee can distrain (*d*). Probably also, if rent were paid *qua* rent, with reference to a year or aliquot part of a year, and there was nothing in the mortgage shewing that a tenancy at will only were intended, a tenancy from year to year would be created.

If the mortgagor be tenant at will to the mortgagee, an

(*b*) *Morton* v. *Woods*, L.R. 3 Q.B. 658, per Blackburn, J., in argument and judgment. See *Simpson* v. *Hartman*, 27 U.C.R. 460, where a mother seised in fee in consideration of five shillings and natural love, granted, bargained, and sold to her daughter, and her heirs, *to their own use*, for ever, "reserving, nevertheless, to my (the grantor's) own use, benefit and behoof, the occupation, rents, issues and profits of the above granted premises during my natural life." The Court considered that the fee passed to the grantee. The operation of the Statute of Uses was not alluded to; and if it had been, it would seem that taking the conveyance to operate by way of grant (whatever might have been the case if it were to operate as a covenant to stand seised, or by way of bargain and sale), the use in favour of the grantor would still have been a use upon a use, and so unexecuted by the statute, and a mere trust. This case, therefore, does not conflict with what is stated in the text.

(*c*) See *Simpson* v. *Hartman*, *supra*.

(*cc*) *Ante* note *b*.

(*d*) *West* v. *Fritche*, 3 Ex. 216; *Morton* v. *Woods*, L.R. 3 Q.B. 658; *Royal Canadian Bank* v. *Kelly*, 19 C.P. 196; see further, postea, s. 17.

assignment or sub-lease by the mortgagor does not *per se*, without notice to the mortgagee, determine the tenancy (*e*).

5. On default in the last instance, where the licence is to remain in possession till default, the mortgagor becomes tenant at sufferance.

6. If the duration of the intended demise be uncertain, or couched in the shape only of a *negative* covenant by the mortgagee, it has been said this will not operate as a valid demise (*f*). Thus a mere covenant by the mortgagee that in case of non-payment on the day named he would *not* enter till after a month's notice in writing, has been said to be invalid as a demise, on the double objection of want of certainty and of affirmative language. And even though there were affirmative language giving to the mortgagor a possessory right, it will not avail unless the period for possession be fixed and certain; thus an agreement that the mortgagor might remain in possession till a month's *notice* in writing to quit after default, would not create a term certain. Where, as is usual, the mortgage names a day for payment of principal money with intermediate days for payment of interest, and a provision that till default in payment the mortgagor may remain in possession, no objection can be made on the ground of want of certainty. Such provision operates as creating a term till the day named for payment of the principal, with a cesser of the term on default in payment of interest. A lease for ten years, if the lessee so long live, is a good lease.

7. If by the operation of an attornment clause, as before explained, the mortgagor should expressly become tenant to the mortgagee, either at will or from year to year, at a rent,

(*e*) *Pinhorn* v. *Souster*, 8 Ex. 763; *Melling* v. *Leak*, 16 C.B. 652, 669; *Richardson* v. *Langridge*, Tud. Lg. Ca. 4th ed. at p. 18. The position of a tenant of a mortgagor, himself tenant at will to the mortgagee, seems to be involved in some obscurity. As a general rule, a lessor being reversioner can treat the tenant of his tenant at will as a trespasser; but there is a case "which goes so far as to shew that a mortgagor in possession, who is not treated by the mortgagee as a trespasser, may confer on his lessee the legal possession, although the mortgage was in fee." *Doe d. Higginbotham* v. *Barton*, 11 A. & E. 307; *James* v. *McGibney*, 24 U.C.R. 158, per Draper, C.J. See also *Evans* v. *Elliott*, 9 A. & E. 342, per Ld. Denman, C.J.

(*f*) See the notes to *Keech* v. *Hall*, 1 Sm. Lg. Ca. 494; see also on the question as to certainty, *Ashford* v. *McNaughten*, 11 U.C.R. 171; *McMahon* v. *McFaul*, 14 C.P. 433; *Konkle* v. *Maybee*, 23 U.C.R. 274; *Sidey* v. *Hardcastle*, 11 U.C.R. 162; *Copp* v. *Holmes*, 6 C.P. 373; *Richardson* v. *Langridge*, Tud. Lg. Ca. 4th ed. at p. 13, and cases there referred to; see also a review of the cases in *Royal Canadian Bank* v. *Kelly*, 19 C.P. 196.

then he will have the ordinary right to possession of any such tenant, except in so far as such right may be qualified by the mortgage itself in giving right to entry without notice on default in payment or non-observance of covenants.

8. Those cases where, as in the fourth and seventh instances above, the proviso for possession is valid as a re-demise by the mortgagee if the mortgage were executed by him, but if not so executed, might fail to create the term intended, as not being in compliance with the Statute of Frauds, or R.S.O. c. 119, s. 7.

Unless there be some absolute necessity for the mortgagee to enter into possession, such a course is usually avoided, for it involves an account between him and the mortgagor. A mortgagee in possession is liable to account for what he has received, or for what, but for his wilful default, he might have received (*g*). He is chargeable with an occupation rent in respect of property held by himself, and is liable for voluntary waste, (as in pulling down houses and opening mines). As a mortgagee in possession is regarded in some measure in the light of a trustee, he will, if he assign the mortgage and possession to another without the assent of the mortgagor, *continue* to be accountable and chargeable for rents and profits after assignment; a matter of some importance where they should be large, and the assignee should receive, or, but for his wilful default, might have received, more than sufficient to pay the mortgage debt. For many improvements he might make he will not be allowed, as otherwise by large expenditure he might preclude the mortgagor from redeeming (*h*). This would be what has been termed "improving the mortgagor out of his estate" (*i*).

7. *Actions to protect Property.*

Though a mortgagor has, by the conveyance, parted with the property to the mortgagee, yet where there is a clause entitling him to remain in possession until default, and no default has been made, he has always in equity been entitled to sue to prevent any injury or violation of right without

(*g*) As to the nature and extent of liability, see *Coldwell* v. *Hall*, 9 Gr. 110; *Paul* v. *Johnson*, 12 Gr. 474.

(*h*) *Kerby* v. *Kerby*, 5 Gr. 587.

(*i*) *Saudon* v. *Hooper*, 6 Beav. 246.

joining the mortgagee (*j*). And so a mortgagor in possession under such a clause and not in default was held entitled to proceed for an injunction to restrain the breach of a covenant not to use the property in a certain way (*k*). And at law under similar circumstances actions of trespass (*l*) and ejectment (*m*) could be brought. After default, however, the mortgagor would no longer be entitled to possession nor to receipt of the rents and profits. By the Judicature Act (*n*) it is now enacted that "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or sue, or distrain for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person, and in that case he may sue or distrain, jointly with such person." Since this enactment a mortgagor may maintain an action even after default if no notice of taking possession has been given, but after such a notice his right ceases (*o*).

8. *Custody of Title Deeds.*

A mortgagee becomes immediately entitled to the title deeds, and in the case of mortgages made on or before 1st July, 1886, the mortgagor is not entitled to inspect them in the hands of the mortgagee for any purpose whatever (*p*). But, with regard to mortgages made after that date, a mortgagor, as long as his right to redeem subsists, is entitled from time to time, at reasonable times, on his request and at his own cost, and on payment of the mortgagee's costs, to inspect and make copies or abstracts of, or extracts from the documents of title in the mortgagee's custody or power (*q*).

(*j*) *Van Gelder* v. *Sowerby*, 44 Ch. D. 374, at pp. 390, 392, *et seq.* In *Platt* v. *Attrill*, 12 Ont. R. 119, the contrary is stated, but the case there relied on, *Swan* v. *Adams*, 23 Gr. 120, does not so decide.

(*k*) *Fairclough* v. *Marshall*, 4 Ex. D. 37.

(*l*) *Rogers* v. *Dickson*, 10 C.P. 481.

(*m*) *Ford* v. *Jones*, 12 C.P. 358.

(*n*) R.S.O. c. 5, s. 58, s.-s. 4.

(*o*) *Keech* v. *Hall*, 1 Sm. L.C., notes at pp. 507, 508.

(*p*) See cases cited, Armour on Titles 98.

(*q*) R.S.O. c. 121, s. 3.

9. *Interest.*

The defeasance clause, or proviso for redemption, contains the terms upon which the mortgagor or those claiming under him may redeem, and the rate and mode of payment of interest and principal. A provision that if interest be not punctually paid the rate will be increased is considered, on equitable grounds, to be a penalty for not paying in time, and is relieved against by compelling the mortgagee to receive the lower rate. On the other hand, if a higher rate be stipulated for, with a provision that a smaller rate will be accepted if paid punctually, there is no relief against this, which is regarded as a mere matter of contract (*r*). Care should be taken in drawing a proviso of this kind. In one case, the mortgage required payment of interest on the 16th of the month at twelve per cent. per annum, "but to secure prompt payment of said interest, the said mortgagee hereby agrees to take and receive at the rate of ten per cent. providing the said interest is paid on the said 17th, etc." On the 17th a bill was filed for foreclosure claiming the higher rate, and the court held that the first date (16th) being unequivocally mentioned as the day for payment, default had been made when the bill was filed, and, though the mortgagor tendered the lower rate on the 17th after the filing of the bill, the mortgagee was not bound to accept it (*s*). A stipulation that, if the interest be not paid punctually, the principal shall bear a higher rate after the day fixed for payment of interest, is not regarded as a penalty, but as a contract for a lower rate up to a certain day and a higher rate afterwards (*t*). Where a claim is made for interest after maturity of the mortgage, it may be allowed as a claim for damages for detention of the money beyond the day fixed for payment, and therefore it will be computed at six per cent. per annum, the statutory rate (*u*), unless the mortgage contains a stipulation for payment at some other rate after maturity. A provision that the mortgagor shall pay a certain rate "until the whole amount shall be fully paid and satisfied," or words to that effect, is not sufficient to carry the obligation

(*r*) 2 Davidson Conv. 3 ed. 292.
(*s*) *Bennett* v. *Foreman*, 15 Gr. 117.
(*t*) *Waddell* v. *McColl*, 14 Gr. 211; *Downey* v. *Parnell*, 2 Ont. R. 82.
(*u*) R.S.C. c. 127, s. 2.

beyond the maturity of the mortgage—these words having reference only to the date of payment fixed by the mortgage (*v*). And there is no difference in this respect between an action on the covenant by the mortgagee, and an action for redemption by the mortgagor (*w*).

Where after maturity of a mortgage, a mortgagor continued to pay eight per cent. per annum, not knowing that he was liable only for six per cent., it was held that he could not recover back the excess, nor have it credited on principal (*w w*). But where a mortgagee sold under his power of sale and retained the contract rate after maturity, it was held that he was bound to account for the excess over the statutory rate (*x*). For this reason, where the contract rate is higher than the statutory rate, it is usual to stipulate that interest shall be paid at the rate mentioned after as well as before maturity, and after as well as before default.

It is necessary that the rate of interest should be stated in the mortgage in order to comply with the Interest Act (*y*). When the mortgage is payable on a sinking fund plan, or by blended payments of principal and interest, or on any plan which involves an allowance of interest on stipulated payments, no interest is chargeable or recoverable unless the rate is set out in the mortgage and the amount of principal money is also shewn. And by another section (*z*), when any principal is not made payable until a time more than five years after the date of the mortgage, then at any time after the expiration of such five years any person entitled to redeem may tender the principal money with interest to date and for three months in advance, and no further interest is then chargeable.

10. *Interest and Taxes after Default.*

After a mortgage matured it was always the rule in equity that a mortgagee was not bound to take his mortgage

(*v*) *Powell* v. *Peck*, 15 App. R. 138. See also *St. John* v. *Rykert*, 10 S.C.R. 278.

(*w*) *Powell* v. *Peek*, *supra*.

(*ww*) *Stewart* v. *Ferguson*, 31 Ont. R. 112.

(*x*) *Peoples Loan Co.* v. *Grant*, 18 S.C.R. 262.

(*y*) R.S.C. c. 127, s. 3.

(*z*) S. 7.

money without six months' notice (*a*). Now, by the Mortgage Act (*b*), where default has been made in payment of principal in any mortgage made after the 1st of July, 1888, the same may be paid at any time thereafter without previous notice to the mortgagee and without payment of any interest in lieu of notice; but if there is any express agreement in or collateral to the mortgage with respect to such a notice or interest in lieu thereof, the agreement is to be binding. The enactment does not apply to cases of principal maturing on account of default in payment of interest, but in due course at the date fixed for payment. It has consequently become the practice to provide in the redemption clause that if the principal money, or any part thereof, be not paid at maturity, the mortgagor shall not be at liberty to pay it afterwards without giving notice or paying interest in lieu of notice.

The proviso for redemption in the statutory short form appears to be defective in an important particular. The stipulations are to be taken, according to the decisions respecting the duration of the covenant (*c*), as applying only to the period up to maturity of the mortgage, and the covenant to pay to the same period; and indeed the proviso requires the payments to be made and all things to be done under the proviso "until default." The covenant is to make the payments and perform the acts required by the proviso Payment of taxes is included in the proviso. Hence the covenant extends only to the payment of taxes "until default," and there appears to be no obligation on the mortgagor to pay taxes after default (*d*), though he could not redeem without paying them.

11. *Covenants—For Title.*

Following the defeasance are the covenants for title, and for security of the mortgage obligation, and other stipulations. The short form covenants for title are the same as in ordinary purchase deeds, except that the covenant for quiet enjoyment is made to take effect only after default in payment of the

(*a*) See *Archbold* v. *Building & Loan Association*, 15 Ont. R. 237; 16 App. R. 1.

(*b*) R.S.O. c. 121, s. 17.

(*c*) *St. John* v. *Rykert*; *Powell* v. *Peck*; and *People's Loan* v. *Grant*, *supra*.

(*d*) Leith R.P. Stat. 419.

mortgage money; and the covenants are not limited, as in case of an ordinary purchase deed, to the acts of the grantor, but are unlimited and absolute. This has been complained of, on the ground that the result is, after foreclosure, or sale under a power of sale in the mortgage, that the mortgagor continues liable more extensively on his covenants which run with the land, than if he had sold the estate in the first instance; and no doubt this is so. On the other hand, if, through defect in title, the mortgagee lost the security of the land on recovery by a stranger through some defect in title not occasioned by the mortgagor, and the covenants for title were limited to his acts, the mortgagee might be in a very precarious position, in case the day appointed for payment of the principal were distant; whereas, if the covenants were general, he might sue on them at once in such case without waiting for the day appointed for payment, and the measure of damages would be, it is apprehended, the amount of the loan; for the mortgagee is entitled to what he stipulated for, viz., the security of the land, and failing that, to be reinstated and to a return of his money.

12. *For Quiet Possession.*

The covenant that on default the mortgagee shall have quiet possession (No. 7 in the Statutory form), the power to enter and sell (No. 14), and the proviso that until default the mortgagor shall have quiet possession (No. 17) are not quite in harmony with each other. Clause 7 gives the mortgagee the right to possession in default of payment of principal or interest, and also apparently of taxes and statute labour; clause 14 gives the right only after default in payment of principal or interest, and then only after a certain written notice; clause 17, on the other hand, allows the mortgagor the right to possession till default of payment of principal or interest, or in *observance of covenants.* Thus the right of the mortgagee to possession is more extensive under the grant of the lands to him and of clause 17 negativing his right to possession, than under the positive effect of clauses 7 and 14, giving him the right to enter. If these various clauses be used together without any modification, as is probable, then it would seem that they may yet to a great extent be reconciled. Thus, suppose the covenant to insure be inserted, and default be made therein by the mortgagor, whereon the mortgagee should bring ejectment;

the mortgagor would contend that clauses 7 and 14, which give a right to the mortgagee to enter do not extend to breach of covenant, and that clause 14 requires written notice to be given before entry. The proper answer of the mortgagee apparently would be, that the effect of the conveyance is to give him the immediate estate and right to possession; that such effect is controlled solely by clause 17, which allows the mortgagor possession only till breach of covenant; that there is no other clause giving possession to the mortgagor, and consequently the general effect of the conveyance must govern; and so far as regards clauses 7 and 14, that they do not expressly negative any right the mortgagee otherwise has, nor do they positively confer any right to possession on the mortgagor; that clause 7 operates only as a covenant for quiet enjoyment against interruption, not to come into operation on default of the covenant to insure (to which it does not extend), but only on default in payment of the mortgage moneys, taxes or statute labour, and "in the meanwhile, though the mortgagee is equally to have power to enter and enjoy the land, yet he must content himself with his own title against interruption by strangers, there being no covenant by the mortgagor to protect him during that period; whereas if he be disturbed after default in the covenant to insure he may have recourse to his remedy on the covenant" (*e*). Clause 14 is capable, perhaps of a somewhat similar construction; at any rate it would seem that on breach of the covenant, the mortgagee might eject, though no default were made in the payment of the mortgage moneys, taxes or statute labour.

13. *Further Assurance.*

Clause 9 of the statutory form, being the covenant for further assurance, is made to operate only after default; in this respect it is "objectionable, as it might well happen that some act for further assurance might be required to be done before default" (*f*). It need hardly be mentioned that, so long at least as the equity of redemption subsists, the mort-

(*e*) *Doe d. Roylance* v. *Lightfoot*, 8 M. & W. 553, in which case there was no right to possession given to the mortgagor, but the covenant for possession was that *after default* the mortgagee might enter, possess, etc.; the question was whether the mortgagee had right immediately on execution of the deed, or only after the default.

(*f*) Davidson Conv. 3 ed., vol. 2, 659.

gagor cannot under this covenant be required to convey except subject to the proviso for redemption; nor can he be required after default to release his equity of redemption.

14. *Production of Title Deeds.*

Clause 10, that the mortgagor will produce title deeds, is a clause which, without some explanation, might strengthen a practice unfortunately once too prevalent, viz., that the title deeds may be left in the hands of the mortgagor. This should never be permitted, if only (apart from other reasons) on the ground of the frequent impossibility of ever afterwards obtaining any production of the title deeds, and the consequent depreciation in the value of the property, and difficulty in carrying out a sale. When the mortgagor makes default, and the mortgagee proceeds to enforce his claim by foreclosure or sale, an hostility frequently springs up, and the mortgagor, so far from producing the title deeds, does all in his power to thwart the mortgagee. The remedy on the covenant will frequently be found useless, and when a foreclosure or sale has to be resorted to, the mortgagor is generally in such circumstances that, on a sale, any proceedings on the covenant to produce only entail expense on the mortgagee, and on a foreclosure any order for delivery up of the title deeds might be of no avail. The form may be of service where the title deeds cover other property to be retained by the mortgagor and not included in the mortgage; or where the mortgagor has sold part of the property covered by the title deeds, and has himself given his vendee a covenant to produce. Even in these cases a prudent mortgagee will obtain possession of the title deeds to himself, or at least to some trustee for both parties. When the mortgagor objects on the ground that the deeds cover other property, the mortgagee may himself offer to covenant to produce; and when the objection is that the mortgagor has covenanted to produce to a former purchaser, the mortgagee may urge that the covenant would also be binding on him during the continuance of his estate as running with the land (*g*).

(*g*) Sugden Vendors, 14 ed., 453. It must not be supposed that the fact of a vendor having given a covenant to produce on sale of part of the property, entitles him, on sale of the residue, to retain the title deeds to answer his covenant; in the absence of any contract on the subject, it would seem he will have to deliver them over to the purchaser of the residue; he can neither retain them nor deliver them to the first purchaser. The vendor

15. *Insurance.*

Clause 12, the covenant for insurance, is defective in that it provides that the mortgagor will insure, "unless already insured." If he is already insured the covenant does not apply. Though the mortgagee should insist upon an assignment of the policy, the covenant operates as an equitable assignment of a policy effected under it, entitling the mortgagee to sue for a loss (*h*).

If a policy be assigned, the covenant to keep it up so long as any moneys remain due should contain a stipulation to pay the annual premium requisite so to do, two or three days at least before the policy would expire, and produce the receipt on demand; this gives time to the mortgagee after default to pay, or insure himself before the policy expires. It should provide also that the mortgagor will do or suffer nothing whereby the policy may be vitiated, and that thereon or on any default by the mortgagor in keeping up the policy, the mortgagee may keep up the insurance or otherwise insure, and that the premiums so paid shall be charged on the land. Where, however, no power to insure is given to the mortgagee by the mortgage, then on omission to pay for insurance, which, by the terms of the mortgage, ought to be paid, the mortgagee may insure and add the premium to the principal money at the same rate of interest. This is under power given by R.S.O. c. 121, s. 18.

Both the mortgagor and mortgagee have insurable interests. And if the mortgagee should insure at his own expense, without having any right under the morgage deed or otherwise to recover the premium from the mortgagor, then he is considered as having insured for his own benefit, and not for that of the mortgagor, or of the estate, and could retain the insurance money upon a loss happening and also recover the mortgage money without any deduction; and in this respect he stands on much the same footing as a lessor insuring under like circumstances (*i*).

It is a practice, now almost universal, for the mortgagee to procure from the insurance office what is commonly known

would, however, in such a case be entitled to have the covenant recited in the conveyance of the residue, or endorsed on it, so as to create notice, and might fairly require a covenant from the purchaser to perform it: Sugden Vendors, 14 Ed. 434.

(*h*) *Greet* v. *Citizens Ins. Co.*, 27 Gr. 121; 5 App. R. 596.

(*i*) *Dobson* v. *Land*, 8 Ha. 216; *Russell* v. *Robertson*, 1 Ch. Ch. 72.

as a mortgage clause. This clause is inserted in the policy and usually provides that the interest of the mortgagee in the policy shall not be invalidated by any Act or neglect of the mortgagor, nor by the occupation of the premises for purposes more hazardous than are permitted by the policy. And it also provides that if a loss shall happen which the insurance office shall pay, and the office shall claim that there is no liability to the mortgagor, it shall be subrogated to all the rights of the mortgagee under all the securities held for the debt to the extent of the payment; or that the office may pay the whole mortgage off and take an assignment. This clause should always be obtained, as upon a mere assignment of the policy it continues to be voidable by the acts of the mortgagor (*j*). The effect of this arrangement upon the interest of the mortgagee is that as to all acts or negligence occurring after it is made the mortgagee is protected, but the policy may still be shewn to be invalid for some reason existing at the time of the assignment (*k*). This clause covers the neglect of the mortgagor to make proofs of loss within the time required by the conditions of the policy, and enables the mortgagee to sue, notwithstanding the mortgagor's neglect (*l*). And the claim of the mortgagee may be good although the mortgagor himself could not recover (*m*). Where the insurance office claims to be subrogated to the rights of the mortgagee it must shew that no liability exists to the mortgagor and that there is a good defence to any action brought by him on the policy (*n*).

The covenant for insurance does not provide for the application of the insurance money, in case a loss occurs and is paid. In the absence of any special contract, the rights of the parties are governed by the Mortgage Act (*o*), which enacts that "(1) all money payable on an insurance to a mortgagor shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received. (2) Without prejudice to any obligation to the contrary imposed by law or by special

(*j*) *Mechanics' Bdg. & S. Society* v. *Gore District Ins. Co.*, 3 App. R. 151.

(*k*) *Omnium Securities Co.* v. *Canada Mutual Ins. Co.*, 1 Ont. R. 494.

(*l*) *Anderson* v. *Saugeen Mut. Ins. Co.*, 18 Ont. R. 355.

(*m*) *Howes* v. *Dominion F. & M. Ins. Co.*, 8 App. R. 644.

(*n*) *Anderson* v. *Saugeen Mut. Ins. Co.*, 18 Ont. R. 355; *Bull* v. *North British Co.*, 15 App. R. 421; 18 S.C.R. 697.

(*o*) R.S.O. c. 121, s. 4.

contract, a mortgagee may require that all money received on an insurance be applied in or towards the discharge of the money due under his mortgage." This enactment is explained thus by Osler, J. A., (*p*):—"Now the Act does not profess to interfere with any right the mortgagee had theretofore possessed to deal with the proceeds of the policy when the mortgage money was over-due. He was not compelled to apply it at all, or if he did apply it he might apply it in such a way as to preserve the full benefit of his contract. The new right or option which is given to him must, I think, be considered as one controlling any right which the mortgagor might otherwise have had, to direct the disposition of the insurance received by or paid into the hands of the mortgagee before the mortgage debt became due. In effect, the option given by the section is either to have the money applied in rebuilding or to have it at once applied in reducing the debt secured by the mortgage. If the latter option is not exercised the money remains in the mortgagee's hands (in those cases in which he has had, apart from the Statute, the right to receive it), as it would have done before the Act, and subject to whatever rights or interests the parties by law respectively had therein, and *inter alia* to the right of the mortgagee to make such application of it as he might deem proper to the payment either of principal or interest, or of both, overdue or to make no application of it if he should deem it more advisable for the security of his contract not to adopt that course, but to require the mortgagor to make his payments in accordance with his covenants." And per Maclennan, J.A. (*q*):—"Every dollar of the insurance money is a security for every dollar of the debt, just as the whole mortgage debt is a charge upon every foot of the land. The mortgagee is not obliged to apply it to arrears either of principal or interest unless he pleases, any more than he is obliged, having a power of sale, to sell portions of the land from time to time for that purpose. He may keep the insurance money by him, and sue for arrears, or distrain for them, if he has that power, or he may at his option apply the whole or part of the insurance money to the arrears. It is part of his security, and whenever there is default he

(*p*) *Edmonds* v. *Hamilton Prov. L. & S. Soc'y*, 18 App. R. 347, at p. 357.
(*q*) At p. 367.

may resort to it, or he may resort to his personal or other remedies."

The first subsection of the enactment will apply, although there may be no covenant to insure, for it is general in its terms, and applies to any money payable to a mortgagor (*r*).

In mortgages executed after 11th March, 1879, the mortgagee has after default in certain cases a power to insure and to add the premiums to the principal money at the same rate of interest (*s*); but this enactment does not apply in the case of a deed which contains a power to insure, nor to any deed which declares that the enactment is not to apply to it (*t*).

16. *Power of Sale.*

Clause 14 conferring the power of sale and providing for application of moneys is one which varies much from the modern approved forms. It conflicts apparently as regards right to possession with clauses 7 and 17. It does not extend to breach of covenants as do those clauses. The power should be given to the personal, not to the real, representatives, although by the Devolution of Estates Act (*u*) it is enacted that in the interpretation of any act, or any instrument to which a deceased person was a party, his personal representatives while the estate remains in them, shall be deemed his heirs, unless a contrary intention appears. For, though the administrator might sell under the power while the estate is vested in him, yet if it should shift into the heirs, the administrator in the absence of a power reserved to him could not then sell, though entitled to receive the money. It should not be dependent on notice, but the provision as to notice should be by a covenant by the mortgagee that notice shall be given; and the purchaser should be expressly relieved from any necessity as to seeing that notice was given. There is no power to the mortgagee to buy in at auction and re-sell without being responsible for loss or deficiency on re-sale; or to rescind or vary any contract of sale that may have been entered into; or to

(*r*) See *Stinson* v. *Pennock*, 14 Gr. 604; *Carr* v. *Fire Assurance Ass'n*, 14 Ont. R. 487; and *Edmonds* v. *Ham. Prov. L. & S. Soc'y*, 18 App. R. at p. 354, referring to above cases.

(*s*) R.S.O. c. 121, s. 18.

(*t*) Ibid., s. 28.

(*u*) R.S.O. c 127, s. 10.

sell under special conditions of sale (the latter, however, may be permissible when the conditions are not of a depreciatory character). The application of insurance moneys is not sufficiently provided for; nor would they be received by the heirs (as assumed by the clause), but by executors, if payable to any representatives of the mortgagee. The surplus of sale moneys should not be made payable exclusively to the personal representatives, for on sale after death of the mortgagor, the heirs might by the shifting of the estate become entitled to the surplus; in this respect the form might mislead the mortgagee to his prejudice. There is no clause relieving a purchaser from seeing that default was made, or notice given, or otherwise as to the validity of the sale; the importance and benefit of which to the mortgagee, and even to the mortgagor, will be presently alluded to. The provision that the giving of the power of sale shall not prejudice the right to foreclose is unnecessary, as it is an independent contractual right. It is much to be regretted that a better form of power of sale had not been adopted.

For the transfer of the legal estate of the mortgagee at law no power of sale is requisite, and the assignee or vendee will take subject to such rights as may be subsisting in the mortgagor, or those who claim under him, of possession, redemption, or otherwise; in other words, the mortgagee may always assign the mortgage debt and convey the land; and thus a sale and conveyance of the estate by the mortgagee to a vendee, though made professedly as on a power of sale in the mortgage, is valid to pass the legal estate of the mortgagee, even though no power of sale existed, or were improperly exercised; and when the mortgagor's right to possession is gone, the vendee can maintain ejectment; he occupies in fact the position of assignee of the mortgage (*v*). The chief object of the power is to enable the mortgagee or other party claiming through him to sell and convey the land free from the equity of redemption of the mortgagor, and of all claiming through him subsequent to the mortgage, whether by express charge or by execution, or otherwise, and thus avoid the time and expense of proceedings required to foreclose or sell under the order of the Court.

The power of sale is now commonly resorted to, and although at first sight its insertion may appear prejudicial to the interests

(*v*) See *Nesbitt* v. *Rice*, 14 C.P. 409.

of the mortgagor, yet in truth it is not so, if it is only to be exercised on reasonable notice after default and the sale take place at public auction. The absence of such a power may be very prejudicial to the interests of both mortgagor and mortgagee, where the equity of redemption becomes incumbered by executions or otherwise, as on a suit of foreclosure or sale the incumbrancers have to be made parties, sometimes at great expense. As regards any objection on the ground of possibility of improper exercise of the power by an individual, which could not happen on sale under direction of the court, it will be seen in the sequel that a Court of Equity will closely scrutinize the mortgagee's conduct, and, if improper, afford relief.

The power of sale should be given to the mortgagee, his executors, administrators and assigns; it should not be given to heirs instead of the personal representatives, as already explained.

The word "assigns," as referable to the mortgagee, should never be omitted, for in its absence it has been said that an assignee of the mortgage could not exercise the power of sale (*w*), and that it may be doubtful whether a devisee could (*x*).

The power in the statutory form is made conditional on notice being given. It is preferable that notice should be provided for by a separate covenant by the mortgagee not to sell till after the specified notice (*y*). But where the statutory form is used the mortgagee cannot sell without notice. As it has been held that the statutory form cannot be modified by changing the provision for notice to one without notice (*z*), it is incumbent on the conveyancer to make an additional stipulation that after default for a longer period than that mentioned in the power, the mortgagee may sell without notice.

As regards the clause or covenant providing that notice be given before sale under the power, if assigns are to receive notice, ample scope should be given as to the mode of giving it, and it might be provided that the notice need not be personal, but may be left on the premises, and need not be addressed

(*w*) Davidson Conv., 3 ed. vol 2, 621; *Bradford* v. *Belfield*, 2 Sim. 264.

(*x*) *Cooke* v. *Crawford*, 13 Sim. 91; *Wilson* v. *Bennett*, 5 DeG. & Sm. 475; *Stevens* v. *Austen*, 7 Jur. N.S. 873; *Macdonald* v. *Walker*, 14 Beav. 556; see also *Ridout* v. *Howland*, 10 Gr. 547.

(*y*) *Forster* v. *Hoggard*, 15 Q.B. 155.

(*z*) *Re Gilchrist & Island*, 11 Ont. R. 537; *Clark* v. *Harvey*, 16 Ont. R. 159. See also R.S.O. c. 121, ss. 29 and 34.

to any person by name or designation, or may be sent by post addressed to the party at the post office next his residence. Where the power required the notice to be served on the mortgagor, "his heirs, executors, or administrators," it was held that a notice given after a mortgagor's death should have been served upon both the heir and administrator (*a*). And where the notice is to be served on the mortgagor, his heirs, or assigns, and the mortgagor has made a second mortgage, the notice must be served upon both the mortgagor and his assign, the second mortgagee (*b*). This may be provided against by stipulating that the notice may be served on all the persons named, "or some or one of them" (*c*).

An execution creditor whose writ is in the sheriff's hands at the time of giving the notice of sale has been said to be an "assign" entitled to notice (*d*).

It is important also to provide that any sale purporting to be made by the mortgagee shall be valid as regards the purchaser in all events of impropriety in the sale, leaving the former personally liable for improper conduct, if any; and that the purchaser shall not be bound to enquire as to whether notice has been given, or default made, or otherwise as to the validity of the sale. In the absence of such a clause the mortgagee selling may sometimes have difficulty in enforcing the sale against an unwilling purchaser (*e*). But such a clause will not protect a purchaser who has express notice that the notice of sale stipulated for has not been given (*f*).

The power usually authorizes a sale by private contract or at public auction, for cash or on credit, in one parcel or in lots, from time to time, under any special conditions of sale as to title or otherwise, with power at any sale at auction to buy in and re-sell, without being responsible for any loss or diminution of price occasioned thereby, and to rescind or vary any contract of sale that may have been entered into (*g*).

(*a*) *Bartlett* v. *Jull*, 28 Gr. 142.

(*b*) *Hoole* v. *Smith*, 17 Ch. D. 434.

(*c*) *Bartlett* v. *Jull*, *supra*.

(*d*) *Re Abbott & Metcalfe*, 20 Ont. R. 299.

(*e*) See *Hobson* v. *Bell*, 2 Beav. 17; *Ford* v. *Heely*, 3 Jur. N.S. 1116; *Forster* v. *Hoggart*, 15 Q.B. 155; *Dicker* v. *Angerstein*, 3 Ch. D. 600.

(*f*) *Parkinson* v. *Hanbury*, 2 D. J. & S. at p. 452; *Selwyn* v. *Garfit*, 38 Ch. D. 273.

(*g*) *Dudley* v. *Simpson*, 2 Ch. App. 102.

On any sale under the power, the vendor must be careful so to act that the interests of the mortgagor be not prejudiced by any negligence or misconduct. The duty of a mortgagee on a sale by him resembles that of a trustee for sale (*h*), though perhaps a greater latitude may be allowed to a mortgagee than to a bare trustee not interested in the proceeds, and the court might restrain a sale by a trustee under circumstances in which they would not restrain a mortgagee (*i*). It is more advisable, of course, in order to avoid any ground of complaint of insufficiency of price or of unfair sale, that the property should be sold at public auction, instead of by private contract, even though the power authorize the latter. In one case where the mortgagee expressed a desire to get his debt only, and made no effort to sell, and never having advertised, sold at private sale at a great undervalue, the sale was set aside, though it did not appear that the purchaser was aware of the negligence of the mortgagee (*j*). Due notice by advertisement of the intended sale should be given, and perhaps as to this the practice which governs on sales by the direction of the Court would be the safest guide. Unnecessary and too stringent conditions of sale as to title and production of title deeds or otherwise should be avoided as likely to prejudice the sale; and if in this, or other respects the conduct of the mortgagee be improper, not only will he be held responsible, but under circumstances the sale may be set aside (*k*); but the circumstances must be very strong to induce the Court to set aside a sale as against a purchaser acting *bona fide*, and if the sale were set aside as against such purchaser, he might be allowed for his improvements (*l*).

A mortgagee cannot purchase at a sale under his power, and, notwithstanding any such purchase, he will still continue mortgagee, and liable to redemption. A mortgagee stands much in the position of a trustee for sale; his duty as vendor

(*h*) *Richmond* v. *Evans*, 8 Gr. 508; *Latch* v. *Furlong*, 12 Gr. 306.

(*i*) As to cases wherein the Court declined to interfere: *Matthie* v. *Edwards*, 11 Jur. 761; *Kershaw* v. *Kalow*, 1 Jur. N.S. 974; see also *Falkner* v. *Equitable Society*, 4 Drew. 352.

(*j*) *Latch* v. *Furlong*, 12 Gr. 303.

(*k*) *Richmond* v. *Evans*, 8 Gr. 508; *Jenkins* v. *Jones*, 2 L.T.N.S. 128; *Latch* v. *Furlong*, 12 Gr. 303; *McAlpine* v. *Young*, 2 Ch. Ch. 171. As to depreciatory conditions, see *Falkner* v. *Equitable Ben. Society*, 4 Drew. at p. 355.

(*l*) *Carroll* v. *Robertson*, 15 Gr. 173.

is to obtain as much as possible for the property, his interest as purchaser is the reverse of this, viz., that the property shall sell for as low a price as possible. Courts of Equity forbid a man placing himself in this position, wherein his interest may conflict with his duty. Neither can an agent of the mortgagee buy for him, nor his solicitor's clerk (*m*), nor his solicitor, either for himself or the mortgagee (*n*). Nor can the secretary or manager of a company (mortgagees) buy at a sale by the company (*o*). But a second mortgagee buying on a sale by the first mortgagee, under a power of sale in his mortgage, takes the estate as any stranger, free from the equity of redemption (*p*). And if the mortgage of the second mortgagee be *in trust* for sale on default, instead of with the usual power of sale, so that the mortgagee stands more in the position of a trustee, it is said (*q*) even then he can purchase from a prior mortgagee.

Whoever is entitled to the right to redeem is the person who is entitled to the residue of the property left unsold after satisfaction of the mortgage debt, and the surplus proceeds if all be sold. If the mortgagor of a freehold does not intend this, but intends a conversion in the event of a sale, and that the proceeds shall go as personal estate, then that should be clearly expressed; for when there is a mere power and not an absolute trust for sale, and a sale takes place *after* the death of the mortgagor, the surplus proceeds will go to the heir, even though the trust of them be declared in favour of the personal representatives (*r*). On a badly drawn mortgage, by inattention to the above, the mortgagee may frequently be misled into payment to the wrong party. Where a sale is had in the lifetime of the mortgagor, the surplus proceeds will go to personal representatives on his death before payment. The general principle is, that the property or its proceeds will, where there is a mere power of sale, go to real or personal representatives, according to the state in which it was on the death of the mortgagor.

(*m*) *Ellis* v. *Dellabough*, 15 Gr. 583; *Nelthorpe* v. *Pennyman*, 14 Ves. 517; *Howard* v. *Harding*, 18 Gr. 181.

(*n*) *Downes* v. *Grazebrook*, 3 Mer. 200; *Whitcomb* v. *Minchin*, 5 Madd. 91.

(*o*) *Martinson* v. *Clowes*, 21 Ch. D. 857.

(*p*) *Shaw* v. *Bunny*, 2 D.J. & S. 468; *Parkinson* v. *Hanbury*, 2 D.J. & S. 450; *Watkins* v. *McKellar*, 7 Gr. 584; *Brown* v. *Woodhouse*, 14 Gr. 684.

(*q*) *Kirkwood* v. *Thompson*, 2 D.J. & S. 613; but see *Parkinson* v. *Hanbury*, 2 D.J. & S. 450.

(*r*) *Wright* v. *Rose*, 2 Sim. & Stu. 323; *Bourne* v. *Bourne*, 2 Ha. 35.

The effect of giving notice of exercising the power of sale is to stay all proceedings for the time (if any) mentioned in the notice for payment, even the proceedings under the notice itself (*s*). The original statute providing for this, declared that no further proceedings "at law or in equity" should be taken, and no suit or action should be brought, the purpose being to prevent the making of unnecessary costs. After the Judicature Act was passed, and the distinction between Courts of Law and Equity was abolished, the words, "at law or in equity," were dropped out of the Act in the next revision of the statutes. The Act in that condition simply declared that no further proceedings should be taken, after a notice given, until the expiration of the time mentioned in the notice. Hence it was held that further proceedings for sale under the power were included in the enactment, and notice to sell has therefore the effect of staying proceedings to sell (*t*). It is not necessary to demand the money in a notice of sale, or to fix or mention any time in the notice for doing anything required to be done. But if any time is mentioned, it should be forthwith, in order to prevent the notice from operating as a stay. The enactment in question authorizes an application to the Court for leave to bring an action, notwithstanding the stay, and the motion may be made *ex parte*, and is never refused when the desire is to recover possession in anticipation of being obliged to deliver the land to a purchaser. The notice operates as a stay, whether the action is commenced before or after the notice is given (*u*).

17. *Distress for Interest.*

It is not uncommon to add to the other clauses in a mortgage one constituting the relationship of landlord and tenant between the mortgagee and the mortgagor, at a rent equal to the interest, for additional security. When the rent so reserved is fair and reasonable, and the intention and object is not merely to give the mortgagee an undue advantage over other creditors, but in good faith to obtain an additional security, the arrangement is perfectly valid (*v*). But if the rent reserved is so unreasonable and excessive as to shew that

(*s*) R.S.O. c. 121, s. 31.

(*t*) *Smith* v. *Brown*, 20 Ont. R. 165; *Lyon* v. *Ryerson*, 17 P.R. 516.

(*u*) *Perry* v. *Perry*, 10 P.R. 275; *Lyon* v. *Ryerson*, 19 P.R. 516.

(*v*) *Trust & Loan Co.* v. *Lawrason*, 6 App. R. 286; 10 S.C.R. 679.

the parties could not have intended to create a tenancy, and that the arrangement is unreal and fictitious, then the clause will not have the effect of creating the relationship (*w*). The statutory clause allowing distress for arrears of interest does not of itself constitute the mortgagor tenant to the mortgagee, but is a mere licence to take the mortgagor's goods for the arrears; and an additional clause, that the mortgagor "doth attorn to and become tenant at will to the mortgagee," does not aid it for want of a rent being reserved. In order to put the parties in the position desired, there should be an attornment at a fixed rent, and the arrangement must be a reasonable one, as already remarked. It is more to the interest of the mortgagee to constitute the mortgagor his tenant from year to year than at will, as the latter is defeasible by death of either party (*x*), or the alienation of either party with notice to the other; and consequently the rent is precarious. If a tenancy from year to year be created, care must be taken to introduce a clause enabling the mortgagee, at any time after default, to determine the tenancy, as otherwise, unless intent to the contrary were apparent on the mortgage, the ordinary right given to the mortgagee to enter might be overridden, and the mortgagor might, notwithstanding default by him, be entitled to the usual half-year's notice to quit, incident to a tenancy from year to year, before the tenancy could be determined (*y*). If an attornment clause be introduced, it will be unnecessary, perhaps, indeed, improper, to insert the usual clause, authorizing the mortgagor to retain possession until default.

By The Mortgage Act (*z*) it is enacted, that the right of a mortgagee to distrain for interest in arrear upon a mortgage, shall be limited to the goods and chattels of the mortgagor, and, as to such goods and chattels, to such only as are not exempt from seizure under execution. It was said by Burton, J.A. (*a*), that this clause is confined to distresses of this kind, and merely declared what the law was before; and from the cases already referred to, it appears to be clear that it does not impose any new restriction upon the mort-

(*w*) *Hobbs* v. *Ontario L. & D. Co.*, 18 S.C.R. 483.

(*x*) *Turner* v. *Barnes*, 2 B. & S. 435.

(*y*) *Metropolitan Society* v. *Brown*, 4 H. & N. 428; *Doe d. Boston* v. *Cox*, 11 Q.B. 122; *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335.

(*z*) R.S.O. c. 121, s. 15.

(*a*) *Edmonds* v. *Ham. Prov. & L. Socy.* 18 App. R. at p. 351.

gagee. But Osler, J.A., in the same case (*b*) thought that the section had the effect of limiting all rights of distress of the mortgagee even under an attornment clause. By the next clause of the Act, the mortgagee's right to distrain for "arrears of interest or for rent" is limited to one year's arrears of interest or rent, as against creditors of the mortgagor or person in possession under the mortgagor, if one of such creditors is an execution creditor, or if there shall be an assignee for creditors appointed before lawful sale of the goods distrained, and the officer executing the writ of execution or the assignee claims the benefit of the restriction in the manner pointed out in the section. The mention of "rent" in this clause, while interest only is mentioned in the fifteenth section would appear to indicate that the legislature intended to draw a distinction between the two, and that the prior clause is therefore simply declaratory of what was already the law, viz., that the statutory distress clause is merely a licence to take the mortgagor's goods, and was in fact unnecessary (*c*).

18. *Modification of Short Form.*

When the statutory short form is used great care should be taken in making alterations. The short form is merely symbolic, not possessing any meaning in its own words when reference is made to the statute, but being merely a collection of symbols to express in short form the meaning of the extended words used in the long form. Any question of interpretation must therefore be determined by a perusal and consideration of the words used in the long form. The statute permits the parties to introduce into the form any "express exceptions" or "express qualifications," and the corresponding exceptions or qualifications are deemed to be made in the long form, where only, indeed, they appear for the purpose of interpretation. If the form or symbol is altered in a manner not authorized by the Act it is no longer symbolic, but the very words, as they appear, must then be taken in their ordinary signification which is very limited. The mortgagor and mortgagee alone being named in the short form, if, by reason of the mortgage's not referring to the Act,

(*b*) At p. 358.

(*c*) Cf. R.S.O. c. 128, s. 31, which was passed on the supposition that it was a necessary enactment, but which in fact did not change the law: *Sparks* v. *Wolff*, 25 App. R. 326.

or by reason of an unauthorized variation of the form it derives no benefit from the Act, they alone will be affected, and the power of sale will be confined to the mortgagee (*d*). The alteration of the power of sale upon notice, to one without notice, is not a qualification allowed by the Act (*e*). Changing "months" into "one month" in the statutory power of sale is a permissible variation (*f*). Reducing the time to one day is doubtful, the judges disagreeing (*g*); but according to the majority of the Court of Appeal giving ten days' notice is a variation allowed by the statute (*h*). The more prudent course is therefore to leave the statutory form untouched, and add to it such other matters as are desired, taking care, however, to make them harmonious with the provisions of the long form.

If any special covenant be added to the short form care should be taken to make it binding upon the representatives and assigns of the parties, as well as upon the mortgagor and mortgagee, unless there is a general clause in the deed that all covenants are to bind representatives and assigns. The opening words of covenant in the short form, "The said mortgagor covenants with the said mortgagee," are sufficient for all the covenants in the short form, and would probably be sufficient for any covenant inserted immediately after them. But following the covenants are a release, a power of sale, distress clause, acceleration clause, and proviso for possession until default; and if a covenant be added at this place, the opening words of covenant would not affect it, and if it is not precise in mentioning representatives and assigns it will bind only the parties (*i*).

19. *Release of Equity of Redemption—Merger.*

The mortgagee may, if the transaction is a fair one and no pressure used, receive from the mortgagor at any time after the making of the mortgage a release of the equity of redemption (*j*), and the result will be a merger of the charge

(*d*) *Re Gilchrist & Island*, 11 Ont. R. 537.
(*e*) *Re Gilchrist & Island*, *supra*.
(*f*) *Re Green & Artkin*, 14 Ont. R. 697.
(*g*) *Clark* v. *Harvey*, 16 Ont. R. 159.
(*h*) *Barry* v. *Anderson*, 18 App. R. 247.
(*i*) *Emmett* v. *Quinn*, 7 App. R. 306.
(*j*) *Ford* v. *Olden*, L.R. 3 Eq. 461.

in the inheritance unless there is something in the deed to shew the contrary, or it is shewn from surrounding circumstances (*k*). Since the Judicature Act merger is a question of intention, unless affected in some way by statute. That Act declares that there shall not be any merger by operation of law only of any estate, the beneficial interest in which would not, prior to The Ontario Judicature Act, 1881, have been deemed merged or extinguished in equity (*l*). As between the parties to the deed, it will, therefore, always be a question of intention as to whether or not a merger was effected (*m*). And where there is no expressed intention, the benefit or interest of the person in whom the estates meet is looked at, and merger will not be presumed against such interest (*mm*).

20. *Sale of Equity of Redemption under Process.*

By the Mortgage Act (*n*), any mortgagee of freehold or leasehold property, or any assignee of such mortgage, may have and receive from the mortgagee or his assignee a release of the equity of redemption in such property, or may purchase the same under any judgment or decree or execution without thereby merging the mortgage debt as against any subsequent mortgagee or person having a charge on the property. In case the prior mortgagee or his assignee acquires the equity of redemption of the mortgagor in the manner aforesaid, no subsequent mortgagee or his assignees shall be entitled to foreclose or sell such property without redeeming or selling subject to the rights of such prior mortgagee or his assignee, in the same manner as if such prior mortgagee or his assignee had not acquired such equity of redemption.

As against the mortgagor, however, if the mortgagee becomes the purchaser of the equity of redemption at a sale under execution (whether the mortgagee is or is not plaintiff in the action wherein the execution issued), the mortgage debt is considered as satisfied, and the mortgagee must give

(*k*) *North of Scotland Mtge. Co.* v. *German*, 31 C.P. 349; *North of Scotland* v. *Udell*, 46 U.C.R. 511.

(*l*) R.S.O. c. 51, s. 58, s.-s. 3.

(*m*) *Snow* v. *Boycott*, L.R. (1893) 3 Ch. 110.

(*mm*) *Ingle* v. *Vaughan Jenkins*, L.R. (1900) 2 Ch. 368; see also *Heney* v. *Low*, 9 Gr. 265; *Bowles' Case*, Tud. Lg. Ca. 4th ed. 115.

(*n*) R.S.O. c. 121, ss. 8, 9.

to the mortgagor a release of the mortgage debt (*o*). If another person than the mortgagee becomes the purchaser of the equity of redemption at such a sale, and the mortgagee enforces payment against the mortgagor, then the purchaser must repay the mortgagor the debt and interest, and in default of payment within one month after demand, the mortgagor may recover it from the purchaser, and will have a charge therefor on the lands (*p*).

21. *Mortgagee Buying at Tax Sale.*

The right of a mortgagee to buy in the mortgaged estate at a sale for taxes, and hold it free from redemption, is doubtful. In two early cases he was treated as still being mortgagee (*q*); but in a later case (*r*), Spragge, V.C., said:—"A mortgagee may purchase as any stranger may; and may say that his being a mortgagee shall not place him in a worse position than he would be in if he were not mortgagee, because he is not a trustee for and owes no duty to the mortgagor; but if he purchases as mortgagee, makes his interest in the land a ground for being allowed to purchase, can he afterwards set up his right to hold as if he had purchased as a stranger?" It is difficult to see the distinction. A mortgagee cannot gain any other advantages which he is not bound to give the benefit of to the mortgagor (*s*), although in fact he is not a trustee for the mortgagor but has a beneficial interest in the land; and there is no reason why he should be at liberty in this single instance to do so. The general inclination of opinion is against the right of the mortgagee to hold free from redemption on a purchase for taxes.

22. *Assignment of Mortgage.*

To every assignment of a mortgage, the mortgagor, if possible, should be a party; if not a party, he should at least recognize the existence of the mortgage debt, and if the mortgagee be in possession, assent to the transfer. The object of making the mortgagor recognize the mortgage debt as subsisting, arises from the fact that the assignee takes

(*o*) *Woodruff* v. *Mills*, 20 U.C.R. 51.
(*p*) R.S.O. c. 77, s. 32.
(*q*) *Smart* v. *Cottle*, 10 Gr. 59; *Scholfield* v. *Dickenson*, Ibid. 226.
(*r*) *Kelly* v. *Macklem*, 14 Gr. at p. 30.
(*s*) See *Keech* v. *Sandford*, 2 Wh. & T.L.C. notes at p. 702, 7th ed.

subject to all the equities and settlement of accounts between the mortgagor and mortgagee. Thus, if nothing were ever due on the mortgage, or it were obtained by fraud and without consideration, an assignee, though for value and without notice, would stand in no better position than the mortgagee (*t*). All just claims as a deduction from the mortgage debt, by reason of payment or set-off, will be allowed as against the assignee, who can stand in no better position than the mortgagee. This rule will continue to apply, even after transfer, until the mortgagor have notice of the assignment; and any payments made to the mortgagee (*u*), or, it would seem, even set-off accrued against him (*v*), though after transfer, without notice thereof, and under the impression that he still held the mortgage, would be allowed against the assignee. Nor would it make any difference that payments were made, and were unindorsed as such on the mortgage, and that the mortgage moneys were not then payable. Hence the necessity of enquiry at least, prior to assignment, and of notice to the mortgagor of any transfer, in case he does not become a party to the assignment. Under section 92 of the Registry Act, registry of the assignment would not be notice to the mortgagor, as that section only makes registration notice to those claiming an interest *subsequent* to such registry.

The assent to the transfer where the mortgagee is in possession may be of importance in some cases; for, as before explained, a mortgagee in possession is liable to account for rents and profits, and chargeable also for loss to the mortgagor's estate through his wilful neglect or default, and as he occupies somewhat the position of a trustee for the mortgagor, if he assign without assent of the latter, and deliver possession, he will continue responsible on default by the assignee.

On an assignment of a mortgage, or on sale under a power of sale, the only covenant for title to the land that the mortgagee can be required to give is that against his own incumbrances and acts preventing a valid conveyance.

(*t*) *McPherson* v. *Dougan*, 9 Gr. 258; *Elliot* v. *McConnell*, 21 Gr. 376. As to defence of purchase in good faith of a mortgage, except as against the mortgagor, see R.S.O. c. 121, s. 33. See *Smart* v. *McEwen*, 18 Gr. 623; *Totten* v. *Douglas*, 15 Gr. 126; 16 Gr. 353.

(*u*) *McDonough* v. *Dougherty*, 10 Gr. 42; *Engerson* v. *Smith*, 9 Gr. 16.

(*v*) *Galbraith* v. *Morrison*, 8 Gr. 289.

23. *Discharges of Mortgages.*

The provisions of the Registry Act (*w*), as regards releases of mortgages, are to the effect that "where a registered mortgage has been satisfied . . . the registrar, on receiving a certificate executed by the mortgagee, or if the mortgage has been assigned then executed by the assignee, or by such other person as may be entitled by law to receive the money and to discharge such mortgage," in the form given by the Act, or to that effect shall, if the assignment or other document of title of the assignee or other person executing the discharge has been registered, register the same, "and the certificate so registered shall be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor." Where the mortgage is paid off by any person advancing money by way of a new loan on the property, the discharge must be registered within six months from the date thereof, unless the mortgagor in writing authorizes its retention for a longer period. But the registration is not to affect the right of a mortgagee or a purchaser who has paid off the loan to be subrogated to the right of the satisfied mortgagee (*x*). Where the person giving the discharge is not the original mortgagee all intermediate documents through which he claims interest must be registered by him at his own expense (*y*). By section 82 "in case the mortgagee or any assignee of the mortgagee, desires to release or discharge only part of the lands contained in such mortgage, or to release or discharge only part of the money specified in the mortgage, he may do so by deed or by certificate to be made, executed, proven, and registered in the same manner as in cases where the whole lands and mortgage are wholly released and discharged; and such deed or certificate shall contain as precise a description of the portion of lands so released or discharged as would be necessary to be contained in an instrument of conveyance for registration under this Act, and also a precise statement of the amount or particular sum or sums so released or discharged." By section 83, provision is made for discharge by a Sheriff, or Division Court

(*w*) R.S.O. c. 136, s. 76.
(*x*) R.S.O. c. 136, s. 77.
(*y*) Ibid. s. 78.

Bailiff, or other officer who, under execution, may have seized a mortgage and received the amount or part thereof.

It is to be observed that a release under the Act will not operate as a re-conveyance till registered; till then it is but evidence of payment (*z*); nor will it apparently so operate unless the mortgage be registered, and if assigned, unless the assignment be registered. The form of release given by the Act implies that such registration must precede the execution of the release.

It is also to be observed that section 82 was unnecessary; the law was before this to the same effect as thus enacted as to a discharge under the Act of part of the lands (*a*); and it hardly required special legislation to enjoin in case of part payment that the amount paid should be specified; or to give ability "to release or discharge part of the *money*;" or when the intention was "to release or discharge part of the lands" to authorize the mortgagee to do so by *deed*.

The discharge under the Registry Act does not contain the ordinary covenant against incumbrances which is universal on re-conveyance by deed; it may be added to the form, but unless sealed it will only operate as a mere assertion and not as a covenant. An action would, however, lie against the releasor, on the assertion in the form given in the Act that he was entitled to receive the money, in case by his own act or wilful default he should not have been so entitled.

Section 80 provides for discharge of a mortgage by a married woman, and dispenses with the joinder of her husband. It is not easy to understand why the husband should have been required to join in the release. It may be doubtful whether there was any necessity for the Act, or for its continuance, considering that the certificate is a mere receipt for the money, and that it is only by force of the Act that it operates as a conveyance. If the woman can receive the money as a *feme sole* it seems singular that she should not as such be enabled to release the security. Section 81 makes certain discharges by married women valid up to 29th March, 1873, if executed jointly with their husbands. And thereafter it is optional to join the husband or not.

The first part of R.S.O. c. 129, s. 9 (*b*) is framed to meet the rule in Equity that if the trust be of such a nature that

(*z*) *Lee* v. *Morrow*, 25 U.C.R. 604.

(*a*) *Re Ridout*, 2 C.P. 477.

(*b*) This section and the cases thereon are treated of in Leith, Rl. Prop. Stats. p. 84. "The *bond fide* payment of any money to, and the receipt

the person paying the trustees may reasonably be expected to see to the application of the money, he will be bound to do so. The rule and exceptions may be briefly illustrated by stating that if the trust be for payment of legacies, or specified scheduled debts, the purchaser has to see that the money is properly applied, but not so when the trust is for payment of debts generally, because that would compel the person paying the money to administer.

This section does not prevent the application of the rule requiring payment to trustees to be made to all jointly, or on their joint receipt, or to their attorney authorized by all to receive the money (*c*). Payment to one of several executors would suffice. Payment made *mala fide*, of course, will not suffice, as if made with knowledge of intention by the payees to misapply the money.

As to the payment to surviving mortgagees (*d*): mortgagees are tenants in common both of the lands and mortgage money, unless it is otherwise expressed on the face of the mortgage, and there is no right of survivorship, and, apart from the provisions of the Act, payment to a surviving mortgagee did not suffice, if he misapplied the money. "The Statute, in terms, only refers to the *bona fide* payments of money. It does not expressly extend its protection to a mortgagor, who, instead of actually paying the debt, chooses to enter into some different arrangement for securing it." Therefore, purchasers from a mortgagor who bought and paid on an agreement by the mortgagor to indemnify against a mortgage to three mortgagees, were held as against the personal representatives of deceased mortgagees, not to be entitled to any benefit from a registered discharge of the mortgage given by the surviving mortgagee, to whom no money payment had been made, and who, instead thereof, had accepted securities which turned out worthless. But other purchasers who had bought other parts of the lands mortgaged after the

thereof by, any person to whom the same is payable upon any express or implied trust, or for any limited purpose, and such payment to and receipt by the survivor or survivors of two or more mortgagees or holders, or executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary be expressly declared by the instrument creating the trust or security."

(*c*) *Ewart* v. *Snyder*, 13 Gr. 57, *per* Mowat, V.C.

(*d*) See, as to this section, the well-known letter of Mr. Ker, given in Leith Rl. Prop. Stat., p. 84.

registered discharge, and in reliance on it, were protected as purchasers for value without notice under the Registry act (*e*).

The R.S.O. c. 121, s. 11 (*f*), remedies an inconvenience which frequently happened when a mortgagee died, and his personal representatives, or a legatee, became entitled to the mortgage moneys, whilst the legal estate descended to the heir-at-law in the absence of any disposition thereof by the mortgagee. The heir-at-law thus became trustee for the person entitled to the moneys, and on payment thereof was the party to reconvey.

The power given by this section to release part of the land on payment of part of the debt in no way prevents the application of the rule, that personal representatives, or others occupying a fiduciary position, must in any such transaction proceed with due caution at their peril, and see that the value of the security is not prejudiced by a release of part. It may be also, where part of the security is released for a manifestly inadequate amount, and the remainder is not sufficient to answer the mortgage debt, that the executor or administrator so releasing would not only be personally responsible, but the release avoided as against the releasee and all claiming under the release with notice as a breach of trust (*g*).

So also where the mortgagor has sold part of the property, and agreed with the vendee to pay off the mortgage, if the mortgagee release the residue or join with the mortgagor in an absolute sale of it as free from the mortgage, with notice of the prior sale and agreement, and without the assent of the first vendee, the part sold him will be released from the mortgage, even though the mortgagee and not the mortgagor

(*e*) *Dilke* v. *Douglas*, 5 App. R. 77, per Moss, C.J.O.

(*f*) "Where a person entitled to any freehold land by way of a mortgage has departed this life, and his executor or administrator has become entitled to the money secured by the mortgage, or has assented to a bequest thereof, or has assigned the mortgage debt, such executor or administrator, if the mortgage money was paid to the testator, or intestate in his lifetime, or, on payment of the principal money and interest due on the mortgage, or on receipt of the consideration money for the assignment, may convey, assign, release or discharge the mortgage debt and the mortgagee's estate in the land; and such executor or administrator shall have the same power as to any portion of the lands on payment of some part of the mortgage debt, or on any arrangement for exonerating the estate, or any part of the mortgaged lands without payment of money; and such conveyance, assignment, release or discharge, shall be as effectual as if the same had been made by the person having the mortgagee's estate."

(*g*) Davidson Convey. 3 ed., vol. 2, p. 835.

has received the proceeds of the second sale; and this will equally be so if the sale be under a decree in a suit by the mortgagee to which the first vendee is no party (*h*). The principle is that, as between the mortgagor and the first vendee, the lands unsold become principally and solely liable, and the mortgagee, having notice, can do nothing to prejudice the right of the owner of lands first sold to have assigned to him on payment of the mortgage debt the lands so principally liable to him. But the mortgagee can sell under a power of sale in his mortgage, for the power is paramount to any right of the vendee. So also where a mortgagor sells part with an agreement to pay off the mortgage, a release by the mortgagee to the vendee will not prejudice his security as against a purchaser of the mortgagor's interest who had notice of the prior sale (*i*).

One of several executors can release the lands mortgaged on receipt of the mortgage debt (*j*). This would seem to rest on the ground that one of several executors can receive and discharge debts due the testator, and that tender to one is a good tender, and the discharge of mortgage is a mere receipt until registered, the registration having the effect of re-conveying the lands. But probably the power to release the security will not be extended to those cases where one executor never had power to act alone; as, for instance, the case of releasing part of the lands without payment, under the statute just alluded to (*k*).

24. *Mortgages of Leaseholds.*

A mortgage of leasehold property may be made either by way of assignment of the whole term or by way of underlease to the mortgagee. The character of a mortgage of leasehold property must depend much on the nature of the lease. If the rent be of less amount than the annual value of the property, and the covenants binding on the assignees (*l*) be not too onerous, then it is better to have the mortgage by

(*h*) *Gowland* v. *Garbutt*, 13 Gr. 578; see also *Guthrie* v. *Shields*, therein referred to.

(*i*) *Crawford* v. *Armour*, 13 Gr. 576.

(*j*) *Ex parte Johnson*, 6 P.R. 225.

(*k*) See *McPhadden* v. *Bacon*, 13 Gr. 594.

(*l*) As to what covenants are binding on assignees: *Spencer's case*, 1 Sm. Lg. Ca. 52; *Western* v. *Macdermot*, L.R. 1 Eq. 499; *Wilson* v. *Hart*, 1 Ch. App. 463.

way of assignment than underlease. This is advisable, because if the mortgage be by way of underlease, which leaves a reversion in the mortgagor, he may perhaps, by non-observance of some covenant in the original lease giving a right of re-entry to the lessor, forfeit the lease; whereas if the mortgage be by way of assignment of the whole estate of the lessee, no such danger is incurred. It is manifest also that this danger considerably depreciates the value of the security to the mortgagee, as being, among other things, likely to affect the price on any sale under the power of sale in the mortgage. If the rent be too large and the covenants binding on the assignees of a burdensome nature, or such as the mortgagee might not wish to assume, as, for instance, a covenant to repair from which destruction by fire is not excepted, then he may have to rest satisfied with an underlease. For if he take an assignment he would, during the continuance of his estate, be liable for the rent and the performance of such covenants, and that even though he should never enter (*m*); and it would seem even though he should not be entitled to enter; as where the mortgagee should give right to the mortgagor to remain in possession till default in payment of interest or principal, and the interest should be punctually paid. Of course the head landlord could distrain on goods on the premises on non-payment of his rent; but he might lie by, allowing arrears to accumulate, and ultimately sue the assignee for all arrears due during the time he was assignee; hence the necessity, if the mortgagor is to remain in possession, of providing in the mortgage that he pay the rent to the head landlord, and of ascertaining that it be paid.

A mortgage by way of sub-lease is usually made by demise of the land at a mere nominal rent, and for a period equal to the whole term unexpired, less the *last* day or the *last* few days; this prevents any privity of estate between the mortgagee and the original lessor, so that the former is not liable for rent or on covenants in the original lease. Care should be taken to reserve the *last* day and not simply "one day." A lease may be made to commence *in futuro*, and if there is any inconsistency arising between the reservation of the day and the other terms of the instrument, which can be reconciled by

(*m*) *Jones* v. *Todd*, 22 U.C.R. 37; *Cameron* v. *Todd*, ibid. 390; 2 E. & A. 434; *Jamieson* v. *London & Can. L. & A. Co.*, 27 S.C.R. 435.

holding the day reserved to be some other than the last day, that will be done, and the instrument will be in reality an assignment (*n*). The reversion left in the mortgagor exposes the mortgagee to the danger of forfeiture, and decreases the value of the security, as above explained; but this may be obviated, as it always should be, by a declaration made by the mortgagor, that he will stand possessed of the premises comprised in the head lease in trust for the mortgagee, etc., and to assign and dispose of the same as the mortgagee or his representatives or assigns shall direct, but subject to the same right of redemption as is reserved to the mortgagor with respect to the derivative term created by the sub-lease; with a power of attorney irrevocable to the mortgagee or his substitute or substitutes to assign the head term as the mortgagee or his representatives or assigns shall at any time direct, and in particular, upon any sale made by him to execute a deed or deeds for that purpose; with a power further to the mortgagee, or other person entitled to receive the mortgage money, to remove the mortgagor or other person from being the trustee, as aforesaid, and on his death or removal, or the death or removal of any other trustee, to appoint by deed a new trustee or trustees in his or their places (*o*). This enables the mortgagee to hold his security without any danger on his part of becoming liable on the covenants in the head lease, and at the same time enables him at any time to compel the mortgagor, as trustee, to assign the original term according to the directions of the mortgagee, to sell or foreclose, and convey or cause to be conveyed to a purchaser, not only the derivative term but also the head term, and, if necessary, to remove the mortgagor, appoint a new trustee, and, by a declaration in the appointment of such new trustee, to vest the head term in his appointee (*p*). After a sale and conveyance of the derivative term to a purchaser, the mortgagee need not under such a declaration obtain an assignment of the reversion or head term to such purchaser; because in that case, as the term and the reversion immediately expectant thereon would meet in the same person, the term would be merged in it as being a higher estate; and thus the purchaser would stand in the

(*n*) See *Jamieson* v. *London and Can. L. & A. Co.*, 27 S.C.R. 435.

(*o*) See a precedent, Prid. Conv. 17th ed., p. 527.

(*p*) R.S.O. c. 129, s. 5; *London & Co. Banking Co.* v. *Goddard*, L.R. (1897) 1 Ch. 642.

position of *assignee* of the original lessee, and so liable on covenants running with the land which it was originally intended to avoid by the mortgage being made by way of sub-lease. If, therefore, the purchaser is unwilling to assume the responsibility of the covenants, and at the same time wishes to avoid any danger of the mortgagor committing some act which would forfeit the lease, he might obtain an assignment to a trustee for him of the mortgagor's reversion.

The Short Forms Act does not apply to leasehold interests; the word "land" in the first clause being interpreted to mean freehold tenements and hereditaments. The whole frame of the statutory form is applicable to a freehold interest only, and there is the absence of any provision, as in the Act relating to Short Forms of Leases, that "where the premises are of freehold tenure the covenants shall be taken to be made with, and the proviso for re-entry apply to, the heirs and assigns of the lessor, and, where of a leasehold tenure, to his executors, administrators, and assigns." Till a decision to the contrary, it would be advisable not to attempt to apply the Act to mortgages of leaseholds.

CHAPTER XIII.

OF FUTURE ESTATES.

(1). *Estates in Possession.*
(2). *Estates in Remainder.*
(3). *Contingent Remainders.*
(4). *Executory Devises.*
(5). *The Rule against Perpetuities.*
(6). *Executory Interests Assignable.*
(7). *Estates in Reversion.*
(8). *Merger.*
(9). *Purchase of Reversionary Interests.*

1. *Estates in Possession.*

Hitherto we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view; with regard to the *time of their enjoyment*, when the actual pernancy of the profits (that is, the taking, perception, or receipt, of the rents and other advantages arising therefrom) begins. Estates, therefore, with respect to this consideration, may either be in *possession* or in *expectancy*; and of expectancies there are two sorts; one created by the acts of the parties, called a *remainder*; the other by an act of law, and called *reversion* (*q*).

(*q*) The learned commentator classes all remainders, contingent as well as vested, under the head of *estates*; and further on, speaks of a contingent remainder as an *estate*. A contingent remainder is, however, perhaps hardly entitled to be advanced to the dignity of an estate; it is a mere possibility which, when the person is fixed and ascertained, is coupled with an interest; it gives no estate in the land, and would appear to be more properly defined as as *interest* in the land. See 1 Preston Estates, pp. 75, 62, 88. If a contingent remainder is to be considered an *estate* in expectancy, then every possibility coupled with an interest, or even a mere possibility (as on a limitation to the survivor of several), would seem to stand on the same footing. So little does the common law regard a contingent remainder as an estate, or in any other light than as a mere right, that it refused to recognise the validity of its alienation to a stranger. See also Wms. Rl. Prop. 18th ed., 344: "A contingent remainder is no estate, it is merely a chance of having one."

Of estates in *possession* (which are sometimes called estates *executed*, whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstances or contingency as in the case of estates *executory*), there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. These will therefore require a minute discussion, and demand some degree of attention.

2. *Estates in Remainder.*

An estate, then, in remainder may be defined to be, an estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee-simple granteth lands to A. for twenty years, and, after the determination of the said term, then to B. and his heirs forever; here A. is tenant for years, remainder to B. in fee. In the first place, an estate for years is created and carved out of the fee, and given to A.; and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee. They are indeed different *parts*, but they constitute only one *whole*; they are carved out of one and the same inheritance; they are both created, and may both subsist, together; the one in possession, the other in expectancy. So, if land be granted to A. for twenty years, and after the determination of the said term to B. for life; and after the determination of B.'s estate for life, it be limited to C. and his heirs forever; this makes A. tenant for years, with remainder to B. for life, remainder over to C. in fee. Now, here the estate of inheritance undergoes a division into three portions. There is first A.'s estate for years carved out of it; and after that B.'s estate for life; and then the whole that remains is limited to C. and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance; and if there were a hundred remainders, it would still be the same thing; upon a principle grounded in

mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, that no remainder can, by common law conveyance, be limited after the grant of an estate in fee-simple; because a fee-simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the estate; a remainder, therefore, which is only a portion, or residuary *part*, of the estate, cannot be reserved after the whole is disposed of (*r*). A particular estate, with all the remainders expectant thereon, is only one fee-simple; as £40 is part of £100, and £60 is the remainder of it; wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than after the whole £100 is appropriated there can be any residue subsisting.

It must be borne in mind that the above statement that no remainder can be limited on a fee simple, and the following remarks, apply to estates created by conveyance operating only as at common law, and not to estates arising under the Statute of Uses, nor to those created by will. By will a fee simple may be limited to take effect after a prior fee simple which is determinable on a condition; and the same result may be arrived at by a conveyance operating under the Statute of Uses. But such future interests are not remainders. They are executory devises or conditional limitations, or limitations over to take effect in defeasance of a prior estate on the happening of a condition. A remainder never defeats the prior estate, but awaits its determination, and such prior, or particular, estate must always be something less than the fee. Thus much premised we shall be the better enabled to comprehend the rules that are laid down by the common law to be observed in the creation of remainders, and the reasons upon which those rules are founded.

And, first, there must necessarily be some particular estate, precedent to the estate in remainder. As, an estate for years to A., remainder to B. for life; or, an estate for life to A., remainder to B. in tail. This precedent estate is called the *particular* estate, as being only a small part, or *particula*, of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason: that *remainder* is a relative

(*r*) *Musgrave* v. *Brooke*, 2 Ch. D. 792.

expression, and implies that some part of the thing is previously disposed of; for where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder; it is the whole of the gift, and not a residuary part. And such future estates could at common law only be made of chattel interests, which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree; but an estate of freehold must, except by way of remainder, or executory devise, or by conveyance under the Statute of Uses, have been created to commence immediately. For it is an ancient rule of the common law that an estate of freehold cannot be created to commence *in futuro* (*s*), but it ought to take effect presently, either in possession or remainder; because at common law (before 14 & 15 V. c. 7, now R.S.O. c. 119, s. 2), no freehold in lands could pass without livery of seisin; which must operate either immediately, or not at all. It would therefore have been contradictory, if an estate which was not to commence till thereafter, could have been granted by a conveyance which imported an immediate possession. Another reason sometimes assigned, was, that the freehold should not be placed in abeyance, the doing of which, inasmuch as certain real actions had to be brought against the tenant of the freehold, would have led to the inconvenience, whilst the freehold is in abeyance, of there being no tenant of the freehold against whom to bring the action, and no feudal tenant to perform the feudal duties. Therefore, though a lease to A. for seven years, to commence

(*s*) The *dictum* of Maule, J., in *Doe* v. *Prince*, 20 L.J.C.P. 223, must not be taken as implying that since the R.S.O. c. 119, s. 2, by which the immediate freehold lies in grant as well as in livery, an estate of freehold not to take effect immediately can be granted by force of that Act. In that case (to put it shortly) the words were, "in consideration of love, etc., I grant to, etc., and that he is to take possession on Michaelmas Day next." It was contended that the deed was void, as being a grant of a freehold *in futuro*. In answer it might be said that the clauses as to possession, being repugnant to the premises, might be rejected; if not, that it might operate as a covenant to stand seised on Michaelmas Day, and then take effect. The circumstances were such that it was unnecessary to decide more than that the deed could operate as a covenant to stand seised, which was the judgment of the Court. Maule, J., observed that if it were necessary to decide it he would be inclined to say that an immediate freehold did pass. By this must be understood that the clause as to possession might be rejected as repugnant to the premises, and so an immediate freehold passed.

from next Michaelmas, is good; yet a conveyance, not operating under the Statute of Uses, to B. of lands, to hold to him and his heirs forever from the end of three years next ensuing, is void as a present conveyance (*t*). So that when it is intended to grant an estate of freehold, independently of the Statute of Uses, or by way of remainder, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and (before the freehold in lands lay in grant as well as in livery, R.S.O. c. 119, s. 2), for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A. for three years, with remainder to B. in fee, and makes livery of seisin to A.; here, by the livery, the freehold is immediately created, and vested in B., during the continuance of A.'s term of years. The whole estate passes at once from the grantor to the grantee, and the remainder-man is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in præsenti*, though to be occupied and enjoyed *in futuro*.

And here the attention of the reader is directed to the fact, that he may frequently observe herein that a particular state of the law still continues as law, although the grounds or reasons whereon it was originally founded, have by legislative enactment, or otherwise, ceased to exist, and that

(*t*) It was also before stated in the text that "at common law no freehold could pass without livery of seisin, which must operate either immediately or not at all." The editor has not presumed to qualify the statements in the text, as they have been retained in all editions. It is submitted, however, on the authorities hereinafter referred to, that some qualification is requisite. Thus, in *Nolan* v. *Fox*, 15 C.P. 575, it was held that a deed of feoffment, dated the 27th to hold from the 30th day of March, "might, if executed on the day of date, and livery of seisin given on that day, be void; yet, if it was not executed until after the day whereon it was to begin to operate, *or if livery was not delivered till after that day*, then it would be good," referring to the Touchstone, 219-251. See also Co. Litt. 48b, n. 1, to the same effect. See also Co. Litt. 49a, n. 1, that if A. makes a lease for years to B., and afterwards a charter of feoffment to him, being in possession, with letter of attorney to deliver seisin; before livery he may use the deed as a confirmation in fee, and after livery as a feoffment." Effect would, at any rate, now be given to such a conveyance, if made on consideration as a contract to be carried out by a properly drawn instrument, if necessary.

the maxim *cessante ratione cessat et ipsa lex*, does not apply. Thus the principle on which it was first established that no freehold estate could be created by deed, to take effect *in futuro*, viz., that there was a necessity for immediate delivery of seisin, no longer holds good, since by R.S.O. c. 119, s. 2, corporeal hereditaments, so far as regards the immediate freehold thereof, lie in grant as well as in livery; and, independently even of the aid of the Statute of Uses, which will presently be alluded to, lands can be conveyed without actual possession accompanying the conveyance; still the rule of law holds good as first established that no immediate freehold estate can be created by deed to commence *in futuro*. This, however, must be understood as referring to a deed operating as *a common law conveyance*, by transmutation of possession, as a feoffment, or release, because it will be seen hereafter that by the aid of the Statute of Uses an immediate estate of freehold can be created by deed, to take effect *in futuro*. Thus A., for sufficient consideration, can bargain and sell to B., to hold to him and his heirs after the expiry of three years, or on the happening of a future event; and so also covenant to stand seised to the use of B. and his heirs on such event or expiry. In these instances, however, the estate limited to B. and his heirs is granted and created as a *future estate*, by way of future or springing use, to take effect on the happening of the future event, the freehold in the meantime remaining in A.; and when the event happens, the bargainor or covenantor holds for the benefit or use of the bargainee or covenantee, and on this the statute immediately *executes the use*, and transfers to the latter the legal estate in possession in fee simple. Such an estate is *not* limited or created *by way of remainder*, and therefore its creation or existence does not conflict with the rules herein laid down as affecting remainders; for the freehold is at no time in abeyance; no estate even passes from the conveying party till the given event happens; and when it does happen, what has been called the *magic* effect of the Statute of Uses supplies the place of livery of seisin, and the bargainee or covenantee is assumed to be in possession.

But it may be added, also, that though a mere common law conveyance of a future freehold estate, without any precedent estate to support it, would be void at common law as a present conveyance, it would at the present day be held good on equitable grounds as a contract to convey the future

estate, if made on consideration, so as to hold the grantor bound to allow the grantee to enter upon the day fixed for the taking effect of the deed.

As no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder over. For an estate at will is of a nature so slender and precarious that it is not looked upon as a portion of the inheritance, and a portion must first be taken out of it in order to constitute a remainder. Besides, if it be a freehold remainder, livery of seisin must, at common law, have been given at the time of its creation; and the entry of the grantor to do this determines the estate at will in the very instant in which it is made; or if the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract* if the tenant for years be a party to it, yet it is void by way of *remainder*; for it is a separate independent contract, distinct from the precedent estate at will, and every remainder must be part of one and the same estate out of which the preceding particular estate is taken. And hence it is generally true that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also; as, when the particular estate is an estate for the life of a person not in *esse*, or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate; in either of these cases the remainder over is void.

A second rule to be observed is this, that the remainder must commence, or pass out of the grantor, at the time of the creation of the particular estate. As, where there is an estate to A. for life, with remainder to B. in fee; here B.'s remainder in fee passes from the grantor at the same time that seisin is delivered, or conveyance made, to A. of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin being made of the particular estate whenever a *freehold* remainder is created; for, if it be limited even on an estate for years, it was necessary that the lessee for years should have livery of seisin in order to convey the freehold from and out of the grantor, otherwise the remainder was void. Not that the livery was necessary to strengthen the estate for years, but as livery of the land was, at common law, requisite to convey the freehold, and yet

could not be given to him in remainder without infringing the possession of the lessee for years, therefore the law allowed such livery, made to the tenant of the particular estate, to relate and enure to him in remainder, as both are but one estate in law.

Subject to the statute as to contingent remainders, to be presently mentioned, a third rule respecting remainders is this, that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. As, if A. be tenant for life, remainder to B. in tail; here B.'s remainder is vested in him at the creation of the particular estate to A. for life. Or if A. and B. be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives the remainder is vested in neither, yet, on the death of either of them, the remainder vests instantly in the survivor; wherefore both these are good remainders. But if an estate be limited to A. for life, remainder to the eldest son of B. in tail, and A. dies before B. hath any son, here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination of the particular estate; and even supposing that B. should afterwards have a son, he shall not take this by remainder, for as it did not vest at or before the end of the particular estate, it never can vest at all but is gone forever. And this depends upon the principle before laid down that the precedent particular estate and the remainder are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate and the remainder supported thereby; the thing supported must fall to the ground if once its support be severed from it.

An estate in remainder cannot, as already remarked (*u*), by conveyance at common law be limited to take effect in defeasance of the prior estate. Thus on a feoffment to A. for life with remainder to B. on his return from Rome, the remainder is void. Neither can such an estate infringe on the rule against perpetuities (to be hereafter explained), as by a limitation in favour of a child of an unborn child.

(*u*) Ante p. 220; and see *Musgrave* v. *Brooke*, 2 Ch. D. 792.

3. *Contingent Remainders.*

It is upon these rules, but principally the third, that the doctrine of *contingent* remainders depends. For remainders are either *vested* or *contingent*. *Vested* remainders (or remainders *executed*, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As if A. be tenant for twenty years, remainder to B. in fee; here B.'s is a vested remainder, which nothing can defeat or set aside.

Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder (*v*) is limited to take effect either to a dubious and uncertain *person* or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect.

First, they may be limited to a dubious and uncertain *person*. As if A. be tenant for life, with remainder to B.'s eldest son (then unborn) in tail; this is a contingent remainder; for it is uncertain whether B. will have a son or not; but the instant that a son is born in A.'s lifetime the remainder is no longer contingent, but vested. Though, if A. had died before the contingency happened, that is, before B.'s son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A. were tenant for life, remainder to his own eldest son in tail, and A. died without issue born, but leaving his wife *enceinte*, or big with child, and after his death a posthumous son was born, this son could not take the land, by virtue of this remainder; for the particular estate determined before there was any person *in esse*, in whom the remainder could vest. But, to remedy this hardship, it is enacted by statute 10 & 11 Wm. III. c. 16, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime, that is the remainder is allowed to vest in them while yet in their mother's womb.

(*v*) Mr. Preston in Vol. 1 on Abstracts, p. 92, says: "Strictly speaking there cannot be a contingent *estate*; there may be a contingent *interest*; but no interest except such as is vested is accurately termed an *estate*." R.S.O. c. 119, s. 18, which authorizes assignment of contingent remainders, etc., speaks of them only as contingent *interests*. In this point of view, where the word *estate* occurs in the text, *interest* should be substituted.

A remainder may also be contingent, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. As, where land is given to A. for life, and in case B. survives him, then with remainder to B. in fee; here B. is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A. and B. it is contingent; and if B. dies first, it never can vest in his heirs, but is forever gone; but if A. dies first, the remainder to B. becomes vested.

It is to be observed, however, that if there be no uncertainty in the person or event on which the remainder is limited, the mere uncertainty, whether it will ever take effect *in possession* is not sufficient to give it the character of a contingent remainder. Thus in the case of a lease to A. for life remainder to B. for life, the limitation of the remainder is to a person in being, and ascertained, and the event on which it is limited is certain, viz., the death of A.; it is therefore a vested, not a contingent, remainder; and yet it may never take effect in possession, because B. may die before A. Nor would it make any difference if the estate granted to A. were in tail instead of for life, for such estate is still a *particular* estate, and the law will not assume that it will not come to an end in B.'s lifetime; and on the determination of that particular estate, B. is predetermined on as the person to whom the estate shall go.

There are two rules to be observed in the creation of contingent remainders, the first of which is that the seisin or feudal possession must never be without an owner. And, therefore, contingent remainders of either kind, if they amount to a *freehold*, cannot be limited on an estate for years, or any other particular estate less than a freehold. Thus if land be granted to A. for ten years, with remainder in fee to the right heirs of B., a living person, this remainder is void; but if granted to A. for life, with a like remainder it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void; it cannot pass out of him, without vesting somewhere, and in the case of a contingent remainder, it must vest in the particular tenant, else it can vest nowhere. Unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

The second of such rules is that an estate cannot be given to the unborn child of an unborn person; the ultimate limitation being void (*w*). This rule is said to depend on the doctrine that there cannot be a possibility on a possibility and must not be confounded with the rule against perpetuities which forbids the tying up of property for a longer period than a life or lives in being and twenty-one years afterwards. And so a limitation to the unborn children of the unborn person "provided that such children shall be born within a life or lives now in being and twenty-one years afterwards" is bad (*x*).

Contingent remainders might be *defeated* at common law by destroying or determining the particular estate upon which they depend, before the contingency happened whereby they became vested. Therefore, when there was a tenant for life, with divers remainders in contingency, he, at common law, might, not only by his death, but by surrender, merger or forfeiture, destroy and determine his own life estate, before any of those remainders vested; the consequence of which was that he utterly defeated them all. As, if tenant for life, with remainder to his eldest son unborn in tail, with remainder to A. in fee, before any son was born, surrendered this life estate to A., or took from A. a conveyance of the fee, he by that means defeated the remainder in tail to his son. For his son not being *in esse*, when the particular estate determined by merger in the fee, the remainder could not then vest; and, as it could not vest then, by the rules before laid down, it never could vest at all. In these cases, therefore, it was necessary to have trustees appointed to preserve the contingent remainders; in whom there was vested an estate in remainder for the life of the tenant for life, to commence when his estate determined. If, therefore, his estate for life determined otherwise than by his death, the estate of the trustees, for the residue of his natural life, would then take effect and become a particular estate in possession, sufficient to support the remainders depending in contingency.

A *strict settlement* is framed with regard to the above; thus, lands are limited to A. for life, with remainder to trustees, during the life of A., to take effect immediately on the determination, in A.'s lifetime, of that estate, by surrender or otherwise, with remainder after the death of A., to his first

(*w*) *Monypenny* v. *Dering*, 2 D.M. & G. 145, at p. 170.
(*x*) *Whitby* v. *Mitchell*, 42 Ch. D. 494; 44 Ch. D. 85.

and other sons successively in tail male. When an estate is thus settled, the father cannot defeat his sons' estates, nor can any son, during the father's lifetime, even when of age, without the father's consent, do more than defeat his own issue. But the son first entitled in tail can, when of age, with the concurrence of the father, and after his death when tenant in tail in possession, defeat the whole settlement and convey in fee; the whole of which is hereafter explained in dealing with estates tail.

The effect of the statute before referred to (*y*) is, that as to the periods to which it relates, destruction of the particular estate which supports the contingent remainder will not destroy it, if such destruction takes place by forfeiture, surrender, or merger (*z*). But as the Statute does not extend to destruction by death, there is still a necessity for an estate to be limited to trustees to support contingent remainders in any case in which the particular estate might possibly be determined by the death of the owner of such estate prior to the vesting of the contingent remainder. Of this an instance is afforded by a grant to A. for life with remainder to such son of his as shall first attain 21, or with remainder to the eldest son of B., a bachelor, in fee; here, in either case, the death of A. before the majority of a son of his in the one case, or the birth of a son of B. (including a posthumous son) in the other, would defeat the son's interests unless a freehold estate to trustees intervened.

4. *Executory Devises.*

In devises by last will and testament (to which more latitude is given than to deeds, on the supposition that the testator may be *inops consilii*), remainders may be created in some measure contrary to the rules above laid down, though our lawyers will not allow such dispositions to be strictly remainders, but call them by another name, that of *executory devises*, or devises hereafter to be executed.

An executory devise of lands is such a disposition of them by will that thereby no estate vests at the death of the testator,

(*y*) R.S.O. c. 119, s. 29.

(*z*) The statute enacts that, "Every contingent remainder existing on the 2nd day of March, 1877, or created since that day or hereafter, shall be, and every contingent remainder, which existed at any time between the 30th of May, 1849, and the 2nd day of August, 1851, shall be deemed to have been capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold."

but only on some future contingency. It differs from a remainder in three very material points:—1. That it needs not any particular estate to support it, but arises of itself at the time fixed for it. 2. That by it a fee simple, or other less estate, may be limited after a fee simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

The first case happens when a man devises a future estate to arise upon a contingency; and till that contingency happens, does not dispose of the fee simple, but leaves it to descend to his heir-at-law. As if one devises land to a feme sole and her heirs, upon her day of marriage; here is in effect a contingent remainder, without any particular estate to support it; a freehold commencing *in futuro*. This limitation, though it would be void in a deed operating only as at common law, yet is good in a will, by way of executory devise. For, since by a devise a freehold may pass without corporal tradition or livery of seisin (as it must do if it passes at all), therefore it may commence *in futuro*; because the principal reason why it cannot commence *in futuro* in other cases, is the necessity which existed at common law, of actual seisin, which always operates *in præsenti*. And since it may thus commence *in futuro*, there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the present estate, a present interest.

Secondly, by executory devise, a fee simple or other less estate may be limited after a fee; and this happens where a testator devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency, which defeats the first estate. As if a man devised land to A. and his heirs; but if he dies before the age of twenty-one, then to B. and his heirs; this remainder, though void in a deed operating only at common law, and not under the Statute of Uses by way of shifting use, is good by way of executory devise.

Thirdly, by executory devise, a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed; for by law the first grant of it to a man for life, was a total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term of years.

5. *The Rule against Perpetuities.*

In both the first and second instances the contingencies must be such as to happen within a time fixed by law. The

extreme limit beyond which property cannot be rendered inalienable is a life or lives in being and twenty-one years afterwards, without reference to the infancy of any person whatever; and a person *en ventre sa mere* is, for the purpose of the rule, considered as in existence (*a*); and at the expiration of the period the property may vest in a person *en ventre sa mere*. This is called the rule against perpetuities. In order not to transgress the rule, three points must be clear (*b*):—(1) the interest *must* vest within the prescribed period; it is not sufficient that it *may* vest. Thus a devise to the first son of A., a living person, who shall attain the age of twenty-four years, is void, because by possibility it may not vest until twenty-four years after the death of a living person (*c*). (2) The person in whom the interest is to vest must be necessarily ascertainable within the period. (3) The quantum of interest must also be necessarily ascertainable within the period.

As an instance of the effect of the rule it may be observed that lands may be so devised that there may be in the first place an estate in fee given to Z. and his heirs, with an ultimate limitation over in fee, in defeasance of the prior estate in fee, to such person (if any) as at the end of twenty-one years from the expiry of any number of named lives in being shall answer the description of heir of the body of any named person. Assume Z. to be the person to whom the first estate in fee is devised, and A. (just born) to be the person named in favour of whose issue the ultimate limitation over in fee is made, and that the lives in being taken as those which are to expire before the term of twenty-one years shall begin are those of A. and B. Now it is manifest that till the death of A. and B., and the expiry of twenty-one years afterwards, the ultimate limitation cannot absolutely take effect, or the interest created by it vest in any one; because till then it is uncertain who among all the issue (if any) of A. will *at such time* answer the description of heir of his body. Assume that A. lived to the age of seventy, and left surviving him and B., a son, who should just before the expiry of the term of twenty-one years die, leaving a son a year old. Here would be a case in which practically the

(*a*) *Cadell* v. *Palmer*, Tud. Lg. Ca. 4th ed. note p. 594.
(*b*) Ibid. at p. 595.
(*c*) *Newman* v. *Newman*, 10 Sim. 51; *Griffith* v. *Blunt*, 4 Beav. 248.

property would be tied up, and not *indefeasibly* alienable in fee by any one for over 100 years from the death of the testator. For, till the expiry of the term, as it is uncertain whether the estate given to Z. may not be defeated, he and his heirs can convey only a *defeasible* estate; and as far as regards the estate to take effect in defeasance of the prior estate, it is incapable of being released to Z. and his heirs, or of being conveyed to others, first, during the lifetime of A. and the concurrent life of B. (70 years); then the term of twenty-one years; and although on the expiry of the term the ultimate limitation will take effect, and the fee vest absolutely in the grandson in defeasance of the prior estate, still practically a further period of twenty years must be allowed for the minority of the grandson, during which, as an infant, he can convey only a voidable estate. The period of lives in being and twenty-one years after, seems to have been fixed on by analogy to the time, on expiry whereof, after the decision in Taltarum's case, the then most permanent mode of settling, viz., by way of strict settlement, could be defeated; and which would be under any circumstances no later than the life of the first taker (the tenant for life), and the attaining of the majority of the tenant in tail next in remainder, who could then suffer a recovery. It will thus be seen that the effect of being allowed to add by executory devise to lives in being, a term in gross, without reference to minority, during which there may be a suspense in vesting is, that by executory devise property may be tied up for a longer period than by such ordinary strict settlement *inter partes*.

It may be added that the rule against perpetuities applies to all kinds of limitations or agreements which would otherwise have the effect of tying land up for a period longer than, or which might last longer than, the period prescribed by law. Thus, where a railway company by deed conveyed superflous land in fee simple to a purchaser, who covenanted that he, his heirs or assigns, would at any time thereafter, whenever the land might be required for the railway, reconvey to the company, it was held that, as the covenant gave to the company an executory interest to arise on an event which might occur after the legal period, it was void as creating a perpetuity (*d*). And the rule applies also to a common law

(*d*) *London and S. W. R. Co.* v. *Gomm*, 20 Ch. D. 562.

condition, which must be such that it will happen within the period (*e*). It may be of interest to add, that where such an agreement was made as in the case last mentioned, and was confirmed by an Act of Parliament, it was held that the agreement, which would otherwise have been void, on the principle mentioned, was rendered valid and binding in the particular instance by the confirming Act (*ee*).

6. *Executory Interests Assignable.*

It may also be remarked before leaving the subject of contingent and executory interests, that in the time of Blackstone they were not assignable at law to strangers; but the right might be released to the terre-tenant or reversioner as tending to render unimpaired subsisting vested estates. Such interests were also devisable by will under the Statute of Wills of Henry VIII.; so also were possibilities if coupled with an interest, or the person to be benefited were ascertained; and they are now devisable under the R.S.O. c. 128, s. 10. An assignment on sufficient consideration was also enforced in equity; not, however, so much as a valid conveyance of the subject matter thereof, but rather as a *contract* to convey and make good the contract. But now these interests are by Statute capable of being conveyed at law (*f*).

Thus much for such estates in expectancy, as are created by the express words of the parties themselves; the most intricate title in the law. There is yet another species, which is created by the act and operation of the law itself, and this is called a reversion.

7. *Estates in Reversion.*

An estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a grant in tail, the reversion of the fee remains, without any special reservation, vested in the donor by act of law; and so also the reversion, after an estate for life, years, or

(*e*) See *ante* p. 168.

(*ee*) *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, L.R. (1900) 2 Ch. 352.

(*f*) R.S.O. c. 119, s. 8.

at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never therefore created by deed or writing, but arises from construction of law; a remainder can never be limited unless by either deed or devise.

The doctrine of reversions is plainly derived from the feudal constitution; for when a feud was granted to a man for life, or to him and his issue male, rendering either rent or other services, then on his death, or the failure of issue male, the feud was determined, and resulted back to the lord or proprietor, to be again disposed of at his pleasure. And hence the usual *incidents* to reversions are said to be *fealty* and *rent*. When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion. The rent may be granted away, reserving the reversion, and the assignee of the rent may distrain for it in his own name (*g*); and the reversion may be granted away, reserving the rent by *special* words; but by a *general* grant of the reversion the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *e converso*; for the maxim of law is, "*accessorium non ducit, sed sequitur, suum principale.*"

In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their deaths, it is enacted by the Statute 6 Anne c. 18, that all persons on whose lives any lands or tenements are holden, shall (upon application to the Court of Chancery and order made thereupon) once in every year, if required, be produced to the Court, or its commissioners; or upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements till the party shall appear to be living.

After the grant of an estate in fee-simple, no reversion is left in the grantor. But if the fee were granted subject to a

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

condition of re-entry, there would always be the possibility of the grantor's recovering the land on the happening of that event which would give him the right of re-entry; and this right or interest is called a possibility of reverter.

A reversion is, of course, capable of alienation. At common law the attornment of the tenant to the grantee of the reversion was essential to the validity of the alienation; but the necessity for this was abolished by a statute of Queen Anne (*h*). By another statute (*i*), attornments made by tenants to strangers claiming title to the estate of their landlords are null and void, and their landlords' possession is not affected thereby, "unless made pursuant to and in consequence of some judgment at law, or decree or order of a Court of Equity; or made with the privity and consent of the landlord or landlord's lessor or lessors; or to any mortgagee after the mortgage is become forfeited." So, where the defendant made a lease to a tenant of the plaintiff, and thus endeavoured to secure possession of land in dispute between them, it was held in an action to recover the land that the plaintiff was entitled to recover by reason of the defendant having so obtained possession from the plaintiff's tenant, the question of title as between plaintiff and defendant being left open (*j*).

8. *Merger.*

Before we conclude the doctrine of remainders and reversions, it may be proper to observe that whenever a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate, the less is immediately annihilated; or in law phrase is said to be *merged*, that is, sunk or drowned, in the greater. The requisites for merger are (1) two estates; (2) vesting in the same person at the same time; (3) the estates must be *immediately* expectant one on the other; (4) the expectant must be larger than the preceding (particular) estate (*k*). Thus, if there be tenant for years, and the reversion in fee-simple is acquired by him, or in case he surrender his term to the reversioner; in either case the term of years is merged in the inheritance, and shall

(*h*) 4 Anne c. 16, s. 9. See *Allcock* v. *Moorhouse*, 9 Q.B.D. 366.
(*i*) 11 Geo. II. c. 19, s. 11.
(*j*) *Mulholland* v. *Harman*, 6 Ont. R. 546.
(*k*) Encyc. Laws of England, Tit. Merger.

never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en autre droit*) there is no merger (*l*). Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So also, if he who had the reversion in fee married the tenant for years, there was no merger at common law; for he had the inheritance in his own right, the lease in the right of his wife. But since the Married Women's Property Acts, the husband never takes in right of his wife, but the wife holds her property separate from him.

An interest which is not an estate, as an *interesse termini*, or a contingent or executory interest, will not merge in an estate. Thus where tenant for years, during his term, took another lease to commence from the expiration of his first term, and before its expiration the reversioner devised the land to the tenant for his own life, it was held that the future interest, being but an *interesse termini* and not an estate, did not merge in the life estate (*m*).

By the Judicature Act (*n*) it is enacted that "There shall not be any merger by operation of law only of any estate, the beneficial interest in which would not prior to the Ontario Judicature Act, 1881, have been deemed merged or extinguished in equity." The meaning of this section is said to be that "where there would not be a merger both at law and in equity, then the merger shall not follow, shall not be concluded, because it would operate at law; but that where there would be a merger both at law and in equity, then the merger is to exist notwithstanding the provisions of the Act" (*o*). If it were against interest or if it were the evident intention of the parties that there should be no merger, there was none in equity (*p*), which would always interfere to prevent beneficial interests from being destroyed by merger of estates; and that is now the rule. So, where an equitable tenant for 99

(*l*) *Re Radcliffe*, L.R. (1892) 1 Ch. at p. 231.
(*m*) *Doe d Rawlings* v. *Walker*, 5 B. & C. 111.
(*n*) R.S.O. c. 51, s. 58, s.-s. 3.
(*o*) Per Kekewich, J., in *Snow* v. *Boycott*, L.R. (1892) 3 Ch. at p. 116.
(*p*) See *Chambers* v. *Kingham*, 10 Ch. D. 743.

years built on the land demised, and subsequently became tenant for life, it was held that there was no merger because his interest was to keep the term outstanding (*pp*).

An estate tail is an exception to the rule as to merger; for a man may have in his own right both an estate tail and a reversion in fee. For estates tail are protected and preserved from merger by the operation and construction, though not by the express words, of the statute *De donis*; which operation and construction have probably arisen upon this consideration, that in the common cases of *merger* of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate. But, in an estate tail, the case is otherwise; the tenant for a long time had no power at all over it, so as to bar or to destroy it; and now can only do it by certain special modes. It would, therefore, have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue; and hence it has become a maxim that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee.

9. *Purchase of Reversionary Interests.*

On purchase of reversionary interests and on dealings with expectant heirs a court of equity would formerly have relieved such persons from a disadvantageous bargain; on the principle that persons standing in such a position needed protection in dealing with their interests with designing men against the consequences of their own improvidence, and that they generally deal on unequal terms with the other party, and mostly under pressure, and in difficulties. The general rule was that it was incumbent on the purchaser to shew on a bill filed to rescind the transaction, that it was reasonable, or the price given adequate or reasonable, if not the full value. We cannot here enter into the question as to what would be considered a reasonable transaction or adequate price, and moreover each case must depend much on its own

(*pp*) *Ingle* v. *Vaughan Jenkins*, L.R. (1900) 2 Ch. 368.

circumstances; the subject is also fully discussed elsewhere (*q*). The rule under consideration applied until recently in Ontario, but now by statute (*r*) it is enacted that on any attempt to set aside a sale for undervalue made before the 4th of March, 1868, the *onus* of proving undervalue shall lie upon the person seeking to open or set aside the sale; and no purchase of a reversion made after that date *bona fide*, and without fraud, shall be opened or set aside on the ground of undervalue.

(*q*) *Earl of Chesterfield* v. *Jannsen*, 1 W. & T. Lg. Cas. 7th ed. 289; *Morey* v. *Totten*, 6 Gr. 176.

(*r*) R.S.O. c. 119, ss. 33, 34, 35.

CHAPTER XIV.

OF JOINT ESTATES.

(1). *Estates in Severalty.*
(2). *Estates in Joint-tenancy.*
(3). *Incidents of a Joint-tenancy.*
(4). *Jus Accrescendi.*
(5). *Severance of a Joint-tenancy.*
(6). *Coparcenary.*
(7). *Estates in Common.*
(8). *Incidents of Estates in Common.*
(9). *Estates by Entireties.*

1. *Estates in Severalty.*

We now come to treat of estates, with respect to the number and connections of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways; in severalty, in joint-tenancy, in coparcenary, and in common; though estates in coparcenary are probably superseded by the effect of the Inheritance Act, to be presently mentioned.

He that holds lands or tenements in *severalty*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest during his estate therein. This is the most common and usual way of holding an estate; and therefore we may make the same observations here, that we did upon estates in possession, as contradistinguished from those in expectancy in the previous chapter; that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in

laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. We shall, therefore, proceed to consider the other three species of estates, in which there is always a plurality of tenants.

2. *Estates in Joint-tenancy.*

An estate in *joint-tenancy* is where lands or tenements are granted to two or more persons as trustees or executors, or with intent apparent on the face of the instrument that they shall take as joint tenants, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of such grants, an estate is called an estate in joint-tenancy, and sometimes an estate in *jointure*, which word, as well as the other, signifies a union or conjunction of interest; though in common speech the term *jointure* is now usually confined to that joint estate, which, by virtue of the statute 27 Hen. VIII. c. 10, may be vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower.

In unfolding this title, and the two remaining ones, in the present chapter, we will first enquire how these estates may be *created*; next, their *properties* and respective *incidents*; and lastly, how they may be *severed or destroyed*. A joint-tenancy must be created by a declaration or limitation in the deed or will that the several grantees or devisees shall hold as joint-tenants, unless they are trustees or executors. For in Ontario, "where by any letters patent, assurance or will, made and executed after the first day of July, 1834, land has been or is granted, conveyed or devised to two or more persons other than executors or trustees in fee-simple, or for any less estate, it shall be considered that such persons took or take as tenants in common, and not as joint-tenants, unless an intention sufficiently appears on the face of such letters patent, assurance or will, that they are to take as joint-tenants" (*s*). Executors and trustees are excluded from the operation of this statute, because it is more convenient for the purposes of a trust that the holders of land subject thereto should be joint-tenants, one of the properties of a joint-tenancy being that when any one of the joint-tenants dies, his interest, instead of descending to his heirs, or representatives, survives to his co-tenants, as we shall

(*s*) R.S.O. c. 119, s. 11.

presently see. Thus, the trust property is always kept in the hands of the trustees or one of them, though one or more may drop off; and if the last surviving trustee should die, his heir or representative alone has to be dealt with in obtaining a conveyance of the trust estate to new trustees.

Except in the cases mentioned, then, every joint estate created by letters patent, deed or will, is an estate in common, unless it is otherwise expressed in the instrument creating the tenancy. This enactment, however, only relates to the interpretation of documents, or to the joint acquisition of land by purchase. At common law, if two persons disseised the owner they were in as joint-tenants. "If two or three disseise another of any lands or tenements to their own use, then the disseisors are joyntenants" (*t*). And this position has not been affected by our enactment. Hence, if the joint disseisors remain in possession long enough to extinguish the paper title, and thus gain title in themselves under the Statute of Limitations, they would become joint tenants in fee (*u*).

An attempt is sometimes made to create a joint-tenancy in fee by limiting the estate to the grantees and the survivors and survivor of them and the heirs of the survivor; this gives the grantees only life interests with a contingent remainder in fee to the survivor. This is not a joint-tenancy in fee carrying with it as an incident the right of any grantee, to destroy the right of survivorship and convert the joint-tenancy into a tenancy in common with its incidents. The proper mode of creating a joint-tenancy is simply to add to the names of the grantees, and words of limitation (if any), the words "as joint-tenants"; though even this is unnecessary in the case of a grant to trustees or executors as such.

The creation of an estate in joint-tenancy depends on the wording of the deed or devise, by which the tenants claim title. If, prior to the statute referred to, an estate were given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate were granted to A. and B. and their heirs, this at common law made them joint-tenants in fee of the lands. For the law interpreted the grant so as to make all parts of it

(*t*) Co. Litt. 180*b.*; see also 181*a*.

(*u*) *Ward* v. *Ward*, 6 Ch. App. 789.

take effect, which could only be done by creating an equal estate in them both. As therefore the grantor had thus united their names, the law gave them a thorough union in all respects.

3. *Incidents of a Joint-tenancy.*

The *properties* of a joint-estate are derived from its unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession*; or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

First, they have one and the same *interest*. One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life and the other for years; one cannot be tenant in fee, and the other in tail. But if lands are limited to A. and B. as joint-tenants for their lives, this makes them joint-tenants of the freehold; if to A. and B. and their heirs, joint-tenants of the inheritance. If lands are granted to A. and B. as joint-tenants for their lives, and to the heirs of A., here A. and B. are joint-tenants of the freehold during their respective lives, and A. has the remainder of the fee in severalty. Or, if lands are given to A. and B. as joint-tenants and the heirs of the body of A., here both have a joint estate for life, and A. a several remainder in tail.

Secondly, joint-tenants must also have a unity of *title*; their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseisin. Joint-tenancy cannot arise by descent or act of law; but merely by purchase, or acquisition by the act of the party; and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure.

Thirdly, there must also be an unity of *time*; their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A. and B.; or a remainder in fee to A. and B. after a particular estate; in either case A. and B. are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A. and B.; and during

the continuance of the particular estate A. dies, which vests the remainder of one moiety in his heirs; and then B. dies, whereby the other moiety becomes vested in the heir of B.; now, A.'s heir and B.'s heir are not joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other moiety vested at another. Yet, where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for the term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-estate, though vested at different times; because the *use* of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation. The doctrine as to unity of time seems to be confined to limitations at common law, for under the Statute of Uses, as in the last case mentioned, and under wills, by analogy to the decision under the Statute of Uses, persons may take as joint-tenants, though at different times (*v*).

Lastly, in joint-tenancy there must be a unity of *possession*. Joint-tenants are said to be seised *per my et per tout*, by the *half* or *moiety*, and by *all*; that is, they each of them have the entire possession, as well of every *parcel* as of the whole (*w*). They have not, one of them, a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety.

Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint reversion. If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity, or relation of their estate. For the same reason, livery of seisin, made to one joint-tenant, shall enure to both of them. But if four joint-tenants make a lease from year to year, and three of them give notice to quit, those three may recover their several shares. Each having a right to demise his share,

(*v*) *Morley* v. *Bird*, Tud. Lg. Ca. 4th ed. notes, p. 269.

(*w*) There seems to be a doubt whether the word *my* is correctly translated *moiety*. In Blackstone's note to this passage, he cites from Bracton as follows: *Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se.* Each is seised of the whole in common, and *nothing* separately.

each has consequently a right to put an end to the demise (*x*). And where three out of five joint-tenants conveyed their portions, it severed the tenancy and the purchaser recovered their shares in ejectment (*y*).

In all actions also relating to their joint-estate, one joint-tenant cannot sue or be sued without joining the other. Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land; for each has an equal right to enter on any part of it (*z*). But one joint-tenant is not capable by himself to do any act which may tend to defeat or injure the estate of the other, unless it be such an act as severs the joint-tenancy; thus he may lease his share, such a lease being *pro tanto* a severance of the tenancy (*a*). And one joint-tenant may demise his share to the other, with the usual result, a reversion in the lessor and a right of distress (*b*). So, too, though at common law no action of account lay by one joint-tenant against another, unless he had constituted him his bailiff or receiver, yet now by the Statute 4 Anne c. 16, joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenancy (*c*); and a court of equity also has jurisdiction to compel an account. Again, in cases of ouster by one joint-tenant of the other, the tenant ousted may bring ejectment; and the same in cases equivalent to ouster, as by denial of right of entry (*d*).

4. *Jus Accrescendi.*

From the same principle also arises the remaining grand incident of joint-estates, *viz.*, the doctrine of *survivorship*; by which, when two or more persons are seised of a joint-estate of inheritance for their own lives, or *pur auter vie*, or are jointly possessed of any chattel interest, the entire tenancy upon the decease of any of them remains to the

(*x*) *Doe d. Whayman* v. *Chaplin*, 3 Taunt. 120.

(*y*) *Denne d. Bowyer* v. *Judge*, 11 East 288.

(*z*) *Sed aliter* in cases of actual expulsion of one of the tenants by the other: *Murray* v. *Hall*, 7 C.B. 441.

(*a*) Co. Litt. 185 *a*.

(*b*) *Cowper* v. *Fletcher*, 6 B. & S. 464; *Leigh* v. *Dickeson*, 12 Q.B.D. at p. 195.

(*c*) *Gregory* v. *Connolly*, 7 U.C.R. 500; *Thomas* v. *Thomas*, 19 L.J. Ex. 175.

(*d*) *Murray* v. *Hall*, 7 C.B. 454.

survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate. This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint-tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy instantly ceases. But while it continues, each of the two joint-tenants has a concurrent interest in the whole, and therefore on the death of his companion the sole interest in the whole remains to the survivor. For the interest which the survivor originally had is clearly not divested by the death of his companion; and no other person can now claim to have a *joint* estate with him, for no one can now have an interest in the whole, accruing by the same title and taking effect at the same time with his own; neither can any one claim a *separate* interest in any part of the tenements, for that would be to deprive the survivor of the right which he has in all and in every part. As therefore the survivor's original interest in the whole still remains, and as no one can now be admitted, either jointly or severally, to any share with him therein, it follows that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

This right of survivorship is called by our ancient authors the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors. And this *jus accrescendi* ought to be mutual, which, it is apprehended, is one reason why neither the king nor any corporation can be a joint-tenant with a private person. For, first, here is no mutuality; the private person has not even the remotest chance of being seised of the entirety by benefit of survivorship, for the king and the corporation can never die; and secondly, the grant to the corporation is a grant to the corporation and its successors; the grant to an individual is a grant to him and his heirs; and these two estates cannot be blended in the manner necessary for the creation of a joint-tenancy; hence they become tenants in common (*e*).

(*e*) *Law Guarantee & Trust Society* v. *Bank of England*, 24 Q.B.D. at p. 411.

5. *Severance of a Joint-tenancy.*

We are, lastly, to inquire how an estate in joint-tenancy may be *severed* and *destroyed*; and this may be done by destroying any of its constituent unities. That of *time*, which respects only the original commencement of the joint estate, cannot indeed (being now past) be affected by any subsequent transactions.

But the joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession*; for joint-tenants being seised *per my et per tout*, everything that tends to narrow that interest, so that they shall not be seised throughout the whole and throughout every part, is a severance or destruction of the jointure. And therefore, if two joint-tenants part their lands and hold them in severalty, they are no longer joint-tenants, for they have now no joint interest in the whole but only a several interest respectively in the several parts; and for that reason, also, the right of survivorship is by such separation destroyed. By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do; for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But partition can now either be enforced by proceeding in the High Court or by proceeding under the Partition Act (*f*).

The jointure may be destroyed by destroying the unity of *title*. As if one joint-tenant alienes and conveys his estate to a third person; here the joint-tenancy is severed and turned into tenancy in common; for the grantee and the remaining joint-tenant hold by different titles (one derived from the original, the other from the subsequent grantor), though, till partition made, the unity of possession continues. But a devise of one's share by will is no severance of the jointure, for no testament takes effect till after the death of the testator, and by such death the right of the survivor, which accrued at the original creation of the estate, and has therefore a priority to the other, is already vested. Where, however, there was an agreement between two joint-tenants to make mutual wills, under which the survivor was

(*f* R.S.O. c. 123, s. 5.

to take the whole for life, with remainder to certain other persons, and in pursuance of the agreement the wills were made, and then one of the joint-tenants died, it was held that the joint-tenancy had been severed (*g*).

A covenant or agreement to sell an undivided share does not actually sever the tenancy, but it would be enforced in equity if the agreement were capable of specific performance (*h*): but there must be either an actual alienation or an enforceable agreement to create a severance (*i*), and a lease of his share by one joint-tenant to another would probably effect a severance (*j*).

It may also be destroyed by destroying the unity of *interest*. And, therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure; though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to be a merger) but branches of one entire estate. In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure, for it destroys the unity both of title and of interest. And whenever or by whatever means the jointure ceases or is severed, the right of survivorship or *jus accrescendi* the same instant ceases with it. Yet, if one of three joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship; and if one of three joint-tenants releases his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure, for they still preserve their original constituent unities. But when, by any act or event, different interests are created in the several parts of the estate or they are held by different titles, or if merely the possession is separated, so that the tenants have no longer these four indispensable properties, a sameness of interest and an undivided possession, a title vesting at one and the same time and by one and the same act or grant, the jointure is instantly dissolved.

(*g*) *Re Wilford's Estate*, 11 Ch.D. 269.
(*h*) *Brown* v. *Raindle*, 3 Ves. at p. 257.
(*i*) *Partriche* v. *Powlet*, 2 Atk. 54.
(*j*) *Cowper* v. *Fletcher*, 6 B. & S. at p. 472, per Blackburn, J.

In general, it is advantageous for the joint-tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint-estate; as, if there be joint-tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety.

6. *Coparcenary.*

An estate held in *coparcenary* is where lands of inheritance descended at common law from the ancestor to two or more females or heirs of females. It arose either by common law, or particular custom; the latter of which never existed in Ontario. At common law, where a person seised in fee-simple, or fee-tail, died, and his next heirs were two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they would all inherit; and these co-heirs were then called *coparceners*; or, for brevity, *parceners* only.

The *properties* of parceners were in some respects like those of joint-tenants; they had the same unities of *interest*, *title*, and *possession*. They might have sued and been sued jointly for matters relating to their own lands; and the entry of one of them in some cases enured as the entry of them all. They could not have an action of trespass against each other. Parceners, however, differed materially from joint-tenants in four other points: 1. They always claimed by descent, whereas joint-tenants always claim by purchase. Therefore, if two sisters purchased lands, to hold to them and their heirs, they were not parceners, but tenants in common; and hence it likewise followed that no lands could be held in coparcenary but estates of inheritance. 2. There was no unity of *time* necessary to an estate in coparcenary; for if a man had two daughters, to whom his estate descended in coparcenary, and one died before the other, the surviving daughter and the heir of the other, or, when both were dead, their two heirs, were still parceners; the estate vesting in each of them at different times, though of the same quantity of interest, and held by the same title. 3. Parceners, though they had a *unity*, had not an *entirety* of interest. They were properly

entitled each to the whole of a distinct moiety; and of course there was no *jus accrescendi*, or survivorship between them; for each part descended severally to their respective heirs, though the unity of possession continued. And as long as the lands continued in a course of descent, and united in possession, so long were the tenants therein called parceners. But if the possession were once severed by partition, they were no longer parceners, but tenants in severalty; or if one parcener aliened her share, though no partition were made, then were the lands no longer held in *coparcenary*, but in *common*.

Parceners were so called, saith Littleton, because at common law they may be constrained to make *partition*.

There was yet another consideration attending the estate in coparcenary; that if one of the daughters had had an estate given with her in *frank-marriage* by her ancestor (which was a species of estate-tail, freely given by a relation for advancement of his kinswoman in marriage), in this case, if the lands descended from the same ancestor to her and her sisters in fee-simple, she or her heirs should have no share of them, unless they agreed to divide the lands so given in frank-marriage in equal proportion with the rest of the lands descending. This was denominated bringing those lands into *hotch-pot*, which word is explained by using the very words of Littleton: "It seemeth that this word *hotch-pot*, is in English a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together." By this housewifely metaphor our ancestors meant to inform us, that the lands, both those given in frank-marriage and those descending in fee-simple, should be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frank-marriage; and if she did not choose to put her lands into hotch-pot, she was presumed to be sufficiently provided for, and the rest of the inheritance was divided among her other sisters. The law of hotch-pot took place then only, when the other lands descending from the ancestor were fee-simple; for if they descended in tail, the donee in frank-marriage was entitled to her share, without bringing her lands so given into hotch-pot. And the reason was because lands in descending in fee-simple were distributed by the policy of law, for the maintenance of all the daughters; and if one had a sufficient provision out of the same inheritance,

equal to the rest, it was not reasonable that she should have more; but lands descending in tail were not distributed by the operation of the law, but by the designation of the giver, *per formam doni*; it mattered not, therefore, how unequal this distribution might be. Also, no lands, but such as were given in frank-marriage, were to be brought into hotch-pot; for no others were looked upon in law as given for the advancement of the woman, or by way of marriage portion. And, therefore, as gifts in frank-marriage are fallen into disuse, we should hardly have mentioned the law of hotch-pot had not this method of division been revived and copied by the statute for the distribution of personal estates. The principle is also introduced under the Inheritance Act as to descent of real estate, which we shall hereafter consider at large.

The estate in coparcenary might have been *dissolved*, either by partition which disunited the possession; by alienation of one parcener, which disunited the title, and might disunite the interest; or by the whole at last descending to and vesting in one single person, which brought it to an estate in severalty. By the Inheritance Act (*k*) it is enacted that "where an inheritance, or a share of an inheritance, descends to several persons . . they shall take as tenants in common in proportion to their respective rights." In consequence of this enactment, the estate in coparcenary is superseded, and where two or more females inherit, they take as tenants in common. The change effected by the statute is of no great practical importance, unless, perhaps, that as they take as tenants in common, they get the advantage of the action of account given by the statute, 4 Anne c. 16, s. 27, to one tenant in common against the other, whilst it is doubtful whether it extended to coparceners (*kk*).

7. *Estates in Common.*

Tenants in *common* are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously. This tenancy happens, therefore, where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For if there be

(*k*) Now the Devolution of Estates Act, R.S.O. c. 127, s. 56.
(*kk*) *Gregory* v. *Connolly*, 7 U.C.R. 500.

two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no necessary unity of interest; one may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B.; so that there is no unity of title; one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own; otherwise even this would be soon destroyed.

Tenancy in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by the limitations in a deed. By the destruction of the two other estates, is meant such destruction as does not sever the unity of possession, but only the unity of title or interest; as, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they have now several titles, the other joint-tenant by the original grant, the alienee by the new alienation; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to A. in tail, and the other gives his to B. in tail, the donees are tenants in common, as holding by different titles and conveyances. And if one of two parceners aliened, the alienee and the remaining parcener were tenants in common; because they held by different titles, the parcener by descent, the alienee by purchase. In short, whenever an estate in joint-tenancy is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

It is possible, however, by express words to create a tenancy in common with the right of survivorship amongst the several tenants, which will not be a joint-tenancy. Thus, where a testator devised land to three persons "for and during their joint natural lives and the natural life of the survivor of them, to take as tenants in common and not as joint-tenants," with a gift over after the death of the survivor, the court gave effect to the intention by holding the devisees to be tenants in common (*l*). The right of survivorship is not the only incident of a joint-tenancy which distinguishes it from a tenancy in common. The

(*l*) *Doe d. Borwell* v. *Abbey*, 1 M. & S. 428.

incidents of the two estates, apart from the right of survivorship, are distinct, and therefore a tenancy in common may be created, with the addition of a limitation to the survivor of the share of each tenant upon death (*m*).

A tenancy in common may, as we have seen, be created by devise or conveyance; and it may also arise by descent.

8. *Incidents of Estates in Common.*

As to the incidents attending a tenancy in common. Prior to the statute 4 Wm. IV. c. 1, which abolished the old writ of partition, tenants in common, like joint-tenants, were compellable, by statute of Henry VIII. and Wm. III. to make partition of their lands; which they were not obliged to do at common law, as parceners were. Partition may now be compelled under R.S.O. c. 123, s. 5. If a voluntary partition is made between the tenants, it must be by deed (*n*). A singular mode of sale and *quasi* partition is authorized among co-heirs by the Devolution of Estates Act (*o*), under which the parties authorized by law to make partition are to receive an offer from any one of the parties interested to buy the shares of the others and report the same to the court, and preference of offer is to be given always to such an one who before that Act would have been heir-at-law, and after such one, then to the next who would have been heir-at-law. A sale can also be directed so that the proceeds may be divided. The right of partition also existed, and might have been enforced in equity, and may be enforced under the rules of court (*p*) instead of proceeding under the Partition Act. Singular questions sometimes arose under proceedings for partition, from the impartible nature of the property. Difficulties, however, arising from the nature of the property, can now be overcome by the court directing a sale under the Acts and rules before mentioned (*q*).

Tenants in common properly take by distinct moieties, and have no entirety of interest, and therefore there is no survivorship between them; their other incidents are such as

(*m*) *Haddesley* v. *Adams*, 22 Beav. 275.
(*n*) R.S.O. c. 119, s. 7.
(*o*) R.S.O. c. 127, s. 64.
(*p*) Rule 956, *et seq.*
(*q*) *Re Dennie*, 10 U.C.R. 104.

arise merely from the unity of possession, and are, therefore, the same as appertain to joint-tenants merely on that account; such as being liable to reciprocal actions of account by the statute 4 Anne c. 16, s. 27 (*r*); for by the common law, no tenant in common was liable to account with his companion for embezzling the profits of the estate. If one tenant in common actually turns the other out of possession, however, an action of ejectment will lie against him, and trespass also will lie (*s*). Ejectment and trespass will also lie under circumstances equivalent to actual ouster, as by denial of the right of entry to the co-tenant, and adverse continuance in possession of the others. If one tenant in common has been in possession of the whole without excluding his co-tenant, he will not be chargeable with occupation rent, but it is otherwise in case of exclusion, or what is tantamount to it.

There is no fiduciary relationship between tenants in common as such, and one of them cannot, by leaving the management of the property in the hands of the other, impose upon him any obligation of a fiduciary character (*t*). And one tenant in common who voluntarily expends money on the property for ordinary repairs has no right of action against his co-tenant for contribution (*u*). But an account will be taken of them in partition, or on an accounting of rents; thus, where one tenant in common held possession and managed the whole estate, it was held in a proceeding to administer the estate of the co-tenant, deceased, that advances made by the tenant in possession for repairs and improvements were allowable (*v*).

On receipt of rent from tenants a tenant in common would have to account. Where there has been mere possession, without exclusion or its equivalent, it would seem he need not account for timber cut and sold; but if willing to account for his beneficial enjoyment, he may be allowed in certain cases, as on partition, for improvements made by him, but not otherwise (*w*).

(*r*) *Gregory* v. *Connolly*, 7 U.C.R. 500; *Thomas* v. *Thomas*, 19 L.J. Ex. 175, and see *Sandford* v. *Ballard*, 33 Beav. 401; 30 Beav. 109; *Henderson* v. *Eason*, 2 Phill. 308.

(*s*) *Murray* v. *Hall*, 7 C.B. 441.

(*t*) *Kennedy* v. *de Trafford*, L.R. (1897) A.C. 180.

(*u*) *Leigh* v. *Dickeson*, 12 Q.B.D. 194; 15 Q.B.D. 60.

(*v*) *Re Curry*, 25 App. R. 267.

(*w*) *Rice* v. *George*, 20 Gr. 221.

And where a stranger enters upon the land a tenant in common may recover from him only the undivided share to which he is entitled and not the whole (*x*).

But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest, (such as joining or being joined in actions, unless in the case where some entire or indivisible thing is to be recovered), these are not applicable to tenants in common whose interests are distinct, and whose titles are not joint but several.

Where two tenants in common make a joint lease, reserving an entire rent, the two may join in an action to recover it; but if there be a separate reservation to each, then each must bring his separate action. Where a lease was made by two tenants in common reserving rent, and the rent was for some time paid to an agent of both lessors, but afterwards notice was given to the lessee to pay a moiety of the rent to each of the lessors, it was held to be a question of fact whether the parties meant to enter into a new contract with a separate reservation of rent to each, or a continuation of the old reservation of rent (*y*).

Estates in common can only be *dissolved* in two ways:—1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty; 2. By making partition between the several tenants which gives them all respective severalties. For, indeed, tenancies in common differ in nothing from sole estates, but merely in the blending and unity of possession.

9. *Estates by Entireties.*

Tenancy by *entireties* was an estate held by husband and wife at common law. If an estate were given to a man and his wife, they were neither properly joint-tenants, nor tenants in common; for husband and wife being considered as one person in law, they could not take the estate by moieties, but both were seised of the entirety *per tout et non per my*. The consequence of which was that neither the husband nor the wife could dispose in fee of any part without the assent of the other; and the whole estate remained to the survivor on the death of either (*z*). This estate was

(*x*) *Barnier* v. *Barnier*, 23 Ont. R. 280.

(*y*) *Powis* v. *Smith*, 5 B. & Ald. 850.

(*z*) *Green d. Crew* v. *King*, 2 W. Bl. 1211; *Doe d. Freestone* v. *Parratt*, 5 T.R. 652.

called an estate by entireties, and the husband and wife were called tenants by entireties. But the grant must have been made during the coverture, and perhaps also, without any words to expressly define the estate to be taken by them. It is said by Preston that lands might at common law have been granted to husband and wife to hold as tenants in common, or as joint-tenants, and they would in that case hold by moieties as other persons would do (*a*), and he cites Coke upon Littleton for this (*b*). But this is not stated at the passage cited. In Cruise's Digest (*c*) it is stated that "as there can be no moieties between husband and wife, they cannot be joint-tenants." In *Edye* v. *Addison* (*d*), a devise of real and personal estate to husband and wife expressly as joint-tenants, was treated as giving them an estate by entireties. And in an Irish case (*e*) where a grant was made to husband and wife "to hold the same unto the said [husband and wife] forever as joint-tenants thereof," it was held that they took by entireties (*f*). The question is perhaps of no importance since the Married Women's Property Acts, as we shall presently see.

But if lands were limited to a man and a woman as joint-tenants, or tenants in common, and they afterwards intermarried, they did not become tenants by entireties, but remained joint-tenants, or tenants in common (*g*). And where lands were granted to husband and wife and a third person, the husband and wife took one moiety by entireties, and the third person the other moiety.

Neither the husband nor the wife could alien the land without the consent of the other; but, if the husband aliened in the lifetime of his wife and survived her, it was good to pass the whole (*h*). But if she survived him it passed nothing (*i*). As husband and wife could not sue each other at common law, they could not have compelled each other to make partition.

(*a*) 1 Prest. Est. 132; 2 Prest. Abst. 41.

(*b*) Co. Litt. 187*b*; see also Edwards' Law of Prop. in land, 3rd ed. p. 169; and Challis on R.P., citing Preston's opinion.

(*c*) Tit. 18, c. 1, s. 45.

(*d*) 1 H. & M. 781.

(*e*) *Pollok* v. *Kelly*, 6 Ir. C.L.R. 367 (1856).

(*f*) See also *Re Wylde*, 2 D.M. & G. 724.

(*g*) 1 Prest. Est. 134.

(*h*) 1 Prest. Est. 134.

(*i*) *Doe d. Freestone* v. *Parratt*, 5 T.R. 652.

Where husband and wife held as joint-tenants, or tenants in common, the husband might alien his share (*j*).

The Married Women's Property Acts have been said to effect a complete change in this interest. The enactment declaring that where a conveyance is made to two persons, they shall take as tenants in common, was held not to affect the case, because its purport was only to create a tenancy in common where before that Act there would have been a joint-tenancy (*k*). But the Married Women's Property Acts by declaring that a married woman shall be able to acquire, hold and dispose of her real property separate from her husband, have enabled her to convey separately from her husband that which she has acquired. Consequently, if a grant now be made to husband and wife during coverture, the wife may convey her share separately from her husband, and being thus able to sever the joint estate, it is not an estate by entireties, which was incapable of severance (*l*).

This reasoning is open to the objection, however, that though the wife is enabled to dispose of her portion of the estate, nothing is said in the statutes as to the husband's interests. In one case (*m*) it was said, "This enactment, however, is silent as to any correlative rights of the husband, and has no application to a claim by the husband upon the wife's separate estate. It is urged that the Act must have meant to give the husband correlative rights in respect of the separate property of the wife. I answer, I do not see why. I take the Act to mean exactly what it says—no more and no less. It is said that it destroys the doctrine of the common law, by which there was what has been called a unity of person between husband and wife. Again I answer, I do not see why. It confers, in certain specified cases, new powers upon the wife, and in others, new powers upon the husband, and gives them, in certain specified cases, new remedies against one another. But I see no reason for supposing that the Act does anything more than it professes to do, or either abrogates or infringes upon any existing principles or rules of law in cases to which its provisions do

(*j*) 2 Prest. Abstr. 43.

(*k*) *Re Shaver* v. *Hart*, 31 U.C.R. 603.

(*l*) See *Re March*, 24 Ch. D. 222; 27 Ch. D. 161; *Re Jupp*, 39 Ch. D. 148; *Re Dixon*, 42 Ch. D. 306.

(*m*) *Butler* v. *Butler*, 14 Q.B.D. at p. 835, cited with approval in *Re Jupp*, 39 Ch. D. at p. 152.

not apply." It is difficult in the face of this doctrine, to assert that the husband should, as a corollary to the proposition respecting the wife's powers, be able to dispose of his share as if the parties were tenants in common or joint tenants. And it would, perhaps, have been better had these Acts been held not to apply to this extraordinary and unique estate (as in the case of the enactment as to taking in common) which was probably not in contemplation when the Married Women's Property Acts were passed. Nevertheless, it was at first suggested (*n*) and afterwards decided (*o*) that husband and wife now take as tenants in common. And in England, where a conveyance to two persons makes them joint tenants unless it is otherwise expressed, it has been held that a conveyance to husband and wife since the Married Women's Property Act, makes them joint tenants; and as to property held by them in entireties before that Act, they became joint tenants upon being divorced (*p*).

The Ontario decision has an effect which was probably overlooked at the time, viz., it destroys the right of survivorship which was incident to the estate by entireties. It has been held that the Married Women's Property Acts do not deprive the husband of his estate by the curtesy if the wife dies before him without having disposed of her separate estate (*q*); and it is therefore difficult to see why a husband should be deprived of his right of survivorship, if his wife should not exercise her right of disposing of her share during her lifetime. This necessarily results from holding them to take as tenants in common. If these statutes affect this peculiar estate at all, it would be more in accordance with the relative rights of husband and wife to hold that on account of the common law right of survivorship, they would now take as joint tenants.

(*n*) *Griffin* v. *Patterson*, 45 U.C.R. at p. 554, per Armour, J.

(*o*) *Re Wilson & Tor. Inc. El. Co.*, 20 Ont. R. 397.

(*p*) *Thornley* v. *Thornley*, L.R. (1893) 2 Ch. 229.

(*q*) *Cooper* v. *Macdonald*, 7 Ch. D. 288; *Hope* v. *Hope*, L.R. (1892) 2 Ch. 336.

CHAPTER XV.

OF THE TITLE TO THINGS REAL, IN GENERAL.

(1). *Bare Seisin.*
(2). *Seisin is Transmissible.*
(3). *Right to Possession.*

1. *Bare Seisin.*

We come now to consider, lastly, the *title* to things real, with the manner of acquiring and losing it.

There were formerly several stages or degrees requisite to form a complete title to lands and tenements. We will consider them in a progressive order.

The lowest and most imperfect degree of title consists in the mere *naked possession*, or actual occupation of the estate; without any apparent right, or shadow or pretence of right, to hold and continue such possession. This may happen when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a *disseisin*, being a deprivation of the actual seisin, or corporal freehold of the lands, which the tenant before enjoyed. Or it may happen, that after the death of the ancestor and before the entry of the heir, or after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. So again if a stranger take possession of vacant land in the lifetime of him entitled to possession. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner could put an end to, formerly, by a variety of legal remedies, as will hereafter more fully appear. But in the meantime, till some act be done by the rightful owner to divest this possession and assert his title, such actual possession is, *prima facie*, evidence of a legal title in fee in the possessor against all the world but the true owner. It may

also, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. It is clearly established that mere possession of land is good against all the world, except the person who can shew a good title; and if a trespasser should be ousted by another trespasser, he may recover possession on shewing the ouster, and his prior seisin merely, which was good to protect him against any invasion of the land by any person other than the true owner (*r*).

2. *Seisin is Transmissible.*

And such title by seisin or possession only is capable of being transmitted by will (*s*), or by deed (*t*), and the person claiming under such will or deed will not be allowed to dispute its validity as against any other person also claiming under it, though, as against the true owner, they may both do so (*u*); and the seisin may also be transmitted by inheritance to the heir-at-law, who may unite his seisin to that of his ancestor as against the true owner, and thus ultimately extinguish his title.

It may also be observed here, that the Devolution of Estates Act, which casts the land of a deceased person upon his personal representative to the exclusion of the heirs-at-law, applies, as regards freehold interests, only to estates of inheritance in fee-simple, or limited to the heir as special occupant (*v*). Consequently, it is apprehended that if a disseisor should die intestate, while seised of the land, and before the statutory period had run to give him a title in fee-simple, the seisin would pass to his heir-at-law, and not to the personal representative. And where two or more persons wrongfully enter upon land jointly, they enter and are seised as joint-tenants, and would acquire title as such (*w*), the statute creating tenancy in common applying only to title by conveyance. And the seisin of one dying would survive to his joint-disseisor.

(*r*) *Asher* v. *Whitlock*, L.R. 1 Q.B. 1.

(*s*) *Board* v. *Board*, L.R. 9 Q.B. 48; *Anstee* v. *Nelms*, 1 H. & N. at p. 232; *Calder* v. *Alexander*, 16 Times L.R. 294.

(*t*) *Dalton* v. *Fitzgerald*, L.R. (1897) 1 Ch. 440; (1897) 2 Ch. 86.

(*u*) Ibid.

(*v*) R.S.O. c. 127, s. 3 (*a*).

(*w*) *Ward* v. *Ward*, 7 Ch. App. 789.

The nature of such wrongful possession is such that it cannot be measured as to quantity or quality, being wholly wrong, and the disseisors can only have a *quasi-fee*. The reason is given by Hobart—"because wrong is unlimited, and ravens all that can be gotten, and is not governed by terms of the estates, because it is not contained within rules" (*x*).

3. *Right to Possession.*

The next step to a good and perfect title is the *right of possession*, which may reside in one man, while the actual possession is not in himself but in another. For if a man be disseised, or otherwise kept out of possession by any of the means before mentioned, though the *actual* possession be lost, yet he has still remaining in him the *right* of possession; and may exert it whenever he thinks proper, till barred by lapse of time, by entering upon the disseisor and turning him out of that occupancy which he has so illegally gained, or by action to recover the land.

(*x*) *Elvis* v. *Archbishop of York*, Hob. at p. 323.

CHAPTER XVI.

OF TITLE BY PURCHASE, AND FIRST, BY ESCHEAT.

(1). *Purchase.*
(2). *Rule in Shelley's Case.*
(3). *Difference between Descent and Purchase.*
(4). *Escheat.*
(5). *Dissolution of Corporation.*

1. *Purchase.*

Purchase, *perquisitio*, taken in its largest and most extensive sense, is thus defined by Littleton:—the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance, wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law.

Purchase, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land, as are obtained by way of bargain and sale, for money, or some other valuable consideration. But this falls far short of the legal idea of purchase; for if I *give* land freely to another he is in the eye of the law a purchaser; and falls within Littleton's definition, for he comes to the estate by his own agreement, that is, he consents to the gift. A man who has his father's estate settled upon him in tail, before he was born, is also a purchaser; for he takes quite another estate than the law of descents would have given him. Nay, even if the ancestor devises his estate to his heir-at-law by will such heir shall take as a devisee, and so a purchaser, and not by descent (*y*).

(*y*) R.S.O. c. 127, s. 26.

2. *Rule in Shelley's Case.*

If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but if he dies during the continuance of the particular estate, his heirs shall take as purchasers. But if an estate be made to A. for life, remainder to his right heirs in fee, his heirs shall take by descent; for it is an ancient rule of law, that wherever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by *purchase*, but only by *descent*. And, if A. dies before entry, still his heir shall take by descent, and not by purchase; for, where the heir takes anything that might have vested in the ancestor, he takes by way of descent. The ancestor, during his life, beareth in himself all his heirs; and therefore, when once he is or might have been seised of the lands, the inheritance so limited to his heirs vests in the ancestor himself; and the word "heirs" in this case is not esteemed a word of *purchase*, but a word of *limitation*, enuring so as to increase the estate of the ancestor from a tenancy for life to a fee-simple. And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchaser originally nominated in the deed, as must have been the case if the remainder had been expressly limited to Matthew or Thomas by name, then, in the times of strict feudal tenure, the lord would have been defrauded by such a limitation of the fruits of his seigniory, arising from a descent to the heir.

The effect of such a limitation in a conveyance or will as above, viz., to A. for life with remainder to his right heirs in fee, is in fact to give to A. an immediate estate in fee, with the power of alienation and all other incidents attached to such an estate. This is under the well-known rule in *Shelley's case* (z), which rule is thus expressed, viz., that where the ancestor by any gift or conveyance takes an estate of *freehold*, and in the *same* gift or conveyance (a will and codicil being for this purpose considered as the same instrument) an estate is limited either mediately or immediately to his heirs in fee or in tail, in such case "the heirs" are words of limitation and not words of purchase; that is to say, in the first case an estate in fee, in the second case an estate tail, will vest in the ancestor, and on his death his heirs will

(z) 1 Co. 93 b.; Tud. Lg. Ca. 4th ed. 332.

take, not as purchasers under the gift or conveyance, but as heirs of their ancestor by descent. In other words a grant, devise or gift to A. for life, and after his death to his heirs, or the heirs of his body, is equivalent to a gift to A. and his heirs, or to A. and the heirs of his body (*a*). If the estate limited to the heirs be not immediate but mediate, as to A. for life, remainder to B. for life, remainder to the heirs of A. in fee, still the rule will apply, and A. will take an estate for life, with a vested remainder in fee. It will be observed that the limitations must be by the *same* instrument; for if a person by deed give an estate to his son for life, and by his will devise the same estate to the heirs male of his (the son's) body, the son will only take an estate for life, and the heirs male of his body take a remainder in tail by purchase. The rule is not confined to cases in which the word "heirs" is made use of, but is frequently applied in cases of wills where the word "issue," "son," or "child" is used; if it can be gathered that such word is used as synonymous with "heir," as *nomen collectivum*, and not as *designatio personæ*. On this latter point the cases are somewhat abstruse and difficult, and it will therefore be sufficient to call attention to the fact that the rule is not confined to cases where the ordinary strict word of limitation as "heirs" is made use of. It should also be mentioned that it does not necessarily follow in all cases where the words "heirs" or "heirs of the body" are used, that the rule will apply; for the context of the instrument may interpret and limit the ordinary signification of the words; and if it can be clearly gathered that they are not used as words of limitation, but as words of purchase, they will be construed in the latter sense (*b*).

What we call *purchase, perquisitio*, the feudists called *conquest, conquæstus*, or *conquisitio*; both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotland; as it was among the Norman jurists, who styled

(*a*) For a very amusing and instructive essay on the origin, history and application of the rule, see Lord MacNaghten's speech in *Van Grutten* v. *Foxwell*, L.R. (1897) A.C. 658, at p. 667.

(*b*) Tud. Lg. Ca. 4th ed. 332. This subject is not further pursued here because it is incidentally introduced to illustrate the meaning of the word "purchase," and because the question so frequently arises in the interpretation of wills, and so seldom elsewhere, that it is chiefly dealt with in the books on construction of wills.

the first purchaser (that is, he who brought the estate into the family which at present owns it) the conqueror or *conquereur*. Which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the throne of England was, in his own and his successors' charters, and by the historians of the times, entitled *conquæstus* and himself *conquæstor* or *conquisitor*; signifying that he was the first of his family who acquired the crown of England, and from whom, therefore, all future claims by descent must be derived; though now, from our disuse of the feudal sense of the word, together with the reflection on his forcible method of acquisition, we are apt to annex the idea of *victory* to this name of *conquest* or *conquisition*; a title which, however just with regard to the *crown*, the conqueror never pretended with regard to the *realm* of England; nor, in fact, ever had.

3. *Difference between Descent and Purchase.*

The difference in effect between the acquisition of an estate by descent and by purchase, consisted at common law principally in these two points:—1. That by purchase the estate acquired a new inheritable quality, and descended to the owner's blood in general without preference to the blood of a particular ancestor. For, when a man took an estate by purchase, he took it not *ut feudum paternum* or *maternum*, which would descend, by the common law, only to the heirs by the father's or the mother's side; but he took it *ut feudum antiquum*, as a feud of indefinite antiquity; whereby it became inheritable to heirs general. 2. An estate taken by purchase would not make the heir answerable for the acts of the ancestor, as an estate by descent would; for, if the ancestor by any deed, obligation, covenant, or the like, bound himself and his heirs, and died, this deed, obligation, or covenant, was binding upon the heir, so far forth as he had estate sufficient to answer the charge from that ancestor, which sufficient estate is in the law called *assets*, from the French word *assez*, enough. Therefore, if a man covenanted, for himself and his heirs, to keep my house in repair, I could then (and then only) compel his heir to answer this covenant, when he had an estate sufficient for this purpose, or *assets*, by descent from the covenantor; for though the covenant descended to the heir, whether he inherited any estate or no,

it could not be enforced against him, until he had assets by descent. Modern statutes have so qualified the law as to inheritance and payment of debts that the distinction is now to a great extent historical only.

This is the legal signification of the word *perquisitio*, or purchase; and in this sense it includes the five following methods of acquiring a title to estates:—1. Escheat; 2. Occupancy; 3. Forfeiture; 4. Alienation; 5. Prescription. All of these in their order.

4. *Escheat.*

Escheat (*c*) we may remember, was one of the fruits and consequences of feudal tenure. The word itself is originally French or Norman, in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee, who in Canada is the Sovereign; and in England may also be a private individual, if his ancestor had granted the tenure prior to the statute *Quia emptores*, to hold of him and his heirs, thus by a process of subinfeudation creating a manorial estate.

Escheats, therefore, arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the law as to descent and the several cases wherein hereditary blood may be deficient, than by any other method whatsoever.

The law of escheats is founded upon this single principle, that the blood of the person last seised or entitled in fee-simple is, by some means or other, utterly extinct and gone; and, since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence, that when such blood is extinct, the inheritance itself must fail; the land must become what the feudal writers denominate *feudum apertum*, and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*; the

(*c*) See *Atty.-Gen.* v. *O'Reilly*, 26 Gr. 126; 6 App. R. 576; 5 S.C.R. 538; 8 App. Cas. 767.

one sort, if the tenant dies without heirs; the other, if his blood be attainted by crime. But both these species might formerly well be comprehended under the first denomination only; for he that was attainted for felony or treason suffered an extinction of his blood, as well as he that died without relations. The inheritable quality was expunged in one instance, and expired in the other. Inasmuch as the criminal law is entirely within the jurisdiction of the Parliament of Canada, while property and civil rights are solely within the provincial jurisdiction, and as the Act respecting Escheat does not affect to deal with forfeiture for crime, no further reference will be made upon that phase of the subject in dealing with escheat

A monster which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage; but, although it hath deformity in any part of its body, yet, if it hath human shape, it may be heir. This is a very ancient rule in the law of England, and its reason is too obvious and too shocking to bear a minute discussion. The Roman law agrees with our own in excluding such births from succession; yet, accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby (as the *jus trium liberorum*, and the like), esteeming them the misfortune, rather than the fault of that parent. By our law if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

Bastards are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determination. Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is *qui ex damnato coitu nascuntur, inter liberos non computantur*. Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the crown. The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father; and also, if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance; and a bastard

was likewise capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not. But our law in favour of marriage, is much less indulgent to bastards.

As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For, as all collateral kindred consist in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And therefore if a bastard purchases land, and dies seised thereof without issue, and intestate, the land shall escheat to the crown.

By the Devolution of Estates Act (*d*) children and relatives who are illegitimate are excluded from inheriting, which is in affirmance of the prior law.

The law of escheats, being of feudal origin, applies to legal estates only. And consequently, if land be held in trust for another, and the *cestui que trust* die intestate and without heirs, the trustee, being legally seised, retains the land discharged of the trust, the same being absolutely determined (*e*). So also, if a mortgagor die without heirs and intestate, having but an equity of redemption, there is no escheat, and the mortgagee holds the land, subject only to payment of the mortgagor's debts (*f*).

Escheat and forfeiture for any cause other than crime, *e.g.*, for breach of a condition in letters patent entitling the crown to re-enter, are now regulated by statute. The law of escheat remains the same, the procedure is regulated by the statutes now to be noticed.

The original statute respecting escheat and forfeiture was passed in 1877 (*g*), and provides that whenever any lands, tenements, or hereditaments in the Province have escheated to the Crown by reason of the person last seised thereof, or entitled thereto, having died intestate, and without lawful heirs, or have become forfeited for any cause except crime, the Attorney-General may cause possession to be taken in the

(*d*) R.S.O. c. 127, s. 58.

(*e*) *Burgess* v. *Wheate*, 1 Eden 177. And see *Re Lashmar*, L.R. (1891) 1 Ch. 258.

(*f*) *Beale* v. *Symonds*, 16 Beav. 406. And see *Simpson* v. *Corbett*, 10 App. R. 32.

(*g*) 40 V. c. 4; now R.S.O. c. 114.

name of the crown, or bring an action to recover possession; and the Lieutenant-Governor in Council may grant such lands to any person for the purpose of restoring or transferring the same to any person having a legal or moral claim upon the deceased, or of carrying into effect any disposition thereof, which the deceased may have contemplated; or of rewarding any person making discovery of the escheat or forfeiture. Such grant may be made without actual entry, or inquisition made, though the lands are not in the actual possession of the crown, or are adversely claimed by some person.

The effect of this enactment is, that when escheat occurs, according to the common law, the formalities previously required are dispensed with, and the crown may take possession and deal with the land as therein set out.

The Devolution of Estates Act (*h*) (which casts the estate upon the personal representative of a deceased person instead of the heirs-at-law, and declares him to be the heir in the interpretation of statutes, unless the contrary intention appears), though at first sight it appears to prevent the law of escheat from operating, does not in reality interfere with it, for the following reasons:—Both Acts are undoubtedly in force, and the Act respecting escheats postulates the existence of the law of escheat, and provides for procedure. The special case is therefore excepted from the general law. Again, though personal representatives are, by the Devolution of Estates Act, declared to be the heirs of a deceased person, unless a contrary intention appears, the expression "heirs," as used in the Escheat Act, is too plainly intended to mean relatives entitled to succeed beneficially to admit of any other interpretation. Again, by the law of escheat, the land vests in the crown immediately upon, and as the effect or result of, the death of the intestate without heirs; while the Devolution of Estates Act presumably applies only to cases where distribution amongst beneficiaries can take place. Lastly, where there are no kindred, or husband or wife of the deceased, the crown is entitled to administer, and if application is made by any one else for administration, the Attorney-General is cited in order that it may be ascertained whether he will interfere (*i*). If a husband or wife of the intestate survived, and obtained administration, still the crown would

(*h*) R.S.O. c. 127, s. 4.

(*i*) Howell, Prob. Prac. 133, 134.

be beneficially entitled for want of heirs, and the Attorney-General could bring an action, under the Act respecting escheat, to recover possession from the administrator.

Where there are no known heirs of a person who dies intestate, provision is made by statute (*j*) for letters of administration being granted to the Attorney-General; for applying to the Court for an order to enquire whether the crown is entitled to any portion of the land of the deceased on account of his dying intestate and without heirs; power is given to him to sell the land pursuant to order in council passed for that purpose; and to exercise all these rights, though it is alleged or ascertained that the deceased had relatives, or did not die intestate as to the land. And in an action by the Attorney-General to recover the land, the crown is entitled to judgment, unless the person claiming adversely shews that the deceased did not die intestate as to such land, or that he left heirs, or that some other person is entitled to such land. This is not strictly a part of the law of escheat, but it is of a cognate character, proper to be classed with the rights of the crown on failure of heirs.

Aliens also were at common law incapable of taking by descent or inheriting; for they were not allowed to have any inheritable blood in them; rather, indeed, upon a principle of national or civil policy, than upon reasons strictly feudal. Though, if lands had been suffered to fall into their hands who owe no allegiance to the crown of England, the design of introducing our feuds, the defence of the kingdom, would have been defeated. Wherefore, if a man left no other relations but aliens, his land escheated to the lord.

As aliens could not inherit, so far they were on a level with bastards; but as, excepting leaseholds for trading purposes, they were also disabled to hold by purchase as against the crown, they were under still greater disabilities. And they could have no heirs because they had not in them any inheritable blood.

An alien is described as one born in a strange country, under the obedience of a strange prince or country, or out of the ligeance of the king (*k*).

The disabilities of aliens as to holding and transmitting lands have, however, now been wholly removed. The follow-

(*j*) R.S.O. c. 70.

(*k*) Co. Litt. 129*a*. See now as to the Law of Allegiance, 1 C.L.T. 1.

ing is the provision of our present statute (*l*), as to the capacity of aliens in relation to realty (*m*):—

"On and from the 23rd day of November, 1849, every alien shall be deemed to have had and shall hereafter have the same capacity to take by gift, conveyance, descent, devise, or otherwise howsoever, and to hold, possess, enjoy, claim, recover, convey, devise, impart and transmit real estate in this Province as natural born or naturalized subjects of Her Majesty."

"The real estate in this Province of an alien dying intestate shall descend and be transmitted as if the same had been the real estate of a natural born or naturalized subject of Her Majesty."

By *attainder*, also, for treason or other felony, the blood of the person attainted was so corrupted as to be rendered no longer inheritable; but, by the Criminal Code (*n*) "no confession, verdict, inquest, conviction or judgment of or for any treason or indictable offence or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat."

5. *Dissolution of Corporation.*

Before concluding this head of escheat there must be mentioned one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation; for if that comes by any accident to be dissolved, whilst holding the lands and before alienation (*o*), the donor or his heirs shall have the land again in reversion, and not the lord by escheat; which is, perhaps the only instance where a reversion can be expectant on a grant in fee-simple absolute (*p*). The law doth tacitly annex a condition to every such gift or grant, that if the corporation

(*l*) R.S.O. c. 118, ss. 1, 2.

(*m*) See *Rumrell* v. *Henderson*, 22 C.P. 180, as to bearing of the Act.

(*n*) 55 & 56 V. c. 29, s. 965.

(*o*) Preston Est., vol. 2, p. 50. See *Lindsay Petroleum Co.* v. *Pardee*, 22 Gr. 18.

(*p*) Such an interest is not perhaps in strictness a reversion in the nature of a vested estate, but rather a possibility of reverter: 1 Preston Est. p. 115. On a grant of the whole fee, especially since subinfeudation was abolished by the statute *Quia emptores*, there can be no portion of seisin or ownership left in the grantor in the nature of a vested estate. Such an interest is probably "a possibility coupled with an interest where the object is ascertained" within R.S.O. c. 119, s. 8.

be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant faileth. This is, indeed, founded upon the self-same principle as the law of escheat; the heirs of the donor being only substituted instead of the chief lord of the fee; which was formerly very frequently the case in subinfeudations, or alienations of lands by a vassal to be holden as of himself, till that practice was restrained by the statute of *Quia emptores*, 18 Edw. I. st. 1, to which this very singular instance still, in some degree, remains an exception.

CHAPTER XVII.

OF TITLE BY OCCUPANCY.

(1). *General Occupancy.*
(2). *Special Occupancy.*
(3). *Descent of Estates pur auter vie.*
(4). *Newly Formed Land.*

1. *General Occupancy.*

Occupancy is the taking possession of those things which before belonged to nobody. This, as we have seen, is the true ground and foundation of all property, or of holding those things in severalty which, by the law of nature, unqualified by that of society, were common to all mankind; but, when once it was agreed that everything capable of ownership should have an owner, natural reason suggested that he who could first declare his intention of appropriating anything to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it; according to the law of nations, recognized by the laws of Rome, *quod nullius est, id ratione naturali occupanti conceditur.*

The right of occupancy, so far as it concerns real property, (for of personal chattels we are not in this place to speak) hath been confined by the laws of England within a very narrow compass; and was extended only to a single instance, namely, where a man was tenant *pur auter vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestui que vie* or him by whose life it was holden: in this case, he that could first enter on the land might lawfully retain the possession, so long as *cestui que vie* lived, by right of occupancy.

This seems to have been recurring to first principles, and calling in the law of nature to ascertain the property of the land, when left without a legal owner. For it did not revert

to the grantor, though it was formerly supposed so to do; for he had parted with all his interest, so long as *cestui que vie* lived; it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it, much less of so minute a remnant as this; it did not belong to the grantee, for he was dead; it did not descend to his heirs, for there were no words of inheritance in the grant; nor could it vest in his executors, for no executors could succeed to a freehold. Belonging, therefore to nobody, like the *hæreditas jacens* of the Romans, the law left it open to be seized and appropriated by the first person that could enter upon it, during the life of *cestui que vie*, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reversion of the lands, for the reversioner hath an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred; against the king, therefore, there could be no prior occupant, because *nullum tempus occurrit regi*.

2. *Special Occupancy.*

And, even in the case of a subject, had the estate *pur auter vie* been granted to a man *and his heirs* during the life of *cestui que vie*, there the heir might enter and hold possession, and is called in law a *special occupant*; as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *hæreditas jacens*, during the residue of the estate granted; though some have thought him so called with no very great propriety, and that such estate is rather a descendible freehold.

3. *Descent of Estates pur auter vie.*

But the title of common occupancy was reduced almost to nothing by two statutes; the one 29 Car. II. c. 3, which enacted (according to the ancient rule of law), that where there is no special occupant, in whom the estate may vest, the tenant *pur auter vie* may devise it by will, or it shall go to the executors or administrators (*q*) and be assets in their hands for payment of debts; the other, that of 14 Geo. II. c.

(*q*) See Sugden on Powers, 8th ed. p. 193, note (I). Before this statute the estate by occupancy was not subject to debts: *Raggett* v. *Clerke*, 1 Vern. 234.

20, which enacted that the surplus of such estate *pur auter vie*, after payment of debts, should go in a course of distribution, like a chattel interest. And these statutes were again superseded by more modern legislation. By the Wills Act (*r*) such estates may now be devised. And in case of an intestacy they descend to the heir at law or devolve upon the personal representative according to the following enactments. By the statute respecting descent, which came into force in 1852, commonly called the statute of Victoria, and which now forms part of the Devolution of Estates Act (*s*), "real estate" inheritable thereunder is to include every estate, interest and right, legal and equitable, held in fee simple *or for the life of another*. Consequently, from 1st January, 1852, all estates held for the life of another descended to the heirs-at-law, whether limited to the heir as special occupant or not. The Devolution of Estates Act, which cast the estate upon the personal representative instead of the heirs, came into force on 1st July, 1886 (*t*), and was made to apply to estates of inheritance in fee simple or *limited to the heir as special occupant*; and this distinction has been maintained (*u*). Consequently an estate for the life of another simply, passes upon intestacy to the heirs-at-law direct; but an estate for the life of another limited to the heir as special occupant, passes upon intestacy to the administrator.

By these earlier statutes it was thought by some that the title of common or general occupancy became utterly extinct. But strong opinions are found that a general occupant might enter in the interval between the death of a tenant *pur auter vie* and the grant of letters of administration, where the land was not limited to the heir as special occupant. By our statute of Victoria the earlier statutes were impliedly repealed, and the land passed thereunder to the heirs-at-law, and so rendered the question, during that period, of no further practical interest. But since, by the Devolution of Estates Act, we have (as to lands limited to the heir as special occupant) reverted to the position created for estates *pur auter vie* by the statute of 29 Car. II., *i.e.*, since there is now, in such cases, an interval between the death of the tenant and the grant of administration, during which the

(*r*) R.S.O. c. 128, ss. 2 and 9, s.-s. 2 and 10.
(*s*) R.S.O. c. 127, s. 38.
(*t*) 49 V. c. 22.
(*u*) R.S.O. c. 127, s. 3 (*a*).

heir is excluded, it again becomes a question whether there is not a title by general occupancy in any one who chooses to enter.

As to the effect of the statutes of Car. II. and Geo. II., Preston says (*uu*):—"By the statue law (29 Car. II. c. 3, s. 12; 14 Geo. II. c. 20, s. 9) the *executors* and *administrators* are substituted in the place of the general occupant; and Mr. Hargrave (Co. Litt. 41b, note 5) observes—'the title by general occupancy is now universally prevented by the statue of 29 Car. II c. 3, s. 12; and 14 Geo. II. c. 20, s. 9.' The statutes, however, have not substituted an occupant in these instances in which by law there could not be a general occupant, as in copyholds, and in rents, and other incorporeal hereditaments (*Withers* v. *Withers*, Ambl. 151; *Zouch* v. *Forse*, 7 East 186; 2 Bl. Comm. 260; and see 3 East 276). And it was strenuously urged by Lord Redesdale, while Chancellor in Ireland (*Campbell* v. *Sandys*, 1 Sch. & L. 288), that the executors or administrators never could by law have been *special* occupants. In *Ripley* v. *Waterworth* (7 Ves. 425, 440) Lord Eldon did not fully subscribe to this doctrine. And there is one case in which, perhaps, there may for a time, even at this day, be a freehold by *general occupancy*, namely, in the interval between the death of a tenant *pur auter vie*, who dies intestate, and the time of obtaining letters of administration of his effects. Without allowing a title by occupancy to exist, for the intermediate time, the maxim of the law which so carefully guards against the abeyance of the freehold, would be infringed. Unless the law leaves the freehold open to occupancy during the intermediate time, it must be assumed that the statute of 14 Geo. II. requires the construction that it gives to the administrator a title by relation; and this construction must proceed on the ground that no inconvenience will be produced, as administration can be obtained by a stranger, in case the party who is entitled to administration shall, on being cited, refuse to take letters of administration." And the learned writer prefers the former hypothesis.

It is a curious circumstance that *The Devolution of Estates Act* has now placed land limited to the heir as special occupant, and indeed the fee itself, in the same position as the statute of Car. II. placed estates *pur auter vie* where there was no special occupant, *i.e.*, there is an interval of time

(*uu*) I Conv. 44.

between the death intestate of the owner and the grant of letters of administration, during which the heir is excluded, and no one else has a right to enter. Lord Eldon's opinion that the administrator might take as *special* occupant does not aid us, because the question arises as well when the land is limited to the heir as special occupant as when the fee itself descends. And so, if the opinions of Lord Redesdale and Preston are to govern, there occurs a case of *general* occupancy now in every instance, both where the fee descends, and where a tenant *pur auter vie* dies intestate and the land is limited to the heir as special occupant.

It is true that for the purpose of the Statute of Limitations (R.S.O. c. 133, s. 7), and sometimes on equitable grounds, an administrator has a title by relation. But that does not satisfy the feudal rule that the freehold must not be in abeyance; and unless a general occupancy be allowed in the interval, that would, as Preston points out, be the necessary result.

This was the only instance of title by occupancy, of real estate; for there can be no other case devised, wherein there is not some owner of the land appointed by the law. In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor be appointed, yet there is a *legal, potential* ownership, subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And, in all other instances, when the tenant dies intestate, and no other owner of the lands is to be found in the common course of descents, there the law vests an ownership in the king, or in the subordinate lord of the fee, by escheat.

4. *Newly Formed Land.*

So also in some cases, where the laws of other nations give a right by occupancy, as in lands newly created, by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters; in these instances the law of England assigns them an immediate owner.

For Bracton tell us that if an island arise in the middle of a river, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore, which is agreeable to, and probably copied from, the

civil law. Yet this seems only to be reasonable where the soil of the river is equally divided between the owners of the opposite shores, for if the whole soil is the freehold of any one man, there it seems just (and so is the constant practice) that the eyotts or little islands, arising in any part of the river, shall be the property of him who owneth the soil. In other words, if an island arise by natural causes, the property in it remains apportioned in the same manner as was, before its appearance, the property in the soil upon which it stands, or of which it in fact forms a part. And where there is a sudden change in the course of a river, the title to the soil remains as before. And so also where the change is gradual and imperceptible from day to day, but so that by comparison the extent of the change can be ascertained, and the old boundaries defined, the title to the soil is not affected; but otherwise, if the old boundaries cannot be ascertained (*v*).

However, in case a new island rise in the sea, though the civil law gives it to the first occupant, yet ours gives it to the king.

And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*, or by *dereliction*, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king. And the law is the same with regard to the great lakes and rivers of Canada, where the title of the soil beneath is not expressly granted (*w*); and where the grant from the crown defines the boundaries as extending to the water's edge, or to the bank and thence along the bank, or to the lake and thence along the shore; in all these cases, if the land is gradually and imperceptibly formed, the grantee is not limited to the original boundary, but is entitled to the land formed by accretion (*x*).

(*v*) *Foster* v. *Wright*, 4 C.P.D. 438.

(*w*) *Standly* v. *Perry*, 2 App. R. 195; 3 S.C.R. 356.

(*x*) *Throop* v. *Cobourg & Pet. R. Co.*, 5 C.P. 509; *Buck* v. *Cobourg & Pet. R. Co.*, 5 C.P. 552.

CHAPTER XVIII.

OF TITLE BY FORFEITURE.

(1). *Mortmain.*
(2). *Alienation by Particular Tenants.*
(3). *Disclaimer.*
(4). *Breach of Condition.*
(5). *Waste.*

1 *Mortmain.*

Forfeiture is a punishment annexed by law to some illegal act or negligence, in the owner of lands, tenements, or hereditaments; whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with him, hath sustained, or to the crown.

But by the Judicature Act (*y*) the Court has full power to relieve against forfeiture upon such terms as it may think fit, with regard to costs, damages and compensation.

Lands, tenements, and hereditaments may be forfeited in various degrees, and by various means; among others by alienation contrary to law; and by non-performance of conditions.

Formerly, lands were forfeited for crime, but as we have seen such forfeiture is now abolished.

Lands and tenements may be forfeited by *alienation*, or conveying them to another contrary to law. This is either alienation in *mortmain*, or formerly alienation by *particular tenants*; in the former of which cases the forfeiture arises from the incapacity of the alienor to grant.

Alienation in *mortmain, in mortuo manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead

(*y*) R.S.O. c. 51, s. 57 (3).

hand, this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the Statutes of Mortmain; in deducing the history of which statutes, it will be matter of curiosity to observe the great address and subtle contrivance of the ecclesiastics in eluding from time to time the laws in being, and the zeal with which successive parliaments have pursued them through all their finesses; how new remedies were still the parents of new evasions; till the legislature at last, though with difficulty, hath obtained a decisive victory.

By the common law, any man might dispose of his lands to any other private man at his own discretion, when the feudal restraints of alienation were worn away. Yet, in consequence of these it was always, and is still necessary, unless authority is given by the Legislature in the Act of incorporation, for corporations to have a licence in mortmain from the crown to enable them to purchase lands; for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits, by the vesting of lands in tenants that can never die. And such licences of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest. But besides this general licence from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his licence also (upon the same feudal principles), for the alienation of the specific land. And if no such licence was obtained, the king or other lord might respectively enter on the land so aliened in mortmain as a forfeiture. The necessity of this licence from the crown was acknowledged by the constitutions of Clarendon, in respect of advowsons, which the monks always greatly coveted, as being the groundwork of subsequent appropriations. Yet, such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) we find that the largest and most considerable dotations of religious houses happened within less than two centuries after the conquest. And (when a licence could not be obtained), their contrivance seems to have been this; that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate first conveyed

his lands to the religious house, and instantly took them back again, to hold as tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture; and then by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands in right of such their newly acquired seigniory, as immediate lords of the fee. But, when these dotations began to grow numerous, it was observed that the feudal services, ordained for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to stagnate; and that the lords were curtailed of the fruits of their seigniories, their escheats, wardships, reliefs, and the like; and, therefore, in order to prevent this, it was ordained by the Second of King Henry III.'s Great Charters, and afterwards by that printed in our common statute books, that all such attempts should be void, and the land forfeited to the lord of the fee.

But, as this prohibition extended only to religious *houses*, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies (who, Sir Edward Coke observes, in this were to be commended, that they ever had of their counsel the best learned men that they could get), found many means to creep out of this statute, by buying in lands that were *bona fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which are now so frequent in conveyances. This produced the statute *De religiosis*, 7 Edw. I.; which provided that *no person*, religious or other whatsoever, should buy, or sell, or receive under pretence of a gift, or term of years, or any other title whatsoever, nor should, by any art or ingenuity, appropriate to himself any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or, on his default for one year, the lord paramount, and, in default of all of them, the king, might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in mortmain; but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an action to recover it against the tenant; who, by fraud and collusion, made no defence; and thereby judgment was given

for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. And thus they had the honour of inventing those fictitious adjudications of right, which afterwards became the great assurances of the kingdom under the name of *common recoveries*. But upon this the Statute of Westminster the Second, 13 Edw. I. c. 32, enacted, that in such cases a jury shall try the true right of the demandants or bailiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter, in case the tenants set up crosses upon their lands (the badges of knights templars and hospitallers), in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this provident prince to prevent any future evasions, that when the statute of *Quia emptores*, 18 Edw. I., abolished all subinfeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord, a proviso was inserted that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the king's licence by writ of *ad quod damnum* was marked out, by the statute 27 Edw. I. st. 2, it was further provided by statute 34 Edw. I. st. 3, that no such licence should be effectual without the consent of the mesne or immediate lords.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees *to the use of* the religious houses; thus distinguishing between the *possession* and the *use*, and receiving the actual profits, while the seisin of the lands remained in the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestui que use* for the rents and emoluments of the estate. And it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device; for the statute

15 Rich. II. c. 5, enacts, that the lands which had been so purchased to uses should be amortised by licence from the crown, or else be sold to private persons; and that, for the future, uses shall be subject to the statute of mortmain, and forfeitable like the lands themselves. And whereas the statute had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of church-yards, such subtle imagination is also declared to be within the compass of the statute of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And lastly, as during the times of popery, lands were frequently given to *superstitious uses*, though not to any corporate bodies; or were made liable in the hands of heirs or devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore, at the dawn of the Reformation, the statute 23 Hen. VIII. c. 10, declared, that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

The definition adopted of a gift to *superstitious* uses is "one which has for its object the propagation of a religion not tolerated by law." Inasmuch as by our law all bodies of Christians enjoy equal toleration, it has been held in Ontario that a bequest of money for paying for masses for the repose of the testator's soul is not invalid as a superstitious use (*z*).

It was in the power of the crown, by granting a licence of mortmain, to remit the forfeiture so far as related to its own rights, and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative is declared and confirmed by the Statute 18 Edw. III. st. 3, c. 3. But, as doubts were conceived at the time of the Revolution how far such licence was valid, since the king had no power to dispense with the statutes of Mortmain by a clause of *non obstante*, and as by the gradual declension of mesne seigniories through the long operation of

(*z*) *Elmsley* v. *Madden*, 18 Gr. 386. The Statute R.S.O. c. 306, s. 1, enacts, that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, provided the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province assured to all Her Majesty's subjects within the same."

the statute of *Quia emptores*, the rights of intermediate lords were reduced to a very small compass, it was therefore provided by the Statute 7 & 8 Wm. III. c. 37, that the crown for the future, at its own discretion, may grant licences to aliene to take in mortmain of whomsoever the tenements may be holden.

It hath also been held that the Statute 23 Hen. VIII., before mentioned, did not extend to anything but *superstitious* uses, and that therefore a man may give lands for the maintenance of a school, an hospital, or any other *charitable* uses. But as it was apprehended, from recent experience, that persons on their death-beds might make large and improvident dispositions even for these good purposes, and defeat the political ends of the statutes of mortmain, it was therefore enacted by the Statute 9 Geo. II. c. 36, that no lands or tenements, or money to be laid out thereon, should be given for or charged with any *charitable* uses whatsoever, unless by deed indented, executed in the presence of two witnesses twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six months after its execution (except stock in the public funds, which might be transferred within six months previous to the donor's death), and unless such gift should be made to take effect immediately and be without power of revocation; and that all other gifts should be void. There was an exception in favour of purchases and transfers "really *bonâ fide* for a full and valuable consideration, actually paid at or before the making such conveyance or transfer, without fraud or collusion."

A distinction will here be noticed between the capacity to receive and the ability to dispose of property. A bequest payable out of land to a corporation empowered by its charter "to take, receive, purchase, acquire, hold, possess, and enjoy" lands, was, nevertheless, held to be void because, though the corporation had power to acquire realty, the testator could not by will confer it, such a gift being within the statutes of mortmain (*a*). And where such an attempt is made to dispose of land, or an interest therein, by will, the devise is void and the intended gift falls into the general estate.

Grants made to a civil corporation precluded from acquiring lands, or to one which has exhausted its licence to hold in mortmain, are not actually void. Such alienations

(*a*) *Ferguson* v. *Gibson*, 22 Gr. 36.

in mortmain are voidable only, and the lands so aliened can only be forfeited to the crown (*b*). The conveyance is good against the grantor, and the grantee would hold till the crown should claim.

All corporate bodies are affected by these statutes, and consequently a municipal corporation cannot acquire land without a licence or statutory authority (*c*). Nor can an agricultural society, incorporated and authorized to acquire and hold land, but not to take it by devise, accept a legacy payable out of land (*d*).

This statute of Geo. II. and the statutes of mortmain have been held to be in force here (*e*), subject to the exception created by the decision before referred to as to gifts to superstitious uses. Registry in the county registry office (if, indeed, that can be deemed requisite), has been considered equivalent to the enrolment required by the statute. The effect, however, of the statutes has been much diminished by various Provincial Acts relating to particular religious bodies. And by a general Act (*f*), any religious body of Christians may take conveyances for the site of a church, meeting-house, etc., or "other religious or congregational purpose," in the name of trustees, the deed of conveyance to be registered within twelve months after execution. Powers of mortgaging and leasing are granted; also power to any such body to take by gift or devise any lands if made six months before the death of the donor; the lands so given or devised not to exceed, however, one thousand dollars in annual value, nor are they to be held for more than seven years, and unless disposed of within that period, they are to revert to the person from whom the same were acquired, or his representatives. As to any special Act with reference to any religious body, the provisions of such Act are to continue unimpaired, but such body is to be entitled to all additional privileges conferred by the general Act. By 3 V. c. 74 (*g*), certain powers of acquisition of and dealing with lands are granted

(*b*) *McDiarmid* v. *Hughes*, 16 Ont. R. 570.

(*c*) *Brown* v. *McNab*, 20 Gr. 179.

(*d*) *Kinsey* v. *Kinsey*, 26 Ont. R. 99.

(*e*) *Doe d. Anderson* v. *Todd*, 2 U.C.R. 82; *Mercer* v. *Hewston*, 9 C.P. 349; *Halleck* v. *Wilson*, 7 C.P. 28; *Macdonell* v. *Purcell*, 23 S.C.R. 101.

(*f*) R.S.O. c. 307.

(*g*) A will has been held to be a *conveyance* within the meaning of this Act: *Doe d. Baker* v. *Clark*, 7 U.C.R. 44.

to the United Church of England and Ireland in Canada, and by 8 V. c. 82, to the Roman Catholic Church.

And in 1892, the whole policy of the law as to devises for charitable uses was altered by an Act passed in that year (*h*). By this statute, which applies to the wills of testators dying on or after 14th April, 1892, land (by which is intended "tenements and hereditaments, corporeal and incorporeal of any tenure; but not money secured on land or other personal estate arising from or connected with land") may be devised by will to or for the benefit of any charitable use; but notwithstanding anything contained in the will to the contrary, it must be sold within two years from the death of the testator, or such extended period as may be determined by the High Court or a judge thereof in chambers. If the time limited for sale expires, without completion of the sale of the land, it vests forthwith in the accountant of the Supreme Court of Judicature for sale, in trust for the charity, subject to the provisions of the Act. The object of this legislation is to keep the land in the paths of commerce, as far as possible, without at the same time depriving a charity authorized to receive gifts of the intended benefit.

Personal estate directed by will to be laid out in the purchase of land for charitable uses, is to be held as if there were no direction to lay it out. The High Court, if satisfied that land devised, or to be purchased with money bequeathed, is required for actual occupation for the purposes of the charity, and not as an investment, may by order sanction the retention or acquisition of such land.

Money charged or secured on land, or "other personal estate arising from or connected with land," is not to be deemed subject to the Mortmain Acts, as respects the will of a person dying on or after 14th April, 1892. The result of this is that a long term of years may be bequeathed and retained by the charity, where the fee, if devised, would be subject to sale within two years.

Provision is made by The Ontario Companies' Act (*i*) for enabling companies to acquire and hold lands for the purposes of their undertaking; and by the Act respecting

(*h*) Now R.S.O. c. 112.

(*i*) R.S.O. c. 191, s. 25.

Benevolent, Provident and other Societies (*j*), enabling societies incorporated thereunder to hold lands not exceeding certain value.

2. *Alienation by Particular Tenants.*

In cases of conveyance by fine or recovery, when such mode of conveyance was in force, or by feoffment when such a conveyance had a tortious effect, such alienations *by particular tenants*, when they were greater than the law entitled them to make, and divested the remainder or reversion, were also forfeitures to him whose right was attacked thereby. As, if tenant for his own life aliened by feoffment or fine for the life of another, or in tail, or in fee; these being estates, which either must or may last longer than his own, the creating of them is not only beyond his power, and inconsistent with the nature of his interest, but was also a forfeiture of his own particular estate to him in remainder or reversion.

It should be observed that forfeiture as above explained would only take place on a conveyance by way of feoffment with livery of seisin, or by fine or recovery, and not where it was by what is termed an *innocent* conveyance, as one operating under the Statute of Uses. Thus a conveyance by way of bargain and sale, or covenant to stand seised, would not work a disseisin or a forfeiture. And as fines and recoveries are now abolished, and a feoffment no longer has a tortious operation (*k*), and is thus placed on the same footing as an *innocent* conveyance, it would seem that the consequences of conveyance by feoffment would be no more than on any other innocent conveyance, and so no forfeiture.

3. *Disclaimer.*

Equivalent, both in its nature and its consequences, to an illegal alienation by the particular tenant was the civil crime of *disclaimer*; as, where a tenant who held of any lord, neglected to render him the due services, and, upon an action brought to recover them, disclaimed to hold of his lord. Which disclaimer of tenure in any court of record was a forfeiture of the lands to the lord, upon reasons most apparently feudal. And so likewise, if in any court of record

(*j*) R.S.O. c. 211, s. 13.
(*k*) R.S.O. c. 119, s. 3.

the particular tenant did any act which amounted to a virtual disclaimer; if he claimed any greater estate than was granted him at the first infeudation, or took upon himself those rights which belonged only to tenants of a superior class; if he affirmed the reversion to be in a stranger by attorning (*l*) as his tenant, collusive pleading, and the like, such behaviour amounted to a forfeiture of his particular estate.

As all estates except terms of years are now held by one tenure, free and common socage, of the crown, the only case in which it is now important to notice the effect of a disclaimer is that of landlord and tenant; and even in that case the question must be subject to the effect of the enactment already referred to (*ll*), which declares that the relationship of landlord and tenant shall not depend upon tenure.

Forfeiture occurs in consequence of "any act of the lessee, by which he disaffirms or impugns the title of his lessor." "For, to every lease the law tacitly annexes a condition, that if the lessee do anything that may impair the interest of his lessor, the lease shall be void, and the lessor may re-enter. Indeed, every such act necessarily determines the relation of landlord and tenant; since to claim under another and at the same time to controvert his title, to hold under a lease, and at the same time to destroy the interest out of which the lease ariseth, would be the most palpable inconsistency. A lessee may thus incur a forfeiture of his estate by act *in pais*, or by matter of record. By matter of record—where he sues out a writ, or resorts to a remedy, which claims or supposes a right to the freehold; or, where in an action by his lessor grounded on the lease, he resists the demand under the grant of a higher interest in the land; or where he acknowledges the fee to be in a stranger; for having thus solemnly protested against the right of his lessor, he is estopped by the record from claiming an interest under him" (*m*). And formerly by act *in pais*, when a feoffment had a tortious operation, the tenant might, by making a feoffment in fee with livery of seisin, have forfeited his estate. As a feoffment is now an innocent conveyance, it seems that there is no forfeiture occasioned otherwise than by matter of record.

(*l*) But attornment has no longer a tortious effect, by 11 George II. c. 19, s. 11.

(*ll*) Ante, pp. 134, *et seq.*

(*m*) Bac. Abr. Tit. Leases, T. 2.

A mere verbal disclaimer by a tenant for a definite term, and refusal to pay the rent, claiming the fee as his own, is not sufficient to create a forfeiture (*n*). Where the tenancy is from year to year, the oral statements of the tenant in denial of the relationship are sufficient to put an end to it, not so much on the ground of disclaimer as on account of their furnishing evidence in answer to the disclaiming tenant's assertion that he has had no notice to quit; for it would be idle to prove such a notice where the tenant had asserted that there was no longer any tenancy (*o*). There must be a direct repudiation of the relation of landlord and tenant, or a distinct claim to hold possession upon a ground wholly inconsistent with the existence of that relation which by necessary implication is a repudiation of it (*p*). Therefore, where a tenant from year to year agreed to buy the fee, and remained in possession for several years without paying either rent or interest, and on being applied to to give up possession answered "that he had bought the property, and would keep it, and had a friend who was ready to give him the money for it," it was held that this was no disclaimer (*q*). And where a tenant from week to week paid rent to certain persons to whom the land had been devised, but the devise being discovered to be void by reason of the Mortmain Act, the tenant, upon demand for rent made by the heir, said that he had received notice from the other party, and would not pay any more rent till he knew who was the right owner, it was held not to be a disclaimer (*r*).

In other cases, a disclaimer of title has operated as a forfeiture. Thus, where there was a lease by a tenant in tail which was not binding on the heir, and the tenant in tail died, and the next tenant in tail demanded the arrears and entered into negotiations for a lease which were ended by the tenant's denying the title of the tenant in tail, and asserting it to be in another, though still claiming to be tenant of the premises, it was held that his disclaimer entitled the tenant

(*n*) *Doe d. Graves* v. *Wells*, 10 Ad. & E. 427; *Doe d. Nugent* v. *Hessell*, 2 U.C.R. 194, *contra*, but the remarks were *obiter*, the case being one of sale, the purchase money payable by instalments.

(*o*) *Doe d. Graves* v. *Wells*, 10 Ad. & E. at p. 437, per Patteson, J.; *Doe d. Claus* v. *Stewart*, 1 U.C.R. 512.

(*p*) *Doe d. Gray* v. *Stanion*, 1 M. & W. 695.

(*q*) *Doe d. Gray* v. *Stanion*, *supra*.

(*r*) *Jones* v. *Mills*, 10 C.B.N.S. 788.

in tail to recover the land (*s*). So, where tenant for life demised the land to the defendant and died, and the owner in fee then demanded rent, but the defendant wrote a letter refusing to consider him as landlord, but still claiming to hold as tenant to the husband of the deceased tenant for life, it was held to be a disclaimer of the owner's title (*t*).

Again, the assignee of a mortgage upon which default had been made, agreed to sell it to the defendant, who was let into possession, and afterwards made default and refused payment and said he would stand a suit; and it was held that, being tenant at will by possession under the agreement, he had become tenant at sufferance by the default, and his action amounted to a disclaimer of the plaintiff's title (*u*). So, on an agreement to purchase, the defendant, holding possession under the agreement refused to pay certain instalments of purchase money, and said that he had as good a right to the place as the plaintiff, and that the plaintiff had no deed and could not put him off; and it was held that this was a disclaimer entitling the plaintiff to recover the land (*v*).

Under a system of pleading in ejectment, by which the defendant was required to enter an appearance and file a notice denying the plaintiff's title and asserting title in himself, opinion differed as to the effect of this formal denial of the title (*w*). But under our present system it is not necessary for the defendant to deny the plaintiff's title in an action to recover the land; and, therefore, if he gratuitously denies it and puts the plaintiff to prove it, his conduct would no doubt amount to a disclaimer, and he probably would not be allowed to set up title under the plaintiff whose title he had denied.

It must be borne in mind, however, that the court has power to relieve against all forfeitures. It might be a nice question whether, when the defendant by his pleading occasions the forfeiture, he could abandon his pleading when it failed and claim relief from the consequences of having pleaded it. No doubt his conduct at the trial would largely determine whether relief should be granted in any case.

(*s*) *Doe d. Phillips* v. *Rollings*, 4 C.B. 188.

(*t*) *Doe d. Calvert* v. *Frowd*, 4 Bing. 557.

(*u*) *Prince* v. *Moore*, 14 C.P. 349.

(*v*) *Doe d. Nugent* v. *Hessell*, 2 U.C.R. 194.

(*w*) R.S.O. (1877) c. 51. s. 9; *Thompson* v. *Falconer*, 13 C.P. 78; *Cartwright* v. *McPherson*, 20 U.C.R. 251; *Houghton* v. *Thomson*, 25 U.C.R. 561.

4. *Breach of Condition.*

The next kind of forfeitures are those by *breach* or non-performance of a *condition* annexed to the estate, either expressly by deed, at its original creation, or impliedly, by law, from a principle of natural reason. Both which we considered at large in a former chapter (*x*).

5. *Waste.*

Waste was formerly a ground of forfeiture. In favour of the owners of the inheritance, the Statutes of Marlbridge, of Henry III., and of Gloucester, of Edward I., provided that the Writ of Waste shall not only lie against tenants by the law of England (or curtesy), and those in dower, but against any farmer or other that holds in any manner for life or years. And the tenant suffered forfeiture if he committed waste. But the Writ of Waste was abolished by the Statute of 4 Wm. IV. c. 1, and the remedy now is for damages, and to restrain the committing of it by injunction.

(*x*) Chapter XI.

CHAPTER XIX.

OF TITLE BY ALIENATION.

(1). *Restraints on Alienation.*
(2). *Who may Aliene.*
(3). *Persons of Unsound Mind.*
(4). *Infants.*
(5). *Married Women.*
(6). *Equitable Separate Estate.*
(7). *Restraint on Anticipation.*
(8). *Statutory Separate Estate.*
(9). *Aliens.*
(10). *Free Grant Lands.*

1. *Restraints on Alienation.*

The most usual and universal method of acquiring a title to real estates is that of alienation, conveyance or purchase in its limited sense; under which may be comprised any method wherein estates are voluntarily resigned by one man and accepted by another; whether that be effected by sale, gift, settlement, devise, or other transmission of property, by the mutual consent of the parties.

This means of taking estates by alienation, is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feudal law, a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts; for if he might, the feudal restraint of alienation would have been easily frustrated and evaded. And as he could not alien it in his life-time, so neither could he by will defeat the succession, by devising his feud to another family; nor even alter the course of it, by imposing

particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own apparent or presumptive heir. And, therefore it was very usual in ancient feoffments to express that the alienation was made by consent of the heir of the feoffor; or sometimes for the heir-apparent himself to join with the feoffor in the grant. And, on the other hand, as the feudal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his seigniory without the consent of his vassal; for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprised of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seizing of his cattle by the lord of a neighbouring clan. This consent of the vassal was expressed by what was called *attorning*, or professing to become the tenant of the new lord; which doctrine of attornment was afterwards extended to all leases for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchaser and to become his tenant, the grant or contract was in most cases void, or at least incomplete; which was also an additional clog upon alienations.

But by degrees this feudal severity is worn off; and experience hath shewn, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. The restrictions were in general removed by the statute of *Quia emptores* (*y*), whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion.

As to the power of *charging* lands with the debts of the owner, this was introduced so early as Stat. Westm. 2 (*z*) which subjected a *moiety* of the tenant's lands to executions for debts recovered by law; as the *whole* of them was likewise subjected to be pawned in a statute merchant by the statute *De mercatoribus*, made the same year, and in a statute

(*y*) 18 Edw. I. c. 1.
(*z*) 13 Edw. I. c. 18.

staple by statute 27 Edw. III. c. 9, and in other similar recognisances by statute 23 Hen. VIII. c. 6. And now, in Ontario, the whole of them is subject to be sold for the debts of the owner. The restraint of *devising* lands by will, except in some places by particular custom, lasted longer; that not being totally removed till the abolition of the military tenures. The doctrine of *attornments* continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them; till at last, they were made no longer necessary to complete the grant or conveyance, by statute 4 & 5 Anne c. 16; but notice to the tenant by the assignee of the reversioner is requisite to secure payment of rent from the tenant, as payments made in ignorance of the agreement are valid. And if the rent be paid in advance, and notice of the assignment given before the rent became payable, the payment would be invalid to the assignee (*a*); and by statute 11 Geo. II. c. 19, the attornment of any tenant shall not affect the possession of any lands, unless made with consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice.

In examining the nature of alienation, let us first inquire, briefly, *who* may aliene, and to *whom*; and then more largely, *how* a man may aliene, or the several modes of conveyance.

2. *Who May Aliene.*

Who may aliene and to whom; or, in other words, who is capable of conveying and who of purchasing. And herein we must consider rather the incapacity, than capacity, of the several parties; for all persons are *prima facie* capable of conveying, and all persons whatsoever of purchasing, unless the law has laid them under any particular disabilities. But at common law, if a man had only in him the *right* of either possession or property, he, whilst disseised, could not convey it to any other, lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed (*b*). But now a right of entry is, as we have seen, capable of conveyance. Yet reversions and vested remainders might have been granted; because the possession of the particular tenant is the possession of him in reversion or

(*a*) *Doe d. Nichols* v. *Saunders*, LR. 5 C.P. 589.

(*b*) Co. Litt. 214; see *Marsh* v. *Webb*, 19 App. R. 564; 22 S.C.R. 437.

remainder; but *contingencies*, and mere *possibilities*, though they might be released, as thereby tending to render entire and unimpaired vested estates, or devised by will, or might pass to the heir or executor, yet could not before our statute(*c*) be assigned to a stranger, unless coupled with some present interest; but this doctrine only held good at law, and not in equity.

Persons attainted of treason, felony, and *præmunire*, were, at common law, incapable of conveying, from the time of the offence committed, provided that attainder followed. For such conveyance by them might have tended to defeat the king of his forfeiture, or the lord of his escheat. But they might *purchase* for the benefit of the crown, or the lord of the fee, though they were disabled to *hold*; the lands so purchased, if after attainder, being subject to immediate forfeiture; if before, to escheat, as well as forfeiture, according to the nature of the crime. So also, corporations, religious or others, may purchase lands; yet, unless they have a licence to hold in mortmain, or have authority by statute, they cannot retain such purchase; but it shall be forfeited to the lord of the fee, being in Canada the Sovereign; though, if the charter of the corporation forbids their acquisition of lands, or some statute declares conveyances to it shall be void, it seems the grantor will be entitled.

Idiots and persons of nonsane memory, infants (*d*) and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only.

3. *Persons of Unsound Mind.*

With regard to persons of unsound mind, the rule is very clearly laid down in a modern case (*e*), an action on a promissory note, as follows:—"When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had

(*c*) R.S.O. c. 119, s. 8.

(*d*) *Mills* v. *Davis*, 9 C.P. 510; *Gilchrist* v. *Ramsay*, 27 U.C.R. 500; *Featherstone* v. *McDonell*, 15 C.P. 162, in which case *Grace* v. *Whitehead*, 9 Gr. 791, is not followed. In that case, the court considered a *mortgage* from an infant absolutely void, though given to secure the purchase money of lands conveyed to him, and for which, when he came of age, he brought ejectment, repudiating however the mortgage.

(*e*) *Imperial Loan Co.* v. *Stone*, L.R. (1892) 1 Q.B. 599.

been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about" (*f*). And again, "a contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties. A defendant who seeks to avoid a contract on the ground of his insanity must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed" (*g*).

But where a person of unsound mind, being in custody on a criminal charge, made a voluntary conveyance to avoid a forfeiture in case of conviction, and was acquitted on the ground of insanity, it was held that the conveyance was void and inoperative (*h*).

4. *Infants.*

The deed of an infant is voidable only, and not void (*i*). The rule as to the conduct of an infant with regard to such transactions is thus stated by Boyd, C. (*j*):—"The policy of the law now is generally to allow the infant to suspend his ultimate decision upon questions of benefit or injury till he is of legal capacity to bind himself as an adult." Though he may express his disaffirmance during infancy, he may also retract it (*k*), and his ultimate decision can only be given when he arrives at full age. If, however, he sues or defends during infancy, in an action in which the deed is called in question, he may affirm or disaffirm the deed, and the record will bind him (*l*). When the infant arrives at full age, it is

(*f*) Per Lord Esher, M.R., at p. 601.

(*g*) Per Lopes, L.J., at p. 602. See also *Beaven* v. *McDonell*, 9 Ex. 309; 10 Ex. 184; *Elliott* v. *Ince*, 7 D.M. & G. 475; *Molton* v. *Camroux*, 2 Ex. 487; 4 Ex. 18; *Robertson* v. *Kelly*, 2 Ont. R. 163.

(*h*) *Manning* v. *Gill*, L.R. 13 Eq. 485. See also *Re James*, 9 P.R. 88.

(*i*) *Mills* v. *Davis*, 9 C.P. 510; *Foley* v. *Can. Perm. L. & S. Co.*, 4 Ont. R. 38. See *Brown* v. *Grady*, 31 Ont. R. 73, as to liability of an infant on a covenant.

(*j*) *Foley* v. *Can. Perm. L. & S. Co.*, 4 Ont. R. at p. 46.

(*k*) *Grace* v. *Whitehead*, 7 Gr. 591.

(*l*) See *Gilchrist* v. *Ramsay*, 27 U.C.R. 500; *Gallagher* v. *Gallagher*, 30 U.C.R. at p. 422.

clearly his duty to repudiate the deed within a reasonable time, unless he wishes to be bound by it (*m*). Consequently, where an infant made a deed of land to which he had no title, and afterwards acquired title by conveyance from a third person, and fifteen years after attaining majority, repudiated his deed by defending an action of ejectment to recover the land which he had got into possession of, it was held that by acquiescence he had affirmed his deed, and that it operated by estoppel to convey the land (*n*). Very slight acts of acquiescence after majority, with a knowledge of his position, will be taken as an affirmance of a deed. Thus, where an infant made a mortgage to the defendants, and after majority, executed another mortgage to another person, with the purpose of raising money to pay off the defendants' mortgage, and in conversation with the defendants' agent, admitted liability, it was held that he had affirmed the transaction (*o*). Where, however, the infant represents himself to a purchaser to be of full age, he will not be allowed afterwards to set up his infancy (*p*). And a subsequent voluntary grantee, who obtained a deed after the infant had attained full age, with notice of the prior deed which was registered, was held to be in no better position than the infant (*q*). An infant entitled to repudiate a deed, can only get relief upon making restoration of the benefit he has received (*r*).

It seems that an infant who makes a lease, reserving rent, which is for his benefit, cannot repudiate it during infancy (*s*).

An infant cannot make a will (*t*), and although "every married woman" was authorized by a statute to make a will, "as if she were sole and unmarried," this was held to refer only to the disability of coverture, and to remove it, but not to remove the disability of infancy (*u*).

On and since 5th May, 1894, any married woman who is under age has been enabled by statute to bar her dower by joining with her husband in a deed or conveyance containing

(*m*) *Featherstone* v. *McDonell*, 15 C.P. 162, at p. 165.
(*n*) *Featherstone* v. *McDonell*, *supra*. See also *Re Shaver*, 3 Ch. Ch. 379.
(*o*) *Foley* v. *Can. Perm. L. & S. Co.*, 4 Ont. R. 38.
(*p*) *Bennetto* v. *Holden*, 21 Gr. 222.
(*q*) Ibid.
(*r*) *Whalls* v. *Learn*, 15 Ont. R. 481.
(*s*) *Lipsett* v. *Perdue*, 18 Ont. R. 575.
(*t*) R.S.O. c. 128, s. 11.
(*u*) *Re Murray Canal*, 6 Ont. R. 685.

a bar of dower to a purchaser for value, or to a mortgagee; and also to release her dower to any person to whom such lands have been previously conveyed (*v*).

Provision is also made by statute for the sale, lease, or other disposition of an infant's estate, when the court is of opinion that it is necessary or proper for the maintenance or education of the infant, or by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause (*w*). No sale, lease, or other disposition is to be made against the provisions of a will or conveyance by which the estate has been devised or granted to the infant, or for his use (*x*). The procedure is pointed out by the statute, and the conveyance is executed by the infant under the order of the court, unless the court deems it convenient that it should be executed by some other person.

5. *Married Women.*

A married woman, at common law, though able to acquire property, was unable to enjoy it or convey it alone. By the marriage all the freeholds of the wife came under the complete control of her husband. She was incapable of contracting during the coverture and therefore incapable of making a conveyance.

As regards the chattels real of the wife held by her in her own right, either in possession or reversion, the husband at common law had during the coverture complete control and right of disposition thereof, so that though the wife survived she would have no right as against any sale, conveyance, or disposition made by the husband; unless by no possibility could they have vested in the wife during coverture (*y*). They were liable to execution for his debts, and became his if he survived his wife by his mere *marital* right (*z*); but if he made no disposition in his lifetime, and died before the wife, he could not dispose thereof by will, as they had not been transferred from the wife, and she would have become entitled.

(*v*) R.S.O. c. 165, s. 5.
(*w*) R.S.O. c. 168, s. 3.
(*x*) Ibid., s. 4.
(*y*) *Duberley* v. *Day*, 16 Beav. 33
(*z*) *Re Lambert*, 39 Ch. D. 626; *Surman* v. *Wharton*, L.R. (1891) 1 Q.B. 491.

Where the property was not in possession, and was of such a nature that the husband had to resort to a Court of Equity in order to recover possession of it, the court insisted upon the husband's doing equity, in consideration of obtaining relief, by making a settlement of the property on his wife and children. This was called *the wife's equity to a settlement.*

Though a married woman had at common law no power to convey, from a very early period provision was made by statute enabling her to convey under certain conditions. The conditions were that the husband should join in the conveyance, that she should be examined apart from her husband, respecting her free and voluntary consent to convey the land in the manner and for the purposes expressed in the deed, that she should execute the deed in presence of a judge or two justices of the peace, and that a certificate stating the facts of her consent and the execution should be endorsed on the deed by the judge or justices (*a*). The necessity for this separate examination remained until 1873, when an Act was passed (*b*) declaring that every conveyance theretofore executed by a married woman in which her husband had joined, should be taken to be valid and effectual to have passed the estate of the married woman professed to have been passed by the conveyance, notwithstanding the want of a certificate, and notwithstanding any irregularity, informality, or defect in the certificate, and notwithstanding that such conveyance might not have been executed, acknowledged or certified as required by any Act then or thereafter in force. Certain cases were excepted, viz.:—1. When a valid deed had been made after the void conveyance and before 29th March, 1873. In this case, the void deed was not cured unless the grantee in the void deed, or some one claiming under him, had been in the actual possession or enjoyment of the land continuously for three years subsequent to the deed and before the passing of the Act, and was on the latter date in possession. 2. When the void deed was not executed in good faith. 3. When the married woman, or those claiming under her, was or were in the actual possession or enjoyment of the land, contrary to the terms of such conveyance, on the day of the passing of the Act. The "actual possession and enjoyment contrary to

(*a*) C.S.U.C. c. 85.
(*b*) 36 V. c. 18, s. 12.

the terms of such conveyance," required to answer the third exception, has been held by the Court of Appeal to be open acts of ownership in assertion of the right to possession under her legal title, and against her void deed, and not necessarily possession equivalent to that of a trespasser claiming under the Statute of Limitations (*c*).

From 1873 until 1884 a married woman might convey her land as a *feme sole*, or appoint an attorney to do so, provided that her husband was a party to and executed the deed. His concurrence was necessary for her protection, and therefore, by attempting to become his wife's grantee, he placed himself in a position adverse to her, and though he might execute such a conveyance, it was not within the terms of the enactment (*d*).

It was essential in all these cases that the husband, in addition to concurring in his wife's disposition of her interest, should also convey his own interest, or potential interest, as tenant by the curtesy (*e*). At this stage, if a husband was imprisoned for felony, his wife might convey as a *feme sole* (*f*).

In 1884 an Act was passed respecting the property of married women (*g*), and that part of the prior enactment which required the joinder of the husband, in order to validate his wife's conveyance, was repealed, and since that date every married woman may convey her land alone; but, if the land is not separate estate, the husband must still convey his own interest, or potential interest, in order to make a good title.

In 1887 another enactment was passed (*h*) declaring that every conveyance made since 29th March, 1873, or thereafter made by a married woman which her husband "signed or executed, or shall sign or execute," should be valid to pass the wife's property as professed by the deed. This was intended, probably, to cure cases in which the husband had executed the deed but was not a party to it. Considering, however, that by the Act of 1884 the husband's joinder was

(*c*) *Elliott* v. *Brown*, 2 Ont. R. 252; 11 App. R. 228. See remarks on this case, Armour on Titles, 320 *et seq.*

(*d*) *Ogden* v. *McArthur*, 36 U.C.R. 246.

(*e*) See *Allan* v. *Levesconte*, 15 U.C.R. 9; *Doran* v. *Reid*, 13 C.P. 393.

(*f*) *Crocker* v. *Sowden*, 33 U.C.R. 397.

(*g*) 47 V. c. 19, s. 22, latter part.

(*h*) 50 V. c. 7, s. 23.

dispensed with, it is difficult to see why the Act was made prospective. This is of no practical importance, perhaps, because, as a matter of title, a husband would be required to join in order to convey his own interest.

In 1896 still another Act was passed (*i*), by which it was enacted that every conveyance executed before 29th March, 1873, by a married woman shall, notwithstanding that her husband did not join therein, be taken to have passed the estate which such conveyance professed to pass of the married woman in her land conveyed. But the husband's interest is not affected by this Act; it is made subject to the same exceptions as was the Act of 1873 (*j*).

And by an Act passed in 1900, it was declared that every conveyance before 1st July, 1884, executed by a married woman of her real estate, shall be deemed to have been valid to pass her interest in the land, though her husband may not have joined therein (*k*). Exception is made of cases similar to the exceptions in a previous enactment of a similar kind (*l*).

These confusing enactments (except the last) are all collected in The Married Woman's Real Estate Act (*m*), and by its third section it is enacted that every married woman of full age may convey as a *feme sole*, and appoint an attorney to do so. But still, if the land is not separate estate, the husband must join in order to convey his own interest.

At common law husband and wife were unable to contract with each other, on account of the unity of person, and consequently they could not convey to each other. But now by statute (*n*) any property, real or personal, may be conveyed by a wife to her husband, or a husband to his wife.

6. *Equitable Separate Estate.*

In order to overcome the difficulties attending the legal incapacity of married women to deal with their property before the Married Women's Property Acts were passed, resort was had to settlements by which property was put in the hands of trustees to hold upon certain trusts. The general

(*i*) 59 V. c. 41.
(*j*) Ante p. 298.
(*k*) 63 V. c. 17, s. 21.
(*l*) Ante p. 298.
(*m*) R.S.O. c. 165.
(*n*) R.S.O. c. 119, s. 37.

effect of such a settlement may be thus shortly stated:—The trusts are, in effect, to hold the property for the sole and separate use of the married woman, to receive the rents and profits, or the income, and pay them to the married woman, taking her sole receipt therefor, which is to be a sufficient discharge to the trustees paying the same, and to hold the property in trust for such person as the married woman may designate by deed or will. The interest of the married woman being thus wholly equitable became cognizable in a Court of Equity which would enforce the trusts of the settlement. The trustees, observing the terms of the instrument creating the trust, were discharged from obligation by paying the married woman and taking her receipt alone, and they were furthermore bound to hold in trust for such person as the married woman might designate by deed or will, according to the terms of the settlement. She, on her part, being entitled to an equitable interest only, was able to make a disposition of it alone which was effective in equity. And the property was entirely free from the husband's control, and from liability for his debts. Thus, a married woman was enabled to hold and dispose of property held in trust for her free from her husband's control, and such property was, and still is called, equitable separate estate.

7. *Restraint on Anticipation.*

So far, however, the settlement is somewhat incomplete; for, while she had the power of alienation, she might be induced to dispose of the property or charge it with the payment of debts. And therefore, in order more effectually to carry out the intention of securing an income to her, an addition is often made to the settlement by imposing on her a restriction or restraint against alienation during the coverture, called restraint upon anticipation (*o*). Under this restraint she cannot anticipate, *i.e.*, spend, assign, or charge in advance, either principal or income. This enables her to receive the income from time to time, but renders her unable to assign, incumber or in any way charge the money before it actually reaches her hands.

If, then, property is held for her separate use, she has, during coverture, an alienable estate, independent of her husband; if for her separate use, without power of alienation,

(*o*) *Re Ridley*, 11 Ch. D. 645, where general remarks are made; *Re Ellis*, 17 Eq. at p. 413.

she has, during coverture, an inalienable estate, independent of her husband. In either case the common law rights of the husband are defeated during the coverture, and his rights by survivorship are in suspense during the same period. If the married woman does not exercise her right of alienation, and dies intestate, or being restrained from anticipating dies intestate, or without having made some other disposition to take effect on her death, then, if the husband survives her, his right revives, and he becomes tenant by the curtesy if the other necessary conditions are present (*p*).

Separate estate can only exist during coverture, though land may be so settled upon a *feme sole* as that upon marriage she shall hold it for her separate use. When a married woman becomes discovert, land held to her separate use ceases to be separate estate, and the limitations to that effect, and the restraint on alienation, if any, are suspended, and, if apt words are used in the settlement, will revive and become operative again on a subsequent marriage (*q*).

The restraint is effective only with respect to property settled, or declared to be, for the separate use of a married woman. The mere fact that such a restraint is attempted to be annexed to a gift to a married woman will not, of itself, induce a holding that the property is separate property (*r*).

Where the restraint is properly imposed, the married woman is powerless to alienate the property during coverture; and, therefore, if there is a provision for forfeiture upon anticipation, a conveyance which would be effectual but for the restraint, is inoperative, and the forfeiture does not take place; though it would be otherwise if the condition were for forfeiture upon *attempting* to anticipate (*s*).

The purpose of the restraint on anticipation being to render property inalienable for a period, the clause will fail of effect if it is attempted to be annexed to an interest which is so remote that the restraint would continue beyond the period allowed by the rule against perpetuities (*t*). Thus, where property was settled under a marriage settlement, with

(*p*) *Appleton* v. *Rowley*, L.R. 8 Eq. 139; *Cooper* v. *Macdonald*, 7 Ch. D. 288.

(*q*) *Tullett* v. *Armstrong*, 1 Beav. 1; *Baggett* v. *Meux*, 1 Coll. 138; 1 Ph. 627.

(*r*) *Stogdon* v. *Lee*, L.R. (1891) 1 Q.B. 661.

(*s*) *Re Wormald*, 43 Ch.D. 630.

(*t*) *Fry* v. *Capper*, Kay 163.

a power of appointment amongst the children of the marriage, and the power was exercised by appointing to daughters for their separate use without power of anticipation, it was held that the restraint was void as an attempt to tie up the property and render it inalienable in the hands of a person who was not in being when the settlement was made (*u*). This rule was criticized by Sir George Jessel, M.R., who thought it open for consideration whether, as the restraint on anticipation is an exception to the general rule that all property is alienable, it ought not also to be an exception to the rule against perpetuities; but he felt bound to follow the former decisions (*v*).

The restraint may be imposed upon property which, being vested in the married woman, is separate estate by reason of The Married Women's Property Acts only (*w*). By the same statute (*x*) it is provided that, "notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property" (*y*).

8. *Statutory Separate Estate.*

Though settlements may still be resorted to for these purposes, a number of statutes have been passed enabling married women to acquire, hold, and dispose of land as separate property. This species of property may be called statutory separate estate.

The first statute, passed in 1859 (*z*), did not constitute a wife's property separate estate. It enabled a married woman to have, hold, and enjoy her real and personal property free from the debts and control of her husband, but did not enable her to dispose of it without her husband's consent (*a*). The law as to conveyances by married women remained as before, subject to the statutes which have been already referred to (*b*).

(*u*) *Re Teague*, L.R. 10 Eq. 564; *Re Cunynghame*, L.R. 11 Eq. 324.

(*v*) *Re Ridley*, 11 Ch.D. 645.

(*w*) *Re Lumley*, L.R. (1896) 2 Ch. 690.

(*x*) R.S.O. c. 163, s. 9.

(*y*) See *Hodges* v. *Hodges*, 20 Ch.D. 749; *Re Little*, 40 Ch.D. 418; *Re Pollard*, L.R. (1896) 2 Ch. 552.

(*z*) C.S.U.C. c. 73.

(*a*) *Royal Can. Bank* v. *Mitchell*, 14 Gr. 412; *Chamberlain* v. *McDonald*, 14 Gr. 447.

(*b*) Ante p. 298.

In 1872 the first Act was passed in Ontario which enabled a married woman to hold land in her own name as separate property (*c*), and from that date all land acquired by a married woman, whenever she might have been married, was held by her as separate estate, and she was able to enjoy and dispose of it without her husband's consent, in the same manner as if she were a *feme sole* (*d*). But if she did not exercise her right in this respect, but died intestate, the husband after her death became entitled to his estate by the curtesy (*e*). In 1877 the revised Act made the Act of 1872 applicable only to women who were married after that Act was passed. Consequently, from that date, if property was acquired by a married woman, married after the date of the Act of 1872, it was separate estate, and capable of being conveyed by the married woman without regard to her husband; but if acquired by a married woman who was married before the date of the Act of 1872, it fell under the Act of 1859, and the married woman could not convey without her husband's joining.

In 1884 another Act was passed (*f*), which enabled a married woman to acquire hold and dispose of property, without the intervention of trustees, as separate estate, and all property acquired after the date of that Act, 1st July, 1884, by a married woman, and all property of a woman married after the Act, became separate estate, and capable of enjoyment and disposition, as if the married woman were a *feme sole*. These enactments are now consolidated in one Act (*g*).

It being of the essence of separate estate, that a married woman shall be able to convey the land without regard to her husband, it follows that she may make a disposition *inter vivos* in favour of her husband; and though, before the Act enabling husband and wife to convey to each other, there was the technical difficulty as to the operation of the conveyance, still, on equitable grounds, a married woman so attempting to convey was held to be a trustee for her

(*c*) 35 V. c. 16.
(*d*) *Furness* v. *Mitchell*, 3 App. R. 510.
(*e*) *Furness* v. *Mitchell*, supra.
(*f*) 47 V. c. 19.
(*g*) R.S.O. c. 163.

husband, and equitably obliged to execute a proper conveyance (*h*).

Where a married woman was entitled to a remainder in fee-simple expectant on a life estate, before 1872, and had issue born capable of inheriting, it was held that she might convey alone in 1886, the life-tenant being still alive; for the Act of 1884 had dispensed with the necessity of a husband's joining to validate his wife's conveyance, and the wife not being seised, the husband had no estate by the curtesy (*i*).

9. *Aliens.*

The case of an alien born was also peculiar, and has been already considered. For he might purchase anything; but after purchase he could *hold* nothing against the crown under the old law, except a lease for years of a house for convenience of merchandize, in case he were an alien friend; all other purchases (when found by an inquest of office) being immediately forfeited to the king.

10. *Free Grant Lands.*

Where crown land is located under The Free Grants and Homesteads Act, R.S.O. c. 29, s. 19, neither the locatee nor any one claiming under him shall have power to alienate (otherwise than by devise), or to mortgage or pledge any land so located, or any right or interest therein, before the issue of the patent. During this period, though the statute declares this interest not to be subject to alienation, it has been held, but with great difference of opinion, that a contract made, to be carried out after the issue of the patent, will be enforced by the court (*ii*) after such issue.

And (by s. 20) after the issue of the patent, no alienation (otherwise than by devise) and no mortgage or pledge of the land or of any right or interest therein by the locatee, within twenty years from the date of the location, and during the life-time of the wife of the locatee, is valid, unless made by

(*h*) *Sanders* v. *Malsburg*, 1 Ont. R. 178. See also *Kent* v. *Kent*, 20 Ont. R. 445; 19 App. R. 352; *Whitehead* v. *Whitehead*, 14 Ont. R. 621; *Jones* v. *Magrath*, 15 Ont. R. 189.

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

(*ii*) *Meek* v. *Parsons*, 31 Ont. R. 54, 529.

deed, in which the wife of the locatee is one of the grantors with her husband, and the deed is duly executed by her.

Provision is made (by s. 21) for applying to the court for leave to convey alone where the locatee's wife is a lunatic or of unsound mind, or when she has been living apart from her husband for two years under such circumstances as by law disentitle her to alimony; and where the wife of a locatee has not been heard of for seven years, under such circumstances as raise a presumption of death, a judge may make an order dispensing with the concurrence of the wife in any conveyance.

CHAPTER XX.

OF ALIENATION BY DEED.

(1). *Nature of a Deed.*
(2). *Requisites of a Deed—External.*
(3). *Deed must be Written or Printed.*
(4). *Document Signed in Blank.*
(5). *Sealing and Signing.*
(6). *Delivery.*
(7). *Escrow.*
(8). *Conditional Execution.*
(9). *Attestation.*
(10). *Internal Parts of a Deed—Date—Short Form.*
(11). *Parties.*
(12). *Recitals.*
(13). *Consideration.*
(14). *Operative Words and Limitations.*
(15). *Description.*
(16) *Habendum.*
(17). *Stipulations.*
(18). *Covenants.*
(19). *Arrangement of Parts.*
(20). *Alteration of Deeds.*
(21). *Disclaimer.*
(22). *Cancellation.*

We are next, but principally, to inquire, *how* a man may alien or convey; which will lead us to consider the several modes of conveyance.

In consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired; which, we

have more than once observed, was that of occupancy or first possession. But this possession, when once gained, was also necessarily to be continued; or else, upon one man's dereliction of the thing he had seized, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose, therefore, of continuing the possession, the municipal law has established *descents* and *alienations*; the former to continue the possession in the heirs of the proprietor, after his *involuntary* dereliction of it by his death; the latter to continue it in those persons to whom the proprietor, by his own *voluntary* act, should choose to relinquish it in his life-time. A translation, or transfer, of property being thus admitted by law, it became necessary that this transfer should be properly evidenced; in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons, by whom and to whom it was transferred; or with regard to the subject matter, as what the thing transferred consisted of; or, lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the *common assurances* of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

1. *Nature of a Deed.*

In treating of deeds we shall consider, first, their general nature; and, next, the several sorts or kinds of deeds, with their respective incidents. And, in explaining the former, we shall examine, first, what a deed is; secondly, its different parts and requisites; and thirdly, how it may be avoided.

First, then, a deed is a writing sealed and delivered by the parties. It is sometimes called a charter, *carta*, from its materials; but most usually, when applied to the transactions of private subjects, it is called a deed, in Latin *factum*, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed. If a deed be made by more parties than one,

there ought to be regularly as many copies of it as there are parties; and formerly each part was cut or indented (in early times in acute angles *instar dentium*, like the teeth of a saw, but later in a waving line), on the top or side, to tally or correspond with the other; which deed, so made, was called an indenture. Formerly when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some words or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists; and with us *chirographa*, or hand-writings; the word *chirographum* or *cyrographum* being usually that which is divided in making the indenture. At length indenting only came into use without cutting through any letters at all; and the practice of indenting is obsolete at present. The name only is retained for this species of deed; and at present it suffices to style the deed an indenture, in the body thereof, in order to make it one. A deed made by one party only is not indented, but *polled* or shaved quite even; and therefore called a *deed poll*, or a single deed.

2. *Requisites of a Deed—External.*

We are in the next place to consider the different *parts* and *requisites* of a deed. The parts and requisites of an ordinary purchase deed have been, for the purposes of analysis, well divided into those which are external or material, and those which are internal or intellectual (*j*). And this, being the most frequent form of deed in use may serve as a model.

The external or material ingredients are, that the deed should be written or printed on parchment or paper; that it should be sealed and signed; and that it should be delivered.

The internal or intellectual ingredients are the premises, which include "all the fore parts before the habendum;" the habendum; the covenants; and the conclusion.

3. *Deed must be Written or Printed.*

The deed must be *written* or *printed*, for it may be in any character or any language. Where a deed or other instru-

(*j*) Cornish on Purchase Deeds, p. 27.

ment is written in any language other than English, and is presented for registry, it must be accompanied by a sworn English translation thereof, and the Registrar is to enter the translation in his books, and not the original (*k*). But certificates, patents, charters, bonds, records, judgments, statutes and recognizances, are to be in the English language (*l*). It must be upon paper or parchment; for if it be written on stone, board, linen, leather or the like, it is no deed. Wood or stone may be more durable, and linen less liable to erasures; but writing on paper or parchment unites in itself more perfectly than in any other way, both those desirable qualities; for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable.

Formerly many conveyances were made by parol, or word of mouth only, without writing; but, this being a handle to a variety of frauds, the statute 29 Car. II. c. 3, commonly called the Statute of Frauds, enacts that "all leases, estates, interests of freehold, or terms for years, or any uncertain interest of, in, to or out of, any messuage, manors, lands, tenements, or hereditaments, made or created by livery and seisin 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 authorized by writing, shall have the force and effect of leases and estates at will only, and shall not, either in law or in equity, be deemed or taken to have any other or greater force or effect." By the 2nd section, leases for three years, whereupon the rent reserved amounts to two-thirds of the full improved value, are excepted. And by the 3rd section it is enacted, "that no leases, estates, or interests, either of freehold or term for years, or any uncertain interest not being copyhold or customary interest of, in, to, or out of, any messuage, etc., shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act or operation of law." And by the 4th section it is enacted, "that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments,

(*k*) R.S.O. c. 136, s. 59.
(*l*) 4 Geo. II. c. 26.

or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto lawfully authorized." The 1st section appears to relate to cases where an estate or interest is created *de novo*, and actually passes to the grantee or lessee; the 3rd section to cases where an estate or interest previously existing is transferred; and the 4th to cases where a right of action only is created by an agreement, or where an agreement is made respecting the future creation or transfer of an estate or interest.

4. *Document Signed in Blank.*

The whole deed must be written before the sealing and delivery, for if a man seal and deliver an empty piece of parchment or paper, although with instructions to write in it an obligation or other matter, this is not a good deed (*m*). So, a document, designed to be a deed, and executed as such, but with a blank left for the name of the grantee, is void as a deed if the name of the grantee be filled in by another than the grantor after execution without authority under seal (*n*). But if the blank is filled in after execution, in the presence of the grantor with his assent, the deed is good (*o*). Or, if a blank be filled in which is immaterial to the party whose deed it is (*p*), or if the particulars are filled in which merely complete the provisions of the deed and do not otherwise affect it (*q*); or if particulars to be furnished by or for the grantor, such as the date, the names of the tenants in occupation of the land, the particulars of the proviso for redemption in a mortgage (*r*), are filled in, in these cases the deed is good, though it is done after execution.

(*m*) Shepp. Touch. 54. See also per Patterson, J., *Regina* v. *Chesley*, 16 S.C.R. at p. 323.

(*n*) *Hibblewhite* v. *McMorine*, 6 M. & W. 200, approved in *Societe Generale de Paris* v. *Walker*, 11 App. Cas. 20.

(*o*) *Hudson* v. *Revett*, 5 Bing. 372.

(*p*) *Doe d. Lewis* v. *Bingham*, 4 B. & Ald. 672.

(*q*) *Hudson* v. *Revett*, 5 Bing. 368.

(*r*) *Adsetts* v. *Hives*, 33 Beav. 52.

5. *Sealing and Signing.*

Sealing.—It is requisite that the party whose deed it is should *seal*, and, now in most cases, should *sign* it also. The use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely ancient. We read of it among the Jews and Persians in the earliest and most sacred records of history (*s*); and in the book of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase (*t*). In the civil law also, seals were the evidence of truth, and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors, they were not much in use in England; for though Sir Edward Coke relies on an instance of King Edwin's making use of a seal about a hundred years before the Conquest, yet it does not follow that this was the usage among the whole nation; and perhaps the charter he mentions may be of doubtful authority, from this very circumstance of being sealed; since we are assured by all our ancient historians, that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross; which custom our illiterate vulgar do, for the most part, to this day keep up, by signing a cross for their mark, when unable to write their names. And indeed this inability to write, and therefore making a cross in its stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters. In like manner, and for the same insurmountable reason, the Normans, a brave but illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names; which custom continued, when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to Westminster Abbey, himself being brought up in Normandy, was witnessed only by his seal, and is thought to be the

(*s*) 1 Kings, ch. 21; Daniel, ch. 6; Esther, ch. 8.

(*t*) "And I bought the field of Hahameel, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence, and sealed it and took witnesses, and weighed him the money in the balances. And I took the evidence of the purchase, both that which was sealed according to the law and custom, and also that which was open."—Ch. 32.

oldest sealed charter of any authenticity in England. At the Conquest the Norman lords brought over into this kingdom their own fashions, and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross. And in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals. The impressions of these seals were sometimes a knight on horseback, sometimes other devices; but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard I., who brought them from the Crusade in the Holy Land, where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained.

This neglect of signing, and resting only on the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed; and so the former common form of attesting a deed, "sealed and delivered," continued, notwithstanding that the statute 29 Car. II. c. 3, before mentioned, revived the Saxon custom, and expressly directed the signing in all grants of land, and many other species of deeds; in which, therefore, signing seems to be now as necessary as sealing, though it has been sometimes held that the one includes the other, viz., that when sealing and delivery occur, signing is not requisite, notwithstanding the Statute of Frauds (*u*).

While some degree of strictness was in early days required as to sealing, the modern cases seem to shew that if any impression be made with the intention of sealing, it will be sufficient, especially when the testimonium and attestation clauses state that the deed has been sealed. It is a question of fact in each case as to whether an impression has been made for the purpose of sealing (*v*). It is not necessary, therefore, that a waxen seal or a wafer should be used; if an impression is made on the parchment or paper with the intention of sealing, it is sufficient (*w*). Thus, an order of

(*u*) *Cherry* v. *Heming*, 4 Ex. 631.

(*v*) *National Prov. Bank of England* v. *Jackson*, 33 Ch. D. at p. 11.

(*w*) Shepp. Touch. p. 57. *Clement* v. *Donaldson*, 9 U.C.R. 299, where it was held that a mark made with a poker after his name by a party who had just signed, was not a good sealing, is directly opposed to the passage in Touchstone, and cannot be supported.

justices was held to be sufficiently sealed by an impression made in ink with a wooden block in the usual place of the seal, the document purporting to be under seal (*x*). And where slits were made in the parchment, and a ribbon was passed through, so as to appear at intervals on the face of the instrument, and the signature of each one of the parties was opposite one of the pieces of ribbon, the ends being fastened so that the whole remained permanently fixed, it was held a sufficient sealing (*y*). But in an exactly similar case, where the deed was found amongst the papers of an absconder, and the circumstances were suspicious, it was held that there was no sealing (*z*). Where a party made a circle after his name with a pen, and wrote within it "seal," and the testimonium and attestation clauses stated that the deed was sealed, it was held a good sealing (*a*).

Plain wafers have been held good seals for corporate bodies, where the deed stated that the parties thereto had affixed their seals, there being no evidence that these were not the seals of the corporations (*b*).

With regard to the necessity for signing. At common law, before the Statute of Frauds, a deed was requisite (though it might have been without signature) to transfer incorporeal hereditaments, as of those livery could not be made; but where livery could be made nothing further was requisite; and though a deed of feoffment was usually drawn up and sealed and delivered, that was done for the purpose of preservation of the evidence of the land having been conveyed, and of the tenure on which it was to be held. The language of the deed, which some modern deeds still sometimes unnecessarily follow, shews this; it *witnesseth* that the feoffor *hath given*, etc., making use of the past tense. It is true that to the validity of certain conveyances, a deed was requisite, as bargain and sale, covenant to stand seised; but that was in consequence of the peculiar character of those modes of conveyance; but to the validity of certain other modes of conveyance, no instrument whatever was requisite. To remedy this the Statute of Frauds was passed, and as

(*x*) *Regina* v. *St. Paul*, 7 Q.B. 232.

(*y*) *Hamilton* v. *Deemis*, 12 Gr. 325. See also *Re Sandilands*, L.R. 6 C.P. 411.

(*z*) *National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1.

(*a*) *Re Bell & Black*, 1 Ont. R. 125.

(*b*) *Ontario Salt Co.* v. *Merchant's Salt Co.*, 18 Gr. 551; Shepp. Touch. 57.

remarked by Mr. Baron Rolfe (*c*): "The object of the statute was to prevent matters of importance from resting on the frail testimony of memory alone. The statute was not intended to touch those instruments which were already authenticated by a ceremony of a higher nature than a signature or mark." In another case as above referred to as against the necessity of signature (*d*), the point seems to have been given up without argument. As regards sections 1 and 3 of the statute, no violence is done to their language in holding that signing is not requisite when the transaction is authenticated by deed; thus, a lease for years, or freehold created by deed, is not "made or created by livery of seisin only, or by parol" in the language of section 1; and as to the transfer of existing estates under section 3, the word, "signed" may be referred to the words "note in writing" only (*e*). There are, however, decisions and statements of eminent writers that signature is requisite. For the purposes of registration it is essential that a deed should be signed, proof of signature being required before the registrar is bound to receive it.

Before proceeding to the question of delivery it may be remarked that reading is sometimes essential before execution. This is necessary whenever any of the parties desire it. If a man able to read does not do so, or if being blind or illiterate he does not require the deed to be read, yet the deed will be good, although contrary to what he would have agreed to. But if one who is blind or illiterate desires the deed to be read and it is not read, or is falsely read, then it is not a good deed (*ee*).

6. *Delivery.*

In order to constitute the document a deed it is requisite that it should be *delivered*. "Delivery is either actual, *i.e.*, by doing something and saying nothing, or else verbal, *i.e.*, by saying something and doing nothing, or it may be by both; and either of these may make a good delivery and a perfect deed. But by one or both of these it must be made; for otherwise, albeit it be never so well sealed and written,

(*c*) *Cherry* v. *Heming*, 4 Ex. 631. See also *Tupper* v. *Foulkes*, 9 C.B.N.S. 799, *arguendo*; Shepp. Touch. 56.

(*d*) *Aveline* v. *Whisson*, 4 M. & G. 801.

(*e*) *Trust and Loan Co.* v. *Covert*, 32 U.C.R. 222.

(*ee*) Shepp. Touch. p. 56; *Owens* v. *Thomas*, 6 C.P. 383; *Hatton* v. *Fish*, 8 U.C.R. 177.

yet is the deed of no force. And though the party to whom it is made take it to himself, or happen to get it into his hands, yet will it do him no good, nor him that made it any hurt, until it be delivered" (*f*). It may be delivered to the party himself, or to a stranger for him if delivered for the use of the party and the grantor parts with control over it (*g*); but if delivered to a stranger without any declaration or intention that it is for the party, then it is not a good delivery (*h*). Where an instrument is formally sealed and declared to be delivered, and there is nothing to qualify the delivery but the keeping of the deed in the hands of the executing party, nothing to shew that he did not intend it to operate immediately, it is a valid and effectual deed; and the delivery to the party who is to take by it, or to any person for his use is not essential (*i*). So, where a deed was found amongst the papers of the deceased grantor, formally executed, attested, and stated to have been delivered, and the evidence shewed that after execution the grantor put it in his pocket, that he subsequently made another deed of the same house, and the day after that made a will devising the house "subject to two life annuities charged thereon by me," there being no other annuities charged except by the first deed, it was held to have been delivered (*j*). A mortgage drawn by the mortgagee's solicitor and executed by the mortgagor and left with the solicitor with the request not to register it, was held to have been delivered (*k*). Where a deed is sealed by a stranger, yet if the party delivers it himself he adopts the sealing and makes it a good deed; and if it had been signed also by a stranger, the delivery by the party would no doubt be an adoption of the signature, and would make it a valid deed. In practice the seals are always put on before execution, and the signature is an adoption of the seal; and though the proper mode of execution is to place a finger on the seal after signing and say, "This is my act and deed," or some such words, this ceremony is not necessary.

(*f*) Shepp. Touch. p. 57.

(*g*) *Doe d. Garnons* v. *Knight*, 5 B. & C. 671.

(*h*) Shepp. Touch. p. 57.

(*i*) *Doe d. Garnons* v. *Knight*, 5 B. & C. 671; *Xenos* v. *Wickham*, L.R. 2 H.L. 296; *Zwicker* v. *Zwicker*, 29 S.C.R. 527.

(*j*) *Evans* v. *Gray*, 9 L.R. Ir. 539 (1882).

(*k*) *Mackechnie* v. *Mackechnie*, 7 Gr. 23.

7. *Escrow.*

A delivery is absolute if made to the party to take it or any person for his use, with intent that it shall take effect immediately. But a document may be delivered to a stranger to hold until certain conditions are performed on the part of the grantee; in which case it is not delivered as a deed, but as an *escrow*, that is a mere scroll or writing, not to take effect as a deed till the conditions are performed. "In this case two cautions must be heeded, 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made" (*l*). In explanation of this passage it is said, "it will be found that it is not merely a technical question as to whether or not the deed is delivered into the hands of A. B., to be held conditionally; but when a delivery to a stranger is spoken of, what is meant is a delivery of a character negativing its being a delivery to the grantee, or to the party who is to have the benefit of the instrument. You cannot deliver the deed to the grantee himself, it is said, because that would be inconsistent with its preserving its character of an escrow. But, if upon the whole of the transaction it be clear that the delivery was not intended to be a delivery to the grantee at that time, but that it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the persons who executed the instrument" (*m*). So a delivery to the grantee's solicitor for a specific purpose, not to be effectual as a complete delivery, was upon evidence held to be a delivery as an escrow (*n*).

The deed of a corporation aggregate does not need any delivery; for the apposition of their common seal gives perfection to it without any further ceremony. But if the affixing of the seal be accompanied with a direction to the clerk or agent to retain the conveyance till accounts are adjusted it is not complete (*o*). So, where the agent of a life assurance company (under instructions not to hand over a policy till the premium was paid) handed the policy to the

(*l*) Shepp. Touch. p. 58.
(*m*) *Watkins* v. *Nash*, L.R. 20 Eq. at p. 266.
(*n*) Ibid. See also *Lloyd's Bank* v. *Bullock*, L.R. (1896) 2 Ch. 192.
(*o*) *Derby Canal Co.* v. *Wilmot*, 9 East 360.

assured for the purpose of reading the conditions, and it was found amongst his papers after his death, no premium having been paid, it was held that the policy was not complete (*p*). And a mortgage, prepared and executed by the mortgagee's solicitor, and remaining in his hands pending an investigation of title, upon the report of which the mortgagees were either to advance money or refuse the loan, according to the state of the title, was held to have become effective only from the final report on title and delivery of the document by the solicitors to the mortgagees (*q*).

When the conditions are performed upon which the deed was delivered as an escrow, then it should be delivered to the grantee, and it becomes effective as if it had been immediately delivered. So, it is said, that if either of the parties die before the conditions are performed, and the conditions are afterwards performed, the deed is good; and if an infant deliver a deed as an escrow to a stranger, and before the conditions are performed the infant comes of age, and the deed be then delivered by the stranger, yet it is not a good delivery (*r*).

A deed takes effect from delivery only; and it will be presumed to have been delivered on the day it bears date, if there is nothing against it, such as an impossible date, or its being registered before the day of its date. But the day or time of the delivery may always be shewn as a matter of fact.

8. *Conditional Execution.*

The signing, sealing and delivery of a deed constitute its execution. The execution may be conditional. Thus, if two persons execute a deed on the faith that a third person will do so, and that is known to the other parties to the deed, the deed does not in equity bind the two if the third refuses to execute (*s*). And a person so executing is entitled to restrain proceedings upon such an instrument (*t*), and to have it delivered up to be cancelled (*u*). But where a deed of assign-

(*p*) *Confederation Life Ass'n.* v. *O'Donnell*, 10 S.C.R. 92; 13 S.C.R. 218. See and cf. *Xenos* v. *Wickham*, L.R. 2 H.L. 296.

(*q*) *Trust & L. Co.* v. *Ruttan*, 1 S.C.R. 564.

(*r*) Shepp. Touch. 59.

(*s*) *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. at p. 125.

(*t*) *Evans* v. *Bremridge*, 8 D.M. & G. 100.

(*u*) *Underhill* v. *Horwood*, 10 Ves. at p. 225. See also *Elliot* v. *Davis*, 2 B. & P. 338.

ment for benefit of creditors was made, and certain creditors executed it and appended a note to the effect that the execution was only with respect to certain claims, it was held that the creditors so executing were bound by the deed, particularly as they had received payment under it (*v*).

A party to a deed taking the benefit of it is bound by the whole deed though he may not execute it (*w*). But apparently he is not bound by a covenant to do something *in futuro* not a condition of or connected with the grant, unless he executes the deed (*x*).

9. *Attestation.*

It is not necessary that there should be any attesting witnesses to a deed in order to constitute it a valid and effective deed. The facts of signing, sealing and delivery may be proved as any other matters of fact. And, even though there be an attesting witness it is not necessary to call him to prove the deed (*y*). But a deed should be attested for the purpose of registration, as the execution has to be proved by affidavit of the witness for that purpose (*z*). If there be no attesting witness, the judge of a County Court, on its being proved to his satisfaction that the deed was executed, may grant a certificate to that effect, upon which the deed may be registered (*a*). And where a deed in duplicate has been registered, the certificate of the registrar endorsed thereon is *prima facie* evidence of the due execution as well as of the registration of the deed (*b*).

Where a deed is made in exercise of a power which requires attestation, then the terms of the power must be observed, and the deed attested; or the deed may be attested as provided by statute, in presence of two or more witnesses in the manner in which deeds are ordinarily executed and attested (*c*).

(*v*) *Exchange Bank of Yarmouth* v. *Blethen*, 10 App. Cas. 293.

(*w*) Co. Litt. 231*a*, Butler's note; *Rex* v. *Houghton-le-Spring*, 2 B. & Ald. 375; *Burnett* v. *Lynch*, 5 B. & C. 589; *Webb* v. *Spicer*, 13 Q.B. 886; *Willson* v. *Leonard*, 3 Beav. 373.

(*x*) *Witham* v. *Vane*, 44 L.T. N.S. 718; S.C. in H.L., Challis on Real Prop. 2nd ed. p. 401. But see *Jessup* v. *G.T.R. Co.*, 7 App. R. at pp. 130, 133.

(*y*) R.S.O. c. 73, s. 54.

(*z*) R.S.O. c. 136, ss. 40, *et seq.*

(*a*) R.S.O. c. 136, s. 50.

(*b*) R.S.O. c. 136, s. 63.

(*c*) R.S.O. c. 119, s. 18.

10. *Internal Parts of a Deed—Date—Short Form.*

Next as to the internal parts. The premises of a deed are "all the foreparts of the deed before the habendum" (*d*); and include the date, reference to any statute that it is desired to make applicable, the parties, recitals, consideration, receipt, operative words and description of parcels.

The date of a deed is, as we have seen, the day of delivery; and therefore, if possible, the date inserted in the deed should correspond with the day of the delivery.

As most of our deeds are made according to the form in the Short Forms Act, it may be important here to observe, that it is only when the deed refers to the statute, as shewing an intention to adopt it, that the symbolical short form acquires the meaning given it in the long form by the statute.

Though the interpretation of deeds is not within the scope of this treatise, it may not be out of place (inasmuch as these forms are so largely used in this Province) to mention that, where the written parts of a deed conflict with the printed part, the written parts are entitled to the greater weight in ascertaining the meaning of the deed (*dd*).

11. *Parties.*

As to the *names and descriptions* of the parties, except in so far as the registry laws may affect the question, strict accuracy is not requisite, if there be sufficient to identify (*e*). So if a man be known by a different description than even his name of baptism, it will do (*f*). The parties should include all those who are to convey any estate or interest in the property, those who are to give any consent or direction in relation to the conveyance, or to confirm the conveyance of any of the interests affected, or to give a receipt for the consideration, or to release any claim, incumbrance, or interest on or in the property, or to give any covenant; and all those who are to take any interest or benefit under the conveyance (*g*). It will be always advisable to *classify* the

(*d*) Shepp. Touch. 75.

(*dd*) *Meagher* v. *Etna Ins. Co.*, 20 U.C.R. 607; *Meagher* v. *Home Ins. Co.*, 11 C.P. 328; *McKay* v. *Howard*, 6 Ont. R. 135.

(*e*) *Janes* v. *Whitbread*, 11 C.B. 406.

(*f*) *Williams* v. *Bryant*, 5 M. & W. 447.

(*g*) 5 Bythe. Conv. 117.

parties into various parts and priorities, according to their various estates and interests; thus, those conveying the legal estate are placed first, then those conveying any equitable estate or mere beneficial interest, those who release or confirm, those who enter into any covenants or other stipulations, and lastly, those who consent to or direct the exercise of any power. As to those who receive interests, first the parties receiving the immediate estate; then those who take equitable interests and those who take the benefit of any covenants. All persons whose interests are identical, and all persons having joint estates should be of one part; and so with trustees (*h*). A husband conveying, and a wife barring dower, should be distinct parties, by reason of their distinct interests, and the wife placed last, as having no present estate, but a mere possible right of action contingent on her surviving. Where advantage is to be taken of implied covenants, the parties who convey should be described as persons "who convey and are expressed to convey as beneficial owners" (*i*).

No person can, by or under an *indenture inter partes*, take an *immediate* interest or benefit, unless named as a party, at least if any other be named in the premises as grantee (*j*). This rule, however, does not extend to remainders, nor, it is said, to uses (*k*); and under a grant or feoffment from A. to B., *habendum* to the use of C., the latter may take, though not named as a party; so also if the grant had been to B. for life, with remainder to C. in fee. A person named as a party will not be bound by his covenant with one not a party, though a person covenanting and sealing the indenture will be bound by his covenant with one named as a party.

12. *Recitals.*

Next the parties come the recitals if any. Their purpose is to narrate such facts as are necessary to explain the title of any party conveying, or the purpose of the conveyance; or they may serve the purpose of placing upon record some fact, such as the date of a birth, death or marriage or a particular relationship with a view to exhibiting a pedigree,

(*h*) 5 Bythe. Conv. 123.
(*i*) R.S.O. c. 119, s. 17.
(*j*) Co. Litt. 231*a*, 239*b*.
(*k*) Burton, Rl. Prop. 442, note.

which in time will furnish proof of the fact recited under the Vendor and Purchaser Act (*l*); or they may be used for the purpose of estopping parties as to the facts recited (*m*). But in general they are not necessary, and should be avoided if possible.

13. *Consideration.*

As to the consideration. A bargain and sale, as its name implies, imports the payment of a money consideration, and its peculiar operation depends upon it. Therefore, if it is desired to use the operative words "bargain and sell" a money consideration ought to be expressed.

A deed also, or other grant, made without any consideration, is, as it were, of no effect, for it is construed to enure, or to be effectual, only to the use of the grantor himself, and this is what is called a *resulting use*; thus, if A., without consideration, should, by some conveyance not operating under the Statute of Uses, convey in fee simple to B. and his heirs, without any consideration or declaration of use expressed, it is said (*n*), inasmuch as there is no reason apparent why the conveyance should have been made for B.'s benefit, that, therefore, he will be considered as holding for the use and benefit of A.; in which case, as we shall presently see, the land will, by force of the Statute of Uses, be revested in A. But this doctrine of resulting use applies, it is said, only to conveyances *in fee simple* (*o*). If a use be *declared* in such a conveyance, then no use will be *presumed* in favour of the grantor, but the conveyance, though without consideration, will enure to the benefit of the person for whom the use is declared, *i.e.*, the *cestui que use*. Great latitude, however, is allowed in shewing whether there has in fact been a consideration paid, and what it is; and though, by the bare interpretation of such a deed with no use declared, its effect will be as stated, yet it might appear on evidence that a consideration was in fact given, which would prevent the use from resulting. And a nominal consideration, if expressed, will prevent a resulting use.

The consideration may be either a *good* or a *valuable* one. A good consideration is such as that of blood, or of natural

(*l*) R.S.O. c. 134, s. 2.
(*m*) 5 Bythe. Conv. 128, *et seq.*
(*n*) *Tyrrell's Case*, Tud. Lg. Ca. 4th ed. 296.
(*o*) Shepp. Touch. 513.

love and affection, when a man grants an estate to a near relative; being founded on motives of generosity, prudence and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant; and is, therefore, founded on motives of justice. Deeds made upon good consideration only are considered as merely voluntary, and may be set aside in favour of creditors, and in some cases in favour of *bona fide* purchasers.

If a deed is made upon a fraudulent or collusive consideration, either to deceive, delay, or defeat creditors, it may be set aside at the instance of creditors. But it will nevertheless be good between the parties to this extent, that it will be effectual to pass the estate. As no person can set up his own fraud in order to obtain relief from a transaction tainted with the fraud, therefore the grantor in such a deed could not set it aside.

So if a conveyance be made upon an illegal or immoral consideration, or a consideration against public policy, it cannot be enforced if the party trying to enforce it has to set out the illegal purpose in order to succeed. And similarly if the deed does not disclose the illegal consideration, and the party trying to enforce it relies on the deed alone, the defendant cannot in opposition to the deed set up the illegality, if he has to rely upon it for relief (*p*).

When the consideration is a money payment the deed usually contains a receipt for it or an acknowledgment that it has been paid. As between the parties, this at law would have estopped the parties from denying the payment; but in equity, and now on equitable grounds, the actual facts as to payment or non-payment may be proved, notwithstanding the formal receipt. So that a vendor may shew that the purchase money has not been paid and claim a lien on the land therefor. But if a subsequent purchaser, relying on a receipt in a deed without notice of the facts, were to acquire the land or any interest in it, he would be protected under the Registry Act. But if he had notice of non-payment he would take subject thereto (*q*).

It is also enacted (*r*) that a receipt for consideration money or securities contained in the body of a conveyance shall be a sufficient discharge to the person paying or deliver-

(*p*) *Clark* v. *Hagar*, 22 S.C.R. 510.
(*q*) *Forrester* v. *Campbell*, 17 Gr. 379; *Wigle* v. *Setterington*, 19 Gr. 512.
(*r*) R.S.O. c. 119, s. 5.

ing the same, without any further receipt being indorsed on the conveyance. Indorsing a receipt was the common conveyancing practice in England, and the absence of an indorsed receipt was constructive notice that the money had not been paid. This enactment was passed to dispense with the necessity for such indorsement. And the enactment further declares that, in favour of a purchaser not having notice that the consideration was not paid or given, the receipt in the body of the deed shall be sufficient evidence of the payment.

14. *Operative Words and Limitations.*

The *operative words* of the conveyance should be such as are apt and proper according to the mode in which the instrument is intended to operate, as by grant, demise, surrender, assignment, bargain and sale, or otherwise, the nature of which will presently be spoken of. Until recently a multiplicity of operative words was used, as "give, grant, bargain, sell," etc., etc.; this is useless, and proceeded from a fear that if one word alone were used, a wrong one might be adopted, and the right one omitted. As, however, lands now lie in grant, if the word "grant" be used it will suffice in every case. Moreover, as hereafter shewn, if a word cannot operate in its own peculiar character, it may in another; thus, the word "release" may operate as a grant, and "grant" as a release. Still perhaps the neatest mode is to make use of the proper operative word which stamps the character of the instrument, and to this if thought proper the word *grant* can be added. The present tense alone should be used except in deeds of disclaimer and feoffment. Both that and the past tense were formerly used, which arose from the early conveyance by livery of seisin, which without deed or writing passed the estate; a charter or deed, however, usually accompanied the transaction, as evidence for the future, which stated, as the fact was, that the feoffor had enfeoffed, and then proceeded in the present tense to confirm it. In deeds of disclaimer also, the past tense is proper, as where a person to whom property is conveyed either beneficially or in trust, declines to accept the conveyance or the trust, it is proper to say that he always has disclaimed and still disclaims; for if he have once accepted he cannot *disclaim*. In such latter case, if allowable, he should *convey*, for the estate has vested in him. In this place also it is usual to

limit the estate to be granted—for years, for life, in tail, or in fee simple, by proper words of limitation. But by statute (*s*) it is not necessary to use the technical words "heirs," "heirs of the body," etc., to create a fee simple or a fee tail, but it will be sufficient to use the expression "in fee simple," "in fee tail," or, as the case may be. And if none are used, all the estate of the grantor which he has power to convey will pass.

15. *Description.*

Following the operative words, comes the *description* of the property, technically called the *parcels*. In describing the property it is very inadvisable, though sufficient (*t*), to describe it or its boundaries, by reference to another conveyance, as "heretofore conveyed by one A. to one B. by deed dated," etc., or "conveyed by the within indenture," or, "bounded on the north by property conveyed," etc. This is too frequently done, and leads to great difficulty in proving title, and may, perhaps, in registration of the instrument (*u*). It is far better to take certain named limits or fixed boundaries, or if there be none, then to make such. And it is prudent to follow a description by which a parcel of land has become known, for the purpose of maintaining its identity, even if a better one could be devised. We may here mention, however, that though lands are usually described as being a particular lot, or part of it, a general conveyance of *all the lands* of the grantor in a particular city or township, is a good conveyance of all such lands, and capable of registry.

There is a maxim that *falsa demonstratio non nocet*; thus if I convey lot 20 in concession 1 of the Township of York now occupied by A., and A. be not occupant, that false addition to what was before sufficiently certain will not affect the conveyance.

As soon as there is an adequate and sufficient definition with convenient certainty of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it (*v*).

In order to make the maxim applicable there must be a description composed of several parts, of which one part is

(*s*) R.S.O. c. 119, s. 4.

(*t*) *Re Treleven & Horner*, 28 Gr. 624.

(*u*) *Regina* v. *Registrar of Middlesex*, 15 U.C.R. 976.

(*v*) *Llewellyn* v. *Earl of Jersey*, 11 M. & W. at p. 189. See also *Morrell* v. *Fisher*, 4 Ex. at p. 604.

true and sufficient to identify the subject matter of the grant, and the other part is untrue; then the untrue part—*falsa demonstratio*—will not vitiate the grant, but will be rejected (*w*). So, where a parcel of land is known and granted by a specific name, the addition of a particular description, which does not correctly describe it, will not prevent the whole parcel from passing under its specific name (*x*). And, on the other hand, where land was sufficiently and certainly defined by reference to landmarks, the land so described was held to pass, though it was generally described as lot 4 when in fact it included also part of lot 3 (*y*); and land well described in the particular description was held to pass, though in the general description it was stated to be part of lot 42 instead of lot 45 (*z*). But where a whole lot was referred to by number, and the particular description, being, however, inaccurate in some respects, appeared to include only a portion of the lot, it was held that the whole lot passed, the inaccurate particular description being rejected (*a*). In each case the principle is the same, viz., that if the two parts of the description do not agree, that which is certain and definite governs, and a false addition will not vitiate it.

Where land is described by reference to a plan, the plan is considered as incorporated in the deed (*b*), and becomes just as much a part of the description as if it were drawn upon the face of the conveyance; and so, in determining the proper description the deed and plan alone are to be looked at (*c*).

Easements and privileges legally appurtenant to the lands, as for instance a right of way, or of drainage of water *in alieno solo*, founded on prescriptive right, pass by conveyance of the lands simply; but there may be others used and enjoyed with the land, and still not legally appurtenant to it (*d*); and hence after the description sometimes follows a

(*w*) *Cowen* v. *Truefitt*, L.R. (1899) 2 Ch. 309. See *Barthel* v. *Scotten*, 24 S.C.R. 367; *Talbot* v. *Rossin*, 23 U.C.R. 170.

(*x*) *Attrill* v. *Platt*, 10 S.C.R. 425.

(*y*) *Doe d. Murray* v. *Smith*, 5 U.C.R. 225.

(*z*) *Doe d. Notman* v. *McDonald*, 5 U.C.R. 321. See also *Hart* v. *Bown*, 10 Gr. 266.

(*a*) *Jamieson* v. *McCollum*, 18 U.C.R. 445.

(*b*) *Grasett* v. *Carter*, 10 S.C.R at p. 114.

(*c*) *Smith* v. *Millions*, 16 App. R. 140.

(*d*) *Pheysey* v. *Vickary*, 16 M. & W. 484.

grant of all easements and privileges enjoyed with the lands or known as part thereof. The necessity for any such clause is obviated by the use of conveyances drawn under the Acts as to Short Forms of Conveyances and of Mortgages (*dd*).

Any intended *exception* out of the property conveyed is most properly made in the premises; it must not, however, be repugnant to the grant, so as to take away all benefit from it. Thus, if land be granted, except the profits, the exception is void. Nor can it be such as to render nugatory any part of an express specific grant of what is afterwards excepted; thus, if a grant be made of a house and shops, except the shops; or of twenty acres except ten, the exceptions are void. So if a person grants *all his horses* except his white horse, and he has three or more horses, and one is white, the exception is good; but if he has only *two* horses, the exception is void as conflicting with the grant, which was of more than one horse (*e*). But if lot 20 be granted, excepting the house on it, or the trees, or a particular field, these exceptions are good.

16. *Habendum.*

Next come the *habendum* and *tenendum*.

The office of the *habendum* was to mark out the estate of the grantee and declare the uses. That may be, however, and now almost universally is, done in the premises following the operative words. And where it is so done, it is unnecessary to repeat it in the *habendum*; but where uses are to be declared, the *habendum* is the most convenient place for it. If an *habendum* be used, it should be made to harmonize with the premises. If it contradicts or is repugnant to the premises, it is void, and must be rejected; but every effort will be made, in construing the deed, to make it agree with the rest of the deed before declaring it to be repugnant.

Though it may not be repugnant to the premises, it may lessen, explain, or qualify the premises, if the premises are not *definite* but give rise to a presumption or implication susceptible of qualification in the manner just spoken of; and it may enlarge the premises by adding another estate. The rule is thus clearly stated by Abbott, C.J. (*f*):—"If no estate

(*dd*) See *Winfield* v. *Fowlie*, 14 Ont. R. 102.

(*e*) Shepp. Touch. 78.

(*f*) *Goodtitle* v. *Gibbs*, 5 B. & C. at p. 717. See also *Boddington* v. *Robinson*, L.R. 10 Ex. 270.

be mentioned in the premises, the grantee will take nothing under that part of the deed, except by implication and presumption of law, but if an *habendum* follow, the intention of the parties as to the estate to be conveyed will be found in the *habendum*, and consequently no implication or presumption of law can be made, and if the intention so expressed be contrary to the rules of law, the intention cannot take effect, and the deed will be void. On the other hand, if an estate and interest be mentioned in the premises, the intention of the parties is shewn, and the deed may be effectual without any *habendum*, and if an *habendum* follow which is repugnant to the premises or contrary to the rules of law, and incapable of a construction consistent with either, the *habendum* shall be rejected and the deed stand good upon the premises" (*g*). Thus, if at common law a grant were made to A. (by which he would, by implication, take an estate for life), *habendum* to A. for ten years, the implication or presumption arising in the premises is rebutted or qualified by the *habendum*, which is express, and A. would take an estate for ten years (*h*), for the grant taken altogether is no more than a grant to A. for ten years. But if a grant be made to A. for life, *habendum* to A. for ten years, the estate given in the premises is express and not implied, and the *habendum* is repugnant to it and void. So, if lands are granted to A. and his heirs, *habendum* to A. for his own life, this is repugnant and void, and A. takes a fee (*i*). But if a grant be made to A. and his heirs, *habendum* to him and his heirs for the life of B., there is no repugnancy, and A. takes an estate to himself and his heirs for the life of B. (*j*). This is simply an estate *pur auter vie* limited to the heir as special occupant. So if a grant be made to A. and his heirs, *habendum* to A. and the heirs of his body, this

(*g*) See also *Jameson* v. *Lond. & Can. L. & A. Co.*, 27 S.C.R. 435.

(*h*) Shepp. Touch. 75, note. This would apparently still be the effect, notwithstanding the statute (R.S.O. c. 119, s. 4, s.-s. (3)), which declares that, where no words of limitation are used, the conveyance shall pass all the estate which the grantor has power to pass, unless a contrary intention appear from the conveyance. If there be nothing in the conveyance to qualify the grant, then the whole estate will pass, but if there be anything to qualify it (as an *habendum* for years, etc.), then the premises remain indefinite or general, and may be qualified or explained by the *habendum*, which shews the contrary intention of the statute.

(*i*) Ibid.; and see *Owston* v. *Williams*, 16 U.C.R. 405; *Doe d. Meyers* v. *Marsh*, 9 U.C.R. 242.

(*j*) Ibid.

explains what heirs are meant in the premises, which, without that explanation, would mean heirs general, and A. takes an estate tail. But, if a grant be made to A. and the heirs of his body, *habendum* to A. and his heirs, A. will take a fee-tail with a fee-simple expectant thereon, for there is no inconsistency or repugnancy, and an estate-tail does not merge in a fee-simple (*k*). And a grant to A. for life, *habendum* to A. and his heirs, gives A. a fee-simple, for there is no inconsistency in a grantee's taking two estates by the same deed (*l*).

And so in every case where general words are used in the premises, and the deed then descends to special words in the *habendum*, if the special words agree with the general words they will govern (*m*). Where the estate in the premises is express, it may not be detracted from in the *habendum*, but may be added to or enlarged. So, if the estate in the premises is, by implication only, an estate larger than that expressed in the *habendum*, the latter may *lessen* it; if smaller, either expressly or by implication, the *habendum* may *enlarge it*; if indefinite, *e.g.*, as to heirs, the *habendum* may *explain* or *qualify* it by shewing what heirs.

So, also, if a grant be made to A. and B., *habendum* to A. for life, remainder to B. for life, the *habendum* explains how A. and B. are to take, and A. will take a life estate, followed by a life estate to B. in remainder (*n*).

The *tenendum* "and to hold," is now of very little use, and is only kept in by custom. It was sometimes formerly used to signify the tenure by which the estate granted was to be holden, viz., *tenendum per servitium militare, in burgagio, in libero socagio, etc.* But, all these being now reduced to free and common socage, the tenure is never specified. Before the Statute of *Quia emptores*, 18 Edw. I., it was also sometimes used to denote the lord of whom the land should be holden; but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* has been also antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be holden *de capitalibus dominis feodi*; but as this expressed nothing more than the statute had already provided for, it gradually grew out of use.

(*k*) Ibid.
(*l*) Ibid.
(*m*) Ibid.
(*n*) See also *Doe d. Timmis* v. *Steele*, 4 Q.B. 663 for a curious case.

17. *Stipulations.*

Next follow the terms of stipulation, if any, upon which the grant is made; the first of which is the *reddendum* or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted, as "rendering therefor yearly the sum of ten shillings, or a pepper corn, or two days' ploughing, or the like." Under the pure feudal system, this render, *reditus*, return or rent, consisted in chivalry principally of military services; in villenage of the most slavish offices; and in socage, it usually consisted of money, though it may still consist of services, or of any other certain profit. To make a *reddendum* good, if it be of anything newly created by the deed, the reservation must be to the grantors, or some or one of them, and not to any stranger to the deed.

Another of the terms upon which a grant may be made is a *condition*; which is a clause of contingency, on the happening of which the estate granted may be defeated; as, "Provided always, that if the mortgagor shall pay the mortgagee £500 upon such a day, the whole estate granted shall determine;" and the like.

18. *Covenants.*

Next follow the *Covenants*, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something for, or to, the other. Thus, the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment; or the like. The grantee may covenant to pay his rent, or keep the premises in repair, etc. The covenants ordinarily used in the short form deed are limited to the acts and omissions of the grantor only and those claiming under him; while those which are set out in the short form of mortgage are unlimited and extend to the acts and omissions of all persons.

19. *Arrangement of Parts.*

Lastly, it may be observed that the matter written should be *legally* or *orderly* set forth; that is, there must be words sufficient to specify the agreement and bind the parties; which sufficiency must be left to the courts of law to

determine. For it is not absolutely necessary in law to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity. It is very inadvisable, therefore, to depart either from the usual order, or from the well *settled precedents*. The usual order is important in enabling any particular part of a conveyance to be found at once without reading through a long deed, and is especially so in the hurry of *nisi prius* on the trial of a cause. And the importance of adhering to precedents, particularly as regards covenants, is manifest, for otherwise, on difficulty arising, the parties are all at sea without probably the aid of decisions to guide them, whereas the usual forms have by a series of decisions during centuries received judicial construction.

Punctuation in strictness is not observed in a legal instrument, nor is it recognized; and the settled forms of conveyances were, formerly at least, so drawn as to be independent of punctuation in their construction; for no one would like to have his title dependent on a comma (*o*).

20. *Alteration of Deeds.*

We are next to consider how a deed may be *avoided* or rendered of no effect. And from what has been laid down, it will follow, that, if a deed wants any of the essential requisites before mentioned, it is a void deed *ab initio*.

It may also be avoided by matter *ex post facto*, as by rasure, interlineation, or other alteration of a material part. The early rule was that if a deed were altered in a material part by any person, even a stranger, except the maker of the deed, or in an immaterial part, even to the advantage of the other party, by the owner of the deed, the deed became void. But if an alteration were made by the party bound by the deed in any part (*q*), or by a stranger in an immaterial part, the deed remained good (*r*). The principle upon which this

(*o*) *Doe d. Willis* v. *Martin*, 4 T.R. 39 at p. 65; *Gascoigne* v. *Barker*, 3 Atk. 9; *Sandford* v. *Raikes*, 1 Mer. 651.

(*q*) An alteration made by the verbal direction of a party bound by a deed does not bind him; *Martin* v. *Hanning*, 26 U.C.R. 80.

(*r*) Shepp. Touch. 68, 69.

was based was, "that a party who has the custody of the instrument made for his benefit is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part" (*s*). The rule has been much varied by modern cases. An alteration of a note, which by interpretation was payable on demand, was made (though by whom was not shewn) by adding the words "on demand," the legal effect not thereby being changed, and it was held that the validity of the instrument was not affected (*t*). But a material alteration in a deed made by, or on behalf of, a party holding the deed, or against the interest of a party bound by the deed, will vitiate it (*u*). As a deed can only be materially altered after execution by fraud or wrong, and the law does not presume fraud, every alteration, or apparent alteration, made in a deed is presumed to have been made before execution, and the onus is cast upon the person asserting that it was made after execution, and therefore vitiates the deed, to prove it (*v*).

But this must be understood only of obligations in the deed that might be sued on. For if an estate be granted by a deed, it will remain vested in the grantee, though an alteration in the deed may destroy the future obligations created thereby (*w*).

And so, when it is said that, by breaking off or defacing the seal, and by delivering it up to be cancelled, a deed may be avoided, the absence of proper appreciation of the two latter instances of avoiding a *deed* has led to what may be sometimes a source of great difficulty—the supposition that the destruction of a *conveyance*, with the assent of the grantee, will have the effect of a *reconveyance* to the grantor in such conveyance, and revest in him the estate which had previously passed by its execution and delivery. This would be

(*s*) *Davidson* v. *Cooper*, 13 M. & W. at p. 352.

(*t*) *Aldous* v. *Cornwell*, L.R. 3 Q.B. 573.

(*u*) *Crookewit* v. *Fletcher*, 1 H. & N. 893; *Ellesmere Brewery Co.* v. *Cooper*, L.R. (1896) 1 Q.B. 75; *Graystock* v. *Barnhart*, 26 App. R. 545; *Suffell* v. *Bank of England*, 9 Q.B.D. 555.

(*v*) Cru. Dig. Tit. 32, c. 27, s. 14; *Graystock* v. *Barnhart*, 26 App. R. 545; *Northwood* v. *Keating*, 18 Gr. 643.

(*w*) *Doe d. Lewis* v. *Bingham*, 4 B. & Ald. 672; *West* v. *Steward*, 14 M. & W. 47; *Suffell* v. *Bank of England*, 9 Q.B.D. at p. 568.

a singular way of defeating the Statute of Frauds. What is meant by the foregoing instances is, that the alteration, tearing off the seal, or cancelling the deed, will avoid the deed so far as regards executory *contracts or obligations* arising out of it. Such a covenant in an indenture, or a bond, could not be enforced after destruction with intent by the covenantee, or obligee, to cancel the obligation; but an estate once passed by the instrument will not revest, however the deed may be destroyed (*x*).

The question becomes of great importance in dealing with leases. Thus, where the plaintiff had by deed demised to the defendant for a term not expired, reserving rent, and he sued in debt on the demise (not on the *covenant*), for the rent, averring that the defendant had entered; the plea was that after the making of the deed and before suit, the deed was cancelled by mutual consent of both parties; the court considered that the estate which had passed by the lease was not divested, that the plaintiff was still reversioner and the defendant still lessee, and consequently liable for the rent reserved by reason of the *privity of estate* between the parties. "When a man demises land for a term of years, reserving to himself a rent, the effect of it is to create two estates, viz., the estate of the lessee, and the reversion of the lessor, and the rent is incident to the reversion. When the day of payment arrives, the rent still remains annexed to the reversion. Here the question is whether the simply cancelling a lease destroys the lessor's right of action for the recovery of the rent. I am of opinion that it does not, because the cancelling a lease does not destroy the estates already vested, or their incidents" (*y*). But an action on the covenant could not have been maintained.

Under our present Landlord and Tenant Act (*z*) the relationship of landlord and tenant does not depend upon tenure, and, as has been already mentioned, it may be a question whether a tenant now takes an estate or term of years, and upon that will depend the question whether the destruction of a lease will now be attended with the same consequences as formerly.

The fact of cancellation, though not of itself sufficient to amount to surrender, is still a strong fact from which, if coupled with others, surrender may be *implied in law* (*a*).

(*x*) *Fraser* v. *Fralick*, 21 U.C.R. 343.

(*y*) *Lord Ward* v. *Lumley*, 5 H. & N. 87, per Martin, B., at p. 93. See also *Doe dem. Burr* v. *Denison*, 8 U.C.R. 185; *Laur* v. *White*, 18 C.P. 99.

(*z*) R.S.O. c. 170, s. 13.

(*a*) *Doe dem. Burr* v. *Denison*, 8 U.C.R. 185.

21. *Disclaimer.*

A deed may be avoided by the *disagreement* of such, whose concurrence is necessary, in order for the deed to stand; as an infant, or person under duress, when those disabilities are removed; and the like. Where a person is named as grantee or devisee, the grant or devise being for his benefit, the law, till the contrary appears, assumes that he assents (*b*); an assumption of the law certainly not unreasonable. But the law will not force an estate upon a man against his will (*c*). And so, either the grantee in a deed or the devisee under a will may refuse to take the estate, and may renounce or disclaim. It is essential, if he does not desire to take the estate, that he should execute a deed of disclaimer, before doing any act from which it could be inferred that he had previously accepted the benefit of the gift. And this is especially to be observed with respect to trustees and executors, who, if they *convey* the estate, instead of *disclaiming*, will, by the act of conveying, shew that they must first have accepted the trusts, from which they cannot be relieved by a mere conveyance. If they desire to refuse the trusts, they should renounce and disclaim, and thus by their disagreement the deed will not take effect. And so, also, of a grantee or devisee for his own benefit.

22. *Cancellation.*

A deed may be avoided by the judgment or decree of a court of judicature. This was anciently the province of the court of star-chamber, then of the chancery, but now of any court having equitable jurisdiction; when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute forgery. Not but that such a deed may be often shewn to be void at law, but except in case of forgery, the deed would be good in the hands of a purchaser under it for good consideration without notice (*d*). The danger, also, of an innocent purchaser becoming protected by the registry laws is so great that the advantage is incalculable of resorting to the court for a judgment that the deed be delivered up to be cancelled (*e*).

(*b*) *Re Dunham*, 29 Gr. 258; *Re Defoe*, 2 Ont. R. 623.

(*c*) Per Abbott, C.J., *Townson* v. *Tickell*, 3 B. & Ald. 31, at p. 36.

(*d*) *Matthewson* v. *Henderson*, 15 C.P. 99; *Scholefield* v. *Templer*, 4 DeG. & J. 429; *Stump* v. *Gaby*, 2 D.M. & G. at p. 630.

(*e*) *Harkin* v. *Rabidon*, 7 Gr. 243.

CHAPTER XXI.

OF THE DIFFERENT KINDS OF CONVEYANCES.

(1). *Introduction.*
(2). *Conveyances, Primary and Secondary.*
(3). *Primary Conveyances—Feoffment.*
(4). *Gift.*
(5). *Grant.*
(6). *Lease.*
(7). *Exchange.*
(8). *Partition.*
(9). *Secondary Conveyances—Release.*
(10). *Confirmation.*
(11). *Surrender.*
(12). *Assignment—Liability on Covenants.*
(13). *Defeasance.*

1. *Introduction.*

And, having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents. And herein we shall only examine the particulars of those which, from long practice and experience of their efficacy, are generally used in the alienation of *real* estate; for it would be tedious, nay infinite, to descant upon all the several instruments made use of in *personal* concerns, but which fall under our general definition of a deed; that is, a writing sealed and delivered. The former, being principally such as serve to *convey* the property of lands and tenements from man to man, and commonly denominated *conveyances*; which are either conveyances at *common law*, or such as receive their force and efficacy by virtue of the *Statute of Uses*.

It may be premised that the transfer of equitable interests is not governed by the strict rules hereafter referred to applicable to conveyances of legal estates; for strictly speaking when a man's equitable interest is transferred, it is not the case of

conveyance of *land*, but of the *trust* in the land on which the trustee holds the same. Moreover, there never could have been livery of seisin, and the Statute of Uses cannot apply; any instrument in writing within the Statute of Frauds and shewing the intention suffices (*f*).

2. *Conveyances, Primary and Secondary.*

Of conveyances by the common law, not dependent for their effect on the Statute of Uses, or any other statute, some may be called *original* or *primary* conveyances; which are those by means whereof the benefit or estate is created or first arises. Others are *derivative* or *secondary*; whereby the benefit, or estate originally created is enlarged, restrained, transferred or extinguished.

Original conveyances operating at common law without the aid of the Statute of Uses, are the following:—1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition. *Derivative* are, 7. Release; 8. Confirmation; 9. Surrender; 10. Assignment; 11. Defeasance.

3. *Primary Conveyances—Feoffment.*

A feoffment, *feoffamentum*, is a substantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud; and therefore feoffment is properly *donatio feudi*. It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that so gives, or enfeoffs, is called a *feoffor* and the person enfeoffed is denominated the *feoffee*.

A feoffment was formerly an assurance of greater power than any other. By it, contingent remainders depending on particular estates could be barred or destroyed. If made by tenant in tail in possession, for a fee simple absolute, it worked a *discontinuance*, which tolled or took away the right of entry of the issue in tail, as also of the remainderman or reversioner, and left them but a right of action, to be enforced by the peculiar writ of *formedon*. When made by a person in actual possession, though wrongfully so, yet if not a mere temporary trespasser, it had the effect of passing by wrong the estate of which the feoffment was made; thus, on a feoffment in fee by a disseisor or mere tenant at will, the feoffee

(*f*) Hayes' Convey., vol. 1, p. 96.

took a fee *by wrong*, the true owner of the freehold was *disseised*, remainders and reversions, if any, were *divested* or *displaced*, so that each (strictly speaking) ceased to have any estate, which was turned to a mere right to be enforced on proper occasions. The consequence of any such powerful tortious conveyance (other than by tenant in tail) was immediate forfeiture of the feoffor's estate. A feoffment has now no longer a tortious operation, and so now it will work no forfeiture; and unless made by deed it is void (*g*).

As the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the feoffee's estate was confined to his person, and subsisted only for his life; unless the feoffor, by express provision in the creation and constitution of the estate, hath given it a longer continuance. These express provisions were generally made; for this was for ages the only conveyance, whereby our ancestors were wont to create an estate in fee-simple, by giving land to the feoffee, to hold to him and his heirs forever; though it serves equally well to convey any other estate of freehold.

But by the mere words of the deed the feoffment is by no means perfected; there remains a very material ceremony to be performed, called *livery of seisin*; without which the feoffee has but a mere estate at will. This livery of seisin is no other than the pure feudal investiture, or delivery of corporal possession of the land or tenement, which was held absolutely necessary to complete the donation.

Investitures, in their original rise, were probably intended to demonstrate in conquered countries the actual possession of the *lord*, and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of the by-standers, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate, and that such as claimed title by other means might know against whom to bring their actions.

In all well-governed nations some notoriety of this kind has been ever held requisite, in order to acquire and ascertain

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

the property of lands. In the Roman law *plenum dominium* was not said to subsist, unless where a man had both the *right* and the *corporal possession*; which possession could not be acquired without both an actual intention to possess, and an actual seisin, or entry into the premises, or part of them in the name of the whole. Even in descents of lands by our law, which are cast on the heir by act of the law itself, the heir had not till 4 Wm. IV. c. 1, *plenum dominium*, or full and complete ownership, till he had made an actual corporal entry into the lands; for if he died before *entry* made, *his* heir formerly was not entitled to take possession, but the heir of the person who was last actually seised. It was formerly not therefore only a mere right to enter, but the actual entry that made a man complete owner; so as to transmit the inheritance to his own heirs—*non jus, sed seisina, facit stipitem.*

Yet, the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. Among the Jews we find the evidence of a purchase thus defined in the book of Ruth (*h*): "Now this was the manner in former time in Israel, concerning redeeming and concerning changing, for to confirm all things; a man plucked off his shoe, and gave it to his neighbour; and this was a testimony in Israel." Among the ancient Goths and Swedes, contracts for the sale of lands were made in the presence of witnesses, who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession; and a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses. With our Saxon ancestors, the delivery of a turf was a necessary solemnity to establish the conveyance of lands.

Conveyances in writing were the last and most refined improvement. The mere delivery of possession either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities, introduced by the advancement of commerce, required means to be devised of

(*h*) Ch. iv., v. 7.

charging and encumbering estates, and of making them liable to a multitude of conditions and minute designations for the purposes of raising money, without an absolute sale of the land; and sometimes the like proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views. None of which could be effected by a mere simple corporal transfer of the soil from one man to another, which was principally calculated for conveying an absolute unlimited dominion. Written deeds were therefore introduced, in order to specify and perpetuate the peculiar purposes of the party who conveyed; yet still, for a very long series of years, they were never made use of but in company with the more ancient and notorious method of transfer by delivery of corporal possession.

Livery of seisin, by the common law, was necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made; for they are not the object of the senses; and in leases for years, or other chattel interests, it is not necessary. In leases for years, indeed, an actual *entry* is necessary to vest the right in the lessee; for the bare lease gives him only a right to enter, which is called his interest in the term, or *interesse termini*; and when he enters in pursuance of that right, he is then and not before in possession of his term, and complete tenant for years. This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin from the grantor could have done; which it would have been improper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence *in futuro*, because they could not (at the common law) be made but by livery of seisin; which livery, being an actual manual tradition of the land, must take effect *in præsenti*, or not at all.

Livery of seisin is either in *deed*, or in *law*. Livery in *deed* is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney (for this may as effectually be done by deputy or attorney, as by the principals themselves in person), come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be

made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect:—"I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But, if it be of a house, the feoffor must take the ring or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others. If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all; but, if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. And thus much for livery in deed.

Livery in *law* is where the same is not made *on* the land, but *in sight of it* only; the feoffor saying to the feoffee, "I give you yonder land, enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise; unless he dares not enter, through fear of his life or bodily harm; and then before 4 Wm. IV. c. 1 (*i*), his continual claim, made yearly, in due form of law, as near as possible to the lands, would suffice without an entry to preserve his right from being barred by time. This livery in law cannot, however, be given or received by attorney, but only by the parties themselves.

These remarks on feoffment with livery of seisin are retained, because, although it is neither an ordinary nor convenient form of conveyance, at the present time, a conveyance which fails to take effect in some other way might be supported as a feoffment with livery if the facts are favourable.

4. *Gift.*

The conveyance by *gift, donatio,* is properly applied to the creation of an estate-tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. The strictly proper operative words of conveyance in this case are *do* or *dedi*. Of the nature of an estate-tail and its

(*i*) Now R.S.O. c. 133, s. 9.

incidents, we have before spoken (*j*). The word "give," it is said (*k*), implies a warranty of title on a gift in tail, or on a lease for life, rendering rent.

5. *Grant.*

Grants, concessiones. The regular method by the common law of transferring the property of *incorporeal* hereditaments, or such things whereof no livery can be had. For which reason all corporeal hereditaments, as lands and houses, are said to lie *in livery*; and in others, as advowsons, commons, rents, reversions, remainders, &c., to lie *in grant*. These, therefore, pass merely by the delivery of the deed. And in seigniories, or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite) were held to be of equal notoriety with, and, therefore equivalent to, a feoffment and livery of lands in immediate possession. It, therefore, differs but little from a feoffment, except in its subject matter; for the operative word is *grant*.

By statute (*l*) "All corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery." The result of this is that this mode of conveyance supersedes the mode of conveyance formerly most generally adopted to pass fee simple estates; viz., by way of bargain and sale, which has disadvantages not attendant on a conveyance by way of grant; so also has that by lease and release, as will be shewn in treating of those modes of conveyance.

The word *grant*, as an operative word, had always a most extensive signification; it might, as the circumstances of the case should require, operate as a feoffment, surrender, lease, release, bargain and sale, covenant to stand seised, or other assurance; and *vice versa*. But for the purposes of pleading, it is proper to determine in what way the instrument really does operate, and to set it out accordingly; thus, if a lessee should convey the residue of his term to his landlord by use of the words, "release, assign, bargain, sell, give," etc., the instrument should not be pleaded as operating in either of

(*j*) Ante pp. 97, *et seq.* See also Chap. XXVI. *post* as to conveyances of estates tail.

(*k*) Davidson Concise Prec. 26. See also Bellenden Kerr's letter, p. 24 of Appx. to Leith R. P. Statutes.

(*l*) R.S.O. c. 119, s. 2.

those modes of conveyance, but as a surrender; for as it can so operate (without use of the word surrender), such is its proper legal effect. And so in every case, in correct pleading, the instrument should be pleaded in the character in which it really operates in law, and not in the general words used in it. In some cases it must be so pleaded, as where the grantee may elect between two modes of operation; for though "where a deed may operate in two ways, he to whom it is made may elect in which way he will have it operate, the Court ought not to be left to make the election" (*m*).

There was, however, an objection to the use of the word "grant," from a supposition that it implied a covenant or warranty for title, and certainly in the case of a lease it did imply, as the word "demise" now implies, a covenant for quiet enjoyment, unless the implication be destroyed by an express covenant on the subject. But by statute it is declared that the words shall imply neither a warranty nor a covenant (*n*).

Conveyances of remainders or reversions dependent on a life or other freehold estate, were always properly made by way of grant, as being in their nature incorporeal, whereof livery could not be made, for the seisin of the freehold was in the immediate freeholder. Such interests are not touched by the statute, and grants of them operate under the common law.

A grant of the immediate freehold will operate under the statute as at common law, that is, it will not *require* the aid of the Statute of Uses to give it effect. Thus, if A., tenant for life, or seised in fee, grant to B. for a consideration, the conveyance will operate as a feoffment or a common law conveyance. And if the conveyance had been to B., to the use of C., the first and only use raised would be in B., which (as presently explained in speaking of the Statute of Uses) would be executed by the statute, and C. thus takes the legal estate.

In cases of informal conveyancing, a question of some difficulty might arise as to whether the conveyance should operate as a common law conveyance, or under the Statute of Uses. Thus if A. seised in fee should, using the words "grant, bargain and sell," for a pecuniary consideration expressed to be paid, convey to B. and his heirs to the use of C. and his heirs, and no intention be apparent as to the party

(*m*) *Roe* v. *Pranmar*, 1 Sm. L.C. 492.

(*n*) R.S.O. c. 119, s. 9.

in whom the legal estate is to be vested, or who paid the money, the conveyance would, it seems, operate as at common law (*o*), and the fee, therefore, vest in C.; unless, indeed, an election were made that it should operate as a bargain and sale, for it would seem that in such case an election might be made (*p*).

But if it were manifest on the face of the instrument that B. should take the legal estate, and C. the equitable estate only; then as it can operate as a bargain and sale, it would appear that it will be so construed, to carry out the intention of the parties (*q*). In other words, the deed must be construed, with reference to all its parts, so as to carry out the intention of the parties as appearing from the whole deed, and a choice of operative words, if there are several, will be made to harmonize with the general intention (*qq*). The same questions might arise where the word "grant" or the words "bargain and sale" alone are used as the words of conveyance, which, as before mentioned, may operate respectively in various characters. In any case of drafting wherein a doubt might possibly arise, the conveyancer might avoid it by declaring in the conveyance how it should operate, as for instance, by adding to the operative words, "by way of conveyance as at common law," or, as the case may require "by way of bargain and sale creating a use."

A singular mistake was made in the original Act of 9 V. 6, as to short forms of conveyance, in that only the word grant was used as the operative word, whereas the immediate freehold did not then, nor till some time afterwards, lie in grant, and thus many conveyances drawn under the Act were open to the difficult questions before alluded to as to the placing of the legal estate (*r*). The use of the word "grant" in the short form might, however, have been interpreted as an authority by implication to use that word for the conveyance of the immediate freehold.

(*o*) *Haigh* v. *Jaggar*, 16 M. & W. 525.

(*p*) *Heyward's case*, 2 Rep. 35 a; *Fox's case*, 8 Rep. 93 b.; *Seaton* v. *Lunney*, 27 Gr. 176, per Proudfoot, V.C. See further *Ormes' case*, L.R. 8 C.P. 281.

(*q*) *Seaton* v. *Lunney* and cases, supra; *Mitchell* v. *Smellie*, 20 C.P. 389.

(*qq*) See and consider *Hartley* v. *Maddocks*, L.R. (1899) 2 Ch. 199.

(*r*) Leith Rl. Prop. Stats. 101.

6. *Lease.*

A *lease* is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompence), made for life, for years, or at will, but always, at common law, for a *less* time than the lessor hath in the premises; for if made for the *whole* interest, it was more properly an assignment than a lease (*s*). But since the passing of the enactment, referred to in the note (*t*), a "reversion in the lessor shall not be necessary in order to create the relation of landlord and tenant;" and a lease may now be made by agreement where the whole interest of the lessor passes to the lessee. The usual words of operation in a lease are, "demise, grant, and to farm let." *Farm* or *feorme*, is an old Saxon word, signifying provisions; and it came to be used instead of rent or render, because anciently, the greater part of rents were reserved in provisions; in corn, in poultry, and the like; till the use of money became more frequent. So, that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme*; though at present, by a gradual departure from the original sense, the word *farm* is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments.

Leases, like other conveyances, were good at common law by parol. By section 4 of the Statute of Frauds, an *agreement* for a lease, or for any interest in lands, to be binding on the party to be charged, must be signed by him or his agent. By section 1, all leases and other interests in lands *made and created* by parol, and not put into writing by the parties making or creating the same, or their agents lawfully authorized *in writing*, are void, and to have the effect of estates at will only; except (by s. 2) leases not exceeding three years from the making, whereon is reserved as rent two-thirds of the full improved value. It will be observed that this exception to the operation of s. 1 does not apply to s. 4; so that there is this singularity; that a lease not exceeding

(*s*) Thus A., tenant for 5 years, sub-let to B. for 7 years, reserving rent. Held, that this was an assignment as regards the superior landlord, who might therefore treat B. as his tenant; though as between A. and B. themselves, the contract to pay rent was valid, but A. having no reversion could not distrain: *Selby* v. *Robinson*, 15 C.P. 390.

(*t*) R.S.O. c. 170, s. 3.

three years at such a rent, if *actually made*, is good by parol, whilst a parol *agreement* for such a lease is void as against the party making it. This is the reverse of the policy of the legislature, which was to place the actual creation of an interest on a higher footing than an *agreement* for its creation; thus, in the latter case, it will be seen they required only verbal authority to the agent, but in the former a written one.

If the lessee execute a lease with covenants on his part, and the lessor do not execute, so that the lessee does not get, and has not enjoyed, the benefit stipulated for—that is, a lease for a term certain—then, though he have entered, he will not be bound by the lease as to the rent and matters relating to the land (*u*); unless there is an equitable obligation, enforceable against the lessor, to give a proper lease (*v*); but if by payment of rent or otherwise a tenancy from year to year be created, it would seem that the lessee would be liable under his agreements in the lease so far as they could be applied to a tenancy from year to year.

The use of the word *demise* as an operative word will imply a general covenant for quiet enjoyment against all claiming by lawful title; and a like covenant will be implied on a mere parol lease (*w*); but the implication of the covenant will endure only during the continuance of the original estate of the lessor; thus, where tenant for life demised for years and died, and before expiry of the lease, the tenant was evicted by the remainder-man, it was held that no action lay against the executors of the life tenant on the implied covenant (*x*). It would seem also that the word "demise" raises an implied covenant to give possession (*y*); and that on an agreement to let, the party so agreeing impliedly promises that he has a good title (*z*). If, as is most usual, there be an express covenant on the subject, no covenant will arise by implication, even though the express

(*u*) *Swatman* v. *Ambler*, 8 Ex. 72; *Toler* v. *Slater*, L.R. 3 Q.B. 42; *Ecclesiastical Commissioners* v. *Merral*, L.R. 4 Ex. 162.

(*v*) *Manchester Brewery Co.* v. *Coombs*, 16 Times L.R. 299.

(*w*) *Bandy* v. *Cartwright*, 8 Ex. 913.

(*x*) *Adams* v. *Gibney*, 6 Bing. 656. See also *Penfold* v. *Abbott*, 32 L.J.N.S.Q.B. 67. It will be observed that in both these cases the lessee had notice of the nature of the estate of his lessor and its consequent liability to determine pending the lease.

(*y*) *Saunders* v. *Roe*, 17 C.P. 344.

(*z*) *Stranks* v. *St. John*, L.R. 2 C.P. 376.

covenant be limited to the acts of the lessor and those claiming under him, and is thus less extensive than the covenant the law would imply. In such cases the maxim "*expressum facit cessare tacitum*" applies.

We have before spoken of rents, of their nature, and of remedies therefor, and proceedings of the landlord. The subject of covenants, and the rights of the assignees of the lessor and lessee respectively, are reserved for future consideration.

7. *Exchange.*

An *exchange* is a mutual grant of equal interests, the one in consideration of the other. The word "exchange" is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocution. Separate grants by the parties, the one to the other, with covenants for title, had not the same effect (*a*). The estates exchanged must be equal in quantity; not of *value*, for that is immaterial, but of *interest*; as fee-simple for fee-simple, a lease for twenty years for a lease for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery. If, after an exchange of lands or other hereditaments, either party were evicted of those which were taken by him in exchange, through defect of the other's title, he, by the old law, might return back to the possession of his own, by virtue of the implied warranty contained in all exchanges; but not if he had aliened the land taken in exchange (*b*). But now by statute (*c*) the word "exchange" shall create no warranty, or right of re-entry, or covenant by implication; and every exchange must be by deed.

8. *Partition.*

A *partition* is when two or more joint-tenants, or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part. Here, as in some instances, there is a unity of interest, and in all, a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates, which they are to take and enjoy separately. By the common law, coparceners, being compellable to make partition, might have made it by

(*a*) *Bartram* v. *Whichcote*, 6 Sim. at p. 92.
(*b*) Ibid.
(*c*) R.S.O. c. 119, s. 9.

parol only; but joint-tenants and tenants in common must have done it by deed; and in both cases the conveyance must have been perfected by livery of seisin. The Statute of Frauds, 29 Car. II. c. 3, and our own statute (*d*), have now abolished this distinction, and made a deed in all cases necessary.

These are the several species of *primary* or *original* conveyances. Those which remain are of the *secondary* or *derivative* sort which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance.

9. *Secondary Conveyances—Release.*

Releases are a discharge or conveyance of a man's right in lands or tenements to another that hath some former estate in possession. The words generally used therein are "remise, release, and for ever quit-claim."

And these releases may enure, in the following ways: 1. By way of *enlarging an estate*; as if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee. But, in this case, the relessee must be in *possession* of some *estate*, for the release to work upon; for if there be lessee for years, and, before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the relessee, for under a lease operating only at common law, the lessee, till entry, has no complete estate, but a mere *interesse termini*. But a *virtual* possession or possession in law, when the estate is vested and complete, will suffice for a release to operate on; as where the owner in fee for a money consideration should bargain and sell to the lessee for a term; here the lessee, as hereafter explained, will, by virtue of the Statute of Uses, be deemed in possession, at least sufficiently for the operation of a release. Or, perhaps, for the purposes of the question now under consideration, it may be said, that in such cases the estate granted is by force of the statute no longer incomplete as on a lease operating only at common law, for want of entry; it is, in fact, by such a lease, and such a release, that the ordinary mode of convey-

(*d*) R.S.O. c. 119, s. 7.

ance by lease and release takes place without entry or livery of seisin. So also a *virtual* possession will suffice, if the relessee has an estate actually vested in him at the time of the release, which would be capable of enlargement by such release if he had the *actual* possession; thus, if a tenant for twenty years makes a lease to another for five years, who enters, a release to the first lessee by his lessor, the owner in fee, is good, for the possession of his lessee was his possession. So if a man makes a lease for years, remainder for years, and the first lessee enters, a release by the lessor to the person in remainder for years is good, to enlarge his estate (*e*). But it has been considered that there can be no release to one in possession as a tenant at sufferance, for though in possession, he has no *estate*. After some fluctuation of opinion (*f*) it has been held that a conveyance in which the only operative words are "remise, release, and quit-claim," is sufficient to pass the fee, and that a pecuniary condition will make it operate as a bargain and sale (*g*).

2. By way of *passing an estate*, or *mitter l'estate*; as when one of two joint-owners releases all his right to the other, that passeth the fee-simple of the whole. And in both cases there must be a privity of estate between the relessor and relessee; that is, their estates must be so related to each other, as to make but one and the same estate in law, as in the cases put above. But if A. lease to B. for life, and B. sublet for years, here a release to the sublessee from A. would be void, as there is no privity between them.

3. By way of *passing a right*, or *mitter le droit*; as if a man be disseised, and releaseth to his disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful.

4. By way of *extinguishment*; as, if my tenant for life makes a lease to A. for life, remainder to B. and his heirs, and I release to A.; this extinguishes my right to the reversion, and shall enure to the advantage of B.'s remainder as well of A's particular estate.

(*e*) Co. Litt. 270a. n. 3, by Hargrave.

(*f*) *Doe d. Connor* v. *Connor*, 6 U.C.R. 298; *Doe d. Prince* v. *Girty*, 9 U.C.R. 46; *Nicholson* v. *Dillabough*, 21 U.C.R. 591; *Cameron* v. *Gun*, 25 U.C.R. 77; *Acre* v. *Livingstone*, 26 U.C.R. 282, Hagarty, J. *diss.*; *Collver* v. *Shaw*, 19 Gr. 599.

(*g*) *Pearson* v. *Mulholland*, 17 Ont. R. 502.

5. By way of *entry* and *feoffment*; as, if there be two joint disseisors and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee.

10. *Confirmation.*

A *confirmation* is of a nature nearly allied to a release. Sir Edward Coke defines it to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased; and the words of making it are these, "ratify, approve, and confirm." An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term; here the lease for years is voidable by him in reversion; yet if he hath confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure. The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release which operates by way of enlargement.

A confirmation must be by deed, but under certain circumstances a confirmation may be *implied* by law.

11. *Surrender.*

A *surrender*, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender is the yielding up of a less estate into a greater. It is defined as a yielding up of an estate for life or years to him that hath the immediate reversion or remainder wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words, "surrenders, and yields up." The surrenderor must be in possession; and the surrenderee must have a higher estate, in which the estate surrendered may merge; therefore, tenant for life cannot surrender to him in remainder for years.

At common law a surrender was good by parol, but by section 3 of the Statute of Frauds all surrenders must be by deed, or note in writing, signed by the party surrendering, or his agent thereunto authorized in writing; or by act or

operation of law. There is, as to surrenders, no exception in favour of leases created for less than three years, with a two-thirds rent reserved, which by section 2 are good by parol; a surrender of a parol lease must therefore be in writing or by act of law. By statute (*h*) "an assignment of a chattel interest in land, and a surrender in writing of land, not being an interest which might by law have been *created* without writing shall be void at law, unless made by deed." Thus a surrender of a parol lease, valid by parol as being excepted from the first section of the Statute of Frauds, will suffice, if in writing, as required by that statute, or if by operation of law, and need not be by deed; but if the interest surrendered were such as could not have been created without writing, as for instance for four years, then a surrender in writing must be by deed.

A surrender by act of law is expressly excepted out of the Statute of Frauds, and is not within the operation of the Revised Statute, which speaks only of surrenders *in writing* (*i*). A surrender in law, or implied surrender, as distinguished from a surrender in fact, may take place by the acts of the parties. Thus, when a lessee for years accepts a lease from his lessor for any term of which any part was included in the old lease, the latter shall be deemed surrendered, for otherwise the new lease could not be valid; moreover, by accepting the new lease, the lessee admits the lessor had power to make it, which could not be unless the first lease were surrendered. And even though under the second lease, the lessee will take for a less number of years than under the first, this principle will apply; thus, if a lessee for thirty years accept a new lease for ten years, part of such thirty, the first lease is surrendered in law. So also, though such second lease is to commence three years after its execution, the first lease will cease instantly on the execution. And again, where there is a tenancy from year to year determinable on a quarter's notice, and the lessor licenses the tenant to leave in the middle of a quarter, and he leaves accordingly, and the lessor takes possession, this is a surrender in law; and the landlord could not recover any part of the current quarter's rent. But where the landlord by parol agrees that the tenant may leave, and the tenant leaves accordingly, but the landlord never takes possession or

(*h*) R.S.O. c. 119, s. 7.

(*i*) *Lewis* v. *Brooks*, 8 U.C.R. 576.

does anything equivalent to taking possession, there is no surrender, and the Statute of Frauds must govern, and the tenant pay rent accruing due subsequent to his leaving. But if the tenant should leave on such agreement and the landlord re-let to another, this is a taking of possession by the landlord and so equivalent to a surrender. The acts relied on as shewing the acceptance by the landlord of a surrender, and as effecting a surrender by operation of law, must be such as are not consistent with the continuance of the tenancy. So that acts done for the preservation of the premises merely by the landlord are not sufficient to evidence a surrender (*j*). In each case the facts themselves determine the question. The mere cancelling of the lease is not sufficient, though a circumstance from which, if coupled with others, a surrender may be implied (*k*). If a lease containing a personal covenant for payment of rent be surrendered, the surrenderor still remains liable to pay the rent which fell due before the surrender, unless under special circumstances or agreement (*l*).

The effect of a surrender is of course that the estate thereby surrendered is gone, but the rights of strangers are, however, preserved. Thus, if lessee for years surrender to the lessor, or acquire from him the reversion, having prior thereto granted a sublease, the rights of the sublessee are not prejudiced.

12. *Assignment—Liability on Covenants.*

An *assignment* is properly a transfer, or making over to another, of the right one has in *any* estate (*m*); but it is usually applied to estates for life or years, and to equitable estates. And it differs from a lease only in this; that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor; subject, however, to an exception as regards both the burden of covenants entered into by the assignor, and the benefit of covenants made to him, in case such covenants do not run with the land. The frequent occurrence of the necessity for applying the law on this subject, induces us to consider it at some length.

(*j*) *Ontario Industrial Loan Co.* v. *O'Dea*, 22 App. R. 349.
(*k*) *Doe d. Burr* v. *Denison*, 8 U.C.R. 185.
(*l*) *Bradfield* v. *Hopkins*, 16 C.P. 298.
(*m*) *Watt* v. *Fexder*, 12 C.P. 254.

There are, apart from express covenants by the parties, *covenants by implication* of law; thus, a covenant would be implied after entry, from the words "yielding and paying," on the part of the lessee and his assigns to pay rent to the reversioner. So the word "demise" will, in the absence of an express covenant, raise an implied covenant against the landlord for quiet enjoyment by the lessee and his assigns against all having lawful title. But his liability ceases when he assigns his estate in reversion, which destroys the privity of estate between him and his lessee; so also it ceases with the determination of his estate in reversion, as where a tenant for life should demise for a term, and die before its expiration, no action will lie against his executors on eviction of the tenant after the death (*n*).

Covenants implied by law are subservient to and controlled by express covenants between the parties on the same subject matter; or perhaps it may be stated thus, that no covenant will arise by implication of law on any matter as to which the parties have themselves expressly provided. The maxim applies, "*expressum facit cessare tacitum.*"

Implied covenants, or, as they are sometimes termed, covenants in law, are binding between the parties by reason of the *privity of estate* between them, and are binding only as long as that privity of estate exists; thus, on the implied covenant to pay rent, to farm in a husband-like manner and use the premises in a tenant-like manner, which are covenants the law will imply, the lessee will continue liable only so long as his privity of estate continues, that is, so long as he is lessee; for, if he assign, the privity of estate between him and his landlord ceases, and he is no longer liable for future breaches of implied covenants. The privity of estate after assignment exists between the landlord and the assignee, and the assignee becomes liable in his turn, during its continuance, to the landlord on the implied covenants. On his assigning he ceases to be liable, and so on through all assignments; in other words, his implied covenants always run with the land; and the party who takes the estate, takes, during the time he holds such estate, the burden and the benefit of the implied covenants, which go with the land. It must be here remarked that the original lessee cannot, by destroying the privity of estate between him and his landlord, escape liability on an

(*n*) *Penfold* v. *Abbott*, 32 L.J.N.S.Q.B. 67, per Wightman, J., and cases there referred to.

implied covenant to pay rent, without his lessor's assent, which assent may be expressed or implied (*o*); receipt of rent from the assignee of the lessee by the lessor implies assent to the assignment. No assent of the lessor is requisite to any assignment by any *assignee*, unless the lease contains a covenant against assigning without leave binding on assigns, though such assignee should assign to a pauper.

From what has been said as to the cesser of the liability of the lessee with his estate on his assigning with the lessor's assent, it became important to the lessor to have express covenants under which the lessee should continue liable, notwithstanding and after assignment; and to these, as additional security, it is usual to add a clause of reëntry in the lessor and his assigns on breach; the benefit of which, being a condition subsequent, could not before the statute 32 Hen. VIII. c. 34, be taken advantage of by the *assignee* of the lessor.

Express covenants are sometimes termed covenants in deed, as distinguished from covenants in law or implied covenants, and the liability on them arises out of privity of *contract*, as distinguished from the liability on implied covenants arising out of privity of estate.

There is sometimes great difficulty in determining how far, and in what particulars, an assignee of the estate of a covenantor is bound by, or entitled to the benefit of, a covenant; and how far covenants run with the land and reversion.

The subject may be considered under the following heads: 1. Where assigns are within the covenants, though not named; 2. Where they are so only because they are named; 3. Where they are not so, though named.

In considering the above, perhaps no better or more concise statement can be given than that of the Real Property Commissioners in their third report (*p*). Their deduction from the authorities is as follows:—"1st. That in order to make a covenant run strictly with the land, so as to bind the assignee or give him the benefit without his being named, it must relate directly to the land, or to a thing in existence, parcel of the demise (*q*). 2nd. That where it respects a thing not in existence at the time, but which when it comes into

(*o*) *Thursby* v. *Plant*, 1 Wms. Saund. 277.

(*p*) 3rd Rep. p. 45.

(*q*) *Williams* v. *Earle*, L.R. 3 Q.B. at p. 749; and see *West* v. *Dobb*, L.R. 4 Q.B. 634.

existence will be annexed to the land, the covenant may be made to bind the assigns by naming them, but will not bind them unless named. 3rd. That when it respects a thing not annexed, nor to be annexed to the land, or a thing collateral or in its nature merely personal, the covenant will not run, that is, it will not bind the assignee nor pass to him, even though he is named."

It may be as well to illustrate the above by cases. Covenants to pay rent, to keep *existing* buildings and fences in repair, to observe particular modes of culture on the lessee's part, and the covenant for quiet enjoyment on the lessor's part, are all instances under the first class, in which the covenants run with the land, and the assigns would be within the covenant, though not named; so that the assigns of the lessor or lessee may be liable on and entitled to the benefit of the covenants. Thus, on the covenant to keep in repair the dwelling-house demised, the assignee of the lessee would be liable. And where there was a demise to A., his executors, administrators and assigns, with liberty to A. and his executors, administrators and assigns to build, and A., for himself, his heirs, executors and administrators (not mentioning assigns), covenanted that he, his, etc., and assigns would pay the rent, and that he, his executors or administrators would repair both existing buildings and any buildings that might be thereafter erected, it was held that the covenant was a conditional one, viz., to repair new buildings if they were erected; and as they were erected they became part of the demised premises, and the assignee was bound to repair them, though not named in the covenant to repair (*r*). Pollock, C. B., said, "In the present case we think it sufficient to say that as the covenant is not a covenant absolutely to do a new thing, but to do something conditionally, viz., if there are new buildings, to repair them; as when built they will be part of *the thing demised, and consequently the covenant extends to its support*, and as the covenant clearly binds the assignee to repair things *in esse* at the time of the lease, so does it also those *in posse*, and consequently the assignee is bound. There is only one covenant to repair; if the assignee is included as to part, why not as to all?"

So also on the covenant for quiet enjoyment the assignee of the lessor would be liable, in case he evicted the tenant without sufficient cause.

(*r*) *Minshull* v. *Oakes*, 2 H. & N. 793.

Covenants to erect buildings or to plant trees on the premises, are instances under the second class, in which assigns are bound if named, but not bound if not named. The covenant to erect a building must be distinguished from the covenant to repair buildings that may be erected on the premises demised. In the latter case the assigns are bound, as we have seen, though not named, but in the former case they must be named.

Covenants to repair or build a house *off* the premises demised are cases under the third class, in which the assigns will not be bound though named.

Where the assignee's title is equitable only, he is not bound by the covenants. Thus, where under an agreement to buy a lease the assignee went into possession, it was held that the landlord could not sue in equity on the covenants in the lease. The court has no power, at the instance of the landlord, to extend the rights of the contracting parties beyond the point at which they have themselves left them (*s*). Nor can a landlord compel an equitable mortgagee of a lease to take a legal assignment, though the mortgagee has entered under his mortgage and paid rent and otherwise acted as owner of the term (*t*). And a *cestui que trust* of a term occupying the demised premises and paying rent is not equitably liable on the covenants in the lease entered into by the trustee (*u*). In one case B. agreed to demise a hotel to the defendant, and took a covenant from him that he would at all times during the tenancy buy of B. or his successors in business all beer, etc., consumed on the premises. This agreement was signed by the tenant, but not by B. B. afterwards conveyed the premises and all his business, good-will, etc., to the plaintiff, who sued to restrain the tenant from buying beer elsewhere, and it was held that he was entitled to recover, because as between the tenant and B., and consequently B.'s assignee, specific performance would have been adjudged (*v*).

As regards both the burden and benefit to *assignees* on these express covenants running with the land, they depend respectively on the *privity of estate* existing between the parties; and they continue only so long as such privity

(*s*) *Cox* v. *Bishop*, 8 D.M. & G. 815; *Walters* v. *Northern Coal Co.*, 5 D.M. & G. 629.

(*t*) *Moore* v. *Greg*, 2 DeG. & Sm. 304.

(*u*) *Ramage* v. *Womack*, L.R. (1900) 1 Q.B. 116.

(*v*) *Manchester Brewery Co.* v. *Coombs*, 16 Times L.R. 299.

continues; though, of course, if a breach have happened during the existence of the privity of estate, its subsequent destruction will not destroy the liability for the breach.

As between lessor and lessee there is privity of estate by reason of the demise; and the covenants or agreements create privity of contract. Where the lessee has covenanted and assigned all his term, liability on his covenants will continue, notwithstanding the lessor should have accepted the assignee as his tenant (*w*). The privity of estate will thenceforth exist between the lessor and the assignee, and each will be liable to the other on the covenants in the lease, according to the principles above explained; thus, as regards rent, the lessee will continue liable on his covenant, notwithstanding the lessor may have accepted the assignee as tenant; and the assignee will also be liable for such rent as may fall due whilst (but only whilst) assignee, by reason of the privity of estate between him and the lessor (*x*). It is said that as regards covenants contained in the original lease, the privity of contract, or right of action thereon, by or against assignees, is transferred with the privity of estate; and that as regards the right of an assignee of the reversion to sue on the original covenants of the lessee (though *relating* to the land), or to take the benefit of any condition of re-entry, that the statute 32 Hen. VIII. c. 34, s. 4, gave him the benefit of such right of re-entry, and transferred to him the privity of contract on such covenants of the lessee (*y*). Where privity of contract and right of action is thus transferred, it lasts only during the privity of estate, or continuance of the assignee's interest, and again passes with it as regards future breaches.

If the lessee *sublet*, then as the sub-lessee has not the whole estate which the lessee had, there will be no privity of estate between the original lessor and sub-lessee, and as there is also no privity of contract, neither can sue the other. There is, however, an exception to this, as far as regards the right of action given by the Landlord and Tenant Act (*z*), on merger of the reversion of the sub-lessor, which was before alluded to. By reason of the privity of estate between the

(*w*) *Montgomery* v. *Spence*, 23 U.C.R. 39, lessee held liable on covenant to repair; *Baynton* v. *Morgan*, 22 Q.B.D. 74.

(*x*) *Magrath* v. *Todd*, 26 U.C.R. 87.

(*y*) Sugden on Vendors c. 15, s. 1, clauses 16, 17.

(*z*) R.S.O. c. 170, s. 9.

parties, and aided sometimes by the operation of the statute 32 Hen. VIII. c. 34, the assignee in deed or in law of assignees *in infinitum* of the lessor can sue and be sued by the assignee in deed or in law of assignees *in infinitum* of the lessee, on any covenant running with the lands and reversion (*a*).

13. *Defeasance.*

A *defeasance* is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law, and therefore only indulged; no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent (as rents, of which no seisin could be had till the time of payment); and so also annuities, conditions, warranties, and the like, were always liable to be recalled by defeasances made subsequent to the time of their creation.

(*a*) As to the law generally, see *Spencer's case*, 1 Smith's Lg. Ca. 52; Sugden on Vendors c. 15, s. 1.

CHAPTER XXII.

CONVEYANCES UNDER THE STATUTE OF USES.

(1). *Uses and Trusts before the Statute.*
(2). *The Statute of Uses.*
(3). *Springing Uses.*
(4). *Shifting Uses.*
(5). *Resulting Uses.*
(6). *Revocation of Uses.*
(7). *No Use upon a Use.*
(8). *Trusts.*
(9). *Covenant to stand Seised.*
(10). *Bargain and Sale.*
(11). *Lease and Release.*
(12). *Deeds to Lead Uses.*
(13). *Revocation of Uses.*

1. *Uses and Trusts before the Statute.*

There yet remain to be spoken of some few conveyances, which have their force and operation by virtue of the *Statute of Uses.*

Uses and *trusts* are, in their original, of a nature very similar, or rather exactly the same; answering more to the *fidei-commissum* than the *usus fructus* of the civil law; which latter was the temporary right of using a thing, without having the ultimate property, or full dominion of the substance. But the *fidei-commissum*, which usually was created by will, was the disposal of an inheritance to one, in confidence that he should convey it, or dispose of the profits, at the will of another. And it was the business of a particular magistrate, the *prætor fidei-commissarius*, instituted by Augustus, to enforce the observance of this confidence. So that the right thereby given was looked upon as a vested right, and entitled to a remedy from a court of justice; which occasioned that known division of rights by

the Roman law, into *jus legitimum*, a legal right, which was remedied by the ordinary course of law; *jus fiduciarium*, a right in trust, for which there was a remedy in conscience; and *jus precarium*, a right in curtesy, for which the remedy was only by intreaty or request. In our law, a use might be ranked under the rights of the second kind; being a confidence reposed in another who was tenant of the land, or *terre-tenant*, that he should dispose of the land according to the intentions of *cestui que use*, or him to whose use it was granted, and suffer him to take the profits. As, if a feoffment was made to A. and his heirs, to the use of (or in trust for) B. and his heirs; here, at the common law, A. the *terre-tenant* had the legal property and possession of the land, but B. the *cestui que use* was in conscience and equity to have the profits and disposal of it.

This notion was transplanted into England from the civil law, about the close of the reign of Edward III., by means of the foreign ecclesiastics; who introduced it to evade the Statutes of Mortmain, by obtaining grants, not to their religious houses directly, but to *the use of* the religious houses; which the clerical chancellors of those times held to be *fidei-commissa*, and binding in conscience; and therefore assumed the jurisdiction which Augustus had vested in his *prætor*, of compelling the execution of such trusts in the Court of Chancery. And, as it was most easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet, if a testator had enfeoffed another to his own use, and so was possessed of the use only, such was devisable by will. But we have seen how this evasion was crushed in its infancy, by statute 15 Ric. II. c. 5, with respect to the religious houses.

Yet, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes; particularly as it removed the restraint of alienations by will, and permitted the owner of lands in his life-time to make various designations of their profits, as prudence, or justice, or family convenience, might from time to time require. Till at length, during our long wars in France, and the subsequent civil commotions between the Houses of York and Lancaster, uses grew almost universal; through the desire that men had (when their lives were continually in hazard), of providing

for their children by will, and of securing their estates from forfeitures; when each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore, about the reign of Edward IV. (before whose time, Lord Bacon remarks, there are not six cases to be found relating to the doctrine of uses), the courts of equity began to reduce them to something of a regular system.

Originally it was held that the Chancery could give no relief, but against the very person himself intrusted for *cestui que use*, and not against his heir or alienee. This was altered in the reign of Henry VI. with respect to the heir; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use. But purchaser for valuable consideration, without notice, might hold the land discharged of any trust or confidence. And also it was held, that neither the king nor queen, on account of their dignity royal, nor any corporation aggregate, on account of its limited capacity, could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust.

On the other hand, the use itself, or the interest of *cestui que use*, was learnedly refined upon with many elaborate distinctions. And, 1. It was held that nothing could be granted to a use, whereof the use is inseparable from the possession; as annuities, ways, commons, and authorities *quæ ipso usu consumuntur*; or whereof the seisin could not be instantly given. 2. A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another, without any consideration, equity presumes that he meant it to the use of himself, unless he expressly declares it to be to the use of another, and then nothing shall be presumed contrary to his own expressions. But if either a good or a valuable consideration appears equity will immediately raise a use correspondent to such consideration. 3. Uses were descendible according to the rules of the common law, in the case of inheritances in possession; for in this and many other respects *æquitas sequitur legem*, and cannot establish a different rule of property from that which the law has established. 4. Uses might be assigned by secret deeds between the parties, or be devised by last will and testament; for as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary; and as the

intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. 5. Furthermore uses were not liable to any of the feudal burthens; and particularly did not escheat for felony or other defect of blood; for escheats, etc., are the consequence of *tenure*, and uses are *held* of nobody. But the *land* itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by defect; and the lord (as was before observed) might hold it discharged of the use. 6. No wife could be endowed, or husband have his curtesy, of a use; for no trust was declared for their benefit, at the original grant of the estate. And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives; which was the original of modern jointures. 7. A use could not be extended by writ of *elegit* or other legal process, for the debts of *cestui que use*. For, being merely a creature of equity, the common law, which looked no farther than to the person actually seised of the land, could award no process against it.

It is impracticable, upon our present plan, to pursue the doctrine of uses through all the refinements and niceties which the ingenuity of the times (abounding in subtile disquisitions) deduced from this child of the imagination, when once a departure was permitted from the plain, simple rules of property established by the ancient law. These principal outlines will be fully sufficient to shew the ground of Lord Bacon's complaint, that this course of proceeding "was turned to deceive many of their just and reasonable rights. A man that had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds; the husband of his courtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; and the poor tenant of his lease." To remedy these inconveniences abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestui que use*, allowed actions for the freehold to be brought against him, if in the actual pernancy or enjoyment of the profits; made him liable to actions of waste; established his conveyances and leases made without the concurrence of his feoffees; and gave the lord the wardship of his heir, with certain other feudal perquisites.

2. *The Statute of Uses.*

These provisions all tended to consider *cestui que use* as the real owner of the estate; and at length that idea was carried into full effect by the Stat. 27 Hen. VIII. c. 10, which is usually called the *Statute of Uses*, or, in conveyances and pleadings, the statute *for transferring uses into possession*. The hint seems to have been derived from what was done at the accession of King Richard III.; who, having, when Duke of Gloucester, been frequently made a feoffee to uses, would upon the assumption of the crown (as the law was then understood) have been entitled to hold the lands discharged of the use. But, to obviate so notorious an injustice, an act of Parliament was immediately passed, which ordained, that where he had been so enfeoffed jointly, with other persons, the land should vest in the other feoffees, as if he had never been named; and that, where he stood solely enfeoffed, the estate itself should vest in *cestui que use* in like manner as he had the use. And so the Statute of Henry VIII., after reciting the various inconveniences before mentioned, and many others, enacts, that "when any *person* shall be *seised* of lands, etc., to the use, confidence, or trust, of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, etc., of and in the like estates as they have in use, trust, or confidence; and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition as they had before in the use." The statute thus *executes* the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession; thereby making *cestui que use* complete owner of the lands and tenements, as well at law as in equity.

The statute having thus not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of *cestui que use* into a legal instead of an equitable ownership, the courts of common law began to take cognizance of uses, instead of sending the party to seek his relief in Chancery. And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted with improvements by the judges of the common law. The same persons only

were held capable of being seised to a use, the same considerations were necessary for raising it, and it could only be raised of the same hereditaments as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in its fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be alienated to any purchaser discharged of the use, nor be liable to dower or curtesy, on account of the seisin of such feoffee; because the legal estate never rests in him for a moment, but is instantaneously transferred to *cestui que use* as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seisin of *cestui que use*, who was now become the *terre-tenant* also; and they likewise were no longer devisable by will.

3. *Springing Uses.*

The various necessities of mankind induced also the judges very soon to depart from the rigour and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses than upon others. Hence it was adjudged, that the use need not always be executed the instant the conveyance is made; but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time, namely, within such a period as not to transgress the rule against perpetuities; and in the meanwhile the ancient use shall *remain* in the original grantor; as, when lands are conveyed to the use of A. and B., after a marriage shall be had between them; in which case, if the conveyance were a common law conveyance or statutory grant, it would be to a grantee to uses and his heirs to the use of A. and B. after their marriage; or if it were a bargain and sale for money, it would be simply to A. and B. after their marriage. A further instance is afforded by the case of a bargain and sale or covenant to stand seised on the bargainee or covenantee doing any future named act (*b*). These, which are called

(*b*) Shifting, secondary and springing uses, are frequently confounded with each other, and with future or contingent uses. They may, perhaps, be thus classed:—1st. *Shifting or secondary uses*, which take effect in derogation of some other estate, and are either limited expressly by the

springing uses, differ from an executory devise, in that there must be a person seised to such uses at the time when the contingency happens, else they can never be executed by the statute; and therefore, if the estate of the grantee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed for ever; whereas, by an executory devise, the freehold itself is transferred to the future devisee. Therefore, if, in the case first above put, the grantee to uses had taken a mere life estate, and had died, or surrendered his estate to the grantor, the use in favour of A. and B. could not take effect.

4. *Shifting Uses.*

It was also held, that a use, though executed, may change from one to another by circumstances *ex post facto*; as, if A. makes a feoffment to the use of his intended wife and her eldest son, for their lives, upon the marriage the wife takes the whole use in severalty; and, upon the birth of a son, the use is executed jointly in them both. This is sometimes called a *shifting* use. And by shifting use, as by executory devise, a fee may be limited to take effect after and annul a prior fee, so that it be to take effect within the time prescribed by the rule against perpetuities.

5. *Resulting Uses.*

And, whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration, or during such impossibility, and is styled a *resulting* use. As, if a man makes a feoffment to the use of his intended wife for life, with remainder to the use of his first-born son in tail; here, till he marries, the use results back to himself; after marriage, it is executed in the wife for life; and, if she dies without issue, the whole results back to him in fee.

deed, or are authorized to be created by some person named in the deed. 2nd. *Springing uses*, confining this class to uses limited to arise on a future event, where no *preceding* use is limited, and which do not take effect in derogation of any other interest than that which results to the grantor, or remains in him, in the meantime. 3rd. *Future or contingent uses*, are properly uses to take effect as remainders; for instance, a use to the unborn son of A., after a previous limitation to him for life, or for years, determinable on his life, is a future or contingent use; but yet does not answer the notion of either a shifting or springing use. Contingent uses naturally arose after the statute of 27 Hen. VIII., in imitation of contingent remainders.

6. *Revocation of Uses.*

It was likewise held that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would allow, was a deed of defeasance coëval with the grant itself, and therefore esteemed a part of it, upon events specifically mentioned. And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead. And this was permitted, partly to indulge the convenience, and partly the caprice, of mankind; who, as Lord Bacon observes, have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards.

7. *No Use upon a Use.*

By this equitable train of decisions in the courts of law, the power of the Court of Chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use," and that when a man bargains and sells his land for money, which raises a use by implication, to a bargainee, the limitation of a further use to another person is repugnant, and therefore void. And therefore, on a feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity; not adverting, that the instant the first use was executed in B., he became seised to the use of C., which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down through a hundred uses upon uses, till finally executed in the last *cestui que use*. Again, as the statute mentions only such persons as were *seised* to the use of others, this was held not to extend to terms of years, or other chattel interests, whereof the termor is not *seised*, but only *possessed*; and therefore, if a term of one thousand years be limited to A., to the use of (or in trust for) B., the statute does not execute this use, but leaves it as at common law. And lastly (by more modern resolutions), where lands

are given to one and his heirs in trust, to *receive and pay over* the profits to another, this use is not executed by the statute; for the land must remain in the trustee to enable him to perform the trust; and this will be the case, as a general rule, wherever the grantee has some active duty to perform, or control or discretion to exercise. But on a devise to one and his heirs on trust to *permit* another to receive the profits, it has been held that the latter takes the legal estate.

8. *Trusts.*

Of the two more ancient distinctions, the courts of equity quickly availed themselves. Thus, where there was feoffment to A. and his heirs to the use of B. and his heirs, in trust for C. and his heirs, it was evident that B. was never intended by the parties to have any beneficial interest; and, in the second, the *cestui que use* of the term was expressly driven into the Court of Chancery to seek his remedy; and, therefore, that court determined, that though these were not *uses*, which the statute could execute, yet still they were *trusts* in equity, which in conscience ought to be performed. To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of *trusts*; and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of conveyance.

Thus, if a conveyance of lands be made, operating as a common law conveyance, or as a grant, to A. and his heirs, to the use of B. and his heirs, the first use raised will be in A., and the statute will execute it and give B. the legal estate. If the conveyance had gone on to declare a further use in favour of C. and his heirs, here would have been a use upon a use, which second use the statute cannot execute, being exhausted by the execution of the first; and such second use would be a trust; B. being trustee, and C. *cestui que trust.* If the conveyance had been worded thus:—to A. and his heirs, to the use of A. and his heirs, to the use of B. and his heirs, here A. would retain the legal estate, becoming, however, by force of the second use declared, which is unexecuted, trustee for B. For it makes no difference that the first use declared is in favour of the grantee himself instead of in favour of some other; for all practical purposes as regards the person in whose favour the second use (or trust) is

limited, it is as efficacious if declared in favour of the grantee, as of some other; and, indeed, the common mode of expression where B. is to take only a trust estate, is "*unto and to the use of* A. and his heirs in trust for B. and his heirs," which is tantamount to saying, "unto A. and his heirs, to the use of A. and his heirs in trust," etc.

The insertion of five monosyllables in a conveyance thus defeats the great object of the statute, which was to prevent the separation of the beneficial right from the legal estate, and revert to the singleness and simplicity of the common law; and this it proposed to do by abolishing trusts or uses, declaring that the person "to the use, confidence, or trust" of whom any other should be seised, should have "the legal seisin, estate, and possession." If the courts of law had held (which as above mentioned by Sir W. Blackstone, they well might have held) that the second use was not a mere nullity, and that the statute might as well execute any second or subsequent use as the first, then the statute would have operated as intended (*c*).

The only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only ancient conveyance of corporeal freeholds; the security and notoriety of which public investiture abundantly overpaid the labour of going to the land, or of sending an attorney in one's stead.

(*c*) The holding that the second use was not executed, Mr. Watkins says, must have surprised every one who was not sufficiently learned to have lost his common sense; and Chief Baron Pollock, in *Mallett* v. *Bateman*, 12 Jur. N.S. 122, says of the construction placed on the statute that it was "a mistake, the effect of which was to add three words to almost every conveyance, and to extend greatly the dominion of the Court of Chancery." When, therefore, common law lawyers, or men as eminent as Mr. Hayes, speak of "the all absorbing jurisdiction of equity, ever seeking to insinuate its jurisdiction" (Hayes' Convey. p. 163); they may be willing to overlook, among other things, the fact that it was the courts of *law* who expressly continued, if they did not create, the jurisdiction of equity in one of its widest fields; and *that*, by placing a construction on the statute, which Mr. Watkins speaks of as above, and to which Mr. Hayes himself (p. 54) alludes as "mocking the reason and spirit of the statute," "if indeed it did not militate against the plainest principles of interpretation." Trusts at the present day, however, must necessarily exist, and it is fortunate perhaps that the courts of law put the construction they did on the statute, thereby continuing the existence of trusts; how, otherwise, for instance, could a testator devising his lands benefit an improvident son, and at the same time secure him permanently against the results of his own improvidence?

The student will bear in mind that though the words *use* and *trust* usually convey quite distinct meanings as to the nature of the estates or interests, as may be seen from what is above stated; still for the purposes of execution into possession by force of the statute there may be no difference between them; that is, the use of the word *trust* instead of the word *use*, will not prevent the person in whose favour such trust may be declared from taking the legal estate instead of a trust or equitable estate, by force of the statute, in a case where he would have taken it if the word *use* had been employed. Under a common law conveyance to A. and his heirs *in trust* for B. and his heirs, the statute will execute the use under the name of trust, and B. will take the legal estate (*d*); its language is "where any person shall be seised of any lands, etc., to the use, confidence, or *trust* of any other," etc.; and *vice versa*, the employment of the word *use* will not *per se* prevent the person in whose favour it is declared taking more than a trust estate where the interpretation of the conveyance requires it; as on a bargain and sale to A. and his heirs to the use of B. and his heirs.

The attention of the student should also be called to the difference between limitations to uses by conveyances operating at common law by transmutation of possession, or by way of grant (which operates in the same way as a common law conveyance), and by conveyances operating under the Statute of Uses, of which we have yet to speak. The distinction is most important, because on the character in which the instrument operates will depend the placing of the legal and equitable estates. Thus, under a feoffment or grant to A. and his heirs to the use of B. and his heirs, the latter takes the legal estate, for the first and only use raised is in A. But had the conveyance been by bargain and sale, or covenant to stand seised, and could it only so operate, A. would take the legal, and B. merely the equitable estate; for, as we shall see presently, under such conveyances the first use raised is in the bargainor or covenantor, and consequently the use declared in favour of B. is unexecuted by the statute, and is a mere trust.

The courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. The Statute of Frauds, 29 Car. II. c. 3, having required that every declaration, assign-

(*d*) *Doe d. Snyder* v. *Masters*, 8 U.C.R. 55.

ment or grant, of any trust in lands or hereditaments (except such as arise from implication or construction of law), shall be made in writing signed by the party, or by his written will; the courts now consider a trust-estate (either when expressly declared, or resulting by such implication), as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law; and, by a long series of uniform determinations, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds. The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice; which, as *cestui que trust* is generally in possession of the land, and the trusts can be set out on registry, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments, recognizances (by the express provision of the Statute of Frauds), to forfeiture, to leases and other incumbrances, nay, even to the curtesy of the husband, and dower in equity, as if it was an estate at law. It hath also been held not liable to escheat to the lord, in consequence of attainder or want of heirs; because the trust could never be intended for his benefit. But let us now return to the Statute of Uses.

9. *Covenant to Stand Seised.*

Another species of conveyance, called a *covenant to stand seised to uses*, has its present operation under the statute. By this conveyance a man seised of lands, covenants in consideration of blood or marriage, that he will stand seised of the same to the use of his child, wife or kinsman; for life, in tail, or in fee. Here the covenantor, being seised to the use of the person indicated, the statute executes the use at once; and the party intended to be benefited, having thus acquired the use, the statute transfers the legal seisin and he is thereby put at once into corporal possession of the land, without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate when made upon such weighty and interesting considerations as those of blood or marriage.

A use will not arise on a covenant to stand seised to the use of a son-in-law, uncle-in-law, or brother-in-law, for there is no affinity of blood. Where a covenant to stand seised fails to take effect as such, it may yet operate as a bargain and sale, if there be a money consideration expressed. A man could not at common law covenant with his wife to stand seised to her use, for husband and wife are one in law, and a man cannot covenant with himself; the covenant should be with some third person, to stand seised to the use of the wife. This form is wholly out of use; it was always confined in its use by the consideration required, and had the disadvantage (which attends also a bargain and sale), that powers cannot be engrafted on it. A knowledge of its operation might be of service; as where a bargain and sale should fail to take effect as such, for want of a money consideration, it might yet operate as a covenant to stand seised, if on consideration of blood or marriage, of which parol evidence might be given; and operating thus, the legal estate would remain as intended, which would not be the case if it were to operate (as it might) as a grant.

10. *Bargain and Sale.*

The conveyance by way of *bargain and sale* also has its operation under the statute. In England for the passing of freehold estates in possession, it was in less general use than the conveyance by lease and release; or by grant, where estates in reversion or remainder were conveyed. The conveyance by grant is now used in every case where the conveyances by bargain and sale, and by lease and release were formerly used. The latter modes of conveyance have disadvantages which do not attend the conveyance by grant, and in many cases they fail to take effect where a grant will operate.

The following history of conveyance by way of bargain and sale, and the legislative enactments to remedy its inconveniences, will serve to shew the disadvantages which were attendant upon it when first made use of in Canada; many of these have since been removed by statutes; some yet remain.

The bargain and sale was in fact what its name implies—a mere contract whereby the purchaser or bargainee paid a sum of money to the vendor or bargainor for the land.

Prior to the Statute of Enrolments, hereafter referred to, no writing or deed was requisite to create, or rather, was evidence of, the raising of a use, but the mere verbal bargain and payment of the consideration were sufficient to raise a use in the bargainor, to hold for the use of the bargainee; that is to say, the bargainor remained seised of the land, but having received a money consideration for it, was seised to or for the use of the bargainee. Upon this the Court of Chancery fastened, and declared the bargainor a trustee for the bargainee, and that the bargainee was entitled to the *beneficial use* of the land, whilst the bargainor remained seised of the *legal estate*. And as the bargain, before the Statute of Uses, unless otherwise expressed, implied a bargain for a fee simple, no words of inheritance were requisite to raise a use for a fee. The effect of the Statute of Uses, 27 Hen. VIII. c. 10, was, as explained, to execute the use. That is to say, the seisin of the bargainor was immediately upon payment of the money transferred by the Statute of Uses to him who had the use, *i.e.*, the bargainee. The result of course was that the bargainee took the legal estate without any deed or writing by the mere effect of the bargain, and of the payment of the consideration. This being a secret mode of conveyance, a mode which was repugnant to the principles of the common law, and to the ideas of our ancestors, accustomed as they were to the publicity of the conveyance by way of feoffment and livery of seisin, the Statute of 27 Hen. VIII. c. 16, called the Statute of Enrolments, was passed; which required every bargain and sale of an *inheritance or freehold* to be by *deed indented* and *enrolled* within six lunar months after its date in one of the courts at Westminster, or before justices and clerk of the peace in the county where the lands lay. This inconvenient necessity of enrolment was thought to have existed in this Province, and registration was substituted for it, but afterwards abolished as an essential to the validity of the bargain and sale.

There was a further difficulty attending the conveyance by bargain and sale, which also required legislative remedy, namely, that it was doubtful whether a corporation could convey by this mode of assurance. This was chiefly in consequence of the wording of the Statute of Uses being "that where any *person* shall stand seised to the use of another, or of a body politic or corporate," etc.; and it was

held that the word "person" did not include corporations, so that the statute did not apply to a corporation, and the use raised in the corporation would not be executed by the statute, but left as at common law, a mere trust. This was remedied by statute (*e*), declaring that corporations aggregate might convey by bargain and sale; but the statute does not say, as the Statute of Uses says in effect, that a use raised shall be executed in favour of the *cestui que use*. There is in strictness no use executed; the Act simply empowers a corporation to convey in a particular mode. It is generally considered that a corporation cannot be seised to a use.

The chief objections at the present day to the bargain and sale, which do not apply to the conveyance by way of lease and release, or of grant, are; First, that it is essential to the conveyance by way of bargain and sale that a consideration be expressed, and it must be a money consideration, or money's worth, to raise the use; Secondly, as presently explained, no general powers, as powers of appointment, etc., etc., can be engrafted on the deed of bargain and sale.

The first objection, it is sometimes said, depends on the necessity of some consideration passing to the bargainor to raise a use, and make him stand seised to the use of the bargainee; and it must have been money, or money's worth; natural love and affection would not suffice; though in the latter case the deed might operate as a covenant to stand seised. But in fact if there is no consideration there can be no bargain and sale. But what is meant is that if it be desired to make use of the conveyance known as the bargain and sale there must be a money consideration expressed. And in the absence of any consideration, the conveyance may take effect as a *grant*; but in such a case the *legal estate* may not vest in the same person if the instrument operated as intended, namely, as a bargain and sale. Thus if A. bargain and sell to B. and his heirs, to the use of C. and his heirs, and the conveyance operate in that way, B. will take the legal, and C. the equitable estate; for in a conveyance by bargain and sale every use declared is a use on a use, the first use being raised in the bargainor; but if it operate as a grant, C. will take the legal estate.

As to the second objection; general powers, as to grant leases, or of appointment, cannot be engrafted on a bargain and sale, or covenant to stand seised, as they can on a grant,

(*e*) R.S.O. c. 119, s. 13.

or release. Thus, a bargain and sale to A., to such uses as he, or any other should appoint, and till appointment to him in fee, would be ineffectual, as such, to convey the legal estate to A.'s appointee; for the uses which A. may appoint are uses upon a use already raised, and the Statute will not execute them.

11. *Lease and Release.*

On passing the Statute of Enrolments clandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious, till about six years before; which also occasioned them to be overlooked in framing the Statute of Uses; and therefore bargains and sales of chattel interests are not directed to be enrolled. But how impossible it is to foresee, and provide against *all* the consequences of innovations! This omission gave rise to another species of conveyance, viz., by *lease and release*; first invented by Serjeant Moore, soon after the Statute of Uses, and in England the most common of any, till conveyance by grant came into vogue. It is thus contrived: a lease, or rather bargain and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee. Now, this, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the *use* of the term for a year; and the statute immediately annexes the *possession* and gives a vested interest. He, therefore, being thus in possession is capable of receiving a release of the freehold and reversion; which, we have seen before must be made to a tenant in possession, or to one having a vested estate; and, accordingly, the next day, or immediately after the lease, a release is granted to him. This is held to supply the place of livery of seisin; and so a conveyance by lease and release is said to amount to a feoffment.

Thus the transfer of land could be made in fee without the notoriety of livery, and without enrolment or public ceremony, and was in fact entirely secret.

12. *Deeds to Lead Uses.*

To these may be added deeds to *lead* or *declare the uses* of other more direct conveyances, as feoffments, fines, and recoveries, now out of use.

13. *Revocation of Uses.*

Deeds of *revocation of uses* hinted at in a former page, are founded on a previous power, reserved at the raising of the uses, to revoke such as were then declared; and to appoint others in their stead, which is incident to the power of revocation. And this may suffice for a specimen of conveyances founded upon the Statute of Uses; and will finish our observations upon such deeds as serve to *transfer* real property.

CHAPTER XXIII.

OF INHERITANCE AND SUCCESSION.

(1). *General Remarks.*
(2). *Descent under 4 Wm. IV. c. 1.*
(3). *Interests within 4 Wm. IV. c. 1.*
(4). *Interests within 15 Victoriæ, c. 6.*
(5). *From Whom Descent is Traced.*
(6). *Mode of Descent.*
(7). *Where there are Descendants.*
(8). *Where there are No Descendants.*
(9). *Where No Descendants, Father or Mother.*
(10). *Where No Descendants, Father or Mother, or Brothers or Sisters or their Descendants.*
(11). *Half Blood.*
(12). *General Provisions.*
(13). *Devolution of Estates Act.*
(14). *What Interests are Included.*
(15). *Purpose of the Enactment.*
(16). *Operation of the Enactment.*
(17). *The Widow's Share.*
(18). *The Husband's Share.*
(19). *Children and their Representatives.*
(20). *Next of kin.*
(21). *Descent of Estate Tail.*

1. *General Remarks.*

In treating of the law of descent four periods of time are to be observed. The first period is that prior to 1st July, 1834, during which the common law rules of descent were in force. The second period extended from 1st July, 1834, to 1st January, 1852, during which the same rules, as modified by statute, still governed.

The other two occur during the past fifty years, and the changes made by them eradicated the whole common law system of inheritance and substituted a method more in accordance with the system of distribution of personal property. The first change made was the Inheritance Act, the chief characteristic of which was the abolition of primogeniture, or the right of the eldest son to inherit, and the casting of the estate upon all the children equally. The second was *The Devolution of Estates Act*, the chief characteristic of which was the casting of the estate upon the personal representative, instead of the heirs, of the deceased, for distribution amongst the next of kin.

The Act abolishing primogeniture came into force on 1st January, 1852 (*f*). *The Devolution of Estates Act* came into force on 1st July, 1886 (*g*). Both Acts, as well as an earlier statute (*h*), which modified the common law rules of descent, are now consolidated in one statute under the title of *The Devolution of Estates Act* (*i*).

2. *Descent under 4 Wm. IV. c. 1.*

Before considering the Inheritance Act, it may be well to point out the chief characteristics of the Statute of Wm. IV., as they serve by way of contrast to render more striking the provisions of the Statute of Victoria. Descent was to be traced from the purchaser, instead of from the person last actually seised, as at common law; the heir taking from his ancestor by devise took as devisee and not as heir, as at common law; attainder was not to interrupt the course of descent; proof of entry by the heir after his ancestor's death was not necessary in order to prove title in such heir; no brother or sister should inherit immediately from his or her brother or sister, but descent was to be traced through the parent; lineal ancestors were made capable of inheriting from their issue; the male line was preferred to the female; the half-blood were rendered capable of inheriting after the whole blood of the same degree. The great lapse of time since this law was superseded is a sufficient excuse for not enlarging upon it.

(*f*) 15 V. c. 6.
(*g*) 49 V. c. 22.
(*h*) 4 Wm. IV. c. 1.
(*i*) R.S.O. c. 127.

3. *Interests within 4 Wm. IV. c. 1.*

It is important, however, to observe what interests are included within this statute as well as the more modern enactments, for where the old law is not superseded by the Inheritance Act, the former must still be in force, and where in turn the Inheritance Act has not been superseded by *The Devolution of Estates Act*, it must still govern. It is much to be lamented that each new enactment should not have been as comprehensive as its predecessors, so as to have covered the same ground. But such is not the case.

The statute of Wm. IV. defines "land" for its purposes as extending to "messuages, and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, title and interests, or any of them, are in possession, reversion, remainder, or contingency" (*j*).

4. *Interests within 15 Victoriæ, c. 6.*

The statute of Victoria includes, in the term "real estate," "every interest and right, legal and equitable, held in fee-simple or for the life of another [except trust estates] in lands, tenements and hereditaments" (*k*).

The condition of this latter enactment seems to be that whatever the estate, right or interest may be, it should be capable of being held in fee-simple or for the life of another. This seems especially to refer to estates and other like interests in land, and not to rights of entry or action (*l*). There were many inheritable interests and rights at common law, not held in fee-simple, and though the statute of Wm. IV. recognizes this and provides for them, the present statute does not do so. And this is all the more noticeable now, since the two statutes are consolidated in one, for the provisions of each are

(*j*) R.S.O. c. 127, s. 22, s.-s. 1.

(*k*) Ibid. s. 38, s.-s. 1.

(*l*) An equitable right to acquire land contracted to be purchased, though not an equitable estate, would no doubt be included.

thus brought into contrast. Thus the earlier statute included a right or title of entry or action which is never "held in fee-simple or for the life of another," although the land with respect to which the right of entry or action may exist may be so held. Similarly, a bare seisin, that of a trespasser, which at common law was inheritable, and which is included in the statute of Wm. IV. under the term "any other interest capable of being inherited," can hardly be said to answer the description in the later enactment of "an interest or right held in fee-simple."

With respect to rights of entry or action, there is perhaps no substantial difference. Thus, if a person having a right of entry or action on a disseisin died intestate before the statute of Victoria, the right of entry or action would, as such, descend to his heir, under the statute of Wm. IV. But, under the statute of Victoria, such rights are not *eo nomine* included; but the legal estate in the land would descend thereunder, and the heirs could bring their action to recover the land. The distinction is more in nomenclature of this right than in its substance.

But the case of a disseisor is more serious. If a disseisor of nine years' standing should die intestate, would his wrongful seisin pass to his eldest son or to all his children equally? It is true that when a disseisor gets possession of land he has by fiction of law "a freehold by wrong," so as to entitle him to defend his possession against the whole world except the true owner. And this tortious fee is also inheritable. But does it fall within the designation of a right or interest held in fee-simple or for the life of another? The conjunction by the statute of the two classes of interests indicates that rightful estates and interests only were affected. The estate, right or interest must be of such a nature that it may be held *either* in fee-simple *or* for the life of another. No wrongful estate, right or interest can be held for the life of another. Therefore, no tortious estate is referred to.

It is assumed in practice, rather than established by law, that all the children succeed to such a seisin equally, and, by adding their own wrongful possession to that of their ancestor for the statutory period, extinguish the paper title and become tenants in common. It seems more than probable that if the statute received its strict construction the wrongful seisin would descend to the eldest son, and that his possession for the remainder of the statutory period would

give him the possessory title. At any rate, if the seisin does descend to all the children equally, they would, upon extinction of the paper title, become, not tenants in common, but joint tenants (*m*).

Rights of entry for condition broken are within the enactment of Wm. IV. (*n*), but there is no corresponding enactment in the statute of Victoria. The condition of the latter enactment, as already stated, seems to be that the inheritable interest must be "held in fee-simple or for the life of another," plainly referring to estates, or other like interests in land. It may, therefore, be a serious question whether, upon the death of an intestate, after the breach of a condition entitling him to re-enter, his right of entry would not still descend, according to the common law as modified by the statute of Wm. IV. The omission is rendered the more striking when we find that such rights of entry are especially made capable of being disposed of by will (*o*). And the same may be said of possibilities.

The statute of Victoria is quite as unfortunate in its other definitive clauses. "Inheritance" shall be understood to mean real estate, as herein defined, *descended* or *succeeded to*, according to the provisions of the said twenty-seven sections *i.e.*, ss. 41 to 67, both inclusive (*p*). If we substitute for the word "inheritance," where it appears in the statute, the words "real estate descended," it will confine the operation of the statute to land which was previously inherited, and would not include land purchased by an intestate. The expression must perforce be taken in the sense in which it is used by conveyancers, viz., the estate in fee-simple, and in that sense it is used all through the Act, and not in the sense of land which has been acquired by descent.

(*m*) See p. 259. The case of *Brock* v. *Benness*, 29 Ont. R. 468, does not conflict with this, nor furnish any general rule as to such cases. In that case, the trespassers had been in possession under a lease which made them tenants in common. After the expiry of the term they remained in possession without title, and Street, J., held that they continued to be tenants in common as trespassers. *Sed quære*, for the following reasons:—Wrongful possession is governed by no rules as to estates; no agreement between wrong-doers can be presumed; the *possession* of the tenants under the lease ceased, and a wrongful *seisin* (a different thing) began on expiry of the term; and finally, each trespasser was seised of the whole land as against the true owner, which is the case in joint-tenancy, and not of an undivided moiety, which is the case in tenancy in common.

(*n*) R.S.O. c. 127, s. 22, s.-s. 1; *Baldwin* v. *Wanzer*, 22 Ont. R. at p. 641.

(*o*) R.S.O. c. 128, s. 10.

(*p*) R.S.O. c. 127, s. 38, s.-s. 2.

Again, the expressions, "where the estate came to the intestate on the part of the father" or "mother," are defined to mean where the inheritance, *i.e.*, the land, came to the intestate by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent (*q*). But this expression is not found in the statute. Such expressions as "unless the inheritance came, etc." (*r*), "if the same came, etc." (*s*), "where the inheritance came, etc." (*t*), "where the inheritance did not come, etc." (*u*), do occur. And so the interpretation clause must not be taken as strictly accurate in its terms, but as explanatory of phrases conveying a like meaning.

5. *From Whom Descent is Traced.*

It is first to be noticed that where descent is being traced, it must be traced from the person last seised. "Where any person dies seised in fee-simple or for the life of another of any real estate, etc." (*v*). At common law the descent was rigorously traced from the person last *actually* seised. A seisin in law was not sufficient, a seisin in deed being necessary. Thus, if A., an illegitimate person, died seised, leaving his wife and wife's brother, and B., his son and heir at law; and B., never having actually entered, died intestate; at common law the descent had to be traced from A., who was last actually seised, and consequently the land would escheat, for the wife and her relatives could not take by descent from A.

Again, if A., a purchaser, granted a life estate and died intestate seised of the reversion in fee, leaving his son, B., and his father, C., him surviving, the reversion would descend to the son, B.; but if B. died pending the life estate, not having had any actual seisin of the reversion, the descent would be traced again from A., who was the person last seised.

Under the statute of Victoria, if the word "seised" were to be interpreted in the same strict fashion, the same consequences would follow. But the statute provides for the inheritance of equitable as well as legal estates, and the word

(*q*) Ibid. s. 40.
(*r*) S. 45.
(*s*) S. 50.
(*t*) S. 52.
(*u*) S. 53.
(*v*) S. 41.

"seised" is not properly nor strictly applicable to such an estate. Therefore, the word "seised" must be taken in the sense of "entitled to."

In the cases above put, then, B., in the first place, being entitled by the death of his ancestor, would die seised, *i.e.*, entitled, within the meaning of the statute, and the estate, instead of escheating, would go to his mother. In the second case, B., being entitled in fee-simple to a hereditament, viz., a reversion in fee, would transmit it to his heirs, and descent would not be traced as at common law.

6. *Mode of Descent.*

Having ascertained the person from whom descent is to be traced, the next consideration is the method or scheme of descent. The statute declares that the estate shall descend, "firstly, to the lineal descendants of the intestate, and those claiming by or under them *per stirpes*; secondly, to his father; thirdly, to his mother; and fourthly, to his collateral relatives—subject in all cases to the rules and regulations hereinafter prescribed" (*w*).

7. *Where there are Descendants.*

It would appear from this clause that the scheme of the statute was to divide the land in all cases by roots or families, *per stirpes*. But, in fact, the next three clauses provide an entirely different mode. If all the descendants are related in equal degree to the intestate, they take *per capita*. If in unequal degree, then the inheritance descends to the living children, and the descendants of deceased children, so that each living child takes the share which he would have taken if all the children who had died leaving issue had been living, and so that the descendants of each deceased child take the share which their parent would have received if living. And so on, where the descendants are more remote than children and grandchildren.

Thus, A. dies leaving four daughters. They all take equally. If the four daughters died before A., leaving, the first, one child; the second, two; the third, three; and the fourth, four; the grandchildren of A. all being in equal degree would take *per capita*—each one-tenth (*x*). But if A. dies

(*w*) S. 41.
(*x*) S. 42.

leaving two daughters him surviving, one grandson, son of a deceased daughter, and two grand-daughters, children of another deceased daughter; here the descendants being of unequal degrees of consanguinity to the intestate do not take *per capita*, but *per stirpes, i.e.*, the estate is divided into four parts, each surviving daughter taking one-fourth part, the grandson one-fourth, and the two grand-daughters each one-eighth, or one-fourth divided between them (*y*). And the rule is the same with more remote descendants (*z*).

8. *Where there are no Descendants.*

Where there are no descendants of the intestate, but he leaves a father or mother, the estate, generally speaking, goes to the father or mother absolutely; but if there are brothers and sisters or their descendants, then to the father or mother for life, remainder to the brothers and sisters or their descendants (*a*).

Before entering further upon the consideration of these clauses, it will be necessary to consider the clause which defines what is meant by the expressions, "where the estate came to the intestate on the part of his father," or "mother" (*b*). They are defined as meaning when the estate came to the intestate by "devise, gift or descent from the parent referred to, or from any relative of the blood of such parent;" and thus is preserved a relic of the preference formerly given to the blood of the purchaser, as the inheritance is cast upon the paternal or maternal line from which it was originally derived, as the case may be, in preference to the other.

It will be observed that this scheme considerably alters and enlarges the mode, by which, under the Statute of Wm. IV., a person was considered as taking an estate *ex parte materna*, or *paterna*, as the case might be. He was before considered as so taking, in those cases *only* where he took by descent, tracing from the paternal or maternal ancestor as the purchaser; but if (at least after the Statute of Wm. IV.) he took by gift or devise from such ancestor, then the estate was not considered as descending to him at all, but he took as purchaser, and parties claiming on his death had to make themselves heirs to him as the purchaser, and to no one else, and if they could not, the estate would escheat.

(*y*) S. 43.
(*z*) S. 44.
(*a*) Ss. 45, 46, 48.
(*b*) S. 40.

The change effected by the Statute of Victoria is very great, as will be seen by considering one simple and common case. Suppose that the estate had been either devised or given to John Stiles, by his mother, or any relative of hers; here, under the Statute of Wm. IV., John Stiles would have been considered not as taking *ex parte materna* at all, but as a purchaser; and the result was that all the paternal ancestors and their descendants, however remote, must have failed before any maternal ancestor, or any one claiming through such could have taken. Now, however, in such a case, the estate is to be considered as having descended *ex parte materna*, and the paternal line are excluded; except only that if the mother be dead, and there be any brothers or sisters of the intestate, or any of their descendants, the father will take a life estate; or if the mother be dead, and there be no brothers or sisters of the intestate, or their descendants, then the estate will go to the father; and paternal are postponed to maternal uncles and aunts.

Questions may arise as to the construction of section 40, in those cases where the intestate has taken from some person on the paternal or maternal side, who in turn has taken from the other side, and the question would be which side would have preference in distribution of the inheritance. Thus, assume the intestate has acquired the estate by devise, gift or descent, from his mother, who acquired it in either of those modes from her husband, the father of the intestate; the only relatives are brothers and sisters of the mother, and brothers and sisters of the father. In this case either side will take to the exclusion of the other, according to whether the inheritance is to be considered as having come to the intestate on the part of his father, or of his mother. Again, if in the case above supposed there were brothers of the half-blood of the intestate on his father's side, would the half-blood be excluded under section 54, in which section however the word "ancestors" is made use of? Many other instances might be put under the various sections, but the above will serve to elucidate the question. It is apprehended, on the language and construction of the Act, that in such cases the person from whom the intestate immediately takes is the *propositus*, who alone will be regarded, and that you cannot change this by shewing how the estate was acquired, as you can in cases of inheritance under section 4 of the statute of Wm. IV. For the estate came to the

intestate "on the part of his mother" that is "by devise from the parent referred to" within the exact words of the interpretation clause, s. 40.

A further question is, whether, where the intestate has acquired an ancestral estate by gift, devise or descent coming under section 40, alienation and reacquisition by him, which under the old law would have made him a new stock of descent, and also a purchaser, and deprived the estate of its former hereditary qualities on the paternal or maternal side, will equally operate under this Act to cause all consideration of the estate being ancestral to be rejected. This question may arise in various shapes; thus, if the intestate had sold the estate, there can be no doubt that the proceeds, though earmarked, would go as personal estate under the Statute of Distributions. If the proceeds were laid out in other real estate, this would have no ancestral quality in it, and under no circumstances would there be a preference to ancestral paternal or maternal side. It would seem to follow, especially on applying the former law, that the result would be the same if the intestate had conveyed to some one, and forthwith, or at any time afterwards, obtained a re-conveyance; and consequently, that there would be the same result if the estate revested through the medium of the Statute of Uses, as on conveyance by the intestate to a grantee to uses to his own use. If, however, the intestate should not have made disposition of his entire interest, but merely of a portion, leaving a reversion to come by act of law to himself and his heirs, it is apprehended that this reversion would be imbued with the former qualities of the estate.

If the intestate, then, die without descendants, but leaving a father and no mother, the inheritance shall go to the father for life, remainder to the brothers and sisters of the intestate and their descendants according to the law of inheritance by collateral relatives thereinafter provided. If there are no brothers or sisters or their descendants, then the father takes absolutely. If the intestate leaves no descendants, but leaves a father and mother, then the course of descent is the same, if the estate did not come to the intestate on the part of his mother, *i.e.*, by gift from his mother, or by devise, gift or descent from some relative of his mother (*c*).

If the intestate leaves no descendants, but leaves a mother, and no father (or leaves a father not entitled to take by

(*c*) S. 45.

reason of the estate having come to him on the part of his mother) then the inheritance goes to the mother for life, remainder to the brothers and sisters of the intestate and their descendants. If there are no brothers or sisters or their descendants, then the mother takes absolutely (*d*).

These sections may be illustrated thus: Assume John Stiles to be actually a purchaser for money (*for money* is mentioned, because section 40 has altered the meaning and implication of the word *purchaser*, as formerly understood, by excluding from it the case of a man taking by gift or devise from some relative on the father's or mother's side). John Stiles leaves no descendants but leaves his father Geoffrey, and no brothers or sisters. In such case, on John's death without issue, the father would take absolutely under the first part of section 45. The case of the inheritance coming *ex parte materna*, and the mother being *living*, is provided for in the next section, and that therefore is passed for the present, and the next clause proceeded to. Thus, if John Stiles had also left brothers and sisters of the whole blood, Francis, Oliver, Bridget and Alice; here the father would take a life estate, and the reversion would go equally among the brothers and sisters. If also at the time of death of John, his half-brothers *ex parte materna* had been alive, and also his half-brothers *ex parte paterna*, then under section 54 the half-blood *ex parte materna* would have been entitled equally *per capita* with the brothers and sisters of the whole blood. Descendants of any brothers or sisters deceased would have taken *per capita* and *per stirpes* as the case might be. And the same examples *mutatis mutandis*, may be applied in illustration of the next section. Where brothers and sisters and their descendants inherit, they take *per stirpes*, *i.e.* the descendants of each brother or sister take equally between them the same share which their parent would have taken if living, each brother and sister taking the share which he or she would have taken if all the brothers and sisters who have died leaving issue had outlived the intestate (*e*); and so on to the remotest degree (*f*).

9. *Where No Descendants, Father or Mother.*

If there are no descendants, and no father or mother surviving, then the estate goes to the collateral relatives;

(*d*) S. 46.
(*e*) S. 48.
(*f*) S. 49.

and if they are of equal degree to the intestate they take *per capita*, however remote they may be (*g*). This section, if uncontrolled, would admit equally all collateral relatives of equal degrees of consanguinity to the intestate, and would therefore allow uncles and aunts to share with nephews and nieces, if these classes were the only relatives left on the death of the intestate. Subsequent sections however control this section (*h*).

An illustration of the mode of descent under these sections may be made thus:—Assume John Stiles to have died, leaving him surviving his brother Francis; James and George, two sons of his brother Oliver; and William and Frederick, two grandsons of Oliver by a deceased son of his. Here all the claimants are collateral relatives of unequal degrees of consanguinity to the intestate, being one brother, Francis, two nephews, James and George, and two grand nephews, William and Frederick; and a mixed descent, *per stirpes* and *per capita* takes place; *per stirpes* in dividing between the unequal degrees, *per capita* between the equal degrees. Thus James and George between themselves shall take equally; so also shall William and Frederick; but taking James and George together as of *one class*, and William and Frederick together as of *another class*, they take unequally as being of unequal degrees of consanguinity to the intestate. The result of the above is that Francis takes one-half; the deceased brother Oliver's half, which he would have taken had he lived, is divided as follows, viz., into three parts (as he had three sons), and James and George his two surviving sons, each take one-third of one-half or one-sixth of the inheritance, and William and Frederick the other third of one-half between them or one-twelfth of the inheritance each.

10. *No Descendants, Father or Mother or Brother or Sister or their Descendants.*

If the intestate leave no descendants, no father or mother, and no brother or sisters, or descendants of brothers or sisters, then the estate (if it came to the intestate on the part of his father) descends,

"Firstly. To the brothers and sisters of the father of the intestate in equal shares, if all are living;

(*g*) S. 47.
(*h*) See s. 50.

Secondly. If one or more are living, and one or more have died leaving issue, then to such brothers and sisters as are living, and to the descendants of such of the said brothers and sisters as have died—in equal shares;

Thirdly. If all such brothers and sisters have died, then to their descendants; and in all such cases the inheritance shall descend in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate" (*i*).

It will be observed that there is an apparent contradiction in terms between the second and third clauses of this section. Where some of the brothers and sisters of the father are living, and others have died leaving issue, the second section expressly provides that they shall take *in equal shares*, as if they were related in the same degree to the intestate. While the third section declares that "in all such cases" the descent shall be the same as if the estate descended to the brothers and sisters of the intestate and their descendants, *i.e. per stirpes*, the issue of deceased brothers and sisters taking the shares which their parents respectively would have taken if they had survived. That is, assuming that the phrase "in all such cases" refers to all cases under this section. If, however, it refers only to all such cases as may happen under the third clause of the section, then the estate will take different courses in the two different events. Thus, if there are brothers and sisters of the father, and descendants of deceased brothers and sisters, all would share equally under the second clause of the section. But if all the brothers and sisters of the father are dead, then the course of descent amongst their descendants would be the same as if they were descendants of the brothers and sisters of the intestate. Though there does not seem to be any reason for this, such an interpretation would give full effect to each clause in its natural sense. If this interpretation be not adopted, then the two clauses are in direct conflict, and the latter must prevail.

In such cases, if there are no brothers and sisters of the father, and no descendants of such brothers or sisters, in other words if the relatives on the father's side fail, then the brothers and sisters of the mother, and their descendants, succeed to the estate, "in the same manner as if all such brothers and sisters had been the brothers and sisters of the father" (*j*).

(*i*) S. 50.
(*j*) S. 51.

And in such cases, where the estate came to the intestate on the part of the mother, the same course of descent prevails, giving the preference to the mother's relatives if any (*k*).

And again, in such cases, where the estate did not come to the intestate on the part of either the father or mother, it descends to the brothers and sisters of both the father and mother of the intestate without preference, and their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate (*l*).

11. *Half Blood.*

Relatives of the half blood inherit equally with those of the whole blood in the same degree. And the descendants of the half blood inherit in the same manner as the descendants of whole blood, unless the estate came to the intestate by descent, gift, or devise from some one of his ancestors. And in such case those who are not of the blood of such ancestor are excluded (*m*). And on failure of heirs under all the preceding rules, the estate goes to the remaining next of kin according to the Statutes of Distribution of personal estate (*n*).

12. *General Provisions.*

Where several persons take together by descent, they are to take as tenants in common (*o*).

Children *en ventre sa mere* inherit in the same manner as if they had been born in the lifetime of the intestate and had survived him (*p*).

Illegitimate children cannot inherit (*q*).

Dower and curtesy are not affected by the rule of descent prescribed (*r*).

Trust estates are to descend as if the Act had not been passed (*s*). The reason for this is that the Act was intended

(*k*) S. 52.
(*l*) S. 53.
(*m*) S. 54.
(*n*) S. 55.
(*o*) S. 56.
(*p*) S. 57.
(*q*) S. 58.
(*r*) S. 59.
(*s*) Ibid.

for the distribution of beneficial interests; and besides it would be highly inconvenient that the land vested in a trustee should be divided up among a number of heirs instead of being cast upon one person as his heir-at-law. The equitable or beneficial interest, however, descends in such a case under the statute.

Where there has been an advancement of any child, that child cannot share in the inheritance without bringing the amount of his advancement into hotchpot (*t*).

Where the estate has descended to several, and partition is to be made, the person who but for this statute would have been the heir at law, has the first option to purchase the shares of all the others; and after that person, the next who would have been heir-at-law on the decease of the first, and so on in succession (*u*).

13. *Devolution of Estates Act.*

The Devolution of Estates Act occasioned the second of those radical charges in the law of inheritance already referred to. Under this enactment the estate in the first place devolves upon the personal representative, and is either distributed amongst, or ultimately devolves upon, the next of kin, who, however, are still referred to as heirs.

14. *What Interests are Included.*

First, however, we must consider what interests are included within this enactment, because such as are not included, must still remain subject to the prior legislation. The act is very narrow in its operation, and includes only "Estates of inheritance in fee-simple, or limited to the heir as special occupant in any tenements or hereditaments in Ontario whether corporeal or incorporeal," and to chattels real and other personal property. Such interests as the following, then, do not pass to the administrator under this enactment, but still descend to the heirs at law, viz.:—The benefit of a condition reserved; a right of re-entry for breach of a condition occuring in the intestate's lifetime; a right of entry on a disseisin, but as the estate of inheritance in the land passes, it is indifferent that the right of entry as such is not included; the wrongful seisin of a trespasser; possi-

(*t*) Ss. 60 to 63.

(*u*) Ss. 64 *et seq.*

bilities; and all estates for the life of another, save those limited to the heir as special occupant, which are specially mentioned in the Act; and also probably the equitable interest of a locatee of the Crown under the *Free Grants and Homesteads Act*. The equitable right of a purchaser, however, to enforce a contract in specie is probably not an equitable estate in fee-simple until he has completed all that he is bound to do on his part (*v*); and the interest of a locatee which is subject to forfeiture for non-compliance with the statute can hardly be so described. In any event can the Crown be said to be a trustee for him?

Trust estates are apparently included in the general terms of the enactment, which applies to the estates of all persons dying on and after the 1st day of July, 1886. For though section 59 of the Act (a section of the Statute of Victoria) declares that trust estates shall descend as if the Statute of Victoria had not been passed, this very section is declared to be subject to *The Devolution of Estates Act* as to the estates of persons dying on or after the 1st of July, 1886 (*w*). And though, at first sight *The Devolution of Estates Act* appears to relate only to beneficial estates, on account of the declaration that property devolving is to be subject to the payment of debts and to be distributed as personal property is thereafter to be distributed, the same clause which directs such disposition also declares that it shall be distributed as personal estate is to be distributed, "so far as the said property is not disposed of by deed, will, contract, or other effectual disposition" (*x*). And as a trust estate is already disposed of by deed or contract, the personal representative would take subject to such disposition.

15. *Purpose of the Enactment.*

The original purpose of the Act was to deprive the heirs of their right of succession (*y*), and vest the land in the administrator, from whom those ultimately entitled were obliged to take by conveyance if the land was not disposed of for the purpose of paying debts. And the intention also appears to be that heirs-at-law should no longer take as such, but that

(*v*) See *Lysaght* v. *Edwards*, 2 Ch. D. 449; *Re Flatt & Prescott*, 18 App. R. 1.

(*w*) S. 37.

(*x*) S. 4 (1).

(*y*) *Re Pilling's Trusts*, 27 Ch. D. 432.

the persons who are beneficially entitled are the next of kin in course of distribution (*z*). It will be observed, in this connection, that section 3 declares that the following seven sections shall apply to three kinds of property, viz., (a) land held in fee-simple or limited to the heir as special occupant, (b) chattels real, (c) other personal property; and section four declares that "all such property as aforesaid," *i.e.*, personal as well as real property, shall devolve upon the administrator, to be distributed as personal property is thereafter to be distributed. The ultimate destination of both realty and personalty was thus made the same by this express enactment; and by section 37, the rules of descent under the Statute of Victoria which we have been considering are declared not to apply to the estates of persons dying on or after 1st July, 1886. But the general provisions as to the mode of holding, exclusion of illegitimate children, etc., do apply, subject, however, to the provisions of *The Devolution of Estates Act*.

Succeeding legislation (*a*) seemed to indicate that the Legislature still considered that the persons beneficially entitled took as "heirs" by its constant reference to them by that name. And, as the Act now reads, though the land first devolves upon the administrator, who is to distribute it as personal property is thereafter to be distributed, and though the ultimate destination of both realty and personalty is the same (saving dower and curtesy), yet those beneficially entitled to the land are still denominated heirs. And the estate passes to them in course of descent, but is diverted to and remains in the administrator for a limited time and for a special purpose in the course of its descent (*b*).

16. *Operation of the Enactment.*

During the interval between the death of an intestate and the grant of letters of administration, there is no legal owner of the land. We have already referred to the question in dealing with title by occupancy (*c*). But the heirs-at-law

(*z*) See *Plomley* v. *Shepherd*, L.R. (1891) A.C. 244; *Re Reddan*, 12 Ont. R. 78. See also *Walker* v. *Allen*, 24 App. R. 336.

(*a*) 54 V. c. 18, ss. 1 (1), 3, 5, 6; 56 V. c. 20, ss. 1, 2, 3, 4; 60 V. c. 3, s. 3; c. 14. ss. 29, 30, 31.

(*b*) Per Burton, J.A., *Sproule* v. *Watson*, 23 App. R. at p. 697. See also per Maclennan, J.A., *McKinnon* v. *Lundy*, 25 App. R. at p. 567; *Ianson* v. *Clyde*, 31 Ont. R. at p. 584, per Boyd, C.

(*c*) See p. 273.

or next of kin have a prospective or potential ownership—not in the land itself, but in the proceeds of the estate after the administrator has performed all his functions. If the land is required for payment of debts, the heirs-at-law or next of kin get nothing; if partially required, they share in the residue of the proceeds after payment of debts. But they have no title to the land as such, any more than they have to the personalty. It all belongs to the administrator for the purpose of administration and distribution. Yet there is a *contingent* interest in the land itself. For, if the administrator does not require it for payment of debts, he may convey it to the heirs-at-law or next of kin within the year, who thus get a good title, subject, however, to the rights of creditors (*d*). If the year elapses, and the administrator does not retain the land by registering a caution, then the statute vests the land in the heirs-at-law or next of kin, without any conveyance (*e*). By this time a title to the land itself is acquired; but not an indefeasible one. For if the administrator should subsequently require the land, he may still register a caution upon procuring an order of a High Court or County Court Judge, or a consent of adult heirs, or a certificate from the official guardian (*f*) and thereupon the land re-vests in him for purposes of administration (*g*), except as regards the rights of persons who in the meantime may have acquired rights for valuable consideration from or through the heirs (*h*). And he may from time to time register successive cautions so as to keep the land in his hands for successive periods of twelve months each; but even when he finally conveys to the heirs-at-law or next of kin they take subject to the rights of creditors, if any should afterwards appear (*i*).

Shortly after the enactment came into force, it became the practice to apply for and receive letters of administration limited to the personal estate only, on the assumption that the administrator would thus be quit of responsibility for the distribution of the land of the intestate. But it seems clear that whatever might be the form or scope of the letters,

(*d*) S. 20.
(*e*) S. 13.
(*f*) S. 14.
(*g*) *Ianson* v. *Clyde*, 31 Ont. R. at p. 584.
(*h*) S. 15.
(*i*) S. 20.

the statute cast the land upon the administrator in spite of him (*j*), and the title of the heirs-at-law could only be made by conveyance from the administrator.

Where no administrator is appointed the land shifts into the beneficiaries at the end of the year from the intestate's death in the same manner as if an administrator had been appointed, subject to the right of the administrator, when appointed, to register a caution.

17. *The Widow's Share.*

The Act does not take away the right to dower. But a widow may elect to take her interest in her husband's undisposed of real estate in lieu of all claims for dower; and unless she so elects, she is not to share in the undisposed of realty under the Act (*k*). Her share under the Act is her share under the Statute of Distributions and this enactment, the land being distributed as personal estate is thereafter to be distributed; that is to say, one half if her husband leaves no issue, and one third if he does. But this share is a share in the proceeds of the estate after payment of debts and costs of administration, and therefore it may be to the advantage of the widow to take her dower, which is her own property and not liable to her husband's debts.

The election may be made at any time that the exigencies of administration permit; and the widow is entitled to be informed of how the estate will turn out on administration, so as to compare the value of the share with the value of her dower, before she can be called upon to elect between them (*l*).

The election is required to be made by deed or instrument in writing, attested by at least one witness, and so an election by will is sufficient (*m*).

The distributive share of the widow in case of intestacy is one third if the husband leaves issue, but one-half if he leaves none (*n*). But this enactment materially adds to her share under the Statute of Distributions. By section 12, where a man dies after 1st July, 1895, intestate, and leaving a widow, but no issue, and the net value of his real and

(*j*) See *Re Pawley & London and Prov. Bank*,' L.R. (1900) 1 Ch. 58.
(*k*) S. 4 (2).
(*l*) *Baker* v. *Stuart*, 29 Ont. R. 388; 25 App. R. 445.
(*m*) *Re Ingolsby*, 19 Ont. R. 283.
(*n*) 22 & 23 Car. II. c. 10, ss. 5, 6.

personal property does not exceed $1,000, it all belongs to the widow absolutely and exclusively. Where such net value exceeds $1,000, then the widow takes $1,000 out of the estate, after payment of debts, funeral and testamentary expenses and expenses of administration, absolutely and exclusively; and she has a charge therefor on the whole real and personal estate after administration, with interest at four per cent. per annum until payment.

This provision is in addition to her share under the Statute of Distributions; and after payment of the $1,000, she is entitled to share in the remainder of the estate as if it were the whole estate (*o*).

This enactment applies only to the case of a total intestacy, and not where a partial intestacy occurs; and that, too, although the enactment speaks of the payment of "testamentary" expenses, the use of this expression being probably a slip in drafting (*p*). The widow may deprive herself of the right by a settlement (*q*).

Where the intestate leaves a widow and no next of kin, the widow takes her $1,000, then one-half of the remainder, and the other half goes to the Crown (*r*).

18. *The Husband's Share.*

While a widow's right to dower is not affected by the Act unless she elects to take a distributive share in lieu of it, the husband of an intestate is bound to take his distributive share unless he elects to take his estate by the curtesy (*s*). His election must be made within six months from his wife's death; and must be by deed or instrument in writing attested by at least one witness. If he takes his curtesy, he is entitled to nothing further under the Act.

If he does not elect to take his curtesy within the time limited, he takes, under the Devolution of Estates Act, one-third of the real and personal property of his deceased wife, whether separate or otherwise, if she leaves issue; and one-half if she leaves no issue (*t*).

(*o*) *Sinclair* v. *Brown*, 29 Ont. R. 370.

(*p*) *Re Twigg's Estate*, L.R. (1892) 1 Ch. 579. The Act is taken from an English statute, and the mistake is faithfully copied.

(*q*) *Toronto Gen. T. Co.* v. *Quin*, 25 Ont. R. 25; *Lord Buckinghamshire* v. *Drury*, 3 Bro. C.C. 492; 4 Bro. C.C. 506, note; and see *Eves* v. *Booth*, 29 App. R. 420.

(*r*) *Cave* v. *Roberts*, 8 Sim. 214.

(*s*) S. 4 (3).

(*t*) S. 5.

The common law right of the husband to take his wife's choses in action was not affected by the Statute of Distributions, it being enacted by the Statute of Frauds (*u*) that "neither the said Act nor any thing therein contained shall be construed to extend to the estates of feme coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act" (*v*). The husband could then retain the surplus of his wife's estate to his own use (*w*) until the present enactment, whereby he is limited to the proportion mentioned.

19. *Children and their Representatives.*

The Statute of Distribution enacts that the surplusage of the estate shall be distributed as follows:—"One-third to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children in case any of the children be then dead," with a provision that children (not the heir), who shall have been advanced, shall have only such share as will, with the advancement, make their shares equal to the others (*x*). And in case there be no wife, then all the estate is to be distributed equally to and amongst the children (*y*).

The persons who "legally represent" deceased children are not their next of kin, or executors or administrators, but their descendants (*z*). So, if a son of an intestate be dead, leaving a widow and child, the widow takes nothing under the Statute of Distributions, but the whole goes to the child (*a*).

Where there are some children living, and some are dead leaving issue, the descendants of the deceased children take *per stirpes*. That is, the estate is divided into as many shares as there are living children and deceased children leaving descendants; and each living child takes one of these shares,

(*u*) 29 Car. II. c. 3, s. 25.
(*v*) See *Re Lambert's Estate*, 39 Ch. D. 626, at p. 630.
(*w*) *Lamb* v. *Cleveland*, 19 S.C.R. 78.
(*x*) S. 5.
(*y*) S. 7.
(*z*) *Bridge* v. *Abbott*, 2 Bro. C.C. at p. 226.
(*a*) *Price* v. *Strange*, 6 Madd. at p. 162.

and the children of each deceased child divide one of these shares between them (*b*).

Where all the children are dead and leave issue, there seemed to be a difference of opinion as to how they should take. But, as the descendants of children take, not in their own right, but as legally representing their parents, it would seem that they should take *per stirpes*, *i.e.*, each family would take the share which the parent (the deceased child) would have taken had he survived (*c*). This is entirely different from the Inheritance Act, the Statute of Victoria, under which, as we have seen, where the relatives were in equal degree they took *per capita*, where in unequal degree, *per stirpes*.

20. *Next of Kin.*

If there be no children, nor any legal representatives of them, *i.e.*, descendants, then the estate is to be distributed "equally to every one of the next of kindred of the intestate who are in equal degree, and those who legally represent them" (*d*). And amongst collaterals, it is enacted that "there be no representations admitted . . . after brothers' and sisters' children" (*e*); *i.e.*, children of the brothers and sisters of the intestate. Where there are children of brothers and sisters and children of deceased children of brothers and sisters, the latter are excluded (*f*).

Where the intestate left a father, but no children, the father took the whole estate, under the Statute of Distributions, as the nearest of kin, being related in the first degree (*g*). But by *The Devolution of Estates Act*, s. 6, it is enacted that, "when a person shall die without leaving issue, and intestate as to the whole or any part of his real and personal property, his father surviving shall not be entitled to any greater share under the intestacy than his mother or any brother or sister surviving." This has been held to mean that the father, in such case, is not entitled to any greater share than the mother or brother or sister would have been entitled to, if they had been the survivors and not the father. This will vary

(*b*) Wms. Exors. 9th ed. p. 1368.
(*c*) *Re Ross' Trusts*, L.R. 13 Eq. 286; *Re Natt*, 39 Ch. D. 517.
(*d*) S. 6.
(*e*) S. 7.
(*f*) *Crowther* v. *Cawthra*, 1 Ont. R. 128.
(*g*) *Blackborough* v. *Davis*, 1 P. Wms. at p. 51.

according to circumstances. So that a father shares equally with brothers and sisters (*h*).

Where the intestate left a mother but no father, wife or child, the mother took the whole, which occasioned the passing of another Statute (*i*), whereby it is enacted that, "if after the death of a father any of his children shall die intestate, without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her." The reason for the Act was that the mother, taking the whole of her child's estate as nearest of kin, might marry again, and her husband would have become entitled to the property (*j*). Since this enactment, then, the brothers and sisters of an intestate share equally with the mother under the above circumstances (*k*). And the representatives of brothers and sisters take the share which the deceased brothers or sisters would have taken if they had survived, *i.e.*, they take *per stirpes* (*l*). And as this Statute of James II. is *in pari materia* with the Statute of Charles II., it is affected by the enactment in the latter Act, that representation is not to be carried beyond brothers' and sisters' children (*m*). Brothers and sisters of the half blood share with the mother of the intestate under the same circumstances (*n*).

But where there are no father, children, brothers or sisters, or representatives of brothers or sisters, then the mother takes the whole (*o*).

Where there was a grandfather or grandmother, and brothers and sisters, the grandparent was excluded (*p*); and by *The Devolution of Estates Act*, s. 6., it is enacted that, a grandfather or grandmother shall not share in competition with a surviving father, mother, brothers or sisters. Apparently this enactment made no change in the law; for if a father or mother survived, he or she took as nearest of kin, and a grandfather or grandmother would, in such a case, be

(*h*) *Walker* v. *Allen*, 24 App. R. 336.
(*i*) 1 Jac. II. c. 17, s. 7.
(*j*) *Blackborough* v. *Davis*, 1 P. Wms. at p. 49.
(*k*) *Keilway* v. *Keilway*, Gilb. Eq. Cas. 190.
(*l*) *Stanley* v. *Stanley*, 1 Atk. 455.
(*m*) Ibid.
(*n*) *Jessopp* v. *Watson*, 1 M. & K. 665.
(*o*) Wms. Exors. 9th Ed. 1380.
(*p*) Wms. Exors. 9th ed. 1381.

too remote. And it had already been determined that where grandparents and brothers and sisters survived, the former were excluded.

But if grandparents are the nearest of kin, of course they will take; and, being related in the second degree, they will be preferred to uncles and aunts, who are related in the third degree (*q*). But great-grandparents being related in the third degree, will share with uncles and aunts (*r*).

Amongst collaterals, where the next of kin are of equal degree, they take *per capita*; where of unequal degree, they take *per stirpes*. Hence, if an intestate leave a deceased brother's only son, and ten children of a deceased sister, the ten children of the deceased sister take ten parts in eleven of the estate, and the son of the deceased brother, one part (*s*). But if the intestate leave one brother and ten children of a deceased sister, the brother takes one half, and the other half is divided amongst the children of the deceased sister (*t*).

Relatives of the half blood are entitled equally with relatives of the whole blood in the distribution of the estate (*tt*).

21. *Descent of Estate Tail.*

An estate in tail very rarely occurs in this province, and perhaps still more rarely is it allowed to descend. It is not, therefore, proposed to deal at length with the mode of inheritance in such cases.

Necessarily the rules of the common law to some extent prevail, the statutes of Wm. IV. and Victoria not affecting such estates. Their descent is regulated *per formam doni*, by the form or terms of the gift in tail and by the statute *De donis*. This occasions two important exceptions to the common law rules of descent. The first is that the maxim *seisina facit stipitem*, or that the inheritance descends to the issue of the person who last died *actually seised*, does not apply. As the gift originally limited the estate to the issue of the first donee in tail, descent must always be traced from him, that is, through and to his heirs in the direct line downwards. And the second is, that the half blood are not excluded,

(*q*) Wms. Exors. 9th Ed. 1382.
(*r*) *Lloyd* v. *Tench*, 2 Ves. Sr. 215.
(*s*) *Bowers* v. *Littlewood*, 1 P. Wms. 594.
(*t*) *Lloyd* v. *Tench*, 2 Ves. Sr. 215.
(*tt*) Wms. Exors. 9th ed. p. 1382.

as in the case of a fee-simple. The reason for this is the same, viz., that descent must always be traced from the first donee to and through his *descendants*, and as all descendants claim, not from the person last seised, but from their ancestor, the original donee in tail, they must always be of his whole blood (*u*).

The rules of primogeniture and preference of males to females, however, do apply, if the entail is general.

If the gift in tail be special, as to heirs male of the body, or heirs female of the body, descent must be traced wholly to and through males or females, as the case may be.

And so also where the gift in tail is special as being limited to the issue by a certain wife or husband, the form of the gift must still be observed, and only those issue who answer the conditions of the gift will be admitted.

Upon failure of the issue in tail, if the entail is not barred, the land reverts to the original donor or his heirs.

(*u*) *Doe d. Gregory* v. *Whichelo*, 8 T.R. 213.

CHAPTER XXIV.

OF ALIENATION BY DEVISE.

(1). *Origin of Wills.*
(2). *The Statute of Frauds.*
(3). *The Statute of Wm. IV.*
(4). *Wills before 1874.*
(5). *What Might be Devised.*
(6). *After-acquired Property.*
(7). *Words of Limitation.*
(8). *Wills of Married Women.*
(9). *Wills after 1st January, 1874.*
(10). *Execution.*
(11). *Attestation.*
(12). *Wills of Soldiers and Sailors.*
(13). *Competency of Witnesses.*
(14). *What May Be Devised.*
(15). *Infants and Married Women.*
(16). *Revocation.*
(17). *After-acquired Property.*
(18). *General Description of Lands.*
(19). *Words of Limitation.*
(20). *Lapse.*
(21). *Die Without Issue.*

1. *Origin of Wills.*

It seems sufficiently clear that, before the Conquest, lands were devisable by will. But, upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feudal doctrine of non-alienation without the consent of the lord. And some have questioned whether this restraint (which we may trace even from the ancient Germans) was not founded upon truer principles of policy, than the power of wantonly disinheriting

the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this, it is alleged, maintained the balance of property, and prevented one from growing too big or powerful for his neighbours; since it rarely happens that the same man is heir to many others, though by art and management he may frequently become their devisee. Thus the ancient law of the Athenians directed that the estate of the deceased should always descend to his children; or, on failure of lineal descendants, should go to the collateral relations; which had an admirable effect in keeping up equality, and preventing the accumulations of estates. But when Solon made a slight alteration, by permitting testators (though only on failure of issue) to dispose of their lands by testaments, and devise away estates from the collateral heir, this soon produced an excess of wealth in some, and of poverty in others; which, by a natural progression, first produced popular tumults and dissensions; and these at length ended in tyranny, and the utter extinction of liberty; which was quickly followed by a total subversion of their state and nation. On the other hand, it would now seem hard, on account of some abuses (which are the natural consequence of free agency, when coupled with human infirmity), to debar the owner of lands from distributing them after his death as the exigence of his family affairs, or circumstances, may perhaps require. And this power, if prudently managed, hath with us a peculiar propriety; by preventing the very evil which resulted from Solon's institution, the too great accumulation of property; which is the natural consequence of the doctrine of succession by primogeniture, to which the Athenians were strangers. Of this accumulation the ill effects were severely felt even in the feudal times; but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

However this be, we find that, by the common law of England since the Conquest, no estate, greater than for term of years, could be disposed of by testament, except only in Kent, and in some ancient burghs, and a few particular manors, where their Saxon immunities by special indulgence subsisted. And though the feudal restraint on alienations by deed vanished very early, yet this on wills continued for some centuries after; from an apprehension of infirmity and

imposition on the testator *in extremis*, which made such devises suspicious. Besides, in devises there were wanting that general notoriety and public designation of the successor, which in descents is apparent to the neighbourhood, and which the simplicity of the common law always requires in every transfer and new acquisition of property.

But when ecclesiastical ingenuity had invented the doctrine of uses as a thing distinct from the land, uses began to be devised very frequently, and the devisee of the use could in Chancery compel its execution. For it is observed by Gilbert that, as the Popish clergy then generally sat in the Court of Chancery, they considered that men are most liberal when they can enjoy their possessions no longer, and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, would intercede for their happiness in another world. One mode adopted was to enfeoff another to such uses as the feoffor should by his last will appoint, and afterwards to exercise the power of appointment by devise to superstitious uses, tending to alienation in mortmain, a practice which by reason of the ingenuity of the religious bodies interested in upholding such devises, the legislature had great difficulty in preventing. But when the Statute of Uses had annexed the possession to the use, these uses, being the very land itself, became no longer devisable; which might have occasioned a great revolution in the law of devises, had not the Statute of Wills been made about five years after, viz., 32 Hen. VIII. c. 1, explained by 34 & 35 Hen. VIII. c. 5, which enacted that all persons being seised in fee-simple (except feme-coverts, infants, idiots, and persons of nonsane memory) might by will and testament in writing devise to any other *person*, except to bodies corporate, two-thirds of their lands, tenements and hereditaments, held in chivalry, and the whole of those held in socage; which, through the alteration of tenures into socage by the statute of Charles the Second amounted to the whole of their landed property, except their copyhold tenements.

Corporations were excepted in these enabling statutes, to prevent the extension of *mortmain*; but by construction of the statute 43 Eliz. c. 4, it was held, that a devise to a corporation for a charitable use was valid, as operating in the nature of an *appointment*, rather than of a *bequest*.

It has been explained that so far as regards devises of lands and tenements, and bequests of money, to be laid out

thereon, the operation of the statute of Elizabeth was virtually repealed by the statute of 9 Geo. II. c. 36, and that now by Provincial legislation devises of land for religious and other purposes may be made.

With regard to devises in general, experience soon shewed how difficult and hazardous a thing it is, even in matters of public utility to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them, disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this Act by the courts of law, that bare notes in the handwriting of another person were allowed to be good wills within the statute.

2. *The Statute of Frauds.*

To remedy this the Statute of Frauds and Perjuries, 29 Car. II. c. 3, now repealed as to that portion of it relating to wills, directed that all devises of lands and tenements should not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed in his presence, by three or four credible witnesses.

3. *The Statute of Wm. IV.*

A provincial Statute of Wm. IV. declared that a will executed after 6th March, 1834, in the presence of and attested by two or more witnesses, should have the same validity as if executed in the presence of and attested by three witnesses (*v*).

Notwithstanding that the Provincial Act was silent as to the credibility of the witnesses, that qualification still continued to be requisite as under the Act of Charles (*w*). The Statute of Charles was not impliedly repealed by that of William (*x*). It seems clear, therefore, that a will invalid as not complying with the latter, was valid if it complied with the former. In one case (*y*) the Court went further, and held in effect that the statutes were cumulative, and might be read

(*v*) C.S.U.C. c. 82, s. 13, now R.S.O. c. 128, s. 5.
(*w*) *Ryan* v. *Devereux*, 26 U.C.R. 107.
(*x*) *Crawford* v. *Curragh*, 15 C.P. 55.
(*y*) *Crawford* v. *Curragh*, supra.

together; so that a will, invalid under either statute taken singly, might be supported on their joint authority. Thus, a will executed in the presence of two witnesses who subscribed in the presence of the testator, but not in the presence of each other, was held sufficient (*z*).

The Statute of Charles required that the witnesses should be credible, and though as to this the Provincial Statute was silent, yet it was held, as we have seen (*a*), that the requirements of the former statute continued. In one case, decided under the Statute of Charles, but afterwards over-ruled as to *creditors* as wrongly decided, the judges would not allow any legatee, nor by consequence, a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues (and these are the persons most likely to be present in the testator's last illness), and if, in such case, the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6, which restored both the competency and the credit of such *legatees*, by declaring void all beneficial legacies, devises, estates, interests, gifts, or appointments of or affecting any real or personal estate, given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of *creditors*, by directing the evidence of all such creditors to be admitted, but leaving their credit (like that of all other witnesses) to be considered, on a view of all the circumstances, by the Court and jury before whom such will shall be contested.

(*z*) *Ryan* v. *Devereux*, 26 U.C.R. 107.

(*a*) Ibid.; and see *Little* v. *Aikman*, 28 U.C.R. 337; the case of a gift to an unnecessary *third* witness being void.

As this Act did not extend to a devise or bequest to the husband or wife of an attesting witness, so as to avoid it, it was held that the witness was still not a credible witness as being interested indirectly in upholding the will and gift made by it. Thus, if the husband were a witness, and the will made provision for his wife, he was not a competent witness. This has been dealt with by subsequent legislation to be referred to presently.

Another inconvenience was found to attend this new method of conveyance by devise; in that creditors by bond and other specialties, which affected the *heir*, provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the *devisee* of their debtor. To obviate which, the statute 3 & 4 W. & M. c. 14 provided that all wills and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple, or having power to dispose by will, shall (as against such creditors only), be deemed to be fraudulent and void; and that such creditors may maintain their actions jointly against both the heir and the devisee (*b*).

The subject of devisees by will is one which, to be fully treated of, would require very much more space than can be devoted to it in a work of this nature, which treats of so many subjects in the law of real property. We shall therefore treat briefly of the law under the present Wills Act (*c*), and confine our remarks to realty as distinct from personalty.

4. *Wills Before 1874.*

In 1873 an Act was passed to come into force on 1st January, 1874, which consolidated all previous enactments designed to be continued in force, and comprised a new enactment as to wills made after it came into force. We shall, therefore, treat of wills before 1st January, 1874, and after that date.

Before 1st January, 1874. The mode of execution and attestation of wills has already been adverted to. Every will was to be executed in the presence of two witnesses, who should subscribe their names in the presence of each other, though not necessarily in the presence of the testator (*d*)

(*b*) See *Vankoughnet* v. *Ross*, 7 U.C.R. 248, commented on in *Rymal* v *Ashberry*, 12 C.P. 339.

(*c*) R.S.O. c. 128.

(*d*) R.S.O. c. 128, s. 5.

It was not necessary, however, before the Wills Act of 1873, that the testator should sign the will in any particular place; and accordingly a holograph will, *i.e.*, one written by the testator himself, was sufficiently signed if written as follows: "I, A.B., do hereby make, etc.," or "This is the will of me, A.B., etc."

5. *What Might be Devised.*

"Land" was defined to extend to messuages, and all other hereditaments, whether corporeal or incorporeal, to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs (as heir-looms) and also to any share of the same hereditaments and properties, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, to any possibility, right or title of entry or action, and to any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, were in possession, reversion, remainder or contingency (*e*).

Although this statute explicitly mentions "any estate of inheritance," estates tail being governed by a special statute, *De donis conditionalibus*, are necessarily excluded. It is also to be observed that a right of entry is devisable, so that a person disseised could devise his right of entry. The phrase "any other interest capable of being inherited" would also comprise the seisin of a trespasser, who might devise his wrongful seisin, and thus enable his devisee, if he entered, to add the testator's possession to his own and, if in possession long enough, to extinguish the title of the true owner under the Statute of Limitations.

6. *After-acquired Property.*

A will was in early days looked upon as a present conveyance, *i.e.*, a disposition of property which the testator owned at the time of making it; and property acquired after he made his will would not pass. To remedy this it was enacted that where a will made by any person dying after 6th March, 1834, contained a devise of all such land as the testator died seised or possessed of, it should be valid and effectual to pass land acquired after the making of the will (*f*).

(*e*) S. 2.

(*f*) S. 3. See postea, p. 416.

7. *Words of Limitation.*

Words of limitation, or other words shewing either expressly or by implication that the testator intended to pass the fee, were essential, otherwise an estate for the life of the devisee only would pass. To remedy this it was enacted that wills of persons, dying after the above mentioned date, should be taken as intended to pass all such estate as the testator had in the land, unless a contrary intention appeared in the will (*g*).

8. *Wills of Married Women.*

Any married woman after 4th May, 1859, might by devise executed in the presence of two or more witnesses, neither of whom was her husband, make any devise of her separate property to or amongst her child or children issue of any marriage, and failing there being issue then to her husband, or as she might see fit (*h*). Any disposition attempted to be made by a married woman under this Act to her husband or other persons when she had children was consequently void, and intestacy was the consequence (*i*). And it was doubted whether she could devise her property to one to the exclusion of others of her children (*j*).

9. *Wills After 1st January, 1874.*

With slight exceptions the Wills Act applies to all wills made on or after 1st January, 1874. Four sections, 21, 22, 25 and 26 apply to the wills of all persons who died after 31st December, 1868.

10. *Execution.*

The mode of execution of a will under the present Act is radically different from that under the previous law. Every will must be in writing, and for the first time it is required that a will shall be signed "at the foot or end thereof," which is defined to mean "if the signature is so placed, at, or after, or following, or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will; and no such will shall be affected by the

(*g*) S. 4.
(*h*) S. 6.
(*i*) *Mitchell* v. *Weir*, 19 Gr. 568.
(*j*) *Munro* v. *Smart*, 26 Gr. 37.

circumstance that the signature does not follow or is not immediately after the foot or end of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature, or by the circumstance that the signature is placed among the words of the testimonium clause, or of the clause of attestation, or follows, or is after or under the clause of attestation either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature is on a side, or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will is written above the signature, or by the circumstance that there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment" (*k*).

11. *Attestation.*

The attestation must be by two or more witnesses present at the same time when the signature took place, and they are to subscribe their names in the presence of the testator (*l*). It is the purpose of the Act that every disposition shall be authenticated after it is made by the signatures of both testator and witnesses in the foregoing manner; and consequently if any disposition or direction appears underneath the signature it is not operative, but another signature ought to follow (*m*); and "no obliteration, interlineation or other alteration made in any will after execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration are not apparent, unless such alteration is executed in like manner as hereinbefore is required for the execution of the will; but the will with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses are made in the margin or in some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or in some other part of the will" (*n*).

(*k*) S. 12.
(*l*) Ibid.
(*m*) Sec. 12 (2) ad fin.
(*n*) S. 23.

12. *Wills of Soldiers and Sailors.*

Though the general statutory rule is that wills must be in writing, an exception is made in favour of "soldiers being in actual military service" and mariners or seamen "being at sea," who may dispose of their personal estate as they might have done before the passing of the present Act (*o*). A similar provision was made by the Statute of Frauds (*p*). Any such person may, under the circumstances mentioned, make a will by word of mouth, called a nuncupative will. As regards soldiers, it has been held that they are not privileged if in barracks, but that to be within the Act, they must be on active service; and mariners must be on an expedition (*q*).

13. *Competency of Witness.*

As to the competency of witnesses. Where real or personal estate is charged with debts, and any creditor, or the wife or husband of any creditor whose debt is so charged by the will, attests the execution, he or she is, notwithstanding such charge, admitted to prove the will (*r*). No executor, on that account, is incompetent as a witness (*s*). And any beneficial devisee or legatee, or the wife or husband of any such person, is competent to prove the will, but the devise or legacy in such case is made null and void, thus removing the interest of the witness (*t*).

Lastly, it is enacted that "if any person who attests the execution of a will is, at the time of the execution thereof, or becomes at any time afterwards, incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid" (*u*). It is not quite clear what is meant by this section. Executors, legatees, and creditors whose debts are charged on the estate by the will, their wives and husbands, are all competent witnesses. And if any witness to a will should afterwards by a codicil be made an executor or legatee, or should become a creditor and have his debt charged on the

(*o*) S. 14.
(*p*) 29 Car. II. c. 4, s. 23.
(*q*) See Encyc. of Laws of Eng. 596; Jarm. on Wills, 5th ed. 78.
(*r*) R.S.O. c. 128, s. 18.
(*s*) S. 19.
(*t*) S 17.
(*u*) S. 16.

estate by the will or codicil, he would still be a competent witness under the other sections. The Act contemplates that a witness shall be able to subscribe his name, and afterwards to prove the testator's signature; and it is difficult to conceive of a case where a witness would be incompetent, these qualifications being present. A person incompetent to comprehend what was being done, *i.e.*, one of unsound mind, would hardly be selected as a witness; but this is the only incompetency that suggests itself. And if a witness, sane at the time of attestation, should afterwards become insane, it could hardly be contended that the will would have become invalid thereby, even in the absence of this enactment, any more than if he had died after attestation.

14. *What May be Devised.*

All real estate (messuages, lands, rents, and hereditaments, whether freehold or of any other tenure, corporeal or incorporeal or personal, and any undivided share therein, and any estate, right or interest therein), and personal estate (leaseholds and other chattels real) to which the testator may be entitled at the time of his death, and which, if not devised, would devolve upon his heir-at-law or upon his executor or administrator; estates *pur autre vie*, whether there be a special occupant or not; contingent, executory or other future interests, whether the testator be or be not ascertained as the person or one of the persons in whom the same may become vested, all rights of entry for condition broken and other rights of entry, and such estates and interests as the testator may be entitled to at the time of his death, though he may become entitled thereto subsequently to the execution of his will (*v*).

It will be noticed that a right of entry for condition broken is made devisable by this enactment, whereas only rights of entry as on a disseisin were within the former enactment.

15. *Infants and Married Women.*

An infant cannot make a will (*w*).

When the Wills Act was passed in 1873 (*x*) the words "person" and "testator" included married women. A

(*v*) S. 10.
(*w*) S. 11.
(*x*) 36 V. c. 20, s. 4.

married woman was therefore enabled to make a will in the same manner as any other person. When the statutes were revised in 1887, this clause was omitted (*y*) and the former revised Act was repealed. At the same time the Married Women's Property Act enabled her to make a will of her separate estate (*z*). Without hazarding an opinion as to what might be the judicial interpretation of this position, the fact is very patent that the clause declaring married women to be within the Wills Act was deliberately repealed in 1887, and there was no statutory authority for a married woman to make a will (except of her separate estate) from 1887 to 1897, when the omitted clause was restored (*a*). In the same year, 1897, an enactment was passed respecting married women's property (*b*), which provides that section 26 of the Wills Act shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it. This appears to apply to separate property only, and is now incorporated in the Wills Act (*c*) where the omitted clause is also restored. Thus while the whole Wills Act applies generally to the wills of married women, as being "persons" or "testators" by definition, one clause is made specifically to apply to wills of separate estate. According to the ordinary canon of construction the specific application of one section would exclude the remainder of the Act. But as any attempt to put a construction upon legislation of the kind must result in an arbitrary interpretation, attention is merely called to the point.

16. *Revocation.*

A will might, before 1st January, 1869, have been revoked, either by implication or expressly. Before that date the will of a woman was impliedly revoked by marriage. The will of a man was not revoked by marriage only; nor was a will made after marriage and before birth of issue revoked by the birth of issue only. But marriage and birth of issue revoked a will made by a man before marriage, unless provision were made in the will for wife and children; on the principle that, where a man had made a will in favour of a

(*y*) R.S.O. (1887) c. 109, s. 9.
(*z*) R.S.O. (1887) c. 132, s. 3.
(*a*) R.S.O. c. 128, s. 9, s.-s. 5.
(*b*) 60 V. c. 22, s. 2.
(*c*) R.S.O. c. 128, s. 26 (2).

stranger or remote relation, he could not intend it to be operative to the detriment of his wife and children upon such a change of circumstances. On 1st January, 1869, marriage was declared to be a revocation of the will of a testator, unless made in pursuance of a power of appointment under the circumstances mentioned in clause (c) of the section to be presently mentioned (*d*). The present Wills Act now provides that the will of every person dying on or after 13th day of April, 1897, shall be revoked by the marriage of the testator, except in the following cases:—

(a) Where it is declared in the will that the same is made in contemplation of such marriage;

(b) Where the wife or husband of the testator elects to take under the will, by an instrument in writing, signed by the wife or husband, and filed within one year after the testator's death in the office of the surrogate clerk at Toronto;

(c) Where the will is made in the exercise of a power of appointment, and the real and personal estate thereby appointed would not, in default of such appointment, pass to the testator's heir, executor or administrator, or the person entitled as the testator's next of kin under the Statute of Distributions (*e*).

It will be observed that marriage alone will now revoke a will, except in the cases removed from the operation of the enactment, and birth of issue will not now have any effect, having been disregarded by the legislature in defining how revocation shall take place, and the legislature having explicitly declared (*f*) that "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

With regard to the class of cases comprised in clause (a), inasmuch as it is a statutory requirement that there shall be a declaration in the will that it is made in contemplation of marriage, it is conceived that no evidence would be admissible, either extraneous or by inference from the nature of the disposition contained in the will, to shew such contemplation or intention if the declaration should not appear expressly in the will. At the common law, when marriage and birth of issue constituted an implied revocation, no evidence of intention was admissible (*g*); and so it

(*d*) R.S.O. c. 128, s. 20 (2).
(*e*) Ibid. s. 20.
(*f*) Ibid. s. 21.
(*g*) *Marston* v. *Roe d. Fox*, 8 Ad. & E. 14.

would probably not have been admissible since the statute, even if the clause (a) had not been enacted. It was also the rule at common law that, if the wife and children were provided for in the will of a man unmarried when it was made, the subsequent marriage and birth of issue did not revoke the will (*h*). Bearing this in mind, the legislature has not thought fit to declare that a will shall not be revoked by marriage, if it provides for the event of marriage and its results, or if it appears from the will that the intention was that it should not be revoked by marriage; but has expressly enacted that it must contain a declaration that the will "is made in contemplation of *such* marriage." That is to say, bequests or devises to take effect in the event of marriage, or in case of marriage (as, "I leave my property to A., but in case I marry, then to my wife"), are apparently not sufficient; but there must be a formal declaration that the will is made in contemplation of marriage, and then "such marriage," *i.e.*, the marriage referred to in the declaration will not revoke the will so made.

Clause (b) is no doubt intended to cover cases not within clause (a), and to provide for wills made *in the event*, though not in contemplation, of marriage. If the will contains the declaration required by clause (a), it will be sufficient to prevent revocation, and therefore clause (b) need not be resorted to. Where no formal declaration is contained in the will, then the election of the wife or husband to take under the will, will prevent revocation. In order to make this clause operative, it is perhaps not too much to assume that there must be a bequest or devise to the wife or husband, otherwise the election could not be made. Thus, if a testator should say, "I leave my property to A., but in case I marry, then to my wife," the marriage would cause a dependent revocation of the will, there being no declaration that it is made in contemplation of marriage; but the wife might elect to take under it, and thus prevent complete revocation. If, however, there should be no bequest or devise to the wife or husband, but to children only (thus, "I leave my property to A., but in case I marry, then to my children"), so that wife or husband could not "elect to take under the will," the revocation could apparently be complete by marriage; and intestacy would follow, to the benefit of the children.

(*h*) *Marston* v. *Roe d. Fox*, supra.

The marriage must, of course, be a legal one. In England a form of marriage between persons within the prohibited degrees will of course not work a revocation (*i*).

Cases under clause (c). Where the testator appoints by will property which in default of appointment might go to his family, the will is revoked by his marriage, the policy of the Act being the same as in the case of a disposition of his own property. But where the property, in default of appointment, would not go to his family, then there is no reason why marriage should revoke the will, and consequently that case is excepted from the general provisions of the statute. The only effect of annulling a will in the latter case would be, not to vest the property in the new family of the testator, who are under the protection of the Act, but to carry it to the person entitled in default of appointment.

A will may also be revoked expressly, either (1) by another testamentary document, or in the words of the statute, by "another will or codicil executed in the manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed," or (2) "by the burning, tearing or otherwise destroying the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same" (*j*).

As to revocation by a subsequent testamentary disposition, it must be borne in mind that no informal document is sufficient. Any revoking document must be of the same dignity as the will revoked, *i.e.*, it must be executed in the same manner as a will.

A will may be impliedly revoked by a subsequent inconsistent testamentary disposition of the property affected by it, or partially revoked by a disposition of part of the property. But if there be not an express revoking clause in the subsequent will, both may be read together, and if not entirely inconsistent with each other both may stand. Further consideration of this branch of the subject is not within the scope of this chapter, and the reader is referred to the treatises on wills therefor.

As to revocation by destruction, it will be recalled that "obliteration" (*k*) is not to have any effect unless executed

(*i*) *Mette* v. *Mette*, 1 Sw. & Tr. 416.
(*j*) R.S.O. c. 128, s. 22.
(*k*) S. 23.

in the manner prescribed for the execution of a will. The burning, tearing or otherwise destroying the will stand on a different footing, and though not required to be done in the presence of attesting witnesses, as obliteration is, yet they must be done *with the intention of revoking the will*. This intention may be shewn by evidence, because burning, tearing or other destruction of the will might occur by accident, or be for a specific though mistaken purpose, as will be presently seen. There must be the destruction by the testator with the intention of revoking the will, or destruction by some one acting upon his direction *and* in his presence with the intention of revoking it.

Where the act of destruction takes place with the intention of making another will, so that it may be inferred that its revocation depends upon the efficacy of the new testamentary disposition, and if the new will be defective or inoperative, so that the object of the testator is not attained, the revocation by destruction fails. So also, if a will be destroyed on the assumption that an earlier will is thereby revived, and if this supposition turns out to be erroneous, the revocation fails. The intention to revoke in such cases is not absolute, but dependent upon the substitution of another testamentary disposition; and being thus conditional, and the condition not happening, the revocation does not take place. This is called dependent relevant revocation (*l*).

When it is proved that a will has been executed, and it is traced to the testator's possession, but cannot be found on his death, the presumption is that he destroyed it himself (*ll*). But this presumption may of course be rebutted (*lm*).

No will, which has been in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed as required by the Act, and shewing an intention to revive the will; and where a will which has been partly revoked, and afterwards wholly revoked, is revived, the revival is not to extend to so much as was revoked before the revocation of the whole, unless a contrary intention is shewn (*m*).

Under the old law a conveyance, or attempted conveyance, which was ineffective or inoperative, was held to revoke a devise of the same property, on the principle that it was

(*l*) See *Cossey* v. *Cossey*, 16 T.L.R. 133.

(*ll*) *Allan* v. *Morrison*, L.R. (1900) A.C. 604.

(*lm*) *Sugden* v. *Lord St. Leonards*, 1 P.D. 154.

(*m*) R.S.O. c. 128, s. 24.

inconsistent with the disposition by will. But, by the present Act, "no conveyance, or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, except an act by which such will is revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate, as the testator had power to dispose of by will at the time of his death" (*n*).

17. *After-acquired Property.*

As to what will pass by a devise, we have to consider, what estate will pass and what property is included in the description. A will was originally considered, with regard to real property, as a present conveyance, and to pass, therefore, only such property as the testator owned at the time of making it; but after acquired personal estate passed by a general bequest. In 1834 an Act was passed by which it was declared that when any will executed after the Act "contains a devise in any form of words of all such real estate as the testator dies seised or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land acquired by the devisor after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof" (*o*). The presumption under this Act remained the same as before, namely, that the testator intended to pass only such property as he had at the time of making his will. That presumption had to be removed by some form of words indicating a contrary intention, in order to make the enactment applicable (*p*).

But by the present Wills Act since 1st January, 1874, every will shall be construed *with reference to the real and personal estate comprised in it*, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will (*q*). It is to be observed that it is not for all purposes that the will speaks from the death, but only as far as this enactment is concerned, for the purpose of determining what real and personal property is comprised in it. It is also to be observed that the enactment is not to be taken in its literal sense, as a mandate

(*n*) S. 25.
(*o*) S. 3.
(*p*) *Plumb* v. *McGannon*, 32 U.C.R. at p. 15.
(*q*) R.S.O. c. 128, s. 26 (1).

to construe the will as if made in point of time immediately before the death, but as intended to affect only the real and personal property at the time of the making of the will actually comprised in it. The meaning is that the will is to be construed as if it had been executed immediately before the death, for the purpose of ascertaining what real and personal property is comprised in it, or affected by it (*r*). The object of the enactment was to render a will capable of carrying property acquired after it was executed, if its terms permitted it. *Prima facie* then the will is to be taken as if executed immediately before the death, the statutory presumption being that the testator intends to pass all his estate as he may have it at the time of his death (*s*). But this presumption may be displaced by a contrary intention appearing in the will. Thus a contrary intention may appear in consequence of a reference in the will to its own date, as if the testator devise the land "I *now* occupy" (*t*), or if he contrasts the expressions in his will, by references to property "now" owned, and to other property which "shall be vested in me at the time of my death" (*u*). So where a testator devised to R. the "property on Hughson Street," having at the time only one house on that street known as the Red Lion Hotel, and devised "all the rest and residue of my estate which I shall be entitled to at the time of my decease to A.", and after making his will acquired other property on Hughson Street, it was held that the after acquired property did not pass to R., as the will indicated an intention that the after acquired property should be disposed of differently from that which he had at the time of making the will (*v*). So also a contrary intention may be shewn by a specific description of property (*w*). What is a specific description has occasioned some doubt, where the land is not referred to by lot number or other particular designation. Thus a testator devised "the south eighty acres of lot number 12, excepting so much thereof as I may have sold and conveyed." At the time of making the will, he had sold portions of the south half, but after making his will and before his death he again acquired them.

(*r*) Per Turner, L.J., *Langdale* v. *Briggs*, 2 Jur. N.S. at pp. 995, 996.
(*s*) *Plumb* v. *McGannon*, 32 U.C.R. at p. 15.
(*t*) *Hutchinson* v. *Barron*, 6 H. & N. 583.
(*u*) *Cole* v. *Scott*, 1 Mac. & G. 518.
(*v*) *Morrison* v. *Morrison*, 9 Ont. R. 223; 10 Ont. R. 303.
(*w*) *Crombie* v. *Cooper*, 22 Gr. 267; 24 Gr. 470.

It was held by a majority of the judges that the portions sold were excluded from the devise (*x*).

18. *General Description of Lands.*

With regard to what may be included in a general description of "lands," it is enacted that a devise of the lands of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned, or otherwise described in a *general* manner, and any other general devise which would describe a leasehold estate, if the testator had no freehold estate which could be described by it, will be construed to include his leasehold estates, or any of them to which such description could extend, as well as freehold estates, unless a contrary intention appears by the will (*y*). Leaseholds are chattel property and so not included in the expression "land" unless by express direction. Consequently a devise of a testator's "lands," or "lands at or in" a particular place would not pass leaseholds if there were freeholds to go by such a devise. If there were no freeholds to answer such a description, then the leaseholds necessarily passed under the description of lands. The statute now remedies this, and makes leaseholds pass under the designation of lands in the cases mentioned in the Act.

And so also, a general devise of the real estate of the testator, or of the real estate in any place, or in the occupation of any person mentioned, or otherwise described in a general manner, will include real estate over which the testator has a power to appoint (by will) (*z*) in any way he may think proper, and will operate as an execution of such power unless a contrary intention appears by the will (*a*).

19. *Words of Limitation.*

With regard to the estate which passes, it is not necessary to add limitations thereof. When no words of limitation are used a devise in those terms will pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will, unless a contrary intention appears by the will (*b*). Where the word "heir" or "heirs" is used, not as

(*x*) *Vansickle* v. *Vansickle*, 1 Ont. R. 107; 9 App. R. 352.
(*y*) R.S.O. c. 128, s. 28.
(*z*) *Phillips* v. *Cayley*, 43 Ch. D. 222, at p. 233.
(*a*) R.S.O. c. 128, s. 29.
(*b*) S. 30.

a word of limitation of an estate, but as the designation of a particular person or particular persons, then its signification is the person or persons who would answer that description at the time of the making of the will (*c*). Thus where a will was made of lands in Upper Canada before the Act which abolished primogeniture was passed, devising land to the testator's heir, and after the will was made that statute was passed, and afterwards the testator died without having altered his will, the devisee was held to mean the person whom he understood to be his heir when he made the will, viz., his eldest son (*d*). And where a testator made his will fifteen years after the passing of the Inheritance Act, which made all the children heirs, and devised land to one F., but in case of his death, to the heirs of F., it was held that the word "heirs" meant those who would in fact have been heirs to F.'s estate upon his intestacy (*e*). An erroneous idea as to this seems to have prevailed in the Legislature of Ontario, in consequence of which an Act was passed on 5th March, 1880 (*f*), whereby that method of interpretation is to be applied to the wills of all testators dying on or after that date. But this clause did not make any difference in the doctrine, and does not restrict it to wills made since it was passed (*g*).

20. *Lapse.*

When a devise failed or became void by reason of the death of the devisee in the life time of the testator, or by reason of the devise being contrary to law, or by reason of its being otherwise incapable of taking effect (as by the devisee being a witness to the will) the lapsed devise passed to the heir, whose title by descent was not impaired by the void devise. But by the present Act (*h*), unless a contrary intention appears by the will, such a devise now falls into the residue (if there be a residuary devise) and passes to the residuary devisee. To make this section apply, the residue disposed of must be so disposed of by "a real residuary devise, that is to say, so worded as to apply to all

(*c*) *Tylee* v. *Deal*, 19 Gr. 601 ; *Baldwin* v. *Kingstone*, 16 Ont. R. 341 ; 18 App. R. 63, and Appx.

(*d*) *Tylee* v. *Deal*, supra ; *Baldwin* v. *Kingstone*, supra.

(*e*) *Sparks* v. *Wolff*, 25 App. R. 326 ; 29 S.C.R. 585.

(*f*) Now R.S.O. c. 128, s. 31.

(*g*) *Sparks* v. *Wolff*, supra.

(*h*) R.S.O. c. 128, s. 27.

land that is not otherwise disposed of" (*i*). So, where a testator devised his freehold shop at Wimbledon to his son, and then devised to the plaintiffs "all other my freehold messuages and tenements at Wimbledon and elsewhere," and the devise to the son failed by reason of his having attested the will, it was held that the shop did not pass to the plaintiffs, for the devise to them was not an universal residuary devise, but only a devise of the freeholds at Wimbledon other than the shop (*j*).

Other cases of lapse are prevented by other sections. Thus, where *any person* to whom *land* is devised for an estate tail, or an estate in *quasi* entail, dies in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue are living at the time of the death of the testator, the devise does not lapse, but takes effect as if the death of the devisee had happened immediately after the death of the testator, unless a contrary intention appears by the will (*k*). It will be observed that, as to the subject matter of the devise, this clause applies only to land; as to the objects of the devise, to any person.

And where any person, being a *child or other issue* of the testator, to whom any *real or personal* estate is devised or bequeathed for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator, leaving issue, and any of the issue of such person are living at the time of the death of the testator, the devise or bequest does not lapse, but takes effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will (*l*). This clause, as regards the subject matter of the disposition applies to personal, as well as real, estate; as regards the objects of the testator's bounty, to his children or other issue only.

The word "issue" in these two sections is not confined to the immediate issue or children of the devisee or legatee. "Issue" includes all descendants of any degree unless restrained by a context. In the latter of these two sections the expression "child or other issue" plainly by express intendment includes any direct descendant however remote.

(*i*) Per Mellish, L.J., *Springett* v. *Jenings*, 6 Ch. App. 333, at p. 338.
(*j*) *Re Mason*, L.R. (1900) 2 Ch. 196.
(*k*) R.S.O. c. 128, s. 35.
(*l*) S. 36.

In the former section the expression is "issue who would be inheritable." And this would necessarily include any one in the direct line who could succeed to the entailed property.

21. *Die Without Issue.*

Before the enactment to be presently referred to, if a testator devised land to A., but if A. should die without issue, or die without leaving issue, or if A. should have no issue, then over to B., by this devise A. took an estate tail *by implication*. Although no estate was limited to A. it was clear that B. should take, not at A.'s death in any event, but only upon failure of A.'s issue at an indefinite period. Consequently the implication was that A. and his issue were to take; or, in other words, A. took an estate tail by implication. In order that this rule should apply, it was necessary that there should be no precise time indicated at which B. should take upon failure of issue, *i.e.*, there must have been an indefinite failure of issue, or, more properly, a failure at an indefinite time. And consequently, if a devise were made to A., but in case he should die without leaving issue at the time of his death, then to B.; here a definite period is fixed at which B. must take if he takes at all, viz., at A.'s death if A. leaves no issue at that time. A. in such case took an absolute estate, with an executory devise over to B. if he left no issue. If no issue, B. would take; if issue survived, then B. could never take, and A. had always had (in the event) a fee-simple (*m*). The rule has now been altered by statute (*n*). Since 1st January, 1874, when the enactment came into force, in any devise the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of issue, shall be construed to mean a failure in his lifetime or at the time of his death, and not an indefinite failure of issue. The exception under the old law is the rule under the statute. It is not necessary now that the words of the will should restrict the meaning of the expressions used to the failure at a particular period. The statute now does that; and the consequence is that since the statute the devisee in such a case will take, not a fee-tail by

(*m*) *Nason* v. *Armstrong*, 22 Ont. R. 542; 21 App. R. 183; 25 S.C.R. 263.

(*n*) S. 32.

implication, but a fee-simple if he leaves issue surviving him at his death, with an executory devise over in case he leaves none.

This of course does not obtain if a contrary intention appears by the will, by reason of an estate tail being expressly given. And such contrary intention to give an estate tail must appear, not by *implication*, but by express limitation. Thus if, since the statute, there be a devise to A., but if he die without issue, then to B., A. takes a fee-simple, with an executory devise over to B. if he leave no issue surviving him. But if the devise be to A. and the heirs of his body, but if he die without issue, then to B., the contrary intention appears, A. taking an estate tail by express limitation.

The Act is confined to such expressions as are found in it. It was not intended to apply to such cases as occur upon the expression "issue dying under the age of twenty-one," which fixes a period for failure of issue, and does not leave it indefinite (*o*). Nor does it affect the meaning of the expression "die without heirs of the body" (*p*).

(*o*) *Morris* v. *Morris*, 17 Beav. 198.

(*p*) *Dawson* v. *Small*, 9 Ch. App. 651; *Harris* v. *Davis*, 1 Coll. 416.

CHAPTER XXV.

OF THE STATUTE OF LIMITATIONS, AND PRESCRIPTION.

(1). *Continual Claim.*
(2). *Descent Cast.*
(3). *Continual Claim, etc., Abolished.*
(4). *Possessory Actions.*
(5). *The Modern Statute.*
(6). *Adverse Possession Abolished.*
(7). *What the Statute Includes.*
(8). *Land Titles Act.*
(9). *Crown Lands.*
(10). *Operation of the Act.*
(11). *When the Statute is Operative.*
(12). *When Time Begins to Run.*
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(15). *Upon Alienation inter vivos.*
(16). *Land in a State of Nature.*
(17). *Landlord and Tenant—Lease in Writing.*
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(19). *Encroachments by Tenant.*
(20). *Tenancy at Will.*
(21). *Forfeiture, or Breach of Condition.*
(22). *Future Estates.*
(23). *Acknowledgments.*
(24). *Disabilities—Land or Rent.*
(25). *Mortgages.*
(26). *Estates Tail.*
(27). *Prescription.*
(28). *Disabilities—Easements.*
(29). *Extinction of Easements.*

At common law there were often different remedies for the recovery of land where unlawful possession had been

taken. They may roughly be divided into possessory remedies, and remedies respecting the right of property. The former did not determine the right of property at all, but merely the right to possession, the latter determined the right of property.

Apart from remedies by appeal to the courts, the person entitled to possession always had, and still has, the extra-judicial and summary remedy by entry upon the land and repossessing himself of it, which of itself is no injury to the person wrongfully in possession; though the entry, if forcible, may infringe upon the criminal law, and, if accompanied by unnecessary acts of violence to the person of the trespasser, may subject the owner to an action of trespass to the person at the suit of the person injured. We have already discussed this (*q*).

Inasmuch as all the ancient forms of writ in real actions have been abolished (*r*), and as the law respecting entry upon lands with respect to the limitations of actions has been materially altered, we shall refer to these ancient remedies, and the old law respecting entry, only to a sufficient extent to render intelligible those parts of the Statute of Limitations which require it.

1. *Continual Claim.*

Formerly if the claimant were deterred from entering upon the land by menaces or bodily fear, he might make *claim* as near to the estate as he could, with certain forms and solemnities; which claim remained in force for only a year and a day. And this claim, if it were repeated once in the space of every year and day (which was called *continual claim*), had the same effect with, and in all respects amounted to, a legal entry. Such an entry actually gave a man seisin, or put into immediate possession him that had the right of entry on the estate, and thereby made him complete owner, and capable of conveying it from himself by either descent or purchase, which otherwise, as regards conveyance to a purchaser at least, was not allowed at common law; for a person who was considered as dispossessed and having but a right of entry could not transfer such right to another (*s*).

(*q*) Ante p. 156.

(*r*) See a curious list of them, R.S.O. (1877) c. 51, s. 75.

(*s*) Ante p. 293.

2. *Descent Cast.*

The right of entry, however, might have been *tolled*, that is taken away, by descent. Descents, which took away entries, were when any one, seised *by any means whatsoever*, of an inheritance in a corporeal hereditament, died, whereby the same descended to his heir, and this was termed a *descent cast*. In such a case, however feeble the right of the ancestor might have been, the entry of any other person who claimed title to the freehold was taken away; and he could not recover possession against the heir by this summary method, but was driven to his action to gain a legal seisin of the estate. And this, among others, was for the curious reason that the heir came to the estate by act of law, and not by his own act; the law, therefore having cast the land upon him by descent, protected his title, and would not suffer his possession to be divested, till the claimant had proved a better right (*t*).

In addition to the benefits derived from continual claim, there was a further advantage attendant thereon, viz.: that it prevented the right of entry from being *tolled* or taken away by a descent cast or discontinuance, or, if an action were brought within a year from entry, from being barred by the Statute of Limitations.

And so also if a tenant in tail made a larger estate than he was by law entitled to, it occasioned what was called a *discontinuance*. As if tenant in tail made a feoffment in fee simple, or in tail, or for the life of the feoffee, all which were originally beyond his right to make, as that extended no further than to convey for his own life; in such case the entry of the feoffee was lawful during the life of the feoffor; but, if after his death, possession was retained by the feoffee, it was an injury which was termed a discontinuance. Tenant in tail has now, however, a right to convert the estate into a fee simple in certain cases. And the right of the issue in tail to recover the land is regulated by the statute.

3. *Continual Claim, etc., Abolished.*

The effects of descent cast and continual claim have been abolished by the Statute of Limitations, which enacts

(*t*) The common law doctrine as to the effect of a descent cast was somewhat modified by Statute 31 Hen. VIII. c. 33, enacting that "the dying seised of any disseisor of, or in any lands, etc., having no title therein, shall not be deemed a descent to take away the entry of a person or his heir, who had lawful title of entry at the time of the descent, unless the disseisor has had peaceable possession for five years next after the disseisin, without entry or continual claim by the person entitled."

that "no person shall be deemed to have been in possession of any land within the meaning of this Act, merely by reason of having made an entry thereon" (*u*). And "no continual claim or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action" (*v*). And again, "no descent cast, discontinuance or warranty, which has happened or been made since the first day of July, 1834, or which may hereafter happen or be made, shall toll or defeat any right of entry or action for the recovery of land" (*w*).

4. *Possessory Actions.*

Next to rights of entry followed another class, which were in use where the tenant or occupier had advanced one step nearer to perfection; so that he had in him not only a bare possession, which might be destroyed by a bare entry, but also an *apparent right of possession*, which could not be removed by mere entry, but only by orderly course of law; in the process of which it must have been shewn that though he had possession and therefore the presumptive right, yet there was a right of possession superior to his, residing in him who brought the action.

These remedies were formerly either by a *writ of entry*, or an *assise*; which were actions merely *possessory*; serving only to regain that possession, whereof the demandant (that is, he who sued for the land), or his ancestor had been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claimed. They decided nothing with respect to the *right of property*; only restoring the demandant to that state or situation, in which he was (or by law ought to have been) before the dispossession committed. But this was without any prejudice to the right of ownership; for, if the dispossessor had any legal claim, he might afterwards exert it, notwithstanding a recovery against him in these possessory actions.

At the present day, where an action to recover land is brought, the question of title to or property in the land is always determined, excepting in one peculiar case. By 11 Geo. II. c. 19, s. 11, it is enacted that all "attornments made

(*u*) R.S.O. c. 133, s. 8.
(*v*) S. 9.
(*w*) S. 10.

by tenants to strangers claiming title to the estate of their landlords shall be null and void, and their landlords' possession not affected thereby." And so where a tenant attorns to a stranger, the landlord may recover possession on this ground alone, without prejudice to the question of title which may afterwards be litigated (*x*).

It is true that when a person who is wrongfully in possession of land is ousted by another who has no title, the first can maintain an action to recover the land, and succeed on proof of his prior seisin and the ouster by the defendant. Neither one has a title to the land, and yet the action is not a possessory one. For the prior seisin of the first trespasser is merely accepted as *prima facie* evidence of seisin in fee, which is sufficient to entitle him to succeed, unless the defendant who ousted him can shew a better title.

But the right of *possession* (though it carried with it a strong presumption) was not always conclusive evidence of the right of *property*, which might still subsist in another man. For, as one man might have the *possession*, and another the *right of possession*, which was recovered by these possessory actions; so one man might have the *right of possession*, and so not be liable to eviction by any possessory action, and another might have the *right of property*, which could not be otherwise asserted than by the great and final remedy of a writ of right, or such correspondent writs as were in the nature of a writ of right; and proceedings on them were termed real actions *droiturel*, as distinguished from those possessory.

So it appears that according to various circumstances, a person entitled to land had to assert his rights in various ways; either by entry, or by real action, mixed, possessory, or droiturel, as the case might be, and though he failed in an inferior remedy, he might yet resort, as a general rule, to one superior. There were, however, statutes in early times which imposed a limitation on the time within which rights should be asserted, and remedies applied, which time varied according to the circumstances of the case. Sixty years was the utmost period allowed even on the final remedy by writ of right, and this caused Blackstone to say, that "the possession of land in fee uninterruptedly for sixty years is a sufficient title against all the world, and cannot be impeached by any dormant claim whatever;" an observation admittedly in-

(*x*) *Mullholland* v. *Harman*, 6 Ont. R. 546.

correct, for as said, as to the old law, by Lord St. Leonards: (*y*) "It was possible that an estate might be enjoyed adversely for hundreds of years, and yet at last be recovered by a remainder-man; for instance, suppose an estate to have been limited to one in tail, with remainder over to another in fee, and the tenant in tail to have been barred of his *remedy* by the Statutes of Limitation; it is evident that as his *estate* subsisted, the *remainder-man's right* of entry could not take place till failure of issue of tenant in tail, which might not happen for an immense number of years." Other instances might be put, in which sixty years' possession will not confer a title, as where such possession is during the estate of a life tenant (*z*).

5. *The Modern Statute.*

The intention of modern statutes limiting the time within which actions should be brought to recover land, was, as we have seen, first to abolish at once all the old remedies, and the necessity for them, which existed on account of the variety of rights arising out of a variety of circumstances, and to make one kind of action, ejectment, applicable to all cases if brought within the time limited by the statute.

6. *Adverse Possession Abolished.*

Under the earlier Statutes of Limitations, the time limited did not begin to run except from *adverse* possession, and great difficulties sometimes occurred in determining whether the possession of the party claiming under the statutes, was or was not *adverse* to the party otherwise entitled. This doctrine of non-adverse possession is yet important in cases of written leases at a rent under four dollars which are excepted out of section 5, sub-section 5 of the present Act; and moreover, the present statute cannot be understood without adverting to it.

As a general rule it may be laid down, that possession was not adverse when the parties claimed under the same title; when the possession of one was consistent with the title of the other; or when the party claiming title had never in contemplation of law been out of possession. The mere fact of

(*y*) Sugden Stat. p. 4.
(*z*) *Else* v. *Else*, L.R. 13 Eq. 196.

a tenant's remaining in possession after the tenancy had expired was not deemed an adverse possession; neither was the possession of a person let in under a contract to purchase, though default were made.

The possession of one joint tenant, parcener, or tenant in common was deemed the possession of all the co-tenants or co-parceners; so that even the receipt by one of them of all the profits was not sufficient to cause the possession to be deemed adverse. A tortious actual ouster in deed, or what was tant-amount thereto, was requisite to make the possession adverse; or such a state of facts as that an actual ouster would be presumed to have taken place. Thus, if the co-tenant not only received the whole rents, but on being asked for payment of his co-tenant's share, refused payment and denied the right, it was held to be evidence of an ouster. So also sole possession for forty years by one tenant in common being unexplained, was held sufficient for a jury to presume actual ouster.

The possession of a relative of the heir, *possessio fratris*, was not always deemed adverse to the heir; as when a man seised in fee died leaving two sons, and the younger entered by abatement, the statute did not run against the heir at law: for the law presumed that the younger son entered, claiming to uphold and preserve the title of the ancestor, which was that by which the elder son claimed. But had the elder son entered, and then been disseised by the younger, the possession of the latter would then have been adverse.

Except in the case mentioned of small leases, and cases of tenancies at will (under section 5 (7)), this doctrine of non-adverse possession is abolished (*a*). The general purport of the present Act is to make the time for bringing an action to recover land run from the time of the right first accruing, without considering the nature of the possession. Thus, the possession of one tenant in common or joint tenant is not the possession of his co-tenant (*b*), and the possession of a relative is not the possession of the heir (*c*). And it is entirely immaterial that the claimant may not know of his right or its infringement (*d*).

(*a*) *Nepean* v. *Doe*, 2 Sm. Lg. Cas. 10th ed. 640.

(*b*) S. 11; and see *Harris* v. *Mudie*, 7 App. R. 414; *Hartley* v. *Maycock*, 28 Ont. R. 508.

(*c*) S. 12.

(*d*) *Leeds* (*Duke of*) v. *Earl of Amherst*, 2 Ph. at p. 124.

7. *What the Statute Includes.*

The interpretation clause of the Act (*e*) defines "land" as extending to "messuages and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land (and to chattels and other personal property transmissible to heirs), and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them are in possession reversion, remainder, or contingency."

The section distinctly includes incorporeal hereditaments. But in *Mykel* v. *Doyle* (*f*), where a fence had been built across a parcel of land over which the plaintiff had a right of way and had so stood for more than ten years, the court held (Armour, J., dissenting) that this did not bar the plaintiff's right of action for disturbance of his way, because the Act did not apply to incorporeal hereditaments. This case was followed by Street, J., in *McKay* v. *Bruce* (*g*); but was doubted by Burton, C.J.O., in *Bell* v. *Golding* (*h*). For the present, therefore, it must be taken that incorporeal hereditaments are not within the statute, excepting, of course, rent charges, which are frequently named in the various sections; and so where an easement is interrupted or disturbed, the period of limitation remains unaffected by the Act. Reference will be made to the extinction of easements hereafter.

Rent is variously used in the statute. By the interpretation clause (*i*) it extends to "all annuities and periodical sums of money charged upon or payable out of any land." In some sections it means a "rent-charge," in which a man may have an estate. In others it means rent-service, or rent payable to a landlord. Thus in section 4, "no person shall . . bring any action to recover any land or rent," it means *rent-charge*. In section 5, whenever it

(*e*) S. 2 (1).
(*f*) 45 U.C.R. 65.
(*g*) 20 Ont. R. 709.
(*h*) 23 App. R. 485, at p. 489.
(*i*) S. 2 (3).

is spoken of it means a rent-charge, except when spoken of as rent payable or rent reserved, that is the money payment.

The distinction between the word "rent" as used in the sense of rent charged on land, and as an incorporeal hereditament wherein a distinct estate may exist, and as used in the sense of rent reserved, or rent service (which is a mere incident of the reversion, and wherein no estate exists) may be well illustrated by reference to section 5 (6). That clause enacts that "when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, etc."

Now, as remarked by Lord Denman (*j*), tenant at will of *land* out of which rent is *reserved*, cannot by any possible construction of language be said to be in receipt of that rent which he pays; he cannot be tenant at will of the land and of the rent also, indeed, no one can be said to be tenant of, or have any estate in, the rent reserved by a lease. The word *rent*, therefore, in the seventh section [R.S.O. c. 133, s. 4 (7)] must mean rent-charge; and there is no absolute absurdity in supposing that a person seised in fee, or for life, of a rent-charge, might, for a gross sum of money, demise it for years or at will at a smaller rent" (*k*). By applying the above remarks to other sections (as for instance s. 5, s.-s. 5), in which the word rent is used, little difficulty will be had in understanding in what sense it applies. And the reader should bear in mind that there may be both a seisin and a disseisin of a rent-charge, that in it there may be a distinct estate for life or in fee; and thus the statute frequently refers to land or rent (meaning rent-charge) together, and makes each subject to the same rule under the same circumstances, since, for the purposes of the statute at least, there is no difference, inasmuch as an estate in fee in a rent-charge in an incorporeal hereditament, whilst the same estate in the land is a corporeal one.

Rent reserved on a lease is governed by other sections.

8. *Land Titles Act.*

Where land is registered under *The Land Titles Act* (*l*), no length of possession will defeat the registered title. The

(*j*) *Doe d. Angell* v. *Angell*, 9 Q.B. 328; *Grant* v. *Ellis*, 9 M. & W. 113, where there is a misprint of 2nd for 3rd section, as to which see Sug. Stat. 46.

(*k*) See *Hope* v. *White*, 19 C.P. 479, for an instance of this.

(*l*) R.S.O. c. 138.

intention of this legislation is to make the entry in the books of the office the only and the absolute evidence of title. Consequently it is enacted that "a title to any land adverse to or in derogation of the title of the registered owner shall not be acquired by any length of possession" (*m*).

But this is not to prejudice any adverse claim, in respect of length of possession of any person who was in possession of the land when the registration of the first owner took place, as against any person registered as first owner with a possessory title only (*n*).

9. *Crown Lands.*

The crown, not being expressly named, is not affected by that part of the Act relating to possession of land. But the clauses relating to prescription in cases of easements (*o*) do expressly mention the crown.

It may be convenient, at this place, however, to mention the statute which limits the rights of the crown. There is a maxim at common law that *nullum tempus occurrit regi*. Time is not counted against the crown. But by an Act called the *Nullum Tempus* Act (*p*), which has been held to be in force here (*q*), the crown may be barred under the circumstances mentioned therein.

But, first, as between parties other than the crown. It has been held in this province that time does not run while the fee is in the crown, as between or against persons claiming as lessees or locatees of the crown before patent issued. Consequently, where the plaintiff and defendants held, respectively, the north and south halves of a lot as lessees of the crown, the defendants holding up to a certain line for more than twenty years, and they then obtained letters patent for their respective portions; and afterwards it was discovered that the defendants had always encroached upon the plaintiff's half as granted by the patent, it was held that the plaintiff was not barred of his right to recover the portion which had been wrongfully held by the defendants (*r*).

(*m*) R.S.O. c. 138, s. 32 (1).
(*n*) Ibid. s.-s. 2.
(*o*) Ss. 34, *et seq.*
(*p*) 9 Geo. III. c. 16.
(*q*) *Regina* v. *McCormick*, 18 U.C.R. 131.
(*r*) *Jamieson* v. *Harker*, 18 U.C.R. 590. See also *Dowsett* v. *Cox*, *Ibid.* 594.

The rights of the crown not having been interfered with by the possession, there was a good title to grant the land by the letters patent to the plaintiff. And a patentee from the crown may maintain an action against one whom he finds in possession, for the patent has the effect of a feoffment with livery of seisin, and the trespasser's entry must therefore be regarded as subsequent to the patent (*s*). But, as a mortgage made by a nominee of the crown, or any person through whom any party obtaining letters patent for the land derives his claim, may be registered, and is subject to the same conditions and has the same effect as if letters patent had issued before the execution of the mortgage (*t*), the statute of limitations will apply. So, where D. C., being in possession as locatee of the crown, mortgaged his interest in 1860, and on his death in possession his widow and heir-at-law took possession, and afterwards, and after sale by the mortgagee under the power of sale in his mortgage, the patent issued to the widow and heir-at-law in 1875, and an action was brought in 1878 by the purchaser under the power, it was held that he was barred (*u*).

As regards the rights of the crown, it has been held that although the *Nullum Tempus* Act is in force here, it does not apply to the unsurveyed or waste lands of the crown (*v*).

But in a case from Australia the Judicial Committee of the Privy Council decided that where a defendant claimed waste lands of the crown by possession only for more than the sixty years mentioned by the *Nullum Tempus* Act, the right of the crown to recover them was barred (*w*). This seems to overrule the Canadian case.

The words of the first section of the statute so far as they are necessary to be quoted are as follows:—"The king's majesty, his heirs or successors, shall not at any time hereafter sue, impeach, question or implead any person or persons, bodies politic or corporate, for or in any wise concerning any manors, lands, tenements, rents, tythes, or hereditaments whatsoever (other than liberties or franchises), or for or in any wise concerning the revenues, issues or profits thereof, or make any title, claim, challenge, or demand of, in, or to

(*s*) *Greenlaw* v. *Fraser*, 24 C.P. 230.

(*t*) R.S.O. c. 31, s. 28.

(*u*) *Watson* v. *Lindsay*, 27 Gr. 253.

(*v*) *Regina* v. *McCormick*, 18 U.C.R. 131.

(*w*) *Atty.-Gen. for New South Wales* v. *Love*, L.R. (1898) A.C. 679.

the same or any of them, by reason of any right or title which hath not first accrued or grown, or which shall not hereafter first accrue and grow, within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding . . . unless His Majesty . . . shall have been answered by force or virtue of any such right . . . within the space of sixty years; or that the same have or shall have been duly in charge to His Majesty . . . or shall have stood insuper of Record within the said space of sixty years; and that all and every person or persons, bodies politic and corporate, their heirs and successors and all claiming by, from or under them, for and according to their and every of their estates and interests which they have or claim to have, or shall or may have, or claim to have, in the same respectively, shall at all times hereafter quietly and freely have, hold and enjoy, as against His Majesty, his heirs and successors, claiming by any title which hath not first accrued or grown, or which shall not hereafter accrue or grow, within the said space of sixty years, all and singular manors, lands, tenements, rents, tythes, and hereditaments whatsoever (except liberties and franchises), which he or they, or his or their or any of their ancestors or predecessors, or those from, by, or under whom they do or shall claim, have or shall have held or enjoyed, or taken the rents, revenues, issues, or profits thereof, by the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding; . . . and furthermore, that all and every person and persons . . . shall forever hereafter, quietly and freely have, hold, and enjoy all such manors, lands, tenements, rents, tythes and hereditaments (except liberties and franchises) as they now have, claim or enjoy, . . . against all and every person or persons . . . who shall or may have, claim, or pretend to have any estate . . . by force or colour of any letters patent, etc."

Coke divides the enactment into three parts (*x*). The first part, which declares that the crown shall not sue, or make any claim but within sixty years, is exclusive and negative. The second part, which enacts that persons claiming the estate or interest shall quietly hold it against the crown after sixty years, is affirmative, and establishes the

(*x*) 3rd Inst. 188, cap. 87.

estate of the subject. The third part secures the subject in possession against the subject who may have obtained a patent.

The proviso in the Act, which saves the right of the crown, is thus explained by Lord Halsbury (*y*):—"The provision is intelligible enough, and what in substance it means is, that if the crown is not actually in possession, but that in the crown's accounts some person is charged with the rent which they had not paid and still stand as a crown debtor in the crown books, and that condition of things has existed within the sixty years, the title by that condition of things, although the possession may have been for sixty years, was not adverse, because during that period something was payable to the crown which had not been paid" (*z*). And it was further held that, although there was no such administration in the colony as involved the peculiar form of crown accounting thus described, that did not prevent the application of the Act, but simply prevented the exception from being applicable so as to save the rights of the crown.

The possession must not consist of isolated acts of trespass (*a*), but must consist of continuous acts of ownership in assertion of a right.

10. *Operation of the Act.*

The intention and operation of the present Statute of Limitations is to require the owner of land who is kept out of possession to make an entry or bring his action against the trespasser within ten years from the time when the right to enter or to bring the action first accrued. If he does not make the entry or bring the action within that period, not only is his *remedy* barred, but "the right and title of such person to the land or rent . . shall be *extinguished*" (*b*). The effect of this enactment is to completely obliterate all distinction between rights of property and rights of possession. As soon as the statutory period has elapsed the title of the owner is extinct. Under the previous Statute of Limitations the remedy alone was barred, the right was not extinguished.

(*y*) *Atty.-Gen. of New South Wales* v. *Love*, L.R. (1898) A.C. at p. 686.

(*z*) And see *Tuthill* v. *Rogers*, 1 Jo. & Lat. at p. 80.

(*a*) *Atty.-Gen.* v. *Chambers*, 4 De G. & J. 55; *Doe d. Wm. IV.* v. *Roberts*, 13 M. & W. 520.

(*b*) R.S.O. c. 133, s. 15.

The effect of the present enactment is to deprive the owner of his right of property at the same moment that his remedy is barred. And, therefore, he never can again become invested with any right of property in the land, except by obtaining it again by conveyance (*e*). And if the former owner, after being barred, should enter upon the land again, he would be a trespasser (*d*). The statute says nothing of the occupant's title. And, therefore, although great authorities have spoken of the effect of the Act, as follows: "to make a parliamentary conveyance of the land to the person in possession after that period of twenty years has elapsed" (*e*); "when the remedy is barred the right and title of the real owner are extinguished, and are, in effect, transferred to the person whose possession is a bar" (*f*); "the whole right, title, estate and interest of the mortgagee would be transferred to the mortgagor" (*g*); "it is a divesting of the title, or a transfer of the title to somebody else. . . At the end of ten years . . the title of the mortgagee to the lands was extinguished, and by virtue of the statute a parliamentary re-conveyance was made to the plaintiff" (*h*); yet these expressions are incorrect. The extinction of the title of the true owner leaves the trespasser in possession without liability to be disturbed by anyone, because the only person who could have ejected him has lost his title to the land. The operation of the statute has been better described by Strong, J. (*i*):—"The Statute of Limitations is, if I may be permitted to borrow from other systems of law terms more expressive than any which our own law is conversant with, a law of extinctive, not of acquisitive prescription; in other words, the statute operates to bar the right of the owner out of possession, not to confer title on the trespasser or disseisor in possession. From first to last the Statute of 4 Wm. IV. says not one word as to the acquisition of title by length of

(*e*) *Doe d. Perry* v. *Henderson*, 3 U.C.R. 486; *McDonald* v. *McIntosh*, 8 U.C.R. 388; *Re Alison*, 11 Ch. D. 284; *Sanders* v. *Sanders*, 19 Ch. D. 373.

(*d*) *Holmes* v. *Newland*, 11 A. & E. 44; *Court* v. *Walsh*, 1 Ont. R. 167; see *Moran* v. *Jessup*, 15 U.C.R. 612.

(*e*) Parke, B., in *Doe d. Jukes* v. *Sumner*, 14 M. & W. 42.

(*f*) Lord St. Leonards, in *Incorporated Society* v. *Richards*, 1 Dr. & War. 289. See similar expressions of the same judge in S.C. 1 Con. & L. 85; *Scott* v. *Nixon*, 3 Dr. & War. 405.

(*g*) Lord Selborne, in *Heath* v. *Pugh*, 6 Q.B.D. 365.

(*h*) Boyd, C., in *Court* v. *Walsh*, 1 Ont. R. 170.

(*i*) *Gray* v. *Richford*, 2 S.C.R. at p. 454.

possession, though it does say that the title of the owner out of possession shall be extinguished, in which it differs from the Statute of James, which only barred the remedy by action, but its operation is by way of extinguishment of title only" (*j*). The operation of the statute then is to extinguish the paper title; and the result of that operation is to leave some one in possession who cannot be disturbed for want of a title in any other.

The question recently arose in a curious way, compelling the recognition of the purely negative operation of the statute. A trespasser gained title by possession to a land-locked parcel of land, and then claimed a right of way to get to it. He had used a way to get in and out, but not long enough to get a right of way by user. And it was held that the operation of the statute was negative, no title being conveyed to him, and, consequently, that no right of way passed as appurtenant thereto (*k*).

So, also, where a house was demised for eighty-nine years, and a stranger got into possession and remained there for over forty years, paying rent to the landlord, and then assigned his right to an assignee, the latter was held not to be liable to the landlord on the covenants in the lease; for the title of the lessee was extinguished and not transferred to the assignee (*l*).

The right of the disseisor, however, when once established, is so strong that it is such a title as the court will force upon an unwilling purchaser (*m*).

11. *When the Statute is Operative.*

In order that the statute may affect the owner of land there must be such a state of affairs as that he can bring an action or make an entry, that is to say, there must be some one in possession keeping the owner out of possession. There is no obligation, in fact it is impossible, to bring an action to save the owner's right, if there is no one in possession. Therefore where land is vacant the statute does not operate (*n*).

(*j*) See also 1 Hayes Convey. 168; 11 Jur. N.S. 152; Dart V. & P. 6th ed. 464.

(*k*) *Wilkes* v. *Greenway*, 6 Times L.R. 449; see also *McLaren* v. *Strachan*, 23 Ont. R. at p. 120, note.

(*l*) *Tichborne* v. *Weir*, 69 L.T. 735. See also *Re Jolly*, L.R. (1900) 1 Ch. 292.

(*m*) *Scott* v. *Nixon*, 3 Dr. & War. 388.

(*n*) *Ketchum* v. *Mighton*, 14 U.C.R. 99; *Doe d. Cuthbertson* v. *McGillis*, 2 C.P. 139; *Delaney* v. *C.P.R. Co.*, 21 Ont. R. 11.

Mere cesser of payment of rent will, however, as we shall see, bar the owner of a rent charge.

Every owner of land is in constructive possession thereof by virtue of his title, when the land is vacant. He cannot enter upon himself, nor is there any one against whom he can bring an action. Consequently, as often as a trespasser vacates the land, so often is the owner again in possession (*o*). And, therefore, if a trespasser has been in possession for a period less than the statutory period, and vacates the land, but after an interval returns, his former occupation goes for nothing; because, in the interval, the true owner was in possession, and there was no one against whom to bring an action, and therefore the statute ceased running. And for the same reason, also, if one trespasser should leave the land, and another, not claiming under the first, should enter, he cannot add the possession of the first to his own; and though the two, when added together, make up the statutory period of ten years, yet the owner is not barred (*p*).

But the wrongful seisin of a trespasser is transmissible, and if the first trespasser should transmit his seisin to another by descent, devise, conveyance (*q*), or, it seems, even by contract (*r*), the whole is taken as the continuous possession of one person, and, if it reaches the statutory period, bars the owner. There must, therefore, be continuous possession or occupation by one trespasser, or by several whose wrongful seisin is carried on by conveyance or descent in order to bar the owner.

Not only must the acts of ownership, or the possession, be continuous, not consisting of isolated or intermittent acts of trespass (*s*), but the character of the possession claimed must be unequivocal. And so where the plaintiff, having a right of way over a strip of land belonging to the defendants, leading from his farm to a highway, erected gates at both ends of the strip, kept them locked, and sometimes used to turn his cattle in for grazing, and so continued for more than the statutory period, it was held that the title of the defend-

(*o*) *Handley* v. *Archibald*, 30 S.C.R. 130.

(*p*) *Agency Co.* v. *Short*, 13 App. Ca. 793.

(*q*) *Asher* v. *Whitlock*, L.R. 1 Q.B. 1; *Yem* v. *Edwards*, 1 De G. & J. 598; *Calder* v. *Alexander*, 16 T.L.R. 294.

(*r*) *Simmons* v. *Shipman*, 15 Ont. R. 301.

(*s*) *Coffin* v. *North Am. Land Co.*, 21 Ont. R. 80; *Atty.-Gen.* v. *Chambers*, 4 DeG. & J. 55.

ants was not extinguished (*t*). The gates might have been erected to protect the right of way, and in no way effected an eviction of the defendants from the land.

So, also, the acts of ownership are not extended beyond the land actually occupied. Where land is enclosed and occupied, no difficulty arises. But where possession is taken of unenclosed land the quantity occupied by the trespasser is a question of fact. His wrongful occupation is not limited or bounded in any way by surveys or surveyors' lines. He excludes the true owner from that part only which he physically occupies (*u*).

A different rule prevails where the benefit of the statute is claimed by a person having a paper title which, however, is defective. By reason of his title, defective though it be, he is in constructive possession of all that it covers, and so extinguishes the title to the whole by the entry on and remaining in possession of any part (*v*).

12. *When Time Begins to Run.*

By the fourth section of the Act it is declared that no person shall make any entry or distress, or bring any action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to such person, or to some person through whom he claims.

It is necessary, therefore, to ascertain when the right to make the entry or distress, or bring the action, first accrues. This is fixed by section five.

13. *Dispossession or Discontinuance.*

When the claimant, or some person through whom he claims, has been in possession, or in the receipt of the rents and profits, or in receipt of such rent, and has been dispossessed, or has discontinued such possession or receipt, then his right first accrues at the time of the dispossession or discontinuance of possession, or at the time at which any such profits or rent were or was so received (*w*).

This clause deals with possession of land, possession of a

(*t*) *Littledale* v. *Liverpool Coll.*, L.R. (1900) 1 Ch. 19.

(*u*) See *Harris* v. *Mudie*, 7 App. R. 421.

(*v*) *Heyland* v. *Scott*, 19 C.P. 165; *McKinnon* v. *McDonald*, 13 Gr. 152; *Harris* v. *Mudie*, 7 App. R. 428, 429; *Robertson* v. *Daley*, 11 Ont. R. 552.

(*w*) S. 5, s.-s. 1.

rent charge, receipt of rents or profits of land; and the statute begins to run upon disseisin by a trespasser's ousting the claimant from the possession; or upon the claimant's going out of, or discontinuing possession and some one else going in; or, when a stranger receives the rent due to the claimant, or payment merely ceases, then from the last receipt by the claimant,—as the case may be.

When the claimant has been actually dispossessed or disseised, *i.e.*, ousted by a trespasser, his right immediately arises to bring an action to recover the land, or to make an entry thereon in assertion of his ownership. And if he does neither, his right to make such entry, or bring such action, becomes extinct at the expiration of ten years from the ouster. If the necessity for bringing an action ceases, by reason of the trespasser's leaving the land, the statute ceases to run, as we have seen.

Discontinuance of possession requires some explanation. The word *discontinuance* was formerly applied to the case where tenant in tail enfeoffed in fee, and the feoffee, having entered in the lifetime of the feoffor, retained possession after his death; this was called a discontinuance. The word is not used in that sense in this section. It means the vacating of the land by the claimant, followed, however, by the occupation of the trespasser. It is not enough that the land should be left vacant; for in contemplation of law the owner is still constructively seised. As soon as a trespasser enters, after the owner has left the property vacant, then the right to re-enter upon, or bring an action against, the trespasser immediately arises. "The difference between dispossession and the discontinuance of possession might be expressed in this way—the one is where a person comes in and drives out the other from possession, the other case is where the person in possession goes out and is followed into possession by other persons" (*x*).

And it makes no difference, except in the case of the grantee of the crown to be presently mentioned, that the claimant does not know of the wrongful possession. So, where the defendant occupied a cellar under the ground of the plaintiff for sixty years, this, in the absence of fraud, was held to be a discontinuance of possession on the part of the plaintiff, though he was ignorant of the occupation (*y*).

(*x*) Per Fry, J., in *Raines* v. *Buxton*, 14 Ch. D. 539, 540; *Littledale* v. *Liverpool Coll.*, L.R. (1900) 1 Ch. at p. 22.

(*y*) *Raines* v. *Buxton*, 14 Ch. D. 537.

The mere fact of possession is not sufficient, however, to make the statute operate. The possession, if by licence of the owner, or as agent or servant of the owner, is the possession of the owner. Thus, where a caretaker has been in possession, he gains no title as against the owner (*z*). Nor, of course, does an agent; and where one tenant in common who managed the land for all, put the defendant in possession as caretaker, and afterwards the land was partitioned, but no conveyances were made for some time, and the defendant remained in possession, it was held that he acquired no title as against any of the claimants (*a*).

And the possession of an agent is so much the possession of his principal that his possession will enure to the benefit of his principal, though he be the real owner himself. Thus, a tenant in tail affected to devise the entailed land to his wife. His eldest son acted as his mother's agent in collecting the rents and accounting for them to her; and it was held that his possession was not in consequence of his title as tenant in tail, but as agent of his mother, and that she thereby acquired title as against him (*b*).

And the possession of a servant is, of course, the possession of his master (*c*).

Where the claimant has been in possession of a rent-charge, the time begins to run earlier than in the case of dispossession of land. Thus, if payment should cease, the time begins to run, not from the default or discontinuance, but from the last time at which such rent was received. So that, if the rent were payable annually, the time would be limited to nine years from the default, being ten years from the last receipt by the claimant. "The object of the Legislature seems to have been to fix a point which should be perfectly clear, rather than one which should, abstractedly considered, be the most just" (*d*). It is true that there is, in such a case, a year during which the claimant could not have taken any proceedings, all rent having been paid and the next gale not yet due, and he would thus be guilty of no laches in not beginning an action, and would be guilty of a wrong if he distrained; but the point fixed by the statute is too clear to admit of doubt.

(*z*) *Greenshields* v. *Bradford*, 28 Gr. 299; *Ryan* v. *Ryan*, 5 S.C.R. 387.
(*a*) *Heward* v. *O'Donohoe*, 18 App. R. 529.
(*b*) *Williams* v. *Pott*, L.R. 12 Eq. 149.
(*c*) *Birtie* v. *Beaumont*, 16 East 33.
(*d*) *Owen* v. *De Beauvoir*, 16 M. & W. at p. 565.

It must be borne in mind that, in the case of a rent-charge, the mere cesser of payment will cause the statute to operate, as well as the payment to a person not entitled (*e*).

Where the owner or claimant is not personally in occupation of the land, but has demised it to a tenant, the case is provided for by sub-section 5. We shall treat further of this in dealing with cases between landlord and tenant.

14. *Death of a Person in Possession.*

Where the claimant claims the estate or interest of some deceased person, who continued in possession until the time of his death, and was the last person entitled to such estate or interest who was in possession, then the right accrues at the time of such death (*f*).

It will be observed that this clause applies only to the case of a person dying in possession. If a person were first dispossessed, and then, being out of possession, died, time would run against those claiming under him from the dispossession, under sub-section one. This clause provides for the case of a stranger taking possession after the death of the owner and before the entry of the heir at law or devisee of him who died in possession. Though this clause distinctly states that the time begins to run at the time of the death, yet it must always be understood that the object of the statute is to require persons laying claim to land to bring their actions within the ten years against anyone in possession. Thus, the fourth section, in this respect, governs the whole of the instances dealt with in the fifth section, and the hypothesis underlying it is that there must be someone against whom an action can be brought. In *Owen* v. *DeBeauvoir* (*g*), Parke, B., in dealing with the case of rent, where the period from which time is to run is arbitrarily fixed at the last receipt, refers to this clause in illustration of the intention of the statute to fix definite periods (the date of the death in this instance) for the commencement of its operation. But the dictum was not necessary for the decision of the case, and it seems clear from modern authority that an heir at law or devisee would not be barred unless someone was in possession (*h*). But if the deceased person was in receipt of a rent

(*e*) *Owen* v. *De Beauvoir*, 16 M. & W. 547; *Irish Land Com.* v. *Grant*, 10 App. Cas. 14; *Howitt* v. *Earl of Harrington*, L.R. (1893) 2 Ch. 497.

(*f*) S. 5, s.-s. 2.

(*g*) 16 M. & W. 547, at p. 565.

(*h*) *Agency Co.* v. *Short*, 13 App. Cas. 793.

charge, and at his death payment was withheld, the time in that case would clearly run from his death.

At this point attention must be called to section 7, which enacts that, "for the purposes of this Act, an administrator claiming the estate or interest of the deceased person of whose chattels he has been appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration." When this section was passed, the administrator did not succeed to realty. The administrator, however, did succeed to terms of years; and if a tenant for a term of years were ousted and died intestate, his administrator, taking title only from the grant of letters, would not but for the section be affected by the intermediate lapse of time (*i*). It was otherwise as to an executor, whose title is derived under the will, and consequently arises at the testator's death. Though the title of an administrator relates back in some cases for the benefit of the estate (*j*), so as to enable him to sue for injury to goods and chattels between the death and the grant, it did not relate back so as to cause the statute to run, that being to the prejudice of the estate. By the present enactment, the title now has relation back to the death, so that although letters of administration might not be taken out until ten years had elapsed from the death, the administrator would be barred, if the other conditions were present (*k*).

This section acquires new significance on account of *The Devolution of Estates Act*, which casts the realty upon the administrator; and with respect to land and rent charges, time will now run against the administrator though letters of administration may be delayed in issuing. Although the administrator's title lasts for a year only, the land then shifting into the beneficiaries, yet, if an administrator should subsequently be appointed, it is conceived that his right to register a caution would be affected by this section which makes the statute operate from the death of the intestate.

15. *Upon Alienation Inter Vivos.*

This clause (*l*) is much the same as the preceding one in principle, but it applies to cases of alienation otherwise than

(*i*) *Wooley* v. *Clark*, 5 B. & Ald. 744. For an instance of barring a tenant or years, see *Tichborne* v. *Weir*, 69 L.T. 735.

(*j*) *Morgan* v. *Thomas*, 8 Ex. 302.

(*k*) See *Holland* v. *Clark*, 1 Y. & C.C.C. 151; *Re Williams*, 34 Ch. D. 558.

(*l*) S. 5, s.-s. 3.

by devise, or inheritance. When the person claiming an estate or interest in possession, claims it by assurance made to him or to some person through whom he claims, by any instrument other than a will, by a person in possession or receipt of the profits of the land, or the rent, and no person has been in possession under such instrument, then the right first accrues when the claimant, or the person through whom he claims, became entitled to the possession under such instrument.

In order to make the section applicable, there must be a person in possession of an estate or interest in possession, a grant or assurance to the claimant or some one through whom he claims, and a remaining in possession of the grantor. Time then runs from the time when the claimant, or the person through whom he claims, became entitled to possession under the grant. Thus, if A. conveys to B. in fee, and continues in possession, time runs against B. from the delivery of the deed. But if A. conveys to X. in fee to the use of A. for ten years, and from and after the expiration of ten years, to the use of B. in fee; here B. is not entitled to possession under the conveyance for ten years from its execution. Time, therefore, would not begin to run against him until the lapse of ten years, provided that A., the grantor, then remained in possession.

16. *Land in a State of Nature.*

Where the patentee of the crown, his heirs or assigns, by themselves, their servants or agents, have not taken possession, by residing on or cultivating some portion of the land, and some other person, not claiming to hold under such grantee has been in possession, such possession having been taken while the land was in a statute of nature, then unless it can be shewn that the patentee, or person claiming under him, while entitled to the lands had knowledge of the same being in the actual possession of the trespasser, the lapse of ten years shall not bar the grantee; but the right shall first accrue when such knowledge of the wrongful occupation was obtained; but no action shall be brought after twenty years from the taking of the wrongful possession (*m*).

The conditions necessary for the application of this section are (1) no possession subsequent to the patent by the grantee of the crown, or any one claiming under him; (2) possession

(*m*) S. 5, s.-s. 4.

by some one who does not claim under the patentee of the crown; (3) entry by the wrongdoer while the land is in a state of ature; (4) no knowledge of such wrongful possession by the grantee of the crown or those claiming under him, while he or they is or are entitled. Under such circumstances, time runs against the claimant, but the bar is not complete for twenty years from the taking of the wrongful possession. If knowledge of the wrongful possession is gained by the person entitled during that period, time begins to run from such knowledge, and the bar is complete at the end of ten years therefrom, or at the end of twenty years from the wrongful taking of possession, whichever arrives first.

(1). As to the first element, that there should be no possession taken by the grantee, his heirs or assigns, there is little to be said. The mode of taking possession is defined by the statute—"by residing upon or cultivating some portion thereof." The time of residence or the amount or degree of cultivation cannot be taken into account, if there has been residence or cultivation. And such "residing upon or cultivating" the land must have taken place *after* the grant from the crown (*n*).

(2). Possession by a stranger. This possession must, it is conceived, be the same kind of possession as would be sufficient to make the statute operate in other cases.

Nothing express is said in the statute as to the time when the trespasser's possession should commence in cases under this clause. In *Hill* v. *M'Kinnon* (*o*), Robinson, C. J., suggested the point, but it was not necessary to decide it. But it has been held, as we have seen, that the crown grant has the same effect as a feoffment with livery of seisin, so as to cause the possession of a stranger in possession at the time to be deemed as having commenced after the patent (*p*). And, as the trespasser acquires no title against the crown before patent issued, the patent gives a good title to the patentee, though there may have been a stranger in possession for more than the statutory period before that date (*q*). And if time does not run against the crown before patent issued, it could hardly have been intended that the same possession

(*n*) *Stewart* v. *Murphy*, 16 U.C.R. 224; *Mulholland* v. *Conklin*, 22 C.P. 381.

(*o*) 16 U.C.R. at p. 219.

(*p*) Ante, p. 433.

(*q*) *Fitzgerald* v. *Finn*, 1 U.C.R. 70.

should count against the grantee of the crown immediately upon his title accruing. The words of the statute seem to lead to the same conclusion. "In the case of lands granted by the crown, of which the grantee, his heirs or assigns, . . . have not taken actual possession, . . . and in case some other person . . . *has been* in possession, etc." We may take it, then, that the possession of the trespasser is not more effective if taken before patent than if taken afterwards. If taken during the ownership of the patentee, it is plainly within the statute; and if taken before, the effect of the patent is to make it constructively a taking after the grant.

(3). The use of the term, "such possession having been taken while the land was in a state of nature," raises an obscurity, however. The condition as to the patentee is that he should not have taken possession by "residing upon or cultivating some portion thereof;" while the condition as to the trespasser is that he should have entered while the land was in "a state of nature." Unless the terms are interchangeable and synonymous, or rather, unless the second has the same signification as the first, no intelligible meaning can be assigned to the clause. It would not avail the patentee that he had never taken possession by residing on or cultivating the land, if the trespasser could say that he found undoubted evidence of man's work upon it, which was, in fact, done by a stranger to both. The statute was passed for the protection of the owner, not for the profit of the trespasser. And although the land might not be in a state of nature absolutely, yet, if it be in a state of nature relatively to the owner, *i.e.*, in so far as he is concerned, by his not having resided on or cultivated any portion thereof, then he is protected. If it be urged that the trespasser, seeing some signs of residence or cultivation, could not know that they had been done by a stranger, and not by the patentee, the answer is that he has no rights at all, and no consideration is due to him as a wrong-doer (*r*).

(4). The *onus* is cast upon the trespasser of proving knowledge in the owner of his occupation of the land in order to make the limitation of ten years apply (*s*). And the knowledge of the adverse possession must be acquired by the person to whom it is imputed *while he is entitled* (*t*); so

(*r*) See *Stovel* v. *Gregory*, 21 App. R. 137.

(*s*) *Doe d. McKay* v. *Purdy*, 6 O.S. 144, per Macaulay, J.; *Re Linet*, 3 Ch. Ch. 230.

(*t*) *Mulholland* v. *Conklin*, 22 C.P. at p. 382.

that if the patentee, after conveying to another, becomes aware of the wrongful possession, it will not affect his assignee, nor avail the trespasser anything; and the knowledge must be imputed to a person having such a title as would give him a right of entry. Consequently, where the devisee of one who held a bond for a deed from the patentee, acquired knowledge of the wrongful possession, it was held not to avail the trespasser (*u*).

The clause will operate even though the patentee, or the person claiming under him, may not be conscious that he owns the land (*v*). The trespasser within the meaning of this clause is one not in truth and actual fact claiming under the patentee. So, where a person was in possession under a deed from one whom he supposed to be the heir at law of the patentee, but who (the jury found) was not such heir, it was held that he was not relieved from proving knowledge of his possession in the real owner (*w*).

The clause is necessarily confined to cases falling within its express provisions. And so, where a patentee mortgaged the land, no possession having been taken by either the mortgagor or the mortgagee, it was held that this clause did not affect the right of entry, which was governed by the clauses as to mortgages (*x*). Nor does it apply to a purchaser at a tax sale (*y*).

17. *Landlord and Tenant—Lease in Writing.*

When the claimant is in possession or in receipt of rent by virtue of a *lease in writing*, the rent reserved being $4 a year or upwards, and the rent has been received by some person wrongfully claiming to be entitled to the land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved has afterwards been made to the claimant, his right shall be deemed to have first accrued at the time when the rent reserved was first received by the person wrongfully claiming it, and no such right shall be deemed to have first accrued upon the determination of the lease to the person rightfully entitled (*z*).

(*u*) *Johnson* v. *McKenna*, 10 U.C.R. 520.

(*v*) *Doe d. Pettit* v. *Ryerson*, 9 U.C.R. 276.

(*w*) *Turley* v. *Williamson*, 15 C.P. 538.

(*x*) *Doe d. McLean* v. *Fish*, 5 U.C.R. 295.

(*y*) *Brooke* v. *Gibson*, 27 Ont. R. 218; *Cushing* v. *McDonald*, 26 U.C.R. 605.

(*z*) S. 5 s.-s. 5.

A distinction will be observed between cases under this clause and the case (under clause 1) of receipt of the "profits" of land or of a rent charge. In the latter case time runs from the last receipt of the profits or from the last receipt of rent. In the former (under clause 5) time runs from the wrongful receipt of rent by the stranger.

The making of a lease creates an estate for years in the tenant, and the mere fact that he does not pay his rent during the currency of his term, or the existence of his estate, does not impair the right of the landlord to re-enter when the estate of the tenant ends by the expiry of his term, and in such a case time runs against the landlord from the expiry of the term (*a*). But when a stranger wrongfully claims the reversion, and the rent reserved is paid to such stranger, and the tenant ceases to pay the rent to the landlord (for both must concur), then time begins to run from the receipt of the rent reserved by the stranger, who thus claims, and actually begins to enjoy, the fruits of the reversion. The most effective assertion of a claim to the reversion is the receipt of the rent, and so time runs from the first wrongful receipt, unless, subsequently, the tenant should pay the rent reserved to the landlord (*b*). The case of *Williams* v. *Pott* (*c*) is a striking instance of the effect of this clause, the true owner having, as agent for a person without title, collected the rent and accounted for it to such person, and the effect being to extinguish the title of the true owner.

It is worthy of observation that this clause is precise in referring to the payments as payments of *the rent reserved by such lease*, indicating that the very rent must be paid as rent to the stranger. And furthermore, it adds negatively, as a condition, that no payment in respect of *the rent reserved by such lease* shall have afterwards been made to the person rightfully entitled.

If the lease is in writing, but at a less rent than $4 a year, the case is governed by the old law; and the non-payment to the landlord and wrongful payment to a stranger claiming against the landlord, will not bar him of his right to enter on the determination of the lease.

(*a*) *Sanders* v. *Annesley*, 2 Sch. & L. 106; *Chadwick* v. *Broadwood*, 3 Beav. 308; *Doe d. Dary* v. *Oxenham*, 7 M. & W. 131; *Liney* v. *Rose*, 17 C.P. 186.

(*b*) *Chadwick* v. *Broadwood*, 3 Beav. 308; *Hopkins* v. *Hopkins*, 3 Ont. R. 223.

(*c*) L.R. 12 Eq. 149.

18. *Landlord and Tenant—Parol Lease.*

Where the claimant is in possession, or receipt of the profits, of land, or in receipt of any rent as tenant from year to year or other period, *without any lease in writing*, the right of the claimant, or of the person through whom he claims, first accrues at the determination of the first of such years or other periods, or at the last time when any rent, payable in respect of such tenancy, was received, whichever last happened (*d*).

Thus if a tenant from year to year paid no rent, time would begin to run from the end of the first year of his tenancy; and so with other periods. But if he paid any rent, time would begin to run from the last payment of rent, without regard to the period of his tenancy, unless he paid rent in advance within the first year or other period (*e*). But the payment must be a payment of rent in respect of the tenancy; payment of taxes to the municipality, though part of his contract, will not suffice (*f*).

Under this clause, unlike cases under clause 5, mere non-payment of rent bars the landlord, without payment to a stranger, and the statute operates, in such case, in favour of the tenant; while wrongful payment to a stranger, under clause 5, causes the statute to operate in favour of the stranger.

19. *Encroachments by Tenants.*

Where a tenant encroaches upon land adjacent to the demised land, as between himself and his landlord he takes it as part of the demised premises; but that presumption will not prevail for the landlord's benefit as against third persons (*g*).

20. *Tenancy at Will.*

Where the claimant is in possession or receipt of the profits, or in receipt of any rent, as tenant at will, the right shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined (*h*).

(*d*) S. 5, s.-s. 6.
(*e*) *Finch* v. *Gilray*, 16 App. R. 484.
(*f*) Ibid.
(*g*) *Bruyea* v. *Rose*, 19 Ont. R. 433, and cases cited.
(*h*) S. 5, s.-s. 7.

The effect of this clause is to make every tenancy at will, for the purposes of the Act, end at the expiration of one year from its creation, unless it is sooner determined. And time begins to run from such determination (*i*).

As a matter of law, every landlord has a right to enter at any time and put an end to a tenancy at will. But for the purposes of the Act, the right to make an entry or bring an action accrues ultimately at the end of a year from the commencement of the tenancy, though it may accrue sooner by the determination of the tenancy before that time. When the time begins to run in such a case, it does not cease unless the real owner, whom the statute assumes to have been dispossessed of his property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the land, or by receiving rent from the tenant, or by making a new lease to the tenant which is accepted by him (*j*).

Where an entry has been made on the land in such a case after the expiration of the year, it is a question of fact in what capacity, or for what purpose, it was made. To make the time stop running, it must be such an entry as to determine the will, coupled with such an arrangement as puts the landlord in sole possession, or creates a new tenancy in the tenant. Thus where the plaintiff let the defendant into possession as tenant at will in 1817, and in 1827 entered upon the land without the tenant's consent and cut and carried away some stone therefrom, it was held that this entry determined the tenancy at will, but left the defendant in possession as tenant at sufferance, or over-holding tenant, and therefore time, having begun to run in 1818, did not cease, and the plaintiff was barred in 1839 (twenty years being the period of limitation at that time) (*k*). But on a new trial, it appeared that in 1829 the defendant, being an assessor for the land-tax, signed an assessment in which he was named as occupier and the plaintiff as proprietor, and it was held that there was evidence of a rightful tenancy then existing, and none other appearing it must have been a tenancy at will, and the plaintiff was in time with his eject-

(*i*) See *Foster* v. *Emerson*, 5 Gr. at p. 140, and cases cited.

(*j*) *Day* v. *Day*, L.R. 3 P.C. 751; *Keffer* v. *Keffer*, 27 C.P. 257, overruling *Foster* v. *Emerson*, 5 Gr. 135 on this; *Cooper* v. *Hamilton*, 45 U.C.R. 502.

(*k*) *Doe d. Bennett* v. *Turner*, 7 M. & W. 226. See also *Doe d. Goody* v. *Carter*, 9 Q.B. 863.

ment (*l*). Very slight evidence is necessary from which to infer the creation of a new tenancy at will. So that, where an entry is made under an assertion of right, and the tenant submits and consents to remain as tenant, a new tenancy at will commences, and a new point of time, a year thence, arises from which time will run (*m*).

It is apparent that this clause revives to some extent the old doctrine of non-adverse possession. When the question has to be decided, as a question of fact, whether the old tenancy subsists, or a new one has been created, after the expiration of the first year, it is evident that the nature of the tenant's possession has to be enquired into. The nature of the possession in other cases is immaterial, the time running arbitrarily from the periods mentioned in the various clauses of the section under consideration; but in this instance the nature of the possession is a matter of no small concern.

By clause 8, it is enacted that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will to his mortgagee or trustee, within the meaning of clause 7. Under certain circumstances a mortgagor remaining in possession without any right conferred by the mortgagee might have been looked on as tenant at will. The exception created by this clause has been said to be equivalent to saying that the right of entry of a trustee against his *cestui que trust* shall not be deemed to have first accrued at the expiration of one year next after the commencement of the tenancy; and it seems to have been introduced, in order to prevent the necessity of any active steps being taken by the trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time (*n*).

Where the circumstances are such that the person having the legal estate could not enter, then the statute is not operative. Thus, where in pursuance of an agreement under seal to grant leases for ninety-nine years, at a pepper-corn rent, certain persons went into possession of land, and no leases were ever executed, but the circumstances were such that specific performance would have been adjudged against the owner, it was held that the statute did not operate, because the owner never had a right of entry; and Kay, L.J., thought that under such circumstances the lessees were *cestuis que*

(*l*) *Turner* v. *Doe d. Bennett*, 9 M. & W. 643.
(*m*) *Smith* v. *Keown*, 46 U.C.R. 163.
(*n*) *Garrard* v. *Tuck*, 8 C.B. at p. 253.

trustent within the meaning of this clause (*o*). And where a purchaser goes into possession under an agreement for payment of the purchase money by instalments, the vendor has no right of entry until default made in payment of an instalment (*p*). It was held in this case also that the clause in question applies to the case of an implied trust, and that the purchaser in possession and not in default is not tenant at will to his vendor by reason of this clause. There are objections to holding the vendor to be a trustee for the purchaser, already referred to, and the safer ground of decision for not applying the Statute of Limitations seems to be that of *Warren* v. *Murray*, that the vendor has no right of entry as long as the purchaser is not in default (*q*).

21. *Forfeiture or Breach of Condition.*

These two clauses must be considered together (*r*). Where the claimant has become entitled by reason of any forfeiture, or breach of condition, then the right first accrues when the forfeiture was incurred or the condition broken; but when such right does accrue, in respect of any estate or interest in reversion or remainder, and the land has not been recovered by virtue of such right, the right is deemed to accrue in respect of such estate or interest in reversion or remainder, at the time when such estate became an estate or interest in possession, as if no such forfeiture or breach of condition had occurred.

Forfeitures and breaches of condition which confer a right of entry may in general be waived; the right to forfeit being at the election of the person entitled to the benefit of the condition (*s*); and the statute retains this right to him, and permits the person having the right to re-enter to waive the forfeiture or breach, and retain his right to enforce his entry after his reversionary estate or interest becomes an estate or interest in possession. If clause 9 had stood alone, the reversioner or remainderman would have been obliged to re-enter, otherwise time would have run against him arbitrarily from the act of forfeiture or breach.

(*o*) *Warren* v. *Murray*, L.R. (1894) 2 Q.B. 648.
(*p*) *Irvine* v. *Macaulay*, 28 Ont. R. 92; 24 App. R. 446.
(*q*) *Building & Loan Ass'n* v. *Poaps*, 27 Ont. R. 470.
(*r*) S. 5, s.-ss. 9 and 10.
(*s*) *Doe d. Bryan* v. *Bancks*, 4 B. & Ald. 401.

And if the estate is such that there is no reversion or remainder (as upon a grant in fee simple on condition), so that clause 10 cannot apply, it is apprehended that clause 9 alone will then apply, and at the expiration of ten years from the act of forfeiture or breach, the right will be barred.

Attention must again be called to the distinction between a condition, and a conditional limitation, or a limitation over of the estate upon the happening of a condition (*t*).

Where an estate is made upon condition and the condition is broken, the estate nevertheless continues, and in order to determine it, the grantor or his heirs must enter. The common case of a lease with a proviso for re-entry on breach of covenants is an instance of this. Or, if A. should grant land to B. for life, provided that if B. does, or omits to do, a certain act, the grant shall be void and the land forfeited to A.; here, the estate continues in B., though the condition may have happened, unless A. enters and re-claims his estate.

But if A. grant land to Z., to hold to the use of B. for life, but if B. shall do, or omit to do, a certain act, then from and after such act or omission to hold to the use of C.; here, there is no right in the grantor to enter, and no necessity for C. to do so in order to end B.'s estate; for the effect of the conveyance is to vest the land in C. upon the happening of the condition, B.'s estate at once coming to an end on, or lasting only until, the happening of the condition, without any entry, by force of the limitation in the conveyance.

In the first case, upon the happening of the conditioned event, A., the grantor, acquires a right of entry, and, under clause 9, time begins to run at once; but A. may waive the forfeiture or breach, and B., remaining in possession, gains no advantage from the statute; for under clause 10, A., in respect of his reversion, has another right which first accrues at the death of B., when A.'s reversion becomes an estate in possession (*u*). In the second case, upon the happening of the condition, the estate immediately vests in C., and C. being thus entitled at once to the possession of the land under the instrument, time begins to run against him at once if B. remains in possession.

This section has been held by Sir Geo. Jessel, M.R., to apply to cases both of conditions and limitations. So that

(*t*) See p. 164.

(*u*) *Astley* v. *Earl of Essex*, L.R. 18 Eq. 290; *Leeds* (*Duke of*) v. *Earl of Amherst*, 2 Ph. 117.

where an estate passed to another by limitation, on breach of a condition to assume name and arms, that other had the full statutory period from the determination of the prior estate just as he would have had if that estate had been determinable by and was in fact dependant on re-entry for its forfeiture or determination (*v*). It is submitted with great respect, however, that where the nature of the limitation is to make the estate shift into the remainderman, or into some other person in defeasance of the prior estate, the remainderman, or such other person, is entitled to an estate in possession, the prior estate having continued only until the happening of the condition; and, therefore, that there is no further time allowed. Thus, if land were limited to A. for ten years, remainder to B. in fee; and A. remained in possession for more than ten years after the ten years allowed him by the conveyance; here B.'s estate became an estate in possession at the expiration of A.'s estate of ten years, and time would run against him from such expiration. Similarly, it is submitted, if land were limited to A., a widow, *durante viduitate*, and from and after her death or marriage to B., and she married and remained in possession, time would begin to run against B., from the marriage, and he would never have another right of entry, because his remainder became an estate in possession immediately upon the marriage (*w*). Where the limitations of the estate are such that the estate may remain, nothwithstanding the act of forfeiture, then the two rights undoubtedly exist.

22. *Future Estates.*

Where the estate or interest claimed is an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained the possession or receipt of the profits of the land, or the receipt of such rent, in respect of such estate or interest, then the right first accrues at the time when such future estate or interest becomes an estate or interest in possession (*x*).

A right of entry in respect of an estate in remainder, shall be deemed to accrue when the estate in remainder becomes an estate in possession, by the determination of any

(*v*) *Astley* v. *Earl of Essex*, L.R. 18 Eq. 390. And see *Leeds* (*Duke of*) v. *Earl of Amherst*, 2 Ph. 117.

(*w*) See *Clarke* v. *Clarke*, 2 Ir. R. Com. Law, 395 (1868).

(*x*) S. 5, s.-s. 11.

estate or estates in respect of which such land has been held or the profits thereof or such rent has been received (*y*). As long as the tenant for life is in possession time can never run against the remainderman (*z*).

The first of these sections provides that the time shall begin to run against the remainderman, when his estate becomes an estate in possession; the second of them provides that the right of entry shall accrue when the remainder shall become an estate in possession by the determination of the prior estate. The first of them applies when *no person has obtained the possession, etc., in respect of such estate, i.e.*, such future estate; the second of them applies *notwithstanding that the person claiming such land (i.e., the remainderman), or some person through whom he claims has, at any time previous to the creation of the particular estate, been in possession of such land, etc.* Whether the remainderman has not been in possession, or whether he has been in possession before the particular estate was created, the statute operates in each case.

The second of these clauses (s.-s. 12) prevents any doubt that might arise as to whether a person being in possession of an estate, and then going out to make room for somebody entitled to a sub-interest, could be barred of the remainder of his interest by that person's possession. For instance, suppose A. to be in possession subject to a power of leasing vested in B.; B. exercises the power, and leases for ten years; now, in this case, clause 12 declares that the possession of this lessee for ten years shall not prevent A.'s regress at their termination, but that A.'s right shall be considered as accruing anew at the end of the ten years, and the consequent determination of the lessee's estate (*a*).

As to the determination of the prior estate. If land be granted to A. for life, remainder to B. in fee, and A. be dispossessed, and while time is running A. surrenders to B., B.'s remainder is accelerated by the merger of the life estate and becomes an estate in possession; and time begins to run against B. from the date of the surrender, being the time at which B.'s future estate became an estate in possession. And if B. under such circumstances conveys his estate to A., the latter acquires a new estate, and a new right with respect

(*y*) S. 5, s.-s. 12.
(*z*) *Gray* v. *Richford*, 2 S.C.R. 431.
(*a*) *Nepean* v. *Doe*, 2 Sm. Lg. Cas. 10th ed., notes pp. 652, 653.

to it, and time begins to run, similarly, from the date of the conveyance. And if A. and B. concur in conveying in fee to some stranger, time begins to run from the date of the conveyance. In each case the remainderman had until his estate became an estate in possession, and this right passes with the conveyance of his remainder (*b*).

Upon this, the serious question arises, whether time will not begin to run against the remainderman, if the particular estate is extinguished by wrongful possession, immediately upon such extinguishment. Thus, if land stands limited to A. for life, remainder to B. in fee, and A. is dispossessed by a trespasser who excludes him for ten years, A.'s title is extinguished. His estate is not transferred to the trespasser, as we have seen. The result is, that the particular estate being gone, B.'s remainder must be accelerated and become an estate in possession; and time will thus, it is submitted, begin to run against the remainderman as soon as the particular tenant is barred. If this is the consequence upon extinction of the life estate by merger in the remainder, there is no reason why the same result should not follow when the particular estate is extinguished by wrongful possession (*c*). If that be not so, then the trespasser must be held to gain an estate for the life of A., and the contrary is clearly the law.

The enactment of course applies where the tenant in fee grants away a life estate. His right of entry accrues when his reversion becomes an estate in possession. And if tenant in fee were dispossessed, and while dispossessed granted the land to A. for life, and A. took possession, the right of the tenant in fee would accrue at the determination of A.'s estate, and the prior possession of the trespasser would go for nothing. But a dispossessed tenant in fee cannot stop the running of time by simply settling the property, as we shall see: it is the taking of possession by the grantee for life in such a case that revests all the titles under the settlement (*d*).

We now come to the case of a particular tenant, who has not been in possession when his estate terminates. If the person entitled to the particular estate upon which the future estate is expectant, has not been in possession at the time when his interest determined, no such entry shall be made, or

(*b*) Darb. & Bos, 2nd ed. 326, 327.
(*c*) See 11 Jur. N.S. at p. 152.
(*d*) Darb. & Bos. 2nd. ed. 319.

action brought, by any person becoming entitled in possession to a future estate, but within ten years after the right accrued to the person whose estate has so determined, or within five years after the time when the future estate became vested in possession, whichever of these two periods is the longer (*e*). Thus, if A., a life tenant, is dispossessed, and four years afterwards dies, the trespasser being all this time in possession; then the estate in remainder becomes an estate in possession, and the remainderman has either ten years from the date of A.'s dispossession, or five years from A.'s death, by which he became entitled to the possession, whichever is the longer time. In this case, ten years from A.'s dispossession is the longer time; so that the remainderman must bring his action in that case within six years from A.'s death, when the remainder became an estate in possession.

This clause does not conflict with that we have said as to the acceleration of the remainder by reason of the extinction of the particular estate by wrongful possession. It is true that when the particular estate is extinguished by a trespasser, the particular tenant is not in possession when his estate determines. But if this clause were held to cover such a case, then, upon the extinction of the life estate by ten years' wrongful possession, the remainderman in every such case would have only five years from that time within which to bring his action. But the clause does not even literally cover such a case; for it provides for alternative periods, *i.e.*, either ten years or five years, and there could be no alternative if the case of the barring of a life tenant were included; because the alternative period of ten years from the ouster of the particular tenant would always have elapsed. We may take it then that this clause refers to the natural expiration or determination of the life estate by the dropping of the life pending the dispossession.

When a life tenant conveys away his estate, he is not then "the person last entitled to the particular estate." Thus, tenant for life conveyed his estate to a stranger six years before his death. And an action was brought more than six years afterwards, but less than twelve (the periods under the English Act), to recover the land. It was held that the plaintiff was not barred, because the life tenant was not the person last entitled, but his grantee. The clause was intended to provide for the case where the right to possession and the possession

(*e*) S. 6, s.-s. 1.

itself are separated; in such cases a cause of action accrues to the owner of the particular estate, and on its cesser another cause of action accrues to the remainderman, and the two periods run from the accruing of these rights of action (*f*).

Where the owner has been dispossessed, and after such dispossession, executes a settlement of the land constituting future estates, he does not thereby cause time to cease running; but all claiming under such settlement will be barred at the end of ten years from the time when the first right of entry accrued (*g*). Where the right of any person to an estate in possession has been barred, and such person has at any time during such period been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise in or to the same land, no right accrues in respect of such other estate, etc., unless in the meantime the land has been recovered by some person entitled to an estate, interest or right which has been limited to take effect after or in defeasance of such estate in possession (*h*).

Clause 12 of section 5 applies where the particular tenant and the remainderman are different persons. This clause applies where the owner of the particular estate is also the owner of a future estate (*i*).

The present clause applies to cases where a person immediately entitled has been dispossessed and barred of his present right. He cannot then set up an estate or right in remainder, which he also had at or during the time of his dispossession, but is barred of all. But if any other person is entitled to an estate limited to take effect after his immediate or present estate, and recovers the land after such person is barred of his present right, then the whole title revests, and the future estate is saved.

Thus if land be limited to A. for life, remainder to B. for life, remainder to A. in fee; and A. is dispossessed and barred of his right, and then B. enters and enjoys his life estate, here A. has a new right with respect to his remainder (*j*).

(*f*) *Pedder* v. *Hunt*, 18 Q.B.D. 565.

(*g*) S. 6, s.-s. 2.

(*h*) S. 6, s.-s. 3.

(*i*) *Doe d. Hall* v. *Moulsdale*, 16 M. & W. 689.

(*j*) *Doe d. Johnson* v. *Liversedge*, 11 M. & W. 517.

23. *Acknowledgments.*

Where an acknowledgment of the title of the person entitled to land or rent has been given to him or to his agent, in writing, signed by the person in possession, or in receipt of the profits or in the receipt of such rent, such possession or receipt shall be deemed the possession or receipt of or by the person to whom or to whose agent the acknowledgment was given at the time of giving the same: and the right of such last mentioned person, or of any person claiming through him, to make an entry shall be deemed to have first accrued at the time when the acknowledgment, or the last of them if more than one, was given (*k*). The conditions necessary for the application of this section are that the acknowledgment should be in writing; made by the person in possession himself; made to the person entitled or his agent. No verbal admission or acknowledgment will be of any avail, the statute requiring that it shall be in writing (*l*). But if the writing has been lost or destroyed, parol evidence may be given of it in the same manner as other lost documents are proved (*m*).

The signature must be by the party in possession himself and not by his agent (*n*), but it may be signed for him by an amanuensis (*o*).

The acknowledgment may be made to the person entitled or his agent (*p*), but cannot be made to a stranger (*q*); but the agent need not be authorized to act at the time of the acknowledgment. If there be a subsequent ratification of his receipt of the acknowledgment it is sufficient (*r*). It is not necessary that the person making the acknowledgment should understand its nature, if it is in fact true (*s*).

(*k*) S. 13.

(*l*) *Doe d. Perry* v. *Henderson*, 3 U.C.R. 486; *Doe d. Ausman* v. *Minthorne*, 3 U.C.R. 423.

(*m*) *Haydon* v. *Williams*, 7 Bing. 163.

(*n*) *Ley* v. *Peter*, 3 H. & N. 101.

(*o*) *Lessee of Dublin* v. *Judge*, 11 Ir. L.R. 80 (1847).

(*p*) *Ruttan* v. *Smith*, 35 U.C.R. 165.

(*q*) *Markwick* v. *Hardingham*, 15 Ch. D. 339.

(*r*) *Trulock* v *Robey*, 12 Sim. 402; *Jones* v. *Bright*, 5 Bing. 533; *Lyell* v. *Kennedy*, 14 App. Cas. 437.

(*s*) *Ferguson* v. *Whelan*, 28 C.P. 112.

Joining in a conveyance of part of the land with the true owner has been held to be a sufficient acknowledgment of his title (*t*).

The operation of the Act is in effect to make an acknowledgment equivalent to possession or receipt of rent by the person to whom it is given at the time when it is given, and is in fact equivalent to removing the trespasser from possession for the time being and putting the owner in possession (*u*). But it is ineffectual after the statutory period has run, for the owner has then no right of entry, his title being completely extinguished (*v*).

Attention may here be called to the different provisions regarding acknowledgments according to the different circumstances in which they may be given.

Possession of land. (a) The acknowledgment must be in writing; (b) signed by the trespasser himself; (c) made to the claimant or his agent (*w*).

Arrears of dower, rent and interest. (a) The acknowledgment must be in writing; (b) signed by the person by whom the money is payable, or his agent; (c) made to the person to whom payable, or his agent (*x*).

Mortgagee to mortgagor. (a) The acknowledgment must be in writing; (b) by the mortgagee, or the person claiming through him (*y*); (c) if there are more than one mortgagee or persons claiming under him or them, an acknowledgment signed by one or more is effectual only against the party signing (*z*); (d) made to the mortgagor, or some person claiming his estate, or the agent of such mortgagor or person (*a*); (e) if more than one mortgagor the acknowledgment may be given to any one or more of them, or his or their agent, and is as effectual as if given to all (*b*).

(*t*) *Re Dunham*, 29 Gr. 258.

(*u*) *Cahuac* v. *Cochrane*, 41 U. C. R. 436; *Canada Co.* v. *Douglas*, 27 C. P. 344.

(*v*) *Sanders* v. *Sanders*, 19 Ch. D. 373; *McDonald* v. *McIntosh*, 8 U.C. R. 388.

(*w*) S. 13.

(*x*) S. 17.

(*y*) S. 19.

(*z*) S. 21.

(*a*) S. 19.

(*b*) S. 20.

Money charged on land, and legacies. (a) The acknowledgment must be in writing; (b) signed by the person by whom payable, or his agent; (c) made to the person entitled, or his agent (*c*).

24. *Disabilities—Land or Rent.*

If at the time when the right of entry or action accrues, as in sections 4, 5 and 6 mentioned, such person is under any of the disabilities of infancy, idiotcy, lunacy or unsoundness of mind, then, notwithstanding that the statutory period of limitation may have elapsed, such person, or the person claiming through him may make an entry or bring an action within five years next after the cesser of disability, or death of such person, whichever first happens (*d*).

But no entry shall be made or action brought, by any person under disability at the time when the right first accrued, or by any person claiming through him, but within twenty years after the time when the right first accrued, although the disability continued during the whole twenty years, or although the five years allowed from cesser of disability or death may not have expired (*e*).

It will be observed that the allowance for disabilities is confined to the person to whom the right *first* accrued, and that from the moment at which such person, being under *any* disability when his right accrued, shall be free from any disability, the five years allowed will begin to run, and having once commenced running, will run on, without regard to any disability which he may afterwards contract; while, if he should continue to labour under some disability, whether original or supervening, without a free interval, till his death, the five years would begin to run from his death, without regard to the condition of the next claimant, and although such claimant should, at the time when the right accrues to *him*, be actually under disability. But the right will be absolutely barred, at the end of twenty years, although the person to whom it first accrued should continue under disability for the whole of that time, having never, therefore, been personally able to assert his right, or although five years should not have elapsed since he ceased to be under disability, or died.

(*c*) S. 23.
(*d*) S. 43.
(*e*) S. 44.

To illustrate the matter, let us suppose A., donee in tail, to be insane when his right accrues; if he should be restored to sanity, a term of five years from the time of his restoration, whether the term of ten years from the accruer of his right shall have elapsed or not, is then allowed to him and the issue in tail. If he should die *without* having been restored, the issue would then have five years from his death, whether the ten years had elapsed or not; but if he should continue insane for twenty years, the right would be absolutely barred; or, if he should be restored, or, without having been restored, should die at the end of, say nineteen years, the issue, or he and the issue, whether such issue were under disability at his death or not, would have, instead of five years, only one year from his restoration or death. If A. should continue insane for twenty years; or, if he should be restored, or *without* having been restored, should die at the end of, say nineteen years, and the issue, or he and the issue, should neglect to take any proceeding within one year from such restoration or death, the persons in remainder or reversion, whether under disability or not, would be absolutely barred (s. 27). So, if A. should be restored at the end of, say eighteen years, and die *within* two years from the period of his restoration; or, if he should continue insane for, say eighteen years, and then die, leaving issue in tail, which issue should fail *within* two years from his death; in either case, the persons entitled in remainder or reversion, whether under disability or not, would be absolutely barred unless they prosecuted their claim before the expiration of the two years (s. 28). In the examples here given, it is assumed that no disability, as, for instance, of infancy, existing concurrently with A.'s insanity, when the right first accrued, is of longer continuance; otherwise, the determination of the concurrent disability last removed, must be substituted for his restoration to sanity. It is also assumed that the estate of A. is a tenancy in tail, which, as also the reversion or remainder dependent thereon, are capable of bar by lapse of time and otherwise, as presently explained in treating of sections 27, 28 and 29.

No allowance whatever is made for any disability except that in existence when the right first accrues. And if the first disability ceases by death, and five years more are allowed, and the person then claiming the right is under disability, the time runs against him nevertheless (*f*).

(*f*) S. 45; *Farquharson* v. *Morrow*, 12 C.P. 311.

And it is also to be observed that the disability must exist at the time when the right first accrues in order to prevent the running of time. Hence, if an infant is dispossessed and thus a right of entry accrues to him, his disability saves him for the time. But if his ancestor had been dispossessed and time had commenced to run, and then the infant succeeded by inheritance, his infancy would not be a disability (*g*).

With regard to the disability of infancy, however, care must be taken to distinguish those cases in which possession is taken under such circumstances that the person in possession will be considered as a bailiff for the infant; in which event his possession will be the possession of the infant, and the statute will not operate. Whenever any person, as bailiff, servant, agent, attorney, caretaker, guardian (whether natural or statutory), or in any other fiduciary character, enters into possession, the possession is that of the person entitled; and so long as such person continues in possession his possession is to be ascribed to the character in which he entered, and he cannot denude or divest himself of such character except by going out of such possession and delivering up the land to the owner (*h*). And, therefore, where a man made a conveyance to his wife, inoperative to convey the legal estate but sufficient to constitute him a trustee for her, and remained in possession with her, and after her death continued in possession for eighteen years, it was held that his occupation must be attributed to his rightful title as natural guardian of his infant children, and that the statute did not operate against them (*i*). And the fiduciary character is maintained even after the infant attains his majority (*j*). And where a stranger enters, with notice of the infant's title, he is similarly treated as in possession for the infant, and time does not run (*k*). The law is thus summed up in an Irish case (*l*):—"Where any person enters upon the property of an infant, whether the infant has been actually in possession or not, such person will be fixed with a fiduciary

(*g*) *Jones* v. *Clearelund*, 16 U.C.R. at p. 11.

(*h*) *Kent* v. *Kent*, 20 Ont. R. at p. 463.

(*i*) Ibid; affirmed in appeal, 19 App. R. 352, and see the cases cited in the Court below.

(*j*) Ibid.

(*k*) *Re Taylor*, 8 P.R. 207.

(*l*) *Quinton* v. *Frith*, Ir. R. 2 Eq. at p. 415 (1868).

position as to the infant—first, whenever he is the natural guardian of the infant; secondly, when he is so connected by relationship or otherwise with the infant as to impose upon him a duty to protect, or, at least, not to prejudice his rights; and thirdly, when he takes possession with knowledge or express notice of the infant's rights. Indeed, the last ground is but an instance of the application of the general principle, that a person entering into possession of trust property, with notice of the trust, constitutes himself a trustee, in which case, unless he enters as a purchaser for value and continues in possession for [ten] years from his purchase, or unless the trust be merely constructive (*m*), the statute will afford no defence."

25. *Mortgages.*

Where a mortgagee has obtained possession of the mortgaged property, the mortgagor, or any person claiming under him, will be barred of his right to redeem if he does not bring his action within ten years from the taking of possession; or within ten years from an acknowledgment, or the last of them, if more than one, by the mortgagee or any person claiming through him (*n*). When neither mortgagor nor mortgagee is in possession, but the land is vacant, and no payment is made and no acknowledgment given, the mortgagee is in constructive possession of the land, and time does not run against him; so that he may maintain an action of trespass against anyone unlawfully entering (*o*). Where the owner has been dispossessed, and while out of possession mortgages the land in fee it has been held, both in this Province and in England, that the mortgagee has a new right against the mortgagor, and as long as interest is paid the statute does not operate; in other words that the mortgagor saves himself by mortgaging the land and paying interest (*p*). But the contrary has recently been held in England (*q*).

In case there are more mortgagors than one, or more than one person claiming through the mortgagor, the

(*m*) A constructive trust is now held to stand in the same position as an express trust: *Irvine* v. *Macaulay*, 28 Ont. R. 92; 24 App. R. 446.

(*n*) S. 19.

(*o*) *Delaney* v. *Can. Pac. R. Co.*, 21 Ont. R. 11.

(*p*) *Cameron* v. *Walker*, 19 Ont. R. 212; *Doe d. Palmer* v. *Eyre*, 17 Q.B. 366; *Ford* v. *Ager*, 2 H. & C. 279.

(*q*) *Thornton* v. *France*, L.R. (1897) 2 Q.B. 143.

acknowledgment of the mortgagee, if given to one only of such persons, will be as effectual as if given to all (*r*).

In case there are more mortgagees than one, or more persons than one claiming the interest of the mortgagee, an acknowledgment signed by one or more of such mortgagees or persons, is effectual only as against the person signing, and does not operate to give the mortgagor a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the land mortgaged; and where the persons giving the acknowledgment are entitled to a divided part of the land, and not to any ascertained part of the mortgage money, the mortgagor is entitled to redeem such divided portion of the land on payment, with interest, of the part of the mortgage money which bears the same proportion to the whole of the mortgage money as the value of the divided portion of the land bears to the whole (*s*).

Where the mortgagor is in possession, the mortgagee may make an entry or bring an action to recover the land at any time within ten years next after the last payment of any part of the principal money or interest secured by the mortgage, though more than ten years have elapsed since the time at which the right to enter first accrued (*t*). The payment, to be effectual, must be made within ten years from the time when the right of entry first accrues, inasmuch as the mortgagee's right is extinguished after the lapse of ten years without payment (*u*). The payment must be made by some person either bound to pay, or liable to be foreclosed in default of payment (*v*); the principle underlying the statute being that a payment, to prevent the bar by the statute, must be an acknowledgment by the person making the payment of his liability, and an admission of the title of the person to whom the payment is made (*w*). Hence a payment by a stranger, which would be a mere gratuity (*x*), a payment of rent by a tenant of the mortgaged property to the mortgagee (*y*), or the realization of the security (as by

(*r*) S. 20.

(*s*) S. 21.

(*t*) S. 22.

(*u*) *Hemming* v. *Blanton*, 42 L.J.C.P. 158.

(*v*) *Chinnery* v. *Evans*, 11 H.L.C. 115; *Harlock* v. *Ashberry*, 19 Ch. D. 539; *Re Clifden*, L.R. (1900) 1 Ch. 774.

(*w*) See *Lewis* v. *Wilson*, 11 App. Cas. 639.

(*x*) *Chinnery* v. *Evans*, 11 H.L.C. 115.

(*y*) *Harlock* v. *Ashberry*, 19 Ch. D. 539.

the surrender to the insurance office of a life policy) (*z*), do not stop the operation of the statute.

Where a judgment of foreclosure has been obtained, the mortgagee acquires a new right and title, and has another period of ten years within which to recover possession (*a*).

It will be observed that there is no saving for disability in these cases.

26. *Estates Tail.*

Tenants in fee tail are treated for the most part as if they were tenants in fee simple, *i.e.*, when time begins to run on dispossession of a tenant in tail, the bar is complete in ten years, not only against the tenant in tail himself, but also against his issue and those in remainder or reversion.

By sections 27 and 28 it is enacted that, when the right of tenant in tail has been barred, no action shall be brought by any person claiming any estate, interest or right which such tenant in tail might lawfully have barred; and where the tenant in tail dies before the expiration of the statutory period, no person shall bring an action to recover the land but within the period during which the tenant in tail, had he lived, might have brought the action.

But for the fact that there is a remainder or reversion expectant on every estate tail, the two cases would be exactly parallel. There is nothing more extraordinary in the heirs of a tenant in tail being barred by the laches of their ancestor, than there is in the fact that the heirs of tenant in fee simple are similarly barred. But the peculiar feature of the operation of the statute, as affecting tenants in tail, is that the remainderman is also barred without any possibility of asserting his right, unless the issue in tail fail within the statutory period.

In order properly to appreciate the effect of these sections the student should have some knowledge of the mode of barring estates tail under the disentailing Act, a subject which we have not yet reached, and which is considered in the following chapter. In order that these sections may not be passed over, the mode of bar under that statute will be briefly explained and an endeavour made to illustrate the effect of the Act as regards tenancies in tail. On a gift to A., in fee tail, the reversion in fee simple is left in the donor, to

(*z*) *Re Clifden*, L.R. (1900) 1 Ch. 774.

(*a*) *Heath* v. *Pugh*, 6 Q.B. D. 345; 7 App. Cas. 235.

whom or whose heirs, on failure of the issue in tail, the estate will revert, if the entail be not barred in the meantime. The donor, instead of leaving in himself the reversion, might on the gift grant it as a remainder to B. in fee; and the same observations above made as to the reversioner, apply now to the remainderman. Now, in these instances, the tenant in tail, by a simple assurance under the disentailing Act (which we will not now stop to consider), bars the estates in remainder or reversion, as well as his own issue; that is, he can by the aid of the statute convey a fee simple to a stranger, though he has but a limited interest himself; and the result is that not only are his issue thus deprived of their chances of succession, but the remainderman or reversioner is also deprived of all chance of the land reverting to him on failure of issue of the tenant in tail. The student will now understand the policy and effect of these sections. Section 27 proceeds on the simple and just principle, that as the issue, remainderman, or reversioner, may be barred by some *active* step of the tenant, they shall equally be barred by such *passive* conduct on his part as would bar him; in other words, the neglect of the tenant is tantamount to a disentailing deed. Under section 28, if time has commenced running against the tenant in tail, it will continue to run on his death against all whom he might have barred, notwithstanding any disability they may be under. It will be observed these sections vary in principle from others relating to future estates, which, as before explained, make time run against the parties entitled to such estates from the time they become estates in possession, whereon their right of entry first accrues. In cases of tenancies in tail, remaindermen or reversioners whom the tenant might himself have barred have no such indulgence.

It should be mentioned that if the tenant has made a conveyance in fee simple, not amounting to a bar, and then consequently *afterwards* discontinues possession or is ejected, time will not begin to run against the issue till their right of entry on death of the tenant, as in such case the statute does not apply, since the tenant has not, in the language of section 5, clause 1, "while *entitled* been dispossessed or discontinued possession." And again, the tenant has not, in the language of section 27, during his lifetime, "the right to make an entry" as against his own deed, that can be barred. In fact, where the tenant by his own conveyance precludes himself from possession, the right of his grantee rests on the grant

itself, and there is no necessity for applying any statutory bar in his favour or for giving him any right under the statute (*b*).

Again, land may be limited to A. for life, and from and after his death to B. in fee tail, remainder to C. in fee. In this instance, A., the tenant for life, is called the protector to the settlement; and B., the tenant in tail, cannot effect a complete bar without his consent. If he does not obtain his consent, he can, under the disentailing Act, only bar his own issue. With this explanation, we have now to consider section 29. It enacts that when the tenant in tail has made an assurance which does not operate to bar the estate in remainder, and any person is by virtue of such assurance in possession of the land or rent, at the time of the execution of the assurance or at any time afterwards; and the same person, or any other person (other than some person entitled to possession in respect of the remainder), continues in possession for ten years next after the commencement of the time at which the assurance would (if it had then been executed by the tenant in tail or the person who would have been entitled to the estate tail if the assurance had not been executed) without the consent of any other person have operated to bar the estate in remainder; then such assurance shall be deemed to have been effectual as against the remainderman.

In order to illustrate this section, let us take the case of a settlement with a protector, just instanced. In this case, if B., tenant in tail, without the consent of A., the protector to the settlement, conveys to X., a stranger, so as to bar his own issue, but not the remainder in fee to C.; here C. is safe, unless the circumstances mentioned in section 29 occur. Suppose that X. goes into possession; even now time does not run against C. But if A., tenant for life and protector to the settlement, dies, then time begins to run against C., and in ten years the conveyance to X. will be treated as sufficient to have barred C. The principle is, that according to the concluding words of the section a point of time has arrived, viz., the death of the protector, at which the tenant in tail could have effected a complete bar without the consent of any other person; and what he might have done actively at that time is permitted by the statute to be done by the passing of time.

(*b*) *Cannon* v. *Rimington*, 12 C. B. 1, 18; *Re Sharer*, 3 Ch. Ch. 379.

The conveyance of the tenant in tail, ineffectual at the time to completely bar the entail for want of the protector's consent, becomes an effectual conveyance ten years after the death of the protector if the purchaser remains in possession.

In neither of these cases is the remainderman at any time able to assert his right, assuming that the issue in tail continue. Under sections 27 and 28, where tenant in tail is dispossessed and does not bring an action to recover the land, the remainderman cannot take any step to save his estate, because he is not entitled to the land until the issue in tail are extinct. Although this seems to work an injustice, it does no greater injustice than to allow tenant in tail to bar the entail by assurance, which the remainderman is equally helpless to prevent. And the position is precisely the same in cases under section 29.

27. *Prescription.*

This is the only remaining subject under this statute that we have to consider; and it is absolutely requisite, in order to understand the subject, that a knowledge should be had of prescription as it existed at common law. For those clauses of the statute which relate to prescription do not supersede the old law, but modify it, and furnish an additional mode of claiming title.

Prescription applies to easements only, and not to the land itself, and it is the title by which a man, by long user simply, acquires a right over another's land. At common law usage *from time immemorial* was necessary to establish a prescriptive right; and time immemorial for this purpose began at a time anterior at least to the beginning of the reign of Richard I. Thus, if evidence were given of uninterrupted user for over twenty years, or otherwise raising a presumption (as hereafter explained) in favour of the prescriptive right, it might still have been *destroyed* (among other modes) by shewing that the usage first existed subsequently to the accession of King Richard, and this explains the expression sometimes applied to prescriptive rights, that they must have existed *from time whereof the memory of man runneth not to the contrary.*

From the almost complete impossibility of direct proof that such claim had its origin not later than the period referred to, the courts on evidence of its peaceable actual enjoyment for twenty years, or even for a less period if accompanied by

other presumptive evidence, presumed the enjoyment to have been from time immemorial, so as to sustain the claim by prescription.

So also, after twenty years of such enjoyment, they presumed a *grant* to have been made, that is, that the right claimed originated in a grant which was lost, and so the right claimed might be set up as under a grant.

But in all cases there must have been actual usage during the required period; not a mere claim of right to use or enjoy; and it must have been as of right, and free from interruption, dispute, and denial, during the period relied on as establishing the presumption. It must not have been in the absence or ignorance of the parties interested in opposing the claim during the period it was exercised; nor under a grant or licence from them during the period relied upon. Such parties also must have been capable of resisting the claim during the period it was exercised; therefore, no right would accrue against a landlord, if during the period the enjoyment took place, the tenement were under lease. The exercise of the alleged right must have been over the land of another, and not during unity of possession of the alleged servient tenement with the alleged dominant tenement; for then the alleged enjoyment of the right would not have been of it as a right, but the enjoyment would have been of the very soil itself of the alleged servient tenement.

When once the claim was sufficiently established by proof of constant apparent peaceable user as above at some time for a sufficient period, then a cesser, or wrongful interruption of such user at a subsequent period for a comparatively short time (say ten or even twenty years) would not defeat the right gained by such user (*c*). It is important to bear this in mind because it will be seen hereafter that the statute simply provides, firstly, that such claims shall not be defeated in certain ways; and secondly, the statute gives a new way of asserting the right which can be defeated by modern interruption. It may be necessary, therefore, for the claimant to plead his right as depending on a *non-existing grant* of the right claimed, if the facts are not favourable to the claim under the statute.

This doctrine of, and claim under, an alleged *non-existing grant* is as follows:—From the same facts (after 20 years' enjoyment), that a presumption arose of immemorial usage,

(*c*) Co. Litt. 114 b.

so as to support a claim by way of prescription, there would also in most cases arise a presumption of a grant of the right claimed; and therefore, a claimant could advance his claim either as a prescriptive right, or by pleading a grant to him from a party entitled to make such grant. The latter mode was always adopted, when the claim if made as a *prescriptive* right, could have been defeated by shewing when the enjoyment was first had; whereas, by pleading the right as existing by a grant, if sufficient evidence, as by 20 years' open constant peaceable user, were given, establishing the presumption of a grant having been made of right of such user, then the non-user prior to the alleged grant, became manifestly immaterial.

In these cases, the grant never in fact existed. The party pleading it averred that it was lost, and relied on evidence of enjoyment as presumptive evidence of its having existed. This was well known by juries as well as by judges to be mere fiction, and was introduced and allowed to temper the rigorous rule which destroyed the claim if pleaded by way of prescription. It was observed that "so heavy a tax on the conscience and good sense of juries, which they were called on to make for the sake of administering substantial justice, ought to be removed by the legislature. The Act in question is intended to accomplish this object, by shortening in effect the period of prescription, and making that possession a *bar* or title of itself, which was so before only by the intervention of a jury" (*d*).

The old form of pleading is yet of service, and must be resorted to sometimes, for it will apply, and a claim under a non-existing grant may be good, not only where a claim of prescriptive right at common law would fail, but also where a claim under the statute would fail by reason of absence of enjoyment *down to the time of suit*, as we shall presently see.

On the other hand, where the facts permit it, one advantage of setting up the right under the statute is, that under it the right may be claimed after the prescribed period, as absolute and indefeasible, which, if pleaded as depending on grant is still an open question before the jury, and sustained after all by mere *inference* of the grant, or prescription alleged. "The legislature must be taken to have intended that where a defendant can shew a prescriptive right such as the statute

(*d*) Per Parke, B., quoting from Starkie on Ev., *Bright* v. *Walker*, 1 Cr M. & R. at p. 218.

requires, he should be entitled to succeed without the exercise of any discretion on the part of the jury; that the statute should serve him as a kind of parliamentary conveyance of the easement" (*e*). In this point of view a right by prescription under the statute to incorporeal hereditaments would stand on the same footing as a right acquired to corporeal hereditaments under the statute of limitations.

A claim by *prescription* at common law, as distinguished from a claim under a non-existing grant, or under the statute, could never have been sustained in this country; for here manifestly no right can rest on immemorial usage in the strict legal sense put on those words (*f*). And we shall therefore have to deal only with the two methods of claim, i.e., by non-existing grant, and under the statute.

It may be well at first to point out the distinction between custom and prescription. Custom is properly a *local* usage, and not annexed to any *person*; such as a custom in the manor of Dale that lands shall descend to the youngest son. Prescription is merely a *personal* usage; as, that Sempronius and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege. As, for example, if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation (which is held to be a lawful usage), this is strictly a custom, for it is applied to the *place* in general, and not to any particular *persons*; but if the tenant who is seised of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used time out of mind to have common of pasture in such a close, this is properly called a prescription; for this is a usage annexed to the *person* of the owner of this estate. All prescriptions must be either in a man and his ancestors, or in a man and those whose estate he hath; which last is called prescribing in a *que estate*.

As to the several species of things which may, or may not, be prescribed for, we may, in the first place, observe, that nothing but incorporeal hereditaments can be claimed by prescription; as a right of way, a common, etc.; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had. For a

(*e*) *McKechnie* v. *McKeyes*, 10 U. C. R. 56.

(*f*) *Burrowes* v. *Cairns*, 2 U. C. R. 288; *Grand Hotel Co.* v. *Cross*, 44 U. C. R. 153.

man shall not be said to prescribe, that he and his ancestors have immemorially used to hold the castle of Arundel; for this is clearly another sort of title; a title by corporal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. But as to a right of way, a common, or the like, a man may be allowed to prescribe; for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage.

At common law a prescription must always have been laid in him that was tenant of the fee. A tenant for life, for years, at will, or a copyholder, could not prescribe, by reason of the imbecility of their estates. For, as prescription at common law is usage beyond time of memory, it is absurd that they should pretend to prescribe for anything, whose estates commenced within the remembrance of man. And therefore the copyholder must have prescribed under cover of his lord's estate, and the tenant for life under cover of the tenant in fee-simple. As if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must have prescribed under cover of the tenant in fee-simple; and must plead that John Stiles and his ancestors had immemorially used to have this right of common, appurtenant to the said manor, and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life.

A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Consequently, if the owner of the servient tenement could not grant such a right as that claimed, no claim by prescription could be founded upon long usage. And when a prescriptive right is claimed against a company, and the right claimed is of such a nature that it would have been *ultra vires* of the company to grant it, the right cannot arise by prescription (*g*).

Amongst things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe

(*g*) *Staffordshire Canal* v. *Birmingham Canal*, L.R. 1 H.L. 254. *Canada Southern R. Co.* v. *Niagara Falls*, 22 Ont. R. 41; *Can. Pac. R. Co.* v. *Guthrie*, in the Supreme Court, not yet reported.

in a *que estate*, or in himself and his ancestors. For, if a man prescribes in a *que estate* (that is, in himself and those whose estate he holds), nothing is claimable by this prescription, but such things are incident, appendant, or appurtenant to lands; for it would be absurd to claim anything as the consequence, or appendix of an estate, with which the thing claimed has no connection; but, if he prescribes in himself and his ancestors, he may prescribe for anything whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross. Therefore, a man may prescribe, that he, and those whose estate he hath in the manor of Dale, have used to hold the advowson of Dale, as *appendant* to that manor; but, if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So also a man may prescribe in a *que estate* for a common *appurtenant* to a manor; but if he would prescribe for a common *in gross*, he must prescribe in himself and his ancestors.

And if a way be granted to one unconnected with the enjoyment or occupation of land, it cannot be annexed as an incident of it. And if a way be granted in gross, it is a personal right only, and cannot be assigned (*gg*). Nor can a way appendant to a house or land be granted away, or made in gross; for no one can have such a way but he who has the land to which it is appendant.

We now proceed to deal with the statute. It provides for two cases, viz., profits *à prendre* by section 34; and easements by section 35. The right to the use of light by prescription is abolished by section 36. The distinction between easements and profits *à prendre* is this, that the right to easements gives no right to any profit of the soil charged with them; but the right to take "something out of the soil" is a profit *à prendre* (*h*).

We have already seen that a right claimed by immemorial usage could have been defeated by shewing when it commenced.

A main object of the statute was, 1st, to prevent a *prima facie* right acquired by enjoyment as named in sections 34 and 35, from being defeated by shewing that it had not existed prior to the respective periods named; 2nd, to leave it open to be defeated in any other way as theretofore; but,

(*gg*) *Ackroyd* v. *Smith*, 10 C.B. 164.

(*h*) *Manning* v. *Wasdald*, 3 A. & E. 764.

3rd, to render it absolute and indefeasible after a more lengthened period of enjoyment, unless such enjoyment were had by consent or agreement; 4th, to state and define the time and the circumstances which would give a right by force of the statute in the cases it refers to; 5th, to prevent any presumption arising in favour of a claim on proof of enjoyment for a less time than the prescribed period; and, 6th, to vary the mode of pleading.

By section 34 it is enacted that no claim which may lawfully be made at the common law by custom, prescription or grant to any profit or benefit to be taken or enjoyed from or upon any lands, including crown lands, except rent, shall, when such profit has been taken and enjoyed by any person claiming right thereto, without interruption, for thirty years, be defeated by shewing that it was first taken at any time prior to such thirty years; but such claim may be defeated in any other way by which such claim might be defeated at the time of passing the statute; and after an enjoyment for sixty years the right becomes absolute and indefeasible, unless it appears that it was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

By section 35, no such claim to any way or other easement, or to any watercourse, or the use of any water to be enjoyed, or derived upon, over, or from any land or water of any person, including the crown, when such way or other matter has been enjoyed by any person claiming right thereto, without interruption, for twenty years, shall be defeated by shewing that such way or other matter was first enjoyed at any time prior to such period of twenty years; but such claim may be defeated in any other way by which it could be defeated at the time of passing the statute; and where such way or other matter has been enjoyed for forty years the right is absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement given or made for that purpose by deed or writing.

The periods of thirty and sixty years under section 34, and twenty and forty years under section 35, are required by section 37 to be the periods *next before some action* wherein the claim was or is brought into question. And no act or other matter shall be deemed to be an interruption, unless the same has been submitted to or acquiesced in for one year after the party interrupted has had notice thereof, and of the

person making, or authorizing the same to be made. While, as we have seen, the user for the necessary time is evidence of a lost grant, and a cesser of enjoyment will not necessarily defeat a right so claimed; it is most important to observe that if the claim is laid under the statute, it must be without interruption for a year, and the user must continue down to the bringing of the action, or rather within a year therefrom.

The Act is so worded that, though there may have been fifty years' enjoyment up to the time of the act done, that is no defence, unless it continues up to the time of the commencement of the suit (*i*). Thus to an action of trespass *quare clausum fregit*, the defendant in his plea justified, setting up a prescriptive right under the statute by user and enjoyment of a right of way for twenty years before the commencement of the suit; at the trial he proved an uninterrupted user of the road for forty-eight years, but he failed to give any proof of user during a period of fourteen months next before the commencement of the suit; the Court held the plea was not sustained by the proof. Parke, B., remarked: "It is quite impossible that acts of user should continue to the very moment of action brought, or that they should be continued to within a week or month of that time; but I think that, according to the true construction of the statute, some act of that description must take place in each year" (*j*). In such a case as this, the defendant should, as before explained, have pleaded the right as arising from a non-existing grant. It is not necessary, however, that an act of user must be shewn in *each* year, if it be shewn that there was what fairly amounts to an actual enjoyment of the right for the statutory period, it being a question of fact in each case, having regard to the nature of the right claimed (*k*).

Where, however, the right has been enjoyed for nineteen years and a fraction, it is evident that an interruption cannot take place for a year within the twenty years. It is not the twenty years' enjoyment that gives the right; but twenty years' enjoyment without interruption for a year. Hence, where A. had free access of light and air through a window for nineteen years and three hundred and thirty days, and B. raised a wall which obstructed the light, and the obstruction

(*i*) Per Parke, B., *Ward* v. *Robins*, 15 M. & W. 241.

(*j*) *Lowe* v. *Carpenter*, 6 Ex. 832; *Haley* v. *Ennis*, 10 U.C.R. 404.

(*k*) *Hollis* v. *Verney*, 13 Q.B.D. 304, and cases there collected; *Smith* v. *Baxter*, L.R. (1900) 2 Ch. 138.

was submitted to for only thirty-five days, and A. then brought an action to remove the obstruction, it was held that the right of action was complete (*l*). But in such a case an action will not lie for an injunction to restrain the raising of such an obstruction within the period of twenty years, for though the interruption for a year cannot take place, yet the cause of action is not complete until the expiration of the twenty years (*m*).

The interruption referred to is not mere cesser of use or enjoyment, but an act "submitted to or acquiesced in" by the party interrupted, who must have notice of the interruption, and so it must amount to an adverse obstruction (*n*).

As regards the meaning of the words, *enjoyment as of right*, in section 38, sub-section 2, and of the words, *enjoyed by any person claiming right thereto*, in sections 34 and 35, they mean, "an enjoyment had, not secretly, or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion, or even on many occasions of using it; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user, or by deed conferring the right, or though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing, not under seal, in case of a plea for forty years, or by such writing, or parol consent or agreement, contract or licence, in case of a plea of twenty years" (*o*).

And again, "if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth as a trespasser would have done—if he shall have occasionally asked the permission of the occupier of the land—no title would be acquired, because it was not enjoyed 'as of right.' For the same reason it could not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed 'as of right' the easement, but the soil itself" (*p*). And so, enjoyment by

(*l*) *Flight* v. *Thomas*, 8 Cl. & F. 231; *Burnham* v. *Garvey*, 27 Gr. 80.

(*m*) *Battersea* v. *Commissioners*, etc., L.R. (1895) 2 Ch. 708, better reported 13 Rep. 795; *Bridewell Hospital* v. *Ward*, 3 Rep. 228.

(*n*) *Carr* v. *Foster*, 3 Q.B. 581; *Hollis* v. *Verney*, 13 Q.B.D. 304; *Smith* v. *Baxter*, L.R. (1900) 2 Ch. 138.

(*o*) *Tickle* v. *Brown*, 4 Ad. & E. 382.

(*p*) *Bright* v. *Walker*, 1 Cr. M. & R. at p. 219.

permission (*q*); contentious user, as when the act claimed as of right is punished by conviction not appealed from, or a series of acts take place under such circumstances that it can be found that the claim was never "as of right," but always the subject of contention (*r*); in such cases the enjoyment is not "as of right." But if the right claimed has actually been enjoyed by the claimant for the requisite period "as of right," and not by permission, or secretly or in a contentious manner, and it is one that could originate in grant, it is immaterial on what ground the claimant rested his alleged right to enjoy it (*s*).

But permission for user does not in every case prevent the acquisition of an easement; for the enjoyment *as of right* is not to be confined to an adverse right, and enjoyment is as of right if had by permission. Whether an easement can be gained after user enjoyed by permission depends on the time when permission was granted. On this point it has been laid down that if the permission is given *before* the commencement, and if it extends over the *whole* period of the prescriptive right claimed, the user is as of right, and without interruption, within the meaning of the Act; but that it is otherwise, if permission is given from time to time during the continuance of the user, because that is an admission that at that time the asker had no right (*t*).

"There is, however, a difference between uninterrupted enjoyment for twenty years and for forty years. The former is only *primâ facie* evidence of the title of the owner of the dominant tenement, and his title may be defeated in any other way by which [at the time when the Act was passed] it was liable to be defeated. Proof of a consent or agreement, whether by parol or in writing, will suffice to defeat the title. But uninterrupted enjoyment for forty years is absolute and conclusive evidence of title, with one exception only—namely, if the owner of the servient tenement can establish that the enjoyment was, 'by some consent or agreement, expressly given or made for that purpose by deed or writing.' A parol agreement will not suffice" (*u*). A parol licence in such a case is of no moment,

(*q*) *Monmouth Canal* v. *Harford*, 1 Cr. M. & R. 614.

(*r*) *Eaton* v. *Swansea Waterworks*, 17 Q.B. 267.

(*s*) *De La Warr* (*Earl*) v. *Miles*, 17 Ch. D. 535.

(*t*) *Kinloch* v. *Neville*, 5 M. & W.795; *Tickle* v. *Brown*, 4 Ad. & E. 369.

(*u*) Per Cozens-Hardy, J., *Gardner* v. *Hodgson's Kingston Breweries Co.*, L.R. (1900) 1 Ch. at p. 595.

unless it was applied for and granted within the period of forty years, in which case it might probably be used to negative the enjoyment of the easement for forty years; and that principle applies whether the parol licence is gratuitous or for a consideration. Hence, where a way had been enjoyed for more than sixty years, and a small annual sum had been paid for the use, for at least the last forty-four years, it was found as a fact that the way was enjoyed under a parol licence given more than forty years before, in consideration of the annual payment, and held that, in the absence of proof that the enjoyment was by consent or agreement in writing, an absolute and indefeasible right to the use of the way had been acquired (*v*).

Section 38 varies the form of pleading, and in cases within the Act, renders it unnecessary to prescribe in the name of the owner of the fee.

By section 36, no person shall acquire a right by prescription to the access and use of light to or for any dwelling-house, workshop or other building; but this does not apply to any such right as was acquired by twenty years' user before the 5th March, 1880.

Section 39 prevents any presumption in favour of any claim by the claimant of exercise or enjoyment for a less time than the periods mentioned; which again is contrary to the common law rule, whereby a presumption might frequently be created by user for a less period than named in the Act.

The crown is included in the bar created by sections 34 and 35, unless in cases of unsurveyed lands, as mentioned in section 42 (*w*); and whilst, therefore, as to corporeal hereditaments, time will not, except under the *Nullum Tempus Act*, run against the crown (*x*), it will, as to rights of an incorporeal nature, and the grantee of the crown will take subject to the time run.

28. *Disabilities—Easements.*

The time during which any person, otherwise capable of resisting any claim to any of the matters mentioned in sections 34 to 39 of the Act, is an infant, idiot, *non compos mentis*, or tenant for life, or during which any action has been pending and has been diligently prosecuted, until abated

(*v*) *Gardner* v. *Hodgson's Kingston Breweries Co.*, L.R. (1900) 1 Ch. 592.
(*w*) *Bowlby* v. *Woodley*, 8 U.C.R. 318.
(*x*) Ante p. 432.

by the death of any party thereto, is to be excluded from the computation of the shorter of the two periods mentioned in those sections, but not in the computation of the period for making the right indefeasible (*y*). And where any land or water upon, over or from which any such right has been enjoyed or derived, has been held under or by virtue of any term of life or any term of years, exceeding three years from the granting thereof, the time of enjoyment during the continuance of such term is to be excluded in the computation of the period of forty years, in case the claim is, within three years next after the end or sooner determination of such term, resisted by any person entitled to any reversion expectant upon the determination thereof (*z*).

29. *Extinction of Easements.*

It has been decided, as we have seen (*a*), that the Statute of Limitations does not apply to easements. Consequently, there is no bar under the statute for not bringing an action to prevent disturbance of the right. But an easement may be extinguished or abandoned. And it is a question of fact in each case whether there has been an abandonment of the right.

Mere non-user is not of itself an abandonment, but is evidence with reference to an abandonment. And so where there was continuous non-user and non-claim of a right of way accompanied by adverse obstruction by the erection of buildings upon the land over which the right was alleged to exist for eleven years, it was held that the owner of the dominant tenement had abandoned his right (*b*). Whether the acts done are done by the owner of the servient tenement acquiesced in by the owner of the dominant tenement, or by the owner of the dominant tenement himself, makes no difference. The abandonment may be presumed in either case if the facts are sufficient (*c*).

(*y*) S. 40.
(*z*) S. 41.
(*a*) Ante p. 430.
(*b*) *Bell* v. *Golding*, 23 App. R. 485.
(*c*) Ibid., and cases cited therein.

CHAPTER XXVI.

CONVEYANCES BY TENANTS IN TAIL.

(1). *The Old Law.*
(2). *Fines.*
(3). *Recoveries.*
(4). *The Modern Statute—Who may Bar an Entail.*
(5). *Protector of the Settlement.*
(6). *How Entail may be Barred.*
(7). *Consent of Protector.*
(8). *Enlargement of Base Fee.*
(9). *Bar by Mortgage.*
(10). *Money to be Laid Out.*
(11). *Voidable Estates.*

1. *The Old Law.*

Conveyances by tenants in tail, whereby the estate tail, and all estates to take effect after, or in defeasance of the same, are barred, are now governed solely by R. S. O. c. 122. Before considering this statute, however, it will be advisable to give the student an insight into the former mode of bar by levying a fine, or suffering a recovery, or by warranty; not so much because these modes ever prevailed to any extent in this Province (in fact there are but one or two records of fines at Osgoode Hall), as for the reasons that the former modes elucidate the present mode of bar; and the reports and text-books constantly allude to warranties, fines and recoveries, as methods of conveying not only estates tail, but also many other estates and interests, of the nature and effect of which, therefore, the student should not allow himself to be ignorant. "This statute consults the old law, and it is not possible to appreciate or expound its provisions without some knowledge of the law of settlement, and an acquaintance, more intimate, with those assurances which the statute has superseded; with their various uses and modes of operation, their learning, and their language (*d*)."

(*d*) Hayes Convey. 5th ed. 131.

By the feudal constitution, if the vassal's title to enjoy the feud was disputed, he might vouch or call the lord or donor to warrant or insure his gift, which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense. And so, by our ancient law, if, before the statute of *Quia emptores*, a man enfeoffed another in fee, by the feudal verb *dedi*, to hold of himself and his heirs by certain services, the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered. It was on these principles that the word "grant" in a conveyance in fee was supposed to imply a covenant for title; but all doubt on that point is removed by R.S.O. c. 119, s. 9, which enacts that neither the word "grant" nor "exchange" shall create any warranty, or right of re-entry, or covenant by implication, unless where so enacted by statute. The Provincial Act leaves to the word "give" its former effect; whilst the Imperial statute 8 & 9 V. c. 106, to much the same effect as the Provincial statute extends to such word as well as to "grant" and "exchange." And so even at this day, on a gift in tail or lease for life rendering rent, the donor or lessor (to whom the rent is payable), are bound to warrant the title (*e*).

A tenant in tail in possession might without the forms of a fine or recovery, in some cases make a good conveyance in fee simple by superadding a warranty to his grant, which barred his own issue, and such of his heirs as were in remainder or reversion.

By our modern statute (*f*) "all warranties of lands made or entered into by a tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail."

Before proceeding further it will be necessary shortly to look at the ancient procedure by fine and recovery, and the effects thereof in some cases, because the present statute is to some extent based upon the ancient methods, and cannot be understood without reference to them.

There were two modes before this Act of barring an entail, "by *recovery* at the common law, which gained the *clear fee*, and by *fine* according to the statute law, which

(*e*) Davidson Concise Prec. 26.

(*f*) R.S.O. c. 122, s. 2.

gave a fee measured by the *duration of the issue* on whom the estate tail would, if unbarred, have devolved" (*g*). Both results may be produced by proceedings under the statute, and we shall shortly explain the nature and effect of fines and recoveries respectively.

2. *Fines.*

A *fine* was one of those methods of transferring estates of freehold by the common law, in which livery of seisin was not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to have been an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices; whereby the lands in question became, or were acknowledged to be, the right of one of the parties. In its original, it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were every day commenced, for the sake of obtaining the same security.

A *fine* was so called, because it put an *end*, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter.

The mode of levying a fine was as follows:—The party to whom the land was to be conveyed commenced an action at law against the other, generally by a writ of *covenant real*, the foundation of which was a supposed agreement or covenant that the one should convey the lands to the other on breach of which agreement the action was brought. Then followed the leave to agree the suit, "*licentia concordandi*," for the defendant knowing himself to be wrong was supposed to make overtures to the plaintiff, who accepted them. Next came the *concord*, or agreement itself; which was usually an acknowledgment from the deforciants (or those who kept the other out of possession), that the lands in question were the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine was called the *cognizor*, and he to whom it was levied the *cognizee*. This acknowledgment must have been made either openly in court, or before certain judges or commissioners bound by

(*g*) Hayes Convey. 5th ed. 134.

statute to take care that the cognizors were of full age, sound memory, and out of prison. If there were any feme-covert among the cognizors, she was privately examined whether she did it willingly and freely, or by compulsion of her husband.

By several statutes still more solemnities were superadded, in order to render the fine more universally public, and less liable to be levied by fraud or covin; among other things all proceedings were directed to be enrolled of record, and read, and *proclamation* thereof made in open court during the four succeeding terms.

But in order to make a fine of any avail at all, it was necessary that the parties should have some interest or estate of freehold(*h*) by right or by wrong in the lands to be affected by it; else it were possible that two strangers, by mere confederacy, might, without any risk, defraud the owners by levying fines of their lands; for if the attempt were discovered they could be no sufferers, but only remain *in statu quo*; whereas, if a tenant for life levied a fine, it was an absolute forfeiture of his estate to the remainderman or reversioner, if claimed in proper time.

3. *Recoveries.*

A common recovery was so far like a fine, that it was a suit or action, either actual, or fictitious and amicable; and in it the lands were *recovered* against the tenant of the freehold; which recovery, being a supposed adjudication of the right, bound all persons, and vested a free and absolute fee-simple in the recoveror. A recovery, therefore, was in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding.

In the first place, if the tenant in tail in possession desired to suffer a common recovery, in order to bar all entails, reminders, and reversions, and to convey the land in fee-simple, in order to effect this the purchaser brought an action against him for the lands; and sued out a writ, called a *præcipe quod reddat*. In this writ the demandant alleged that he had title, and that the defendant (here called the *tenant to the præcipe*) had no title. Whereupon the tenant appeared and called upon one X., who was supposed, at the

(*h*) *Davies* v. *Lowndes*, 5 B.N.C. 172.

original purchase, to have warranted the title to the tenant; and thereupon prayed that X. might be called in to defend the title which he had so warranted. This was called the *voucher, vocatio,* or calling of X. to warranty; and X. was called a *vouchee.*

Upon this X., the vouchee, appeared, was impleaded, and defended the title, and afterwards abandoned the defence. Whereupon judgment was given for the demandant, now called the recoveror, to recover the lands in question against the tenant, who was now the recoveree. And the tenant had judgment to recover of X. lands of equal value, to descend to the issue in tail on the former title, in recompense for the lands so warranted by him, and now lost by his default; which was agreeable to the doctrine of warranty mentioned before. This was called the recompense, or *recovery in value.* But X. having no lands of his own, being usually the crier of the court (who, from being frequently thus vouched, was called the *common vouchee*), it was plain that the tenant had only a nominal recompense for the lands so recovered against him by the demandant; which lands were now absolutely vested in the recoveror by judgment of law, and seisin thereof delivered by the sheriff of the county. So that this collusive recovery operated merely in the nature of a conveyance in fee-simple, from the tenant in tail to the purchaser.

The recovery here described is with a *single* voucher only; but sometimes it was with *double, treble,* or further vouchers, as the exigency of the case might require. And, indeed, it was usual always to have a recovery with *double* voucher at least. The tenant in tail first conveyed an estate of freehold to an indifferent person, against whom the *præcipe* was brought, who was a mere friendly nominee of the tenant in tail, and was termed *tenant to the præcipe,* or, to the *writ of entry*; and then he vouched the tenant in tail, who vouched over the common vouchee. For if the recovery were had against the tenant in tail, it barred only such estate in the premises of which he was then actually seised; whereas, if the recovery were had against another person, and the tenant in tail were vouched, it barred every latent right and interest which he might have in the lands recovered.

If a tenancy for life, not being at a rent, or other freehold estate in possession, preceded the estate tail, then, as the action had always to be brought against the first actual

tenant of the freehold, the tenant in tail could not without his aid and assent, and his lending himself to the fictitious proceedings, suffer a recovery. Often this aid was refused. The tenant of the first estate of freehold thus was *protector* of the ultimate reversion and remainders, if any. The protectorship of a settlement under the statute is on the analogy of the protectorship as above. If, however, the first actual tenant of the freehold was a *lessee for life at a rent*, then by 14 Geo. II, c. 20, those entitled to the next freehold estate in remainder or reversion might make a good tenant to the *præcipe* or writ of entry as defendant. And this again is recognised by section 14 of the Disentailing Act, under which lessees for life at a rent are excluded from protectorship of the settlement, and by section 16, the person next entitled to be protector becomes protector.

The supposed recompense in value was a reason why the issue in tail were held to be barred by a common recovery; for, if the recoveree obtained a recompense in lands from the common vouchee (which there was a possibility in contemplation of law, though a very improbable one, of his doing), these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail, and would be assets; on which principle a warranty was a bar. This reason also held with equal force as to *most* remaindermen and reversioners; to whom the possibility remained and reverted as a full recompense from the realty, which they were otherwise entitled to.

The *force* and *effect* of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates tail, but of remainders and reversions expectant on the determination of such estates; in this respect being more effective than a fine. So that a tenant in tail might by this method of assurance, convey the lands held in tail to the recoveror, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions.

Deeds were often made to declare the uses or parties to be benefited by the fine or recovery, as the circumstances might require, in case the cognizee or recoveror desired limitations other than simply to himself to his own use. If made previously to the fine or recovery, they were called deeds to *lead* the uses; if subsequently, deeds to *declare* them; as, for instance, to the use of the recoveror for life, then to A. in fee.

Having to some extent explained the ancient method of barring entails, we now proceed to the modern statute.

4. *The Modern Statute—Who may Bar an Entail.*

Every actual tenant in tail, whether in possession, remainder, contingency or otherwise, may dispose of, for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons upon whom the lands entailed might devolve if the entail was not barred, and also as against all persons, including the crown, whose estates are to take effect after the determination, or in defeasance, of such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail, and the right of all other persons except those against whom the disposition is authorized by the Act to be made (*i*).

By the interpretation clause (s. 1, s.-s. 1) "actual tenant in tail" shall mean exclusively the tenant of an estate tail which has not been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned into a right.

This section, it will be observed, gives to actual tenants in tail greater power than they theretofore possessed; for a tenant in tail in contingency, or one whose estate by some previous act, as by feoffment of his ancestor, or discontinuance, was divested, though not barred, could not have suffered a recovery.

Whenever an estate tail has been barred and converted into a base fee, the person who if such entail had not been barred, would have been actual tenant in tail, may dispose of the lands as against all persons, including the crown, whose estates are to take effect after determination or in defeasance of the base fee, so as to enlarge the base fee into a fee simple absolute; saving always the rights of all persons in respect of estates prior to the estate tail which has been so converted into a base fee, and the rights of all other persons except those against whom such disposition is by the Act authorized to be made (*j*).

A base fee is that estate into which an estate tail is converted, when the issue in tail are barred but not those in remainder or reversion (*k*). Thus where there is a protector whose consent has not been obtained, and the tenant in tail executes a disentailing assurance, he defeats his own issue, and converts the estate tail into a fee simple which will

(*i*) R.S.O. c. 122, s. 3.
(*j*) S. 7.
(*k*) S. 1, s.-s. 1.

last as long as there are issue in tail who would have inherited the entailed land but for the bar; but the remainderman is not barred; and upon the failure of the issue in tail the land reverts to or vests in the reversioner or remainderman.

Before the Act, a tenant in tail, who had by fine levied barred his own issue, but not the remainderman or reversioner (which he could not do immediately by fine), still retained, and his issue in tail inherited, the privilege of defeating the remainder or reversion by consenting to be vouched in a recovery. This section provides that the person who would have been actual tenant in tail (but for the converting of the estate tail into a base fee) may now enlarge the base fee into a fee simple absolute; but if there be a protector his consent will be necessary (*l*).

There are certain persons excepted from the power given by this section. Where, under a settlement made before 18th May, 1846, a woman is tenant in tail of lands within the provisions of 11 Hen. VII. c. 20, the power shall not be exercised by her, except with such assent as (if this Act had not been passed) would under that Act have rendered valid a fine or common recovery levied or suffered by her of such lands. In such a case a widow who was tenant in tail *ex provisione viri*, i.e., by gift of her husband or any of his ancestors, could not bar the entail, unless with the concurrence of the person who would be entitled to enter if she were dead (*m*). It was the practice at one time, on marriage, to settle an estate jointly on the husband and wife in tail, or to the husband for life, remainder to the wife for life, remainder to the issue in tail; and the statute was passed to prevent her barring the entail after her husband's death, where the property was originally of the purchase or inheritance of the husband, or the gift in tail of his ancestors. Since the date mentioned, however, the Act of Hen. VII. does not apply (*n*).

By an Act of 34 and 35 Hen. VIII. c. 20, no recovery had against tenant in tail, of the King's gift, where the remainder or reversion is in the King, shall bar such estate tail, or the remainder or reversion of the crown. These persons are still excepted from the power to bar such entails (*o*).

(*l*) S. 24.
(*m*) Burton Rl. Prop. s. 708.
(*n*) S. 5.
(*o*) S. 6.

And tenants in tail after possibility of issue extinct, whose estates are reduced to life estates, are also excepted from the operation of this statute (*p*).

And nothing in the Act is to enable any person to dispose of any lands entailed in respect of any expectant interest which he may have as issue inheritable to any estate tail therein (*q*). Thus, A. being tenant in tail, his eldest son, being issue inheritable, cannot convey under the Act. In this respect the Act does not go to the extent of the old law, by which even an expectant heir in tail could bar his issue. And although contingent, executory and future interests and possibilities may be disposed of by deed, no such disposition is to defeat or enlarge an estate tail (*r*).

It is not only the issue in tail who can be barred, and all estates to take effect after the determination of the estate, including thus, remainders and reversions, but also all estates to take effect in defeasance of the estate tail; and therefore an executory or shifting limitation over, after an estate tail, to take effect in defeasance thereof, and not await its regular determination by failure of issue, can be barred. Thus, if land be limited by way of use, or of devise, to A. in tail, but if B. should return from Rome to B. in fee, the conveyance of A. under the statute will defeat the executory interest or estate; and this was so before the statute on a recovery suffered by A.

5. *Protector of the Settlement.*

Before entering upon the mode of barring the entail, it will be necessary to ascertain who may be protector of the settlement, and what is his office.

In order to understand the office of the *protector*, it is necessary to call attention to the nature of an estate in *strict settlement*, as also to the modes in which it was formerly and is now preserved and defeated. Limitations on a strict settlement were before explained (*s*); we will therefore here merely state that the great object to be attained has always been to preserve the property inalienable for as long a period as possible in the hands of the particular family or class of persons in whose favour the limitations are made; in short, to revert, as far as possible, to the state of the law immedi-

(*p*) S. 6.
(*q*) S. 8.
(*r*) R.S.O. c. 119, s. 8.
(*s*) Ante p. 228.

ately after the passing the statute *De donis*. The mode adopted has long been thus:—Assuming A., unmarried, to be the person in whose family the property is to be preserved; it will be limited to him for life, with remainders to his first and other sons unborn successively in tail, with remainder over in fee, and trustees are interposed to preserve the contingent remainders to the sons. The limitations of course will vary according to the circumstances of each case, as whether A. had at the time of the settlement sons living; for if so, they will not be made to take in tail, but for life, with remainder to their issue in tail. The above simple case, however, will serve our purpose; and it will be seen, with reference to what has been before mentioned as to the mode of bar by warranty, fine, or recovery, that, prior to the statute, till one of the issue next entitled in tail should have attained the age of twenty-one, no complete bar could have taken place; for the tenant for life could not by warranty, or fine, or recovery, bar those in remainder or reversion; at least a fine was no absolute bar, except by non-claim; the tenant in tail, in possession, or in remainder, could not by warranty bar his issue or the reversioner; nor, if in remainder, before his estate came into possession bar remaindermen; the fine of tenant in tail in possession, though it would bar his own issue, did not necessarily bar the subsequent remainders except in case of non-claim; and the fine of tenant in tail in remainder did not bar them even by non-claim.

In short, the only mode by which an indefeasible fee-simple could be created was by a recovery; and to effect this it was requisite that the tenant for life and tenant in tail of full age next in remainder should concur. For the recovery suffered by tenant for life alone was void, and no recovery could be suffered by tenant in tail alone, as the tenant for life was the party seised of the freehold; and it was against him therefore only that the necessary proceedings could be had; and he, again, was required to vouch the remainderman in tail on a supposed warranty. The tenant for life, therefore, *protected the entail*, and by withholding his concurrence prevented its alienation.

A protectorship is still preserved by the statute in analogy to the above. It will be observed, also, that on the death of the tenant for life, when the remainder in tail became an estate tail in possession, the tenant in tail could make a tenant to the *præcipe*, and by being vouched in a recovery,

convey a fee-simple. To obviate this power of destroying the entail, the usual mode was for the father (the tenant for life), when his eldest son arrived at full age, to join him in a recovery and re-settle the property, giving the father an estate for life, with remainders for life to the eldest son, and in tail to the issue of such eldest son; a further remainder to the second son for life, remainder in tail to his issue, and so on with each son *in esse* and his issue. By these means the power of defeating the entail was postponed for one generation beyond the former settlement; for under that, the eldest son, whilst tenant in remainder, could have by fine bound his own issue, and when his remainder came into possession, by a recovery have barred his issue and all remainders; but under the re-settlement he and all his brothers *in esse* take as tenants for life, and the first who take as tenants in tail are grandchildren. This is the mode still adopted; the re-settlement taking place by means of a conveyance under the statute instead of by a recovery.

The protector of the settlement, as a general rule, subject to exception in particular cases, is the person to whom is given by the same settlement creating the entail, the prior beneficial estate, or the first of several prior beneficial estates, such estate being still subsisting, and not less than one for years determinable on a life or lives, or a greater estate, not being for years (*t*). The Act interposes a "new conservative power" in the office of the protector. "By the old law, a tenant in tail in remainder, expectant on an estate of freehold, was precluded from suffering an effectual recovery without the concurrence of the freeholder; for it was necessary that the person against whom the process issued should be invested with the immediate freehold; or, in other words, that there should be what was technically called a tenant to the *præcipe*" (*u*).

It is to be observed that the prior estate must be *subsisting* and under the *same* settlement; for, if created by some other conveyance than the settlement, the owner will not be protector, and the tenant in tail is not restrained from conveying in fee-simple, or exercising the other powers given to him by the Act.

The office of protector, subject to the exceptions under ss. 17 and 18, is a *personal* one, and continues notwithstanding

(*t*) S. 10.

(*u*) Hayes Convey. 5th ed. 166.

that the protector should cease by alienation or otherwise to be owner of such prior estate; for no "assign" of the protector shall be protector (*v*). Thus, if the limitations be to A. for life, remainder to B. for life, remainder over in tail; although A. should convey his life estate voluntarily, or be deprived of it by his bankruptcy or otherwise, he would still continue to be protector for his life, provided the life estate, formerly his, continued to subsist; but if that estate should merge or be surrendered, and thus cease to *subsist*, A. would cease to be protector. Thus, if the life estates of A. and B., being both *legal* estates, were to be conveyed to the same person, the life estate of A. would be extinct, and he would cease to be protector. If, therefore, A. should have disposed of his life estate, it would not be enough to procure his consent without ascertaining that such estate is actually subsisting; and it would be in the power of the legal owner for the time being of such estate, by his act in merging or surrendering the estate to deprive A. of the protectorship, and promote B. to the office (*w*).

The ownership of a mere *equitable* or *beneficial* estate will qualify for the protectorship; it is not requisite that the estate should be a legal one; indeed, bare trustees by s. 15 are as to settlements made after 1st July, 1846, expressly excluded; and moreover, the word "estate" in this section and throughout the Act is, by s. 1, made to extend to an estate in equity as well as at law. Thus, if on any settlement subsequent to 1st July, 1846, lands be limited to the use of A. and his heirs for the life of B., in trust for B. for life, with remainder to C. in tail, remainder to D. in fee, the protector would be B., the owner of the equitable estate, and not A., in whom the legal estate is vested (*x*). This is a variation from the old law, under which the trustee, or the party to be tenant to the *præcipe*, was protector.

Where two or more persons are owners, under a settlement within the meaning of the Act, of a prior estate, the sole owner of which (if there had been only one) would, in respect thereof, have been the protector, each of such persons, in respect of such undivided share as he could dispose of, is sole protector to the extent of such undivided share, for all purposes of the Act (*y*).

(*v*) S. 15.
(*w*) Hayes Convey. 5th ed. 170.
(*x*) Hayes Convey. 5th ed. 174.
(*y*) S. 11.

Where a married woman would, if single, be the protector in respect of a prior estate, which is not settled, or agreed or directed to be settled, to her separate use, she and her husband together are, in respect of such estate, protector of the settlement, and are to be deemed one owner; but where the settlement is to her separate use she is alone the protector (*z*).

When the protector is a lunatic, idiot, or of unsound mind; or has been convicted of treason or felony (*a*); or, not being owner of a prior estate under a settlement, is protector of the settlement and is an infant, or it is uncertain whether he is living or dead; or where the settlor declares that the owner of the prior estate shall not be the protector, and does not appoint a protector; or, if there is a prior estate sufficient to qualify the owner to be protector, and there is no protector; in such cases the High Court is the protector (*b*).

Where there is more than one estate prior to the estate tail, and the owner of the prior estate, in respect of which he would be protector, is disqualified, then the person (if any) who, if such estate did not exist, would be the protector, shall be such protector (*c*).

The persons disqualified are persons in whose favour a lease at a rent has been created or confirmed by the settlement (*d*), dowresses, bare trustees (except bare trustees under settlements made on or before 1st July, 1846) and heirs, executors, administrators and assigns, in respect of any estate taken by them in that capacity (*e*).

The cases arising under section 14 may be illustrated thus:—Lands are settled upon A. for life with power to appoint and lease for lives, or for years determinable on lives, with remainder in tail, remainder over. A. appoints and leases to B. for life, or for ninety-nine years determinable on a life, reserving rent. In this instance, according to the principles upon which appointments operate, the estate of B. inserts itself into the settlement prior to the estate of A.; but A. remains protector under this section. A case of this

(*z*) S. 12.

(*a*) The distinction between felony and misdemeanor is abolished by the Criminal Code, 55 & 56 V. c. 29, s. 535.

(*b*) S. 22.

(*c*) S. 16.

(*d*) S. 14.

(*e*) S. 15.

kind must not be confounded with the case of A. conveying or assigning his own estate, and not creating a new one under a power; in this latter case the assignee of A.'s estate is disqualified under section 15, and A., by the direct enactment in section 10, remains protector.

One of the reasons for excluding a dowress from the office of protector, while a tenant by the curtesy is admitted, is that the former is only partially interested, viz., to the extent of one-third, while the latter takes the whole for life (*f*).

At first sight it might appear that because, by section 16, where the owner of the first estate is disqualified, the owner of the next in order becomes protector, there might be a conflict between sections 10 and 16. Yet it must not be supposed that, where the protector assigns his prior estate, he is thereby disqualified, and the office passes to the next owner of a prior estate. For by section 10 it is expressly declared that the owner of the first estate, or of the first of such prior estates, if more than one, shall be protector, although the estate may be charged or incumbered even to an extent sufficient to absorb all the rents and profits, and although such prior estate may have been absolutely disposed of. Thus, if under the settlement, A. be tenant for life, remainder to B. for life, remainder to C. in tail, etc., and A. should convey his life estate to X.; the question would be whether, under section 16, the office of protector would pass to B. (X. being excluded as being an assign under section 15); or whether A. would not continue to be protector. It would seem, however, that by the direct operation of section 10 the owner of such prior estate, or of the first of such prior estates, if more than one, would remain protector. Section 15 does not in fact disqualify the protector when he has parted with his estate, but disqualifies his assign, who does not become protector by acquiring the estate; and in such case section 16 does not apply at all; it applies only when the owner of the first estate cannot be protector by reason of his being the owner of a lease at a rent, a bare trustee, etc.

By sections 16, 17, 18 and 19, bare trustees and certain persons who would have been tenants to the writ of entry before 1st July, 1834, when fines and recoveries were abolished, are made protectors to the settlement (*g*).

(*f*) 1st Rep. Real Prop. Comrs. 32, 33.

(*g*) It may be proper here to point out a mistake which occurs in sections 15 & 19 of the Revised Act, and also in the corresponding sections of the

Every settlor may, by the settlement, appoint any number of persons not exceeding three, and not being aliens, to be protector of the settlement in lieu of the person who would have been protector but for this section, and either for the whole or any part of the period for which such person might have continued protector; and the person who, but for this section, would have been sole protector, may be one

Imperial Act, the knowledge of which may save the student the useless labour of endeavouring to reconcile those sections. Section 15 refers to settlements made before 1st July, 1846; while section 19 refers to settlements made before 1st July, 1834. Section 27 of the Imperial Act excepts the case thereafter provided for of trustees under a settlement made on or before 31st December, 1833, the day when the Act came into force, whilst section 31 which intended to provide for the excepted case, provides for the case of a settlement made before passing of the Act, namely, 28th August, 1833. That this is a mistake is clear, but the effect is not so clear; Sugden (Stat. 2nd ed. 219) and Chitty (Stat. vol. 2, p. 92, note 5) quoting Sugden, saying that section 31 will, in connection with section 27 be extended to 31 December, 1833; Hayes (Convey. 5th ed. 519) and Shelford (Stat. 7th ed. 255, note b) adopting the contrary view. The like mistake has been carried into the Provincial Act, except that whilst section 15 refers to 1st July, 1846 (the time of coming into force of the original Provincial Act), section 19 refers to 1st January, 1834, the period when the Stat. 4 William IV. c. 1, virtually abolishing fines and recoveries came into force. It would seem that the Imperial Legislature when they excluded bare trustees from being protectors still desired not to interfere with existing vested rights, and not displace from being protectors, trustees who as the parties to make the *tenant to the precipe*, were such under settlements made before the Act should come into operation; when therefore they excluded bare trustees from being protectors by section 27, leaving by section 22 (section 10 Revised Statutes) as before explained, the party equitably entitled to the estate conferring the office to be protector, they excepted in section 27 (excluding trustees) cases of settlements made before the time of operation of the Act, and intended by section 31 to continue trustees as protectors under settlements made up to that time. It was just they should be so continued, and necessary to perfect the doing so (considering section 27) that section 31 should have referred to the time of the operation, instead of the time of the passing the Act, and possibly therefore in the Imperial Act the time, 28th August, 1833, may be read 31st December, 1833. It does not seem, however, that the same reasons exist here for doing this violence to language, for the grounds fail on which it may be supported in England. Section 15 of the Provincial Act excluding trustees except those under settlements made before the 1st July, 1846 (when the original Act came into force), whilst section 19 continues trustees as protectors under settlements made, not up to the time of the passing of that Act (18th May, 1846) as in the Imperial Act, but to a period long anterior, namely, the 1st July, 1834. It seems to us the Provincial Legislature had a sufficient object in fixing this date, and that it can well be supported; for subsequently to July, 1834, when the statute 4 Wm. IV. c. 1 came into force, an estate tail could not be barred, at least the ulterior remainders or reversion could not be defeated by the tenant in tail, even though there should be no protector; and this being so, there was no necessity after 1st July, 1834, to appoint a protector, for there was nothing to protect against. The result would be that in settlements made here subsequent to 1st July, 1834, the settlors must be supposed to have acted quite independently of any idea of

of those persons appointed protector (*h*); and the settlor may give power in the settlement to perpetuate the protectorship of the settlement in any one or more persons *in esse* and not being aliens, whom the donee of the power thinks proper, in the place of any one or more persons who may die, or by deed relinquish his or their office of protector, the number never to exceed three (*i*).

Every deed by which a protector is appointed under a power in a settlement, and every deed by which a protector relinquishes his office, is void unless registered in the registry office of the registration division in which the lands lie within six months after the execution thereof (*j*).

6. *How Entail may be Barred.*

The disposition under the Act may be made by the execution and registration of such an assurance (not being a will) as would have sufficed if the estate had been an estate in fee simple.

The enactment is as follows:—"Every disposition of lands under this Act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could, before *The Ontario Judicature Act, 1881*, have made the disposition if his estate were an estate at law in fee simple absolute; but no disposition by a tenant in tail shall be of any force, under this Act, unless made or evidenced by *deed*; and no disposition by a tenant in tail resting only in contract, either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force under this Act, notwithstanding such disposition is made or evidenced by deed" (*k*).

The reference to *The Ontario Judicature Act* appears to have been made to preclude the possibility of its being

a protector, and there can be no necessity for the statute being read as continuing trustees as protectors down to 1st July, 1846, when the settlors themselves never intended them to be so; in fact it might be a positive hardship and unjust to give to such persons such an important office, and certainly there would be no such hardship as above alluded to under the Imperial Act.

(*h*) S. 21, latter part.

(*i*) S. 20.

(*j*) S. 21.

(*k*) S. 29.

supposed that a disposition by assignment, good on equitable grounds if made respecting an estate in fee simple, would be an effectual disposition under this Act. But if this is the reason for the insertion of the reference, the fears were groundless; because the section itself requires an "assurance," not a "contract," even when for consideration and under seal.

But the restriction as to time is fortunate for another reason. Since *The Conveyancing and Law of Property Act, 1886* (*l*), words of limitation are not necessary in a conveyance. And if no such words are used the conveyance passes all the estate of the conveying parties in the lands, or "which they respectively *have power to convey*." Now, a tenant in tail can, without the aid of the disentailing Act, convey for his own life; and he has also power, under that Act, to convey in fee simple. And in conveying in fee simple, he may make use of such an assurance as he could have used if his estate were, in fact, an estate in fee simple. A conveyance without words of limitation is sufficient to convey a fee simple. But if used by a tenant in tail it would be doubtful whether he would thereby intend to pass only his own interest, or to exercise his power of barring the entail by conveying in fee. Fortunately the reference in the Act to the date of the Judicature Act prevents the possibility of a conveyance being used under the conveyancing Act.

The disposition, then, must be made by deed, but not by a contract, though it is under seal and for a valuable consideration. The deed must be an assurance, that is a conveyance, or an instrument that passes the estate, and does not simply entitle the person in whose favour it is made to call for a conveyance. It must also be of such a nature that "if his estate had been an estate at law in fee simple absolute" he could have passed it by such assurance, *i.e.*, as explained by Mr. Hayes (*m*), "as if an estate in fee simple absolute occupied the very place of the estate tail." And it must have words of inheritance in it if the intention is to bar the entail, because before 1881 those words were necessary to pass a fee simple. But, as the tenant in tail is authorized to dispose of the land for any estate less than a fee simple absolute, the appropriate limitations for such less estate should be used in such case.

(*l*) 49 V. c. 20, s. 4; now R.S.O. c. 119, s. 4.

(*m*) Convey. 5th ed. 156.

Again, to the sufficiency of an assignment of a *mere equitable* interest recognisable only in equity, as a general rule, any form of words or instrument for valid consideration sufficient to shew the intent will suffice; and the technical rules which would govern the conveyance at law in case the interest conveyed had been a legal instead of an equitable estate will not prevail; but this will not hold good now in cases coming within this section. Thus, if lands are limited to the use of A. in fee, in trust for B. in tail, with remainders over, a disposition in fee by B. of his equitable estate tail in order to operate under the statute, as a conveyance of the equitable fee simple, must not only be by *deed*, but by such a deed, and so worded, as would suffice at law, and "by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute," instead of a mere equitable estate tail.

The nature of the conveyance depends also on the nature of the property or subject to be affected, as well as upon the quantity of interest or estate. Thus, if the entailed property be incorporeal, as a rent charge, though the tenant's estate in it be immediate, or, if the subject be corporeal, and the tenant's interest in it be not immediate, but future, as a contingent remainder, the conveyance, in either case, should not be by way of lease and release, which in the first case would be ineffectual, and in the latter inappropriate, to pass the estate, if a fee simple absolute occupied the place of the estate tail.

In every case, since corporeal as well as incorporeal hereditaments lie in grant, it will be safer in all cases to adopt that mode of conveyance, as it has a broader effect than any other.

Where a married woman is tenant in tail, the conveyance, to bar the entail, must be such a conveyance as she would use to convey her estate in fee simple (*n*).

The matter must not rest in contract. If a contract for sale be made, it will be binding on the tenant in tail solely, and he may personally be compelled to carry out his contract specifically by executing a disentailing assurance (*o*). But there is no power to force the protector (if there be one) to

(*n*) See ante p. 297, *et seq.*

(*o*) *Graham* v. *Graham*, 6 Gr. 372. See *Petre* v. *Duncombe*, 7 Ha. 24, where the right was not disputed.

give his consent; nor can the issue in tail be forced to observe the contract in any particular, if the vendor dies without actually barring the entail. And the courts have no power to interfere upon equitable grounds, their equitable jurisdiction being altogether excluded, "either on behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this Act to tenants in tail; or of the powers of consent given by this Act to protectors of settlements, etc." (*p*). With regard to the enactment as to contract it has been said that it was passed because "there was ground to apprehend that after the legislature should have abolished the ancient solemnities and conferred upon tenants in tail the power of conveying as if seised in fee simple, without any other ceremonies than sealing, delivery and [registry], equity might be induced to enforce the mere contract of a tenant in tail, founded on a valuable or meritorious consideration, just as, in the case of a settlement, to such uses as A. shall by deed enrolled in chancery within six months after the execution appoint, and in default of appointment to uses in strict settlement, equity would certainly supply in favour of a purchaser, wife, child or creditor, the non-observance of the prescribed formalities" (*q*). The parties are thus required to adhere strictly to the formalities and requirements of the statute, and must abide by the result of their want of care.

The assurance, in order to be effective, must be registered within six months after the execution thereof, otherwise it will not have any operation under the Act (*r*). But if unregistered, or not registered in time, it will take effect to the extent to which it would be valid at common law, and so pass the estate for the life of the tenant in tail (*s*). Certain leases are excepted from the provisions as to registration; thus leases for any term not exceeding twenty-one years, to commence from the date thereof, or from any time not exceeding twelve months from the date, where a rent is thereby reserved, which, at the time of granting such lease is rack-rent, or not less than five-sixths part of a rack-rent. It will have been observed that by section 3, every actual

(*p*) S. 36.
(*q*) Hayes Convey. 5th ed. p. 163.
(*r*) S. 30.
(*s*) *Dumble* v. *Johnson*, 17 C.P. 9.

tenant in tail may dispose of the entailed lands "for any less estate" than a fee simple absolute. And, but for the exception in the present clause as to registry it would have been actually necessary to the validity of a lease for twenty-one years or under that it should be registered. While, however, registration may not be essential to the validity of the lease, it may still be necessary to register any lease of more than seven years, or for a less term when possession does not go along with it (*t*), in order to preserve its priority.

The Statute 32 Hen. VIII. c. 28, under which tenants in tail are enabled to grant certain leases binding on the issue in tail, but not on those in remainder or reversion, is probably superseded by the present Act; but the early statute is not repealed. And if a lease for years, or for life, or not exceeding three lives, should fail to take effect under the present Act, it might still be supported if in conformity with the statute of Hen. VIII.

7. *Consent of Protector.*

When an actual tenant in tail, not entitled in remainder or reversion in fee immediately expectant on the determination of his estate tail, is desirous of making a disposition of the entailed lands, and there is a protector of the settlement, then the consent of the protector is necessary in order to enable the tenant in tail to dispose of the lands to the full extent authorized by the Act. But without such consent, the tenant in tail may dispose of the lands as against any one who might claim the estate tail in case he did not make the disposition (*u*). That is to say, that if there is a protector, and his consent is not obtained, the effect of the disentailing assurance is to bar the issue in tail, but not the remainderman, and convey to the purchaser a base fee, or a fee simple limited to last as long as there are issue in tail. But the remainder will vest in possession as soon as such issue come to an end. If the consent of the protector is obtained, then the bar is complete and a fee simple absolute passes to the purchaser.

If the tenant in tail is also entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, the consent of the protector is not necessary. The reason of this is very obvious. The protector's office is

(*t*) R.S.O. c. 136, s. 39.
(*u*) S. 23.

to protect the interest of the remainderman against the tenant in tail; and where they are the same person his office is unnecessary.

The consent of the protector must be given either by the disentailing assurance, or by a distinct deed; but if given by a distinct deed it must be executed either *on or before* the day on which the disentailing assurance is made; otherwise it is absolutely void (*v*), and, as we have seen, equity has no power to aid. If the consent is given by a distinct deed, it is unqualified, unless by such deed it is restricted to a particular assurance referred to in the consent (*w*).

The protector is absolutely free and unfettered in giving his consent; any device, shift or contrivance by which it is attempted to control him in giving his consent, or to prevent him from using his absolute discretion, and any agreement entered into with him to withhold his consent, being absolutely void; he is not a trustee in respect thereof, and no court has any power to control or interfere to restrain the exercise of his power of consent or treat his giving consent as a breach of trust (*x*); nor can the court cure or aid any defect on equitable grounds (*y*); the rules of equity in relation to dealings and transactions between the donee of a power and any object of the power in whose favour the same may be exercised are not to be held to apply to dealings and transactions between the protector and the tenant in tail with regard to the consent (*z*); and when once the consent is given, it is irrevocable (*a*).

Although by section 25, any agreement with the protector to *withhold* his consent is void, it does not follow that he may not make an arrangement or bargain to *give* his consent (*b*). Any agreement to *withhold*, must necessarily be one made at the instance of the remainderman, who is the only person interested in securing his refusal to consent. The tenant in tail is solely interested in procuring the protector to *give* his consent, and though he must not resort to any "device, shift or contrivance" to procure the consent, he is not prohibited

(*v*) S. 31.
(*w*) S. 32.
(*x*) S. 25.
(*y*) S. 36.
(*z*) S. 26.
(*a*) S. 33.
(*b*) Hayes Convey. 5th ed. 183.

from making a bargain; the rules relating to dealings between the donee of a power and the object of the power not applying.

When a married woman is, either alone or jointly with her husband, protector of a settlement (*c*), she may give her consent in the same manner as if she were *feme sole* (*d*).

When the High Court is either sole protector or protector jointly with some person, the consent may be given by the court upon petition or motion in a summary way (*e*); and no document or instrument, or evidence of the consent, shall be requisite beyond the order in obedience to which the disposition is made (*f*).

If the consent is given by a deed distinct from the disentailing assurance, it is void unless registered in the registry office of the division in which the lands referred to lie, either *at or before* the time of registering the disentailing assurance (*g*): and, as before remarked, a mistake cannot be corrected nor defective proceedings aided in any way.

It has been held by the Court of Appeal that the consent of the protector need not be *express*, but may be inferred from his joining in a conveyance with the tenant in tail (*h*). But there are grave reasons for doubting the soundness of this decision, which will presently be mentioned. The facts were as follows: A devise to the testator's widow for life, remainder to two of his daughters in tail. The undisposed of reversion in fee descended to all his children. Legacies were charged on the lands. The widow and the two daughters, tenants in tail, joined in a mortgage in fee to raise money to pay the legacies, and the widow covenanted that she had a good title in fee simple, with right to convey, etc. In fact the mortgage was drawn as if the three mortgagors were tenants in common in fee simple. The question was raised as to whether there was a sufficient consent of the protector, the widow. The Court of Appeal, reversing the judgment of Proudfoot, V.C., held that the consent need not be express, but might be implied; and judging by the circumstances under which, and the purposes for which, the mort-

(*c*) See s. 12, as to this.
(*d*) S. 34.
(*e*) S. 37.
(*f*) S. 38.
(*g*) S. 35.
(*h*) *Ostrom* v. *Palmer*, 3 App. R. 61.

gage was made, there was an evident intention to bar the entail, and the consent might be implied.

It must be observed that the two tenants in tail were themselves (as heirs at law) entitled to the reversion in fee simple in their undivided shares immediately expectant on their estate tail in the whole; and as to these shares the consent of the protector was not necessary (*i*). This is not referred to in the report. But as to the other shares the point remained open.

The decision seems to be unsound for the following reasons: The tenant for life has undoubtedly power to convey away his estate. Although he may do so he remains protector as we have seen, and the conveyance is, therefore, no indication that he intends the entail to be barred. The tenant in tail has also power to bar his own issue without the *consent* of the protector. There is a third position, essentially distinct from both of these, and that is that an artificial result may be produced by the conveyance of the tenant in tail with the *consent* of the protector, *i.e.*, the entail may be barred. And, in giving such consent to bar the entail, it is not by any means necessary that the protector should part with his life estate. In fact, conveying his life estate, and giving consent to a conveyance by the tenant in tail solely, are entirely different and distinct things. Concurring in a conveyance by the tenant in tail is not giving consent (*j*). If the joinder in the conveyance of the tenant in tail had only one significance, it would be nearer a true construction of the statute to hold it equivalent to a consent. But it is not only consistent with, but, it is submitted, attributable only to, his desire to convey his own estate, when he does not *expressly* consent to the conveyance by the tenant in tail of what the latter can convey. Lastly, the proceedings required by the Act are purely formal and artificial. There is a dry, mechanical contrivance provided by the Act which produces a certain result. The *intention* to bar an entail cannot be given effect to in any way if the actual formalities (meaningless, except for the statute) are not complied with. It seems to be expressly against such defects that section 36 is aimed, prohibiting equitable interference. It will be wise then in all cases to provide for the consent by express words, even when the protector desires also to convey his own estate.

(*i*) See s. 23.

(*j*) Hayes Convey. 5th ed. 182.

Where there is a protector of the settlement, and his consent has not been obtained to the disentailing assurance, then, as long as there is a protector his consent is necessary to enable the person who would have been tenant in tail, if the entail had not been barred, to exercise the statutory power of disposition (*k*); but with such consent, the person who would have been tenant in tail may enlarge the base fee into a fee simple absolute (*l*).

8. *Enlargement of Base Fee.*

Whenever a base fee in any land and the reversion or remainder in fee in the same lands unite in any person, and there is no intermediate estate between them, then the base fee does not merge, but is enlarged into as large an estate as the tenant in tail, with the consent of the protector, if any, might have created under the Act if the remainder or reversion had been vested in any other person (*m*).

Some knowledge of the doctrine of merger is requisite to appreciate this section. We shall here merely state that, by the operation of that doctrine as a general rule, when two estates unite in the same person in the same right, the lesser is merged in the greater; and the effect is, that such person being deemed to hold thereafter under the greater estate, holds subject to charges or incumbrances existing thereon at the time of the merger, and cannot set up the former lesser estate, which is merged and has ceased to exist, as a shield against the encumbrances (*n*). In illustration of the above and of the object of the statute, let us first take a case before the statute. Suppose A. to be tenant in tail with reversion in fee to B., and that B. incumbers his reversion to more than the value perhaps of the fee simple in possession of the property; and that afterwards A. acquires such reversion so incumbered from B.; this acquisition would not prejudice A.'s estate in tail or his issue; for no merger of an estate tail takes place when it meets with the remainder or reversion in fee (*o*); and consequently A. or his issue might enjoy the

(*k*) S. 24.

(*l*) S. 7.

(*m*) S. 28.

(*n*) Notwithstanding the provision of the Judicature Act as to the equitable rule in cases of merger, it is probable that it does not apply to a pure case of merger of legal estates: *Thellusson* v. *Liddard*, L.R. (1900) 2 Ch. 635.

(*o*) Ante p. 237.

entail as long as issue continued, free from the incumbrances. But, if at any time A., or any of his issue, tenants in tail, instead of suffering a *recovery*, which would have created a *new fee simple*, created a *base fee* by *fine* to his own use in fee; then, in case the party so creating such base fee was then entitled to such incumbered reversion, a merger would take place; the former tenant in tail would hold only under the reversion in fee, and as such subject to the incumbrances; for the exception preventing the merger of an *estate tail* did not extend to prevent a merger of a *base fee*. The reason for the prevention of merger in the case of an estate tail did not apply to prevent a *base fee* from merging, there being no issue in tail to be protected, the base fee going to heirs general. One object of this section was to prevent the disastrous consequences of a merger of the *base fee* under the above and other circumstances. Another object was to prevent like consequences in cases where after the statute a base fee only should be created by some disposition to be made under it, and the person entitled to the base fee should be entitled to, or should subsequently acquire, the remainder or reversion in fee (*p*).

9. *Bar by Mortgage.*

If a tenant in tail makes a disposition of the lands under the Act by way of mortgage, or for any other limited purpose, the disposition shall, to the extent of the estate thereby created, be an absolute bar in equity, as well as at law, to all persons as against whom the disposition is by the Act authorized to be made, notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition is effected (*q*).

The moment the mortgage is effected the mortgagee becomes seised in fee simple absolute, subject to redemption, in the same manner as if the estate of the tenant in tail had been a fee simple absolute. And not only is that the case with the mortgagee, but the estate of the mortgagor is immediately converted into an equitable estate in fee simple, entirely freed from the settlement (*r*). When the terms of the mortgage are satisfied, a reconveyance or a statutory discharge of mortgage vests in the mortgagor, not an estate tail, but a fee simple (*s*). Where, however, a mortgage in fee

(*p*) Hayes Convey. 5th ed. 187.

(*q*) S. 9, first part.

(*r*) *Culbertson* v. *McCullough*, 27 App. R. 459.

(*s*) *Re Lawlor*, 7 P.R. 242; *Lawlor* v. *Lawlor*, 10 S.C.R. 194.

contained a contract by the mortgagee to re-settle the property on being paid off, by reconveying "the said hereditaments unto the said mortgagors respectively, or as they shall respectively appoint according to their original respective estates and interest therein"—the tenant for life and tenant in tail having joined in the mortgage—it was held that the mortgagors were entitled to a re-conveyance on the terms of the original settlement (*t*).

But if the disposition is but for an estate *pur autre vie*, or for years absolute or determinable, or if, by a disposition under the Act by tenant in tail, an interest, charge, lien or incumbrance is created without a term of years absolute or determinable, or any greater estate for securing or raising the same, then such disposition shall, in equity, be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition is effected (*u*). The resulting beneficial interest after satisfaction of the purpose for which the limited interest was created will be for the benefit of the entail (*v*).

10. *Money to be Laid Out.*

The Act is applied by section 39, to money to be laid out in the purchase of land to be entailed, and to land which is to be converted into entailed estate. This happens when trustees are directed to invest money in land, which, when purchased, is to be settled in tail for the benefit of a certain party; or to sell land, and invest the produce in like manner. With respect to trusts of this description, the Act provides that all the clauses it contains shall be applicable, so far as circumstances will admit, to the moneys or lands so to be invested, in the same manner as they would apply to the lands to be purchased, supposing the same to be actually purchased and settled conformably to the trust. But when the trust fund consists of leasehold estate, or of money, it is to be considered as to the person in whose favour, or for whose benefit the disposition is to be made, as personal estate; and any disposition of such estate by the intended tenant in tail must be made by mere deed of assignment, registered in the county where the lands lie within six months after execution.

(*t*) *Plomley* v. *Felton*, 14 App. Cas. 61.
(*u*) S. 9, latter part.
(*v*) Hayes Convey. 5th ed. 184.

11. *Voidable Estates.*

When a tenant in tail has created a voidable estate in favour of a purchaser for valuable consideration, and afterwards by any assurance other than a lease not requiring enrolment (*w*), makes a disposition under the Act of the land in which the voidable estate has been created; then such disposition, whatever its object may be, and whatever the extent of the estate intended to be thereby created, shall, if made with the consent of the protector (if any) or by the tenant in tail alone (if none) have the effect of confirming the voidable estate to its full extent as against all persons except those whose rights are saved by the Act.

And if there is a protector, and his consent to the subsequent disposition is not obtained, then the disposition is to confirm the voidable estate so far as the tenant in tail is then capable of doing so without the protector's consent.

But if such disposition is made to a purchaser for valuable consideration, not having express notice of the voidable estate, then the voidable estate is not confirmed as against such purchaser (*x*). The Imperial Act has in it, after the words "has created," the words "or shall hereafter create:" so also had the original Provincial Act. The Consolidated Statute of Upper Canada had in it the word "already" before "created." The probability is that the section as it now stands, considering its previous history, was not intended to affect voidable estates created after it appeared in its present form.

The enactment is to a certain extent analogous to the former law, under which, if a tenant in tail created an estate or charge defeasible by the issue in tail, and then levied a fine, or suffered a recovery, its effect was to confirm such estate or charge as against those claiming under the fine or recovery (*y*).

(*w*) Copied from the English Act; registration is required by this Act instead of enrolment, and the word might be substituted for this mistaken word "enrolment."

(*x*) S. 27.

(*y*) Shelford, Stat. 5th ed. 328, note (*g*).

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