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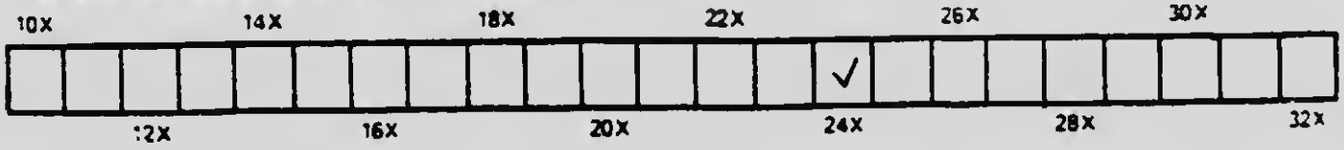

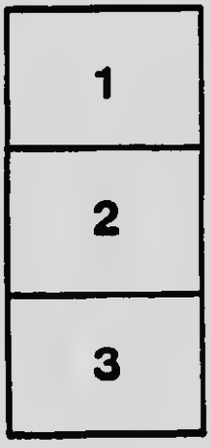

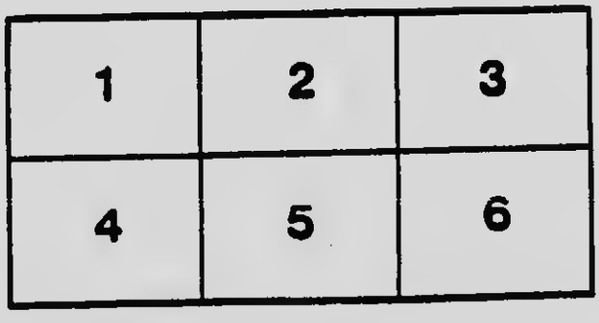

A TREATISE

ON THE

INVESTIGATION OF TITLES

TO

REAL ESTATE

IN ONTARIO;

WITH A

PRECEDENT FOR AN ABSTRACT.

THIRD EDITION.

BY

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OF TRINITY UNIVERSITY, TORONTO.

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PREFACE TO THE THIRD EDITION.

It is now nearly ten years since the last edition of this work was published. During this period, many statutes have been passed, and many decisions have been pronounced, which have necessitated a complete revision of the text and many additions to it.

The writer desires to express his thanks to the profession for the indulgence with which the previous editions were received, and trusts that the present one will be similarly treated.

The Index has been compiled by Eric N. Armour, Esq., Barrister-at-law, and A. D. Armour, Esq., Student-at-law.

E. D. A.

Toronto, March, 1903.

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CORRIGENDA ET ADDENDA.

P. 16, note (*b*), for "Falkiner," read "Falkner."
P. 24, note (*j*), for "Micheltree," read "Mitcheltree."
P. 26, note (*c*), for "Micheltree," read "Mitcheltree."
P. 87, note (*n*), line 2, for "26" read "23."
P. 137. Before last two lines, insert (ii) *Identity of persons.*
P. 149, line 5, for "escertain," read "ascertain."
P. 188, note (*q*), line 6, for "Woodland," read "Wadland."
P. 196, line 16, for "neen," read "need."
P. 215, lines 8 and 9, for "Jessell," read "Jessel."
P. 242, line 19, for "ae," read "as."
P. 255, line 10, for "mortgaor," read "mortgagor."
P. 257, line 4 from bottom, for "sufficent," read "sufficient."
P. 258, line 3, for "Jessell," read "Jessel."
P. 281, note (*h*), for "Waddington," read "Waddingham."
P. 289, line 17, for "Jessell," read "Jessel."
P. 293, note (*c*), for "110," read "119."
P. 315, line 5, for "suffrance," read "sulferance."
P. 344, line 13, for "or" read "and."
P. 350, note (*y*), add, *Betts* v. *Gunnell*, 19 L.T.R. 304.
P. 357, note (*j*), for "Grimstan," read "Gunstan."

TITLES TO REAL ESTATE

IN FEE SIMPLE.

CHAPTER I.

OF THE DIFFERENT KINDS OF TITLE.

1. *Title defined.*
2. *Marketable title.*
3. *Safeholding title.*
4. *Doubtful title.*

1. *Title defined.*

Coke defines Title as follows:—"*Titulus est justa causa possidendi quod nostrum est,* and signifieth the meanes whereby a man commeth to land, as his title is by fine or feoffment, etc.," (*a*). The title to land is the vendor's right to it, and must not be confounded with the evidence of the title. Colloquially, the deeds and other documents are sometimes spoken of as the title; but they are more properly speaking the evidence of the title, *i.e.*, they shew the ownership to be in the vendor. A title may be perfectly good without deeds at all, as in the case of a title by descent, or a title by possession, both of which depend for their proof

(*a*) Co. Litt. 345.

upon evidence to be collected and put in the form of certificates or declarations.

2. *Marketable title.*

As a matter of fact every title is either good or bad, that is to say, the ostensible owner, or the person claiming to be the owner either is, or is not, entitled to the fee. And as between persons contending for the land this is generally true, the Court being bound to express an opinion on the title.

But, as between vendor and purchaser, titles, as a matter of law, do not fall into the classification of good and bad. The parties are not contending for the property on different evidences of their claims, as to the respective merits of which the Court is bound to pronounce. The matter to be adjudicated upon is whether the title of the vendor is so clear that the Court can with confidence force the purchaser to take it; or whether, without declaring it to be bad, there is such a doubt about it that the purchaser will not be compelled to accept it(*b*). That title which, so far as its antecedents are concerned, may at all times and under all circumstances be forced upon an unwilling purchaser, is called a marketable title (*c*); and this, and not a doubtful, or even a safeholding title, a purchaser may require (*d*).

3. *Safeholding title.*

A safeholding title is one which may be perfectly good, the owner being in no way liable to be disturbed in his possession and full enjoyment of the land; yet he may be unable to adduce the proper proofs of the aufficiency of his title (*e*).

(*b*) *Jervoise* v. *Duke of Northumberland*, 1 Jac. & W. 568.
(*c*) *Pyrke* v. *Waddingham*, 10 Ha. at p. 8.
(*d*) *Francis* v. *St. Germain*, 6 Gr. 636; Dart V. & P., 6th ed. p. 105.
(*e*) Leith's Wms. on Real Prop. 309.

4. *Doubtful title.*

A doubtful title is hardly the subject of definition. It may very properly be called an unmarketable title in contra-distinction to a marketable one. The doctrine arose out of the practice of the Court of Chancery in cases of specific performance; and from the inability of the Court in any case to form a clear opinion upon the title, the purchaser was not bound to accept it. The subject will be more fully considered in a subsequent chapter.

CHAPTER II.

OF THE PURCHASER'S RIGHT TO A GOOD TITLE, AND HOW IT MAY BE WAIVED.

1. *Open contract; extent of interest; absolute right to good title.*
2. *Waiver.*
   - (i) *By matter before or contemporaneous with the contract.*
   - (ii) *By the contract itself.*
     - (a) *Limited inquiry.*
     - (b) *No inquiry.*
     - (c) *Rescission by vendor on objections by purchaser.*
   - (iii) *By matter subsequent to the contract.*
     - (a) *Taking possession; securing purchase money.*
     - (b) *Re-sale.*
     - (c) *Favourable opinion of counsel.*
     - (d) *Preparation of conveyance.*
     - (e) *Particular objection.*

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1. *Open contract; extent of interest; absolute right to good title.*

It is an elementary principle that if a vendor contracts to sell land without any saving condition as to the nature of the title he is to confer upon the purchaser, the law implies that it is incumbent on him to make out a good title in fee

simple(*f*). That is to say, an agreement to sell land, without limiting or defining what interest is sold, imports a sale of the whole of the vendor's interest or estate (*g*), and, in the absence of any explanation, imports also a sale of an estate in fee simple in the land(*h*); and a vendor offering an estate for sale, without qualification, asserts in fact that it is his to sell, and consequently that he has a good title(*i*), and undertakes, in the absence of express stipulation, to make over to the purchaser the complete and absolute dominion of the soil, saving, of course, the ultimate rights of the Crown. And, inasmuch as land is not the subject of actual manual delivery, as are personal chattels, the vendor is bound to produce such evidence of ownership as will satisfy the purchaser that he has the right to transfer to him all the legal and equitable interest in the land. In *Hiern* v. *Mill* (*j*) Lord Erskine said that "land is held not by possession, but by title; not so as to personal chattels; for the common traffic of the world could not go on. Therefore a sale in market overt changes the property of a chattel; and that rule, that possession is the criterion of title to a chattel has been adopted in the Bankrupt Acts: so that, if the owner has permitted the bankrupt to be the visible proprietor the property is divested; for no one can distinguish the property except by the possession. But that is not so as to land; for no person in his senses would take an offer of a purchase from a man, merely because he stood upon the ground. It is not even *prima facie* evidence. He may be tenant by sufferance, or a trespasser. A purchaser must look to his title; and if, being asked for his deeds, he

(*f*) *Armstrong* v. *Nason*, 25 S.C.R. at p. 268.

(*g*) *Bower* v. *Cooper*, 2 Ha. 408.

(*h*) *Hughes* v. *Parker*, 8 M. & W. 244; *Worthington* v. *Warrington*, 5 C.B. at p. 644.

(*i*) *Freme* v. *Wright*, 4 Madd. 365; *Brewer* v. *Broadwood*, 22 Ch. D. at p. 107.

(*j*) 13 Ves. 122.

acknowledges he has not got them, the purchaser is bound to further inquiry."

The purchaser's right to a good title does not arise out of any specific term of the agreement itself, but is a right given by law(*k*). Therefore, where there is an open contract, *i.e.*, a mere agreement by the vendor to sell, and by the purchaser to buy, the land, with no conditions, it is the purchaser's right to have a good title made out for him by the vendor. And it is also his right to insist that the question whether the vendor has, or has not, a good title shall be sifted to the bottom before he can be called upon to accept an indemnity, or compensation for a defect, or to let the vendor off his contract(*l*). And even where the purchaser has, by the contract, agreed to accept the vendor's title, he is entitled to full disclosure, and has a right to assume, when such a condition is inserted, that the vendor has disclosed all that it was his duty to disclose, and if the vendor has omitted to make full disclosure, the condition will not be binding (*m*). And where title to part of the property fails the purchaser may rescind (*n*). But where a purchaser had, since the purchase, by his own act acquired the means of curing a defect in the title, the Court refused to dismiss the vendor's bill for specific performance (*o*).

2. *Waiver.*

The purchaser's right to a clear title may be rebutted (i) by matter before or contemporaneous with the contract;

(*k*) *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Hall* v. *Betty*, 4 M. & Gr. 410. In *Ellis* v. *Rogers*, 29 Ch. D. at pp. 670, 671, the question is mooted whether the right to a good title depends upon an implied term of the contract, or is a collateral right given by law. See the authorities there cited.

(*l*) *Knatchbull* v. *Grueber*, 3 Mer. 137.

(*m*) *Re Haedicke & Lipski's Contract*, L.R. (1901) 2 Ch. 666.

(*n*) *Jacobs* v. *Revell*, L.R. (1900) 2 Ch. 858.

(*o*) *Hume* v. *Pocock*, L.R. 1 Eq. 662; *Sheppard* v. *Doolan*, 3 Dr. & War. 1.

(ii) by the contract itself; (iii) by matter subsequent to the contract.

(i) *By matter before or contemporaneous with the contract.*

"Where the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor could not give a good title. If the vendor before the execution of the contract said to the purchaser, I cannot make out a perfect title to the property, that notice would repel the purchaser's right to require a good title to be shown"(*p*). Mere knowledge of a defect is not sufficient to deprive the purchaser of his right; for he may buy knowing, as Sir George Jessel, M.R., said in *Cato* v. *Thompson* (*q*), "that the property is incumbered up to the hilt, but he does not take a conveyance subject to the incumbrances."

"It is necessary," said Cotton, L.J., in *Ellis* v. *Rogers* (*r*), "in order to bring a case within the exception, that there should be knowledge on the part of the purchaser that he cannot get a good title." So, where the purchaser in that case knew of restrictive covenants, but supposed that they had been done away with by compulsory taking on the part of a railway company, it was held that he had not waived his right to object.

"But, if the contract expressly provides that a good title shall be shown, then, inasmuch as a notice by the vendor that he could not show a good title would be inconsistent with the contract, such a notice would be unavailing, and whatever notice of a defect in the title might have been given to the purchaser, he would still be entitled to insist

(*p*) *In re Gloag & Miller's Contract*, 23 Ch. D. 327. And see *English* v. *Murray*, 49 L.T.N.S. 35; *McMurray* v. *Spicer*, L.R. 5 Eq. at p. 541.

(*q*) 9 Q.B.D. at p. 620.

(*r*) 29 Ch. D. at p. 671.

on a good title" (*s*). And in such a case parol evidence to show the knowledge of the purchaser is inadmissible, for it would tend to explain or modify the contract; though it would be admissible for the purpose of reformation (*t*).

And the Court will not relieve a purchaser from the effect of special conditions of sale, where he has had their objectionable nature pointed out to him, and has made inquiries before signing the contract (*u*).

(ii) *By the contract itself.*

The purchaser may forego altogether, or limit, his right to a good title by a term or condition of the agreement, or may undertake himself the burden, or at least the expense, of making out the title. But any condition, limiting the liability of the vendor in this respect being in derogation of the purchaser's right, will be strictly construed. "If a vendor means to exclude a purchaser from that which is a matter of common right, he is bound to express himself in terms the most clear and unambiguous, and if there be any chance of reasonable doubt, or reasonable misapprehension of his meaning, I think that the construction must be that which is rather favourable to the purchaser than to the vendor" (*v*).

And so the vendor, even where the purchaser by the contract agrees to accept the vendor's title, is bound to make full disclosure to him of anything unusual in the title, and if anything is kept back which ought to have been disclosed the purchaser will not be bound by the condition (*w*).

(*s*) *In re Gloag & Müller's Contract*, 23 Ch. D. 327.

(*t*) *Cato* v. *Thompson*, 9 Q.B.D. 616.

(*u*) *Hyde* v. *Dallaway*, 6 Jur. 119.

(*v*) *Per* Sir J. L. Knight Bruce, V.C., in *Symons* v. *James*, 1 Y. & C. C.C. 490. And see *Re Marsh & Earl Granville*, 24 Ch. D. 11.

(*w*) *Re Haedicke & Lipski's Contract*, L.R. (1901) 2 Ch. 666, and cases cited.

The right to demand a clear title is sometimes limited by a condition that the purchaser shall take such title as the vendor has (*x*), or some particular title described in the condition; or in some other way the purchaser's right to inquiry is limited (*y*); and such stipulations are valid and will, in general, bind the purchaser (*z*). But they are construed strictly in his favour, and he must be clearly shown to have deprived himself by contract of his right; otherwise such conditions will be impotent (*a*).

(u) *Limited inquiry.*

The cases in which the purchaser's right may be abridged have been divided into two classes:—"First, cases in which the terms of the contract preclude the purchaser from making requisitions upon the vendor as to his title; and secondly, cases in which they preclude him, not only from making inquiries from the vendor as to his title, but from making any investigation anywhere about the title" (*b*). In cases falling within the first class, though the purchaser cannot make requisitions upon the vendor, he is at liberty to shew *aliunde* that the vendor cannot make a good title. Hence, in *Jones* v. *Clifford*, where the condition was that the purchaser "should not require the production of, or investigate, or make any objection in respect of the prior title"—a point of commencement having been fixed by the contract—the purchaser was not precluded from showing that the vendor had no title to the fee, which was in fact in

(*x*) *Hume* v. *Pocock*, L.R. 1 Eq. 423; 1 Ch. App. 379.

(*y*) *Munro* v. *Taylor*, 8 Ha. 51, 71; *Corrall* v. *Cattell*, 4 [illegible] W. 734; *Taylor* v. *Martindale*, 1 Y. & C.C.C. 658.

(*z*) *Freme* v. *Wright*, 4 Madd. 365.

(*a*) *McIntosh* v. *Rogers*, 14 Ont. R. at p. 99.

(*b*) *Jones* v. *Clifford*, 3 Ch. D. 790. See also *per* Baggallay, L.J., in *Best* v. *Hamand*, 12 Ch. D. at p. 10; *Re Nat. Prov. Bank of England & Marsh*, L.R. (1895) 1 Ch. 190; *Re Scott & Alvarez Contract*, L.R. (1895) 1 Ch. 596.

the purchaser subject to a lease to the vendor (*c*). So, where the parties agreed that the vendor (a lessee) should "not be obliged to produce the lessor's title," it was held that, though the vendor was relieved from showing the title of his lessor, the purchaser was not prevented from taking objections which he had discovered himself (*d*). And where the vendor represented the property to be sold as "freehold," it was held that the purchaser was not bound to take an incumbered freehold title, notwithstanding a condition that he should not investigate or take any objection to the title (*e*). So, in *Waddell* v. *Wolfe* (*f*), where the condition was, "it shall form no objection to the title that such indenture [the commencement of the title] is an underlease; and no requisition or inquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease," it was held that "inquiry" was used as a convertible term with "requisition," and that the purchaser was not precluded by the condition from showing without inquiry of the vendor that he could not make out a good title. In *McIntosh* v. *Rogers* (*g*), the contract contained the following very common condition: "No title deeds, abstracts, or evidence of title to be required other than those in vendor's possession, nor shall the vendor be required to give a covenant for the production of the same." In an action for specific performance by the vendor, it was held, 1, that information desired by the purchaser outside of the limit prescribed by the condition must be sought for at the purchaser's expense; 2, that if the evidence in the vendor's possession, and probably that disclosed by the registry, did

(*c*) See also *Darlington* v. *Hamilton*, Kay, 550. See this case commented on in *Re National Prov. Bank of England & Marsh*, L.R. (1895) 1 Ch. 190.

(*d*) *Shepherd* v. *Keatly*, 1 Cr. M. & R. 117.

(*e*) *Phillips* v. *Caldcleugh*, L.R. 4 Q.B. 159.

(*f*) L.R. 9 Q.B. 515.

(*g*) 14 Ont. R. 97.

no prove a good title, the purchaser was not bound to complete; but in such a case the vendor might not be liable for damages, because by the condition he had relieved himself from the absolute obligation of making out a good title. If, however, the vendor was anxious to complete, he might volunteer, though he could not be compelled, to go beyond the letter of his contract and supply what was required (*h*). Judgment was accordingly granted for specific performance at the instance of the vendor, plaintiff, with a reference as to title.

It was said at one time that a condition of this kind was improper upon a sale by the Court; and in a case where it was imposed the biddings were opened (*i*). It was said to be one which no owner of land selling by private contract would impose; but the condition is very common at the present time, and it is not likely that the Master would refuse to sanction it unless some concealment was intended by it.

A contract for the sale of leasehold property contained a condition that the purchaser should not make any objection respecting the "intermediate title" between the lease and an assignment thereof, "notwithstanding any recital of or reference to such title contained in the assignment or any subsequent documents of title, but shall assume that the said assignment vested in the assignees a good title for the residue of the term." Suspicion having been cast upon the intermediate title by the purchaser, it was held that he could not escape from the contract merely by raising the suspicion, but was bound to shew a defective title in order to be entitled to rescind (*j*).

(*h*) See also *per* Maclennan, J.A., *Martin* v. *Magee*, 18 App. R. at p. 396. *Re Marsh & Earl Granville*, 24 Ch. D. at p. 17.

(*i*) *McDonald* v. *Gordon*, 2 Ch. Ch. 125.

(*j*) *Re Scott & Alvarez Contract*, L.R. (1895) 1 Ch. 596.

(b) *No inquiry.*

But in cases falling within the second class the purchaser is absolutely precluded from inquiry. So, where an agreement by a lessee to sell two leases "as he holds the same," bound the purchaser to accept a proper assignment without requiring the lessor's title, it was held that he was not at liberty to object to the lessor's title (*k*). And where the purchaser of a term agreed that "the lessor's title will not be shown, and shall not be inquired into," it was held that inquiry was precluded for every purpose, and he was debarred from showing by Acts of Parliament that the lessors had no power to grant leases (*l*). So, by an agreement that the purchaser is to take such title as the vendor has received (*m*), or to take his title without dispute (*n*), the purchaser is precluded from raising any objection to the title. And where a purchaser agreed to "assume and admit" that everything was done by a railway company to enable them to sell the land as surplus land, and he discovered that the prior owners had a right of pre-emption which they had not waived, and on that account objected to the title, it was held that he could not recover his deposit on his refusal to admit the vendor's position as he had agreed (*o*).

In such cases although the purchaser will not be entitled to rescind the contract and recover his deposit, the vendor might not be able to enforce specific performance, if the purchaser showed that the title was not good (*p*).

(*k*) *Spratt* v. *Jeffrey*, 10 B. & C. 249. This case seems to conflict with *Shepherd* v. *Keatly*, *supra*, which is said by Sir Edward Fry (Fry Sp. Perf. 3rd Ed. sec. 1331, n. 4) to overrule it; but in *Duke* v. *Barnett*, 2 Coll. 337, the cases are said to be reconcilable.

(*l*) *Hume* v. *Bentley*, 5 De G. & Sm. 520.

(*m*) *Wilmot* v. *Wilkinson*, 6 B. & C. 506.

(*n*) *Duke* v. *Barnett*, 2 Coll. 337.

(*o*) *Best* v. *Hamand*, 12 Ch. D. 1.

(*p*) *Re National Prov. Bank of England & Marsh*, L.R. (1895) 1 Ch. 190.

But if there be any representation on the part of the vendor as to his title upon which the purchaser is to rely, and the representation proves to be untrue, such a condition will not bind the purchaser, and he may even after conveyance rescind the whole contract. So it was held in *Nash* v. *Wooderhouse* (*q*), where it was said, "If the vendor said, I am owner in fee of the property, and then added a condition, 'the purchaser shall accept my title, and shall not go behind the conveyance from me to him, or ask any questions, or make any requisitions whatever,' it appears to me that he would be precluded from making those objections if that statement was true; but that if the statement which accompanied the condition was in itself an untrue statement, then he would not be bound by the condition at all, and would have a right to say, 'Although taking you at your word, taking your statement of title, I may not ask questions, yet if it turns out that that statement upon the faith of which I was content not to ask questions, is an untrue and an incorrect statement, I am not bound any longer by the condition not to ask questions.'" And in *Harnett* v. *Baker* (*r*), where the condition declared that the purchaser should assume a certain state of facts, and it turned out that the facts were erroneously stated, the Court refused to hold the purchaser bound by the condition, and on the vendor's refusal to accept an open investigation of title, dismissed his bill.

But there must be an actual misstatement or such an imperfect statement of the facts as in the result makes what is stated untrue, and a condition that the purchaser shall assume certain facts is not misleading if the vendor believes the facts to be true. So, where a condition required the purchaser to assume that a certain person died intestate and without an heir before a certain time, and the vendor

(*q*) 52 L.T.N.S. 49.
(*r*) L.R. 20 Eq. 50.

believed the fact to be true but could not prove it, it was held that the purchaser was bound by the condition (*s*).

(c) *Rescission by vendor on objections by purchaser.*

It is frequently made a condition of the agreement, that if the purchaser shall make or insist on any objection to the title which the vendor shall be unable or unwilling to remove, he shall be at liberty to rescind the contract and return the deposit without interest, costs, or further compensation. Various forms of the condition, differing but little in effect, will be found in the reports of the cases cited below. In practice the condition is sometimes by its wording extended to conveyance, quantity and quality of estate, evidence of title, etc. Thus, where a condition provided that the purchaser should, within a limited time, send in his objections and requisitions in respect of title and all matters appearing on the abstract or the particulars and conditions of sale, and the purchaser demanded compensation for a deficiency in the quantity, it was held that the vendor might rescind, there being also a condition against claiming compensation (*t*).

Such a condition for rescission may be taken advantage of where it is an objection to title even where the error would also fall under a condition providing for compensation. Thus, an estate was sold under condition 6 which provided that if any error should be found in the description, the same, if capable of compensation, should not annul the sale, but that a fair compensation should be allowed; while condition 8 provided that if the purchaser should insist upon any objection in respect of the title which the vendor was unable or unwilling to remove, the vendor should be at liberty to rescind. A road was shown on a plan of the property, but it did not indicate that any third person had the

(*s*) *Re Sandbach & Edmondson's Contract*, L.R. (1891) 1 Ch. 99.
(*t*) *Re Terry & White*, 32 Ch. D. 14.

right to pass along it. After the title had been investigated it appeared that there was right of way over the road, but neither the vendor nor the purchaser was aware of it when the contract was entered into. The purchaser asked for compensation under condition 6, and the vendor gave a notice of rescission under condition 8. It was held that although the error fell within condition 6, yet the vendor had also the right to rescind under condition 8, as he could not make out a title in fee free from the burden(*u*). But where there is a condition for compensation for error in description, it does not follow that it applies also to title, and so in one case where the purchaser, after conveyance, found that certain parts of the property belonged to other persons from whom he was obliged to purchase them, it was held that the condition for compensation did not apply to failure of title, and that the purchaser was not entitled to rescind, nor to be compensated(*v*).

In one case(*w*) Pearson, J., gave it as his opinion that it is not a proper condition to be inserted with respect to the conveyance. But, in a later case, where a condition empowered the vendor to rescind if the purchaser made any objection "as to the title, particulars, conditions, or any other matter or thing relating or incidental to the sale," it was held by the Court of Appeal that the vendor might rescind where the purchaser asked for the concurrence of an official receiver in the conveyance, the legal estate being outstanding in him(*x*).

This stipulation as regards title, though not unreasonable, illegal, or improper(*y*), is for the sole benefit of the vendor, and is introduced for the purpose of protecting him

(*u*) *Ashburner* v. *Sewell*, L.R. (1891) 3 Ch. 405.
(*v*) *Debenham* v. *Sawbridge*, L.R. (1901) 2 Ch. 98.
(*w*) *Hardman* v. *Child*, 28 Ch. D. at p. 718.
(*x*) *Re Deighton & Harris' Contract*, L.R. (1898) 1 Ch. 458.
(*y*) *Williams* v. *Edwards*, 2 Sim. 83; *Hudson* v. *Temple*, 29 Beav. 543.

against difficulties as to title(*z*), or to meet the case of a purchaser insisting upon objections which the vendor is unable to remove either absolutely or without incurring an unreasonable amount of expense(*a*). It is, in a sense, a depreciatory condition, but being one which a prudent owner would employ, it may be used on a sale by a mortgagee and will bind the mortgagor(*b*). It is construed strictly in favour of the purchaser(*c*). And it has been said that notwithstanding this condition, the vendor must perform all the duties of a vendor with this sole exception that they must be reasonable; that he cannot compel the purchaser to take an imperfect abstract if he can make a complete one(*d*); and that he must do all he can to make out his title(*e*). But in some recent cases where the vendor would have been put to great trouble and expense in removing the objections, it has been held that the purchaser's conduct in insisting upon the objections was unreasonable and that the vendor had an absolute right to rescind(*f*). And it must now be taken as settled that upon making or insisting upon objections, according to the wording of the condition, the right of the vendor to rescind immediately arises(*g*).

The vendor cannot take advantage of the condition if he has knowingly entered into the contract with a defective

(*z*) *Engel* v. *Fitch*, L.R. 3 Q.B. 314.

(*a*) *Hardman* v. *Child*, 28 Ch. D. 712.

(*b*) *Falkiner* v. *Equitable Rev. Socy.*, 4 Drew. 352.

(*c*) *Morley* v. *Cook*, 2 Ha. 115; *Hudson* v. *Temple*, 29 Beav. 543; *Greaves* v. *Wilson*, 25 Beav. 290. For remarks on special conditions, see *Hyde* v. *Dallaway*, 4 Beav. 606.

(*d*) *Greaves* v. *Wilson*, 25 Beav. 293.

(*e*) *Hudson* v. *Temple*, 29 Beav. 543. And see *Morley* v. *Cook*, 2 Ha. 114; *Hobson* v. *Bell*, 2 Beav. 17.

(*f*) *Mawson* v. *Fletcher*, 6 Ch. App. 94; *Re G.N.W. Railway Co. & Sanderson*, 25 Ch. D. 788; *Re Dames & Wood*, 27 Ch. D. 172; 29 Ch. D. 626; *Heppenstall* v. *Hose*, 51 L.T.N.S. 589; *Hardman* v. *Child*, 28 Ch. D. 712.

(*g*) *Re Starr-Bowkett Bdg. Socy. & Sibun*, 42 Ch. D. 375.

title; and in such a case the purchaser was held entitled to specific performance with compensation(*h*); nor can he avail himself of it where he has no title at all(*i*). Nor can a vendor arbitrarily or wantonly rescind the contract, nor put up for sale that to which he knows he cannot make a title(*j*). So, where a termor agreed to sell the fee and attempted to take advantage of such a condition on discovery of the want of title by the purchaser, it was held that he could not do so, and the purchaser was held entitled to damages(*k*); for equity will compel a vendor to perform as much of his agreement as he is able(*l*). And where a purchaser took objections which the vendor was unwilling to satisfy, and the vendor gave formal notice that he was unwilling and called upon the purchaser to withdraw, and in the meantime took advantage of the delay to negotiate with other persons for the sale of the property to them, it was held that the purchaser, although he did not know of the negotiations, had a right to rescind, and that the vendor was making use of the condition for an improper purpose, and could not elect to affirm the contract(*m*).

Where the condition applies to an objection to title only, and the purchaser insists upon compensation for misdescription, the vendor cannot rescind(*n*), unless indeed the objection to title is involved with that of compensation, as where the title to a portion of the property fails; thus, in a case

(*h*) *Nelthorpe* v. *Holgate*, 1 Coll. 203. But this case was decided upon its own peculiar circumstances. See an honest case of rescission, *Re Deighton & Harris' Contract*, L.R. (1898) 1 Ch. at p. 463.

(*i*) *Bowman* v. *Hyland*, 8 Ch. D. 588.

(*j*) *Heppenstall* v. *Hose*, 51 L.T.N.S. 589; *Mawson* v. *Fletcher*, 6 Ch. App. 94; *per* Lopes, L.J., *Re Terry & White*, 32 Ch. D. at p. 34.

(*k*) *Bowman* v. *Hyland*, 8 Ch. D. 588.

(*l*) *Thomas* v. *Dering*, 1 Ke. 729. And see *Wood* v. *Griffith*, 1 Swans. 54; *Mortlock* v. *Buller*, 10 Ves. 315; *Western* v. *Russell*, 3 V. & B. 192.

(*m*) *Smith* v. *Wallace*, L.R. (1895) 1 Ch. 385.

(*n*) *Painter* v. *Newby*, 11 Ha. 26; *Hoy* v. *Smythies*, 22 Beav. at p. 520. See *Debenham* v. *Sawbridge*, L.R. (1901) 2 Ch. 98.

where a vendor agreed to sell five acres, and the abstract shewed a title to three and a half only, the remainder having been enclosed by the vendor and occupied by him for a number of years, it was held that he might take advantage of the condition and rescind the contract on the ground that it would involve him in great trouble and expense to answer requisitions as to the one and a half acres(*o*). And in *Mawson* v. *Fletcher*(*p*), where the vendor was unwilling to make out a title to certain minerals in the property sold, it was held, in an action by the purchaser for specific performance with compensation, that he could rescind although there was a condition for compensation in case of misdescription. In this case the description was said to be accurate but the title to part failed. So, where there was a right of way across the property bought, unknown to either the vendor or the purchaser at the time of the contract, and the purchaser insisted on compensation therefor, and the vendor rescinded, it was held that she was within the condition in doing so, as it was an objection to title although also the subject of compensation within another condition(*q*).

If the vendor is guilty of any wilful misrepresentation(*r*), or makes any attempt to defraud or deceive the purchaser(*s*), the condition will not protect him; and generally, any gross negligence or improper conduct is apparently sufficient to deprive the vendor of his right to shelter himself under it(*t*). Nor can he avail himself of the condition to improperly escape from the performance of any duty which by the nature of the contract he is bound to per-

(*o*) *Heppenstall* v. *Hose*, 51 L.T.N.S. 589.

(*p*) 6 Ch. App. 91.

(*q*) *Ashburner* v. *Sewell*, L.R. (1891) 3 Ch. 405.

(*r*) *Price* v. *Macauley*, 2 D.M. & G. 347.

(*s*) *Greaves* v. *Wilson*, 25 Beav. 296.

(*t*) *Turpin* v. *Chambers*, 29 Beav. 104; *Smith* v. *Wallace*, L.R. (1895) 1 Ch. 385.

form(*u*); nor to escape from a bad sale(*v*). And so, where the condition applied to title or conveyance, and the title was satisfactory, but the purchaser refused to complete until the vendor, a mortgagee, had ousted the mortgagor, which he refused to do, it was held that he could not escape from his contract by giving notice to rescind it under such a condition(*w*). And where there was an outstanding incumbrance which the vendor refused to pay off he was not allowed to rescind(*x*). But in a more recent case(*y*), Pearson, J., allowed the vendors to rescind, upon the purchasers insisting that they should procure a release of a very onerous rent charge upon the property, which they had agreed to sell free from incumbrance.

The vendor, it has been said, must, on receiving objections to the title, determine which of two courses he will adopt, namely, whether he will answer the objections, or put an end to the contract altogether; and where a vendor after having elected to answer the objections attempted to rescind, under a condition that he might do so if the purchaser made any objections which he was unwilling to satisfy, it was held that he could not do so(*z*). The vendor's duty and obligations must depend to some extent upon the form of the condition. There is a distinction between merely raising an objection and insisting on it(*a*). Where the condition is that if the purchaser makes or raises any objection which the vendor is unable or unwilling to remove, it has been settled that the right of the vendor to rescind immediately arises, and he may do so if he acts in good faith and on reasonable grounds; and he is not bound to communicate

(*u*) *Page* v. *Adam*, 4 Beav. 286.
(*v*) *Greaves* v. *Wilson*, 25 Beav. 296.
(*w*) *Engel* v. *Fitch*, L.R. 3 Q.B. 314.
(*x*) *Re Jackson & Oakshott*, 14 Ch. D. 851.
(*y*) *Re G.N.W. Railway Company & Sanderson*, 25 Ch. D. 788.
(*z*) *Tanner* v. *Smith*, 10 Sim. 411.
(*a*) *Greaves* v. *Wilson*, 25 Beav. at p. 295; *Re Dames & Wood*, 29 Ch. D. at p. 629; *Duddell* v. *Simpson*, 2 Ch. App. at p. 106; *Re Starr-Bowkett Bdg. Socy. & Sibun*, 42 Ch. D. at p. 388.

with the purchaser before rescinding, or state his reasons for so doing(*b*). But where the condition gives the right to rescind upon the insistence of the purchaser on objections which the vendor is unable or unwilling to remove, the duty of the latter is thus concisely stated by Cairns, L.J.:—"First, there must be an objection to the title; secondly, there must be inability or unwillingness on the part of the vendor to remove that objection; thirdly, there must be a communication to the purchaser of the existence of this inability or unwillingness; and, fourthly, there must be an insisting by the purchaser on his objection notwithstanding this communication"(*c*). But even if the purchaser insists upon his objections there must be a certain amount of reasonableness in the vendor's refusal to answer them(*d*); and he must give the purchaser the opportunity of waiving the objections(*e*); for if he waives them the vendor cannot then rescind(*f*). And so, where a purchaser filed a bill for specific performance upon receiving, in answer to his objections, a notice of rescission, the court adjourned the cause in order that the vendor might answer them. The purchaser accepted the title upon receiving the answers, whereupon the court decreed specific performance with costs(*g*).

In all cases of rescission under such a condition the vendor, if he is unwilling to remove the objection, must act reasonably and without caprice; he must have a good reason though he need not communicate it to the purchaser; the word "unwilling" does not import that he may act on mere caprice(*h*).

(*b*) *Re Starr-Bowkett Bdg. Socy. & Sibun*, 42 Ch. D. 375.

(*c*) *Duddell* v. *Simpson*, 2 Ch. App. 109.

(*d*) *Greaves* v. *Wilson*, 25 Beav. at p. 295; *Duddell* v. *Simpson*, 2 Ch. App. at p. 107; and see *Re Starr-Bowkett Building Society & Sibun*, 42 Ch. D. 375.

(*e*) *Greaves* v. *Wilson*, 25 Beav. 290.

(*f*) *Duddell* v. *Simpson*, L.R. 1 Eq. 578; 2 Ch. App. at p. 111.

(*g*) *Turpin* v. *Chambers*, 29 Beav. 104; and see *Greaves* v. *Wilson*, 25 Beav. 290. But see *Williams* v. *Edwards*, 2 Sim. 78.

(*h*) *Re Starr-Bowkett Building Society & Sibun*, 42 Ch. D. 375; *Re Glenton & Sanders*, 53 L.T.N.S. 434.

The notice of rescission need not give to the purchaser a time within which to waive his objections(*i*); and once it is rightly given the contract is at an end, and it is then too late for the purchaser to withdraw his objections(*j*). But it cannot be given if no requisitions are made by the purchaser(*k*).

It has been held that a vendor, having once been entitled to the benefit of the condition, may waive his right to avail himself of it by replying to the purchaser's objections(*l*), and it is clear that he may waive the right(*m*); and so it is prudent for the vendor in answering the objections to reserve to himself the benefit of the condition by apt words(*n*). To avert the danger of a waiver of this right the vendor usually adds to his condition the words "notwithstanding any intermediate negotiations" or words having the like effect(*o*).

Where a condition enabled the vendor to rescind notwithstanding "any intermediate or pending negotiation, proceeding or litigation," and the vendor permitted the purchaser to take proceedings under the Vendor and Purchaser Act and then gave notice of rescission, it was held that the Court might still award the costs of the litigation(*p*). But where under a similar condition the vendor allowed a decision to be given on the point litigated, it was said that though the vendor might, pending negotiation or litigation, exercise his right of rescinding if he did not think it worth while to continue the struggle, yet after a judicial

(*i*) *Duddell* v. *Simpson*, 2 Ch. App. 102; *Re Starr-Bowkett Building Society & Sibun*, 42 Ch. D. at p. 382.

(*j*) *Re Dames & Wood*, 27 Ch. D. 172; 29 Ch. D. 626.

(*k*) *Re Moneton & Gilzean*, 27 Ch. D. 555.

(*l*) *Tanner* v. *Smith*, 10 Sim. 410.

(*m*) *Bowman* v. *Hyland*, 8 Ch. D. 588; *Morley* v. *Cook*, 2 Ha. 115.

(*n*) *Morley* v. *Cook*, 2 Ha. 115.

(*o*) Dart V. & P. 6th Ed. p. 183.

(*p*) *Re Spindler & Mear's Contract*, L.R. (1901) 1 Ch. 908.

decision against him on the question involved he would be too late(*q*).

The vendor is protected under this condition from frivolous or untenable objections, or any attempt on the part of the purchaser to compel him to do more than is required of him as his duty under the contract(*r*), or to put him to unreasonable or unjust expense(*s*). And so,where the purchaser refused to complete the contract when the vendor had done all that he could do, it was held that the latter might rescind (not having waived his right) though nothing remained to be done but to make payment of the money(*t*). But the condition in that case was that if from any cause whatever the contract was not completed by a certain day, the vendor should be at liberty to annul(*u*).

Where a condition of the sale is designed to protect the vendor against some defect in the title it should clearly and without ambiguity state the nature of the defect, so that the purchaser may have the opportunity of exercising his judgment upon it; but it is not necessary that the legal effect or inference should be stated if the facts are disclosed(*v*). So, where a condition was that a recital supported by a declaration should be conclusive evidence that no claim existed in respect of an annuity payable during four lives, and the purchaser showed that two lives still subsisted, specific performance was refused(*w*). And where a sale was stated to be by order of executors, and it was a condition that the vendors should not be obliged to procure the concurrence of beneficiaries, and it appeared that the

(*q*) *Re Arbib & Class*, L.R. (1891) 1 Ch. 601.

(*r*) *Page* v. *Adams*, 4 Beav. 269; and see *Lord* v. *Stephens*, 1 Y. & C. Ex. 222.

(*s*) *Hardman* v. *Child*, 28 Ch. D. 712.

(*t*) *Hudson* v. *Temple*, 29 Beav. 543.

(*u*) See *Re Dames & Wood*, 29 Ch. D. 626, for instances of unreasonable objections.

(*v*) *Smith* v. *Watts*, 4 Drew. 338.

(*w*) *Drysdale* v. *Mace*, 5 D. M. & G. 103.

vendor was administrator *durante absentia*, it was held that the purchaser was not bound to complete(*x*).

(iii) *By matter subsequent to the contract.*

The purchaser having, under the contract, a right to have the title strictly investigated, may waive his right by acts subsequent to the contract, either expressly, or by implication; and the waiver may extend to the whole title or to particular objections only; and in case of an express waiver it may be either absolute or conditional(*y*).

The question of waiver is one of fact(*z*), and the inclination of the court being in favour of the purchaser, the vendor must establish to the satisfaction of the court that the purchaser intended to waive, and has waived, his right to object to the title(*a*). If there has been fraud or surprise on the part of the vendor, or concealment of a material fact(*b*), or if the information supplied to the purchaser has been deficient, as by means of an imperfect abstract(*c*), the purchaser will not be allowed to suffer(*d*). Where the purchaser's acts are such as to amount to an acceptance of the title as disclosed by the abstract, he is not thereby precluded from showing *aliunde* that the vendor cannot make a title(*e*). But, even before delivery of an abstract, if the purchaser chooses to assume the title to be good, or if he act upon his own knowledge or opinion without seeing, or without asking to see, how the title is made out by the vendor, he may be concluded by his acts; especially in Ontario

(*x*) *Webb* v. *Kirby*, 7 D. M. & G. 374.

(*y*) Fry, Sp. Perf. sec. 1339.

(*z*) *Burroughs* v. *Oakley*, 3 Swan. 168.

(*a*) *Blacklow* v. *Laws*, 2 Ha. 47; *Commercial Bank* v. *McConnell*, 7 Gr. 327, 328; *O'Keefe* v. *Taylor*, 2 Gr. 307.

(*b*) *Bousfield* v. *Hodges*, 33 Beav. 90.

(*c*) *Blacklow* v. *Laws*, 2 Ha. 40; *Want* v. *Stallibrass*, L.R. 8 Ex. 175.

(*d*) *Jenkins* v. *Hiles*, 6 Ves. 655.

(*e*) *Warren* v. *Richardson*, You. 1; *Bown* v. *Stenson*, 24 Beav. 631; *Denison* v. *Fuller*, 10 Gr. 498; *Nason* v. *Armstrong*, 22 Ont. R. 542; 21 App. R. 183; 25 S.C.R. 263.

where titles are comparatively simple, and the formalities of conveyancing practice are not as strictly observed as they are in England(*f*).

(a) *Taking possession; securing purchase money, etc.*

It has been said that taking possession is a waiver of objections to title; that the purchaser proceeds upon the supposition that the contract will be executed; and that he therefore agrees that from the day of taking possession he will treat it as executed(*g*). But the mere taking of possession is in itself an equivocal act(*h*), and is not of itself a waiver of the right to an inquiry, though it is evidence of waiver which may have to be rebutted(*i*). The Court must be satisfied that it was the intention of the purchaser to take the land without an inquiry(*j*). And the act of taking possession is more lightly regarded in Ontario than it would be in England, where contracts of sale and investigations of title are conducted with more care and solemnity than in this Province(*k*).

Taking possession and making expensive alterations in a mill and its machinery were held to be an acceptance of the title(*l*). The principle is very tersely put by Spragge, V.C., as follows:—"Could [the purchaser] reasonably say if the title turns out not good, I intend to return the property into the hands of the vendors in the state to which I have altered it? If he could not reasonably say this, the alternative seems to me to be, that he must be taken to have intended

(*f*) *Commercial Bank* v. *McConnell*, 7 Gr. 331.

(*g*) *Fludyer* v. *Cocker*, 12 Ves. 27; and see *Fleetwood* v. *Green*, 15 Ves. 594, explained in *Burroughs* v. *Oakley*, 3 Swan. 165. Exercising acts of ownership over the land renders the purchaser liable for interest though he makes no profit: *Ballard* v. *Shutt*, 15 Ch. D. 124.

(*h*) *Simpson* v. *Sadd*, 4 D.M. & G. 672.

(*i*) *Hyde* v. *Warden*, 3 Ex. D. 72.

(*j*) *Micheltree* v. *Irwin*, 13 Gr. 542; *Southcomb* v. *Bishop of Exeter*, 6 Ha. 213.

(*k*) *Mitcheltree* v. *Irwin*, 13 Gr. 541; *O'Keefe* v. *Taylor*, 2 Gr. 307; *O'Connor* v. *Beatty*, 2 App. R. 504.

(*l*) *Commercial Bank* v. *McConnell*, 7 Gr. 323.

not to investigate the title"(*m*). In this case there was also some evidence of the purchaser's prior knowledge of the title. So, acceptance of a title may be implied from writing a letter apologizing for non-payment of the purchase money(*n*), for until the title is approved the purchaser is not, in general, bound to pay the purchase money(*o*). Taking possession, paying part of the purchase money, giving security for the balance, and mortgaging her interest in the land were held to bind the purchaser as an acceptance of title(*p*). But payments are no waiver where the contract contemplates immediate possession, and provides for payment by instalments(*q*). Giving a mortgage for purchase money, and taking a release of dower from the mother of infant heirs were accepted as evidence of approval of the title of the heirs(*r*). So, building on the land, asking twice for a conveyance, and offering a note for the purchase money are acts of waiver(*s*).

Delay in making requisitions on title after delivery of the abstract (the purchaser being in possession), and only requiring production of the deeds after notice by the vendor to complete the purchase concluded the purchaser as to a title abstracted(*t*); and even silence may be similarly construed(*u*). But as a rule the Court will not on account of delay only compel the purchaser to take a bad title(*v*). Where property was purchased by partners who dissolved

(*m*) P. 331. And see *Cutler* v. *Simons*, 2 Mer. 103. But the acts must be very strong; see *Osborne* v. *Harvey*, 1 Y. & C.C.C. 116.

(*n*) *Margravine of Anspach* v. *Noel*, 1 Mad. 310; *McDonald* v. *Garrett*, 8 Gr. 290.

(*o*) *Clarke* v. *Faux*, 3 Russ. 320. See *McDonald* v. *Murray*, 2 Ont. R. 573; 11 App. R. 101.

(*p*) *Haydon* v. *Bell*, 1 Beav. 337.

(*q*) *Darby* v. *Greenlees*, 11 Gr. 353.

(*r*) *McDonald* v. *Garrett*, 8 Gr. 290.

(*s*) *Denison* v. *Fuller*, 10 Gr. 498.

(*t*) *Pegg* v. *Wisden*, 16 Beav. 239.

(*u*) *Rae* v. *Geddes*, 18 Gr. 222.

(*v*) *Blackford* v. *Kirkpatrick*, 6 Beav. 232.

partnership before acceptance of title and made a division of the land between them, it was held that this did not relieve the vendor from his obligation to make a good title(*w*).

If possession is taken, not under the contract, nor by permission of the vendor, but forcibly, that is regarded as such an assumption of the right of property by the purchaser, irrespective of the state of the title, as amounts to a declaration on his part that nothing more remains to be done but the execution of the conveyance; and the purchaser will be taken to have accepted the title(*x*). If possession be taken after delivery of the abstract, and no provision as to possession is made by the contract, it lies on the purchaser to rebut the presumption that he has accepted the title as abstracted(*y*).

But where possession is taken in pursuance of the terms of the contract(*z*); or even where improvements are made, the purchaser continuing to insist upon his right to a good title(*a*); or, the contract being silent, possession is taken prematurely by consent of both parties(*b*); or where the Court is otherwise satisfied that possession is taken without the intention on the part of the purchaser to waive his right, and the vendor so understands it(*c*), the purchaser's right to a good title is not impaired(*d*). Where an agreement for sale of building lots contained a stipulation that the purchasers might occupy and enjoy the property until default made in paying the purchase money, and the purchasers entered and erected two workshops on the land, it was held

(*w*) *Darby* v. *Greenlees*, 11 Gr. 353, 354.

(*x*) *O'Keefe* v. *Taylor*, 2 Gr. 307.

(*y*) *Bown* v. *Stenson*, 24 Beav. 631.

(*z*) *Dixon* v. *Astley*, 1 Mer. 134; *Stevens* v. *Guppy*, 3 Russ. 171.

(*a*) *Rankin* v. *Sterling*, 3 O.L.R. 646.

(*b*) *Vancouver* v. *Bliss*, 11 Ves. 458, 464; *Burroughs* v. *Oakley*, 3 Swan. 159.

(*c*) *Micheltree* v. *Irwin*, 13 Gr. 544.

(*d*) *O'Keefe* v. *Taylor*, 2 Gr. 308. And see *Crooks* v. *Glenn*, 8 Gr. 239

that they had not waived their right to an enquiry(*e*). So, where the purchasers, who were railway contractors, having a right by statute to take possession compulsorily, independently of any contract with the owner, took possession under a contract and commenced work on the land, it was held, on a hill filed by them for specific performance, that they were entitled to a reference as to title(*f*).

Where the purchaser at a judicial sale takes possession without leave of the Court, though with consent of the parties, he impliedly accepts the title(*g*); but if an abstract be subsequently delivered the vendor re-opens the question of title(*h*).

What amounts to taking possession may be the subject of discussion. Thus, in one case(*i*), it was laid down that the delivery of the key of a house was not of itself delivery of possession; it was but a symbolical delivery, but might be evidence of possession, if given or received with that view. In the same case it was held that letting the purchaser into receipt of the rents and profits of one parcel was not a compliance with the condition to give possession of that parcel, where another condition provided for letting the purchaser into the receipt of the rents and profits only of another parcel.

(b) *Re-sale.*

Attempting a re-sale of the property is an important element for consideration in determining upon implied acceptance of title(*j*). An actual or attempted disposal of a portion of the property does not preclude the purchaser from showing that that portion is essential to the enjoyment of the whole and insisting upon the title being made

(*e*) *Darby* v. *Greenlees*, 11 Gr. 351.
(*f*) *Jackson* v. *Jessup*, 6 Gr. 156, 159.
(*g*) *Patterson* v. *Robb*, 6 P.R. 114.
(*h*) *Aldwell* v. *Aldwell*, 6 P.R. 183.
(*i*) *People's Loan and D. Co.* v. *Bacon*, 27 Gr. 294.
(*j*) *Simpson* v. *Sadd*, 4 D. M. & G. 673.

thereto, especially if the treaty for a title has continued(*k*); but a sale of a portion of the property in small lots, and cutting timber thereon, if an acceptance of title, cannot be relied upon as such if the vendor subsequently, on demand therefor, delivers an abstract; and he will be bound to verify the abstract(*l*). If the vendor in such a case intends to rely on the purchaser's acts of waiver he should take advantage of them at once. By delivering an abstract thereafter, and answering requisitions, he admits that the question of title is still open(*m*).

(c) *Favourable opinion of Counsel.*

If a purchaser lays the abstract before counsel who approves of the title, his approbation cannot be taken, as against the purchaser, as a waiver of all reasonable objections(*n*). And where a case was submitted to counsel for his opinion as to the sufficiency of the evidence of an alleged intestacy, and it was therein stated that various other objections to the title had been waived or removed, it was held that the purchaser was not thereby obliged to relinquish his right to a reference on the whole title(*o*). But if counsel for the purchaser waives an objection, and the purchaser adopts that opinion and deals with the vendor upon that view, he will not afterwards be permitted to repudiate the opinion of his counsel(*p*).

(d) *Preparation of conveyance.*

The preparation of the conveyance by the purchaser, which it is his duty as well as his privilege to prepare(*q*),

(*k*) *Knatchbull* v. *Grueber*, 1 Madd. 170.
(*l*) *Gordon* v. *Harnden*, 18 Gr. 231.
(*m*) *Aldwell* v. *Aldwell*, 6 P.R. 183.
(*n*) *Deverell* v. *Lord Bolton*, 18 Ves. 514. And see *Stewart* v. *Alliston*, 1 Mer. 33.
(*o*) *Lenturgeon* v. *Martin*, 3 Myl. & K. 255.
(*p*) *Alexander* v. *Crosby*, 1 J. & L. 666.
(*q*) *Stevenson* v. *Davis*, 23 S.C.R. at p. 633.

may be an important fact, as amounting to evidence that the parties have arrived at a stage of the proceedings subsequent to the question of title; but that fact alone is apparently not sufficient to exclude the purchaser's common equity to an enquiry(*r*). In one case the vendor had prepared and executed a conveyance and retained it in a place of safety. He threatened to convey the land to a stranger and then leave the Province, and the purchaser thereupon declared in writing in the presence of witnesses that he intended to secure possession of the conveyance and register it. He subsequently did so. It was held under these circumstances that he had not waived his right to an enquiry(*s*). Where a purchaser accepts a conveyance from one of several whose titles are identical, he will be concluded as to the titles of all(*t*). But acceptance of a conveyance from one tenant in common is no waiver of the right to an inquiry as to the title of the others, for they may have derived title from different sources(*u*).

(e) *Particular objection.*

Where the question is as to waiver of a particular objection only, it must be shown that it was brought to the knowledge of the purchaser; for, waiver being a question of intention, it could not be argued that the purchaser intended to waive that of which he had no knowledge(*v*). But if he takes possession, either he or his solicitor clearly knowing the objection to the title, but neither of them giving any intimation of it, he waives the objection(*w*), and can never set it up again unless entitled to do so by some act of the vendor's(*x*).

(*r*) *Burroughs* v. *Oakley*, 3 Swan. 171.
(*s*) *Mitcheltree* v. *Irwin*, 13 Gr. 538, 540.
(*t*) *McDonald* v. *Garrett*, 8 Gr. 293.
(*u*) *McDonald* v. *Garrett*, 8 Gr. 292.
(*v*) *Re Cox & Neve's Contract*, L.R. (1891) 2 Ch. at p. 118.
(*w*) *Burnell* v. *Brown*, 1 J. & W. 175.
(*x*) *Burnell* v. *Brown*, 1 J. & W. 174; *Aldwell* v. *Aldwell*, 6 P.R. 183; *Gordon* v. *Harnden*, 18 Gr. 231.

The nature of the objection is a matter of importance. If it be of such a nature that it cannot by possibility be cured, the purchaser should immediately insist upon it and refuse to proceed further with the contract; otherwise he may bind himself to complete the purchase. So, where an estate of seventy acres was described in the particulars as freehold with leasehold adjoining, and it appeared that only eight acres were freehold; but the purchaser, having acquired knowledge of this, went on to treat as to the title, and the vendor cleared up all objections; it was held that the purchaser was bound to complete the purchase(*y*). And where a purchaser was under contract to buy an estate, which he learned for the first time from the abstract to be subject to a right of sporting over it, and went into possession, it was held that he was concluded by his act and could not avail himself of the objection(*z*).

But if the objection is one that may be cured it will be matter for inquiry whether the purchaser committed the alleged acts of waiver in the expectation that the objection would be removed(*a*); and the continuance of negotiations is strong evidence that the purchaser did not intend to waive the objection, for a man by going on to treat does not waive an objection which he is continually insisting upon(*b*).

(*y*) *Fordyce* v. *Ford*, 4 Bro. C.C. 495; cited in *Dewe* v. *Hanson*, 6 Ves. 679.

(*z*) *Burnell* v. *Brown*, 1 J. & W. 168. And see *Ogilvie* v. *Foljambe*, 3 Mer. 53. See also and compare cases in which the purchaser enters into a contract with notice that a good title cannot be made; *ante* p. 6.

(*a*) *Calcraft* v. *Roebuck*, 1 Ves. Jr. 225; *O'Connor* v. *Beatty*, 2 App. R. 505.

(*b*) *Knatchbull* v. *Orrueber*, 1 Mad. 170.

CHAPTER III.

THE ABSTRACT OF TITLE.

1. *Right to abstract.*
2. *Length of title abstracted.*
   (i) *60 years; good root.*
   (ii) *More than 60 years.*
   (iii) *Less than 60 years; Bolton v. London School Board.*
3. *Contents of abstract.*
   (i) *Equitable interests.*
   (ii) *Concealment of documents.*
   (iii) *Perfect abstract.*
   (iv) *Matters of title and matters of conveyance.*
4. *Delivery of abstract—serving objections.*
   (i) *Practice between parties.*
   (ii) *Practice in Master's office.*

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1. *Right to Abstract.*

In Ontario, the purchaser's solicitor in investigating the title nearly always depends upon a registrar's certificate of registered instruments, sometimes called a registrar's abstract, or upon a personal search of the registered title; and it is not infrequently made a condition of the sale that the vendor will deliver a registrar's abstract only. However, in the absence of any stipulation to the contrary, the purchaser may require the vendor to deliver a solicitor's abstract(c)—so called merely for the purpose of distin-

(c) Dart V. & P., 6th Ed. p. 319; *Re Boustead & Warwick*, 12 Ont. R. 488.

guishing it from a registrar's abstract. In matters of importance an abstract is usually demanded.

2. *Length of title abstracted.*

The abstract should cover a period of at least sixty years prior to the date of the contract (though the investigation of the purchaser must be carried back still further), unless the grant from the Crown has been made, or the title quieted, within that period. If the grant has been made within sixty years the abstract should commence with the patent; and if the title has been quieted under the Quieting Titles Act, it should commence with the certificate of title(*d*).

(i) *60 years; good root.*

It has been said that the reasons for the sixty years limit do not apply to this country. The writer cannot agree with this view. By the Provincial Act, 32 Geo. III. cap. 1, it was enacted that in all matters of controversy relative to property and civil rights resort should be had to the laws of England as the rule for the decision of the same. It is fallacious to suppose either that the whole body of English law was introduced into Canada by this enactment, or that those laws only which were then applicable to the Colony were brought into force. Its true effect is stated by Robinson, C.J., as follows:—"They [the words of the Act] seem * * intended to be * * limited to the purpose of giving the principles of English law, modified of course as they may have been by statute, as the rule of decision for settling questions *as they might arise* relative to property and civil rights"(*e*). This interpretation seems expressly to cover the present case. The settled practice of conveyancers is said to be part of the common law(*f*), and in this respect

(*d*) R.S.O. c. 135, sec. 29.
(*e*) *Doe dem. Anderson* v. *Todd*, 2 U.C.R. 87.
(*f*) *Re Ford & Hill*, 10 Ch. D. 370.

the common law in the absence of any statutory enactment is our only guide. The *Nullum Tempus Act* has been held to be in force here(*g*), and it would be difficult to find reasons consistent with this decision for the exclusion of the rule of property as to length of title(*h*).

Various reasons have been assigned for the sixty years limit(*i*); and after the passing of the Imperial Act 3 & 4 Wm. IV. cap. 27, which shortened the period of limitation of actions for the recovery of land, a discussion arose amongst conveyancers as to whether a corresponding diminution of the period of time for which a good title should be shown ought not also to be made. The debated point was settled by Lord Lyndhurst(*j*), who held that the period should not be shortened on that account(*k*). According to Mr. Hayes, the period is merely a conventional limit, required by convenience and established by practice, affording a strong moral probability, though not a mathematical certainty, of a good title (*l*). In England the period has been reduced to forty years by statute(*m*).

The statement that the abstract must cover a period of sixty years anterior to the contract is to be taken subject to this qualification that it shall commence with a good root of title; and if this cannot be found at a distance of sixty years, the abstract must commence at an earlier period(*n*). The point to be considered in commencing the abstract is,

(*g*) *Regina* v. *McCormick*, 18 U.C.R. 131. See also *Atty.-Genl. for N.S.W.* v. *Lore*, L.R. (1898) A.C. 679.

(*h*) See further on this, Leith's Williams' Rl. Prop. 295; 4 C.L.T. 97.

(*i*) Williams on Rl. Prop. 19th Ed. 574, 575.

(*j*) *Cooper* v. *Emery*, 1 Ph. 388.

(*k*) See *Moulton* v. *Edmonds*, 1 D.F. & J. 250.

(*l*) Hayes Con. 4th Ed. 251. In *Else* v. *Else*, L.R. 13 Eq. 196, the production of a will dated nearly fifty years prior to the day of sale, showed that the vendor's estate was determinable on the death without a child of his grantor, the devisee in the will, and it also appeared that the devisee was still living and childless.

(*m*) 37 & 38 Vict. c. 78.

(*n*) *Re Cox & Neve's Contract*, L.R. (1891) at p. 118.

not the quantity of interest which the first abstracted deed purports to convey, but rather the *prima facie* evidence which it affords of the then condition of the title to the fee(o). Therefore, in selecting a document for the commencement of the abstract, care should be taken not to select one which refers to any anterior assurance or depends upon it for its validity. For instance, neither a settlement made in pursuance of articles, nor a deed exercising a power, is a proper point of commencement; for *non constat* that the settlement is prepared conformably to the articles, or that the power was properly exercised. So, if a deed recite anything derogatory to the title which is not subsequently explained, the abstract should be carried back far enough to explain or remove the doubt. A conveyance by one who is described as a devisee, or by one who is described as an heir-at-law, was considered by Preston not to be a good root of title (*p*), for, upon the true construction of the will, the grantor might not be the devisee, nor might he who was described as heir-at-law have been the heir. A recital of heirship ought to contain particulars of the pedigree in order to enable the purchaser to judge whether the facts constitute the person heir who is so alleged to be heir(*q*). And although, by the *Vendor and Purchaser Act* (*r*) the recital of facts, etc., more than twenty years old casts upon the purchaser the *onus* of proving their inaccuracy, the recitals must be recitals of facts and not of conclusions.

A deed by one who appears on the face of the deed to be a trustee or executor is not a good commencement; for it cannot be ascertained whether or not he has acted within his authority unless the instrument under which he acts is abstracted. It is a common though unsafe practice for solicitors who invest trust funds upon mortgage to describe

(*o*) Hayes Conv. 4th Ed. 442.
(*p*) Preston Abs. 5.
(*q*) See *Palmer* v. *Palmer*, L.R. 1 Q.B. 321.
(*r*) R.S.O. cap. 134.

the mortgagees in the mortgage deed as trustees. If in such a case it is disclosed that the mortgage money is held on tha trusts of a settlement, of which the mortgagees were not the original trustees, the purchaser will be entitled to proof that the mortgagees were appointed trustees of the settlement(*s*). A conveyance under the power of sale in such a mortgage is open to a double objection as a root of title—for it must be ascertained, first, that the trustees acted within their powers by lending on mortgage, which necessitates a perusal of tha instrument creating the trust, and, secondly, that they are the persona entitled to sell, and that tha power of sale was properly exercised. It is proper to recite that the persons who are in fact trustees are entitled to, and advance, the mortgage money on a joint account; and the purchaser, in such a case, and those claiming under him will not be obliged to look at the instrument creating the trust(*t*); and such recitals, being in common use amongst conveyancers(*u*) for the specified purpose, are not deemed to be misrepresentations of tha facts(*v*).

(ii) *More than 60 years.*

When the abstract should, and when it should not, be carried back heyond the sixty years has occasioned some controversy. Tha subject may he considered as follows:—

(1) When the abstract showa a good title for sixty years, and the vendor has older deeds in his possession.—There is little or no authority on thia but the opinions of conveyancers, but they seem to concur in the view that the documents need not be abstracted though they must be produced(*w*). If the purchaser desires to have them abstracted he must, apparently, bear the expense himself. The

(*s*) *Re Blaiberg & Abrahams*, L.R. (1899) 2 Ch. 340.
(*t*) *Re Harman & Uxbridge, etc. R. Co.*, 24 Ch. D. 725.
(*u*) *Powell* v. *Broadhurst*, L.R. (1901) 2 Ch. at p. 167.
(*v*) *Carritt* v. *R. & P. Adv. Co.*, 42 Ch. D. at p. 272.
(*w*) Dart V. & P. 6th Ed. p. 339; Hayes Conv. 4th Ed. 444; 1 Byth. & Jarm. 53.

vendor is under an obligation to deduce a good title for sixty years. It has been said there is no rule that a purchaser cannot requir a title to be shown for more than sixty years(*x*). But, on the other hand, it is clear that if the abstract shows a good title for sixty years it is sufficient. And the accident of the vendor having in his possession older deeds cannot make the abstract insufficient(*y*). Any evidence which the vendor has in his possession beyond the sixty years is of a negative character, *i.e.*, it may detract from his title; but he founds nothing upon it, and discharges himself from his obligation with respect to the abstract by showing a good title for sixty years(*z*). Inasmuch as the purchaser would be entitled to all the muniments of title upon completion of the contract, it follows that he should not be called upon to complete without inspection of all the vendors' documentary evidence (*a*). The vendor is therefore bound to exhibit to the purchaser deeds in his possession more than sixty years old, though they have not been, and may not require to be, abstracted. A contrary rule would enable the vendor to conceal evidence which might impeach his title until the completion of the purchase(*b*).

(2) When the abstract shows a good title for sixty years, and the vendor holds a covenant for the production of deeds not in his possession more than sixty years old.—In this case it is said that he cannot be compelled to produce them, unless there is something disclosed by the abstract which leads to the conclusion that they affect the modern title(*c*); and it follows that they need not be abstracted.

(3) When the abstract refers to deeds beyond the sixty years not in the vendor's possession.—The recital of a deed

(*x*) Hayes Conv. 4th Ed. 440.
(*y*) Hayes Conv. 4th Ed. 444.
(*z*) Ibid.
(*a*) Byth. & Jarm. by Sweet, 63.
(*b*) *Parr* v. *Lovegrove*, 4 Drew. 170; and see the note at the end of the case.
(*c*) Hayes Conv. 4th Ed. 443.

is constructive notice of its contents; but it does not follow that the vendor is bound to produce it. The question to be determined is whether its absence throws any reasonable doubt upon the title. "*Prima facie* it is to be presumed that the purchaser in the ancient conveyance had actual inspection of the recited deeds and was satisfied with their contents; and further, it is to be observed that it is not probable that a vendor would recite deeds which afforded evidence against his title." Unless there is something to repel these presumptions, the vendor need not produce deeds more than sixty years old not in his possession, though they are referred to in the abstract(*d*); nor can he be required to abstract them.

(4) When there is a reference in the abstract to something beyond the sixty years which is derogatory to the title.—In this case the abstract does not conform to the rule that the vendor must show a good title for sixty years. If anything appears upon the abstract to cast a doubt upon the title it must be carried back far enough to remove the doubt, if that can be done, and the evidence must be produced by the vendor whether it is in his possession or not(*e*); and on the sale of leasehold property without any condition protecting the vendor, he must produce and abstract the lease which is the root of his title though more than sixty years old(*f*).

(5) Where the register shows something which casts a doubt upon the sixty years title.—The registration of any instrument is *per se* notice to every person claiming any interest in the land subsequent to registration; and it is immaterial whether a search is actually made or not(*g*); the

(*d*) *Prosser* v. *Watts*, 6 Madd. 59; and see *Thompson* v. *Milliken*, 9 Gr. 359; *Moulton* v. *Edmonds*, 1 D.F. & J. 248, 249.

(*e*) Hayes Conv. 4th Ed. 443.

(*f*) *Frend* v. *Buckley*, L.R. 5 Q.B. 213.

(*g*) *Dominion L. & S. Society* v. *Kittridge*, 23 Gr. 635; *Trust & Loan Co.* v. *Shaw*, 16 Gr. 446.

purchaser is still presumed to have notice. If, then, there is anything appearing upon the register which is derogatory to the title as shown by the abstract the purchaser is in the same position as if, under the English law, he had acquired extraneous notice of the defect, and the abstract will be insufficient. If the circumstances justify it, the purchaser, it is conceived, could require the vendor to abstract the prior title in order to clear up the doubt.

(iii) *Less than 60 years; Bolton* v. *London School Board.*

The abstract may, as we have seen, commence at a point within the sixty years; for if the patent has been issued, or the title quieted, within that period, the abstract should commence with the patent or certificate of title.

In *Bolton* v. *London School Board*(*h*), it was held that a recital in a deed more than twenty years old that the vendor was seised in fee simple was sufficient evidence thereof under the Vendor and Purchaser Act, and that no prior abstract of title could be demanded except in so far as the recital should be proved to be inaccurate. It was argued that the recital of seisin in fee was a recital of a conclusion of law, but Malins, V.C., held that it was a recital of a fact or matter within the meaning of the Vendor and Purchaser Act. Wherever such recital occurs in the chain of title it will, if this decision be sound, be a good point of commencement though within the period of sixty years. The result will be to throw upon the purchaser the whole burden of investigating the prior title without any aid from the vendor except the production of deeds. But as such a recital is suficient proof of the facts recited only in so far as they are proved to be inaccurate(*i*), if the purchaser shows the inaccuracy of the recital the vendor would be bound to abstract the prior title, commencing with a good root.

(*h*) 7 Ch. D. 766; followed by Ferguson, J., in *Macklin* v. *Dowling*, 19 Ont. R. at p. 444; and see *Re Marsh & Earl Granville*, 24 Ch. D. 11.

(*i*) R.S.O. cap. 134, sec. 2, s-s. 1.

The soundness of the decision may however be questioned(*j*), although it was followed by Ferguson, J., in *Macklin* v. *Dowling*(*k*). The Vendor and Purchaser Act relates essentially to evidence, and allows a vendor to prove facts necessary to his title by recitals in deeds twenty years old instead of by extraneous proof of the facts recited. This assumes that the parties have arrived at a stage of the proceedings subsequent to the delivery of the abstract, that is to say, at a period at which the vendor is entitled to ask the purchaser to deliberate upon the sufficiency of the evidence adduced, and to make inquiries and disprove, if he can, the statements of his witnesses. It is, however, an established principle that the purchaser may require an abstract even though he may have agreed to accept the title(*l*), and the vendor does not discharge himself from his obligation by first delivering to the purchaser the evidence of his title namely his title deeds(*m*). If he may demand an abstract when he has agreed to accept the title, *a fortiori* ought he to be entitled to it when it is merely alleged that the title is proved by a recital. The decision in question would throw upon the purchaser the duty of examining all the deeds prior to the deed containing the recital, without an abstract, in order to determine whether or not the recital were true, and whether or not the abstract was sufficient.

The Act merely creates a new species of evidence. The recitals in deeds twenty years old are intended to take the place of other modes of proof. The result of the legislation is that where a vendor, but for the Act, would have been obliged to prove certain facts by declarations or certificates, he may now establish the same facts by means of recitals in his deeds twenty years old. And it is submitted that anything that could not have been proved by declarations or

(*j*) See 1 Byth. & Jarm. 253; 2 *Ibid.* 678.
(*k*) 19 Ont. R. at p. 444.
(*l*) *Morris* v. *Kearsley*, 2 Y. & C. Ex. 139.
(*m*) *Horne* v. *Wingfield*, 3 Sc. N.R. 340; Sug. 406.

certificates before the Act cannot now he proved by recitals in deeds though of the required age.

The validity of a title is a matter that is not susceptible of proof by any species of evidence save that afforded by the deeds themselves. No accumulation of sworn evidence, no opinion of counsel, as to the validity of a title would be sufficient to force the purchaser to accept it without an investigation of the deeds. Even when they have been destroyed the vendor must prove their previous existence and contents in order that the purchaser may exercise his own judgment upon the state of the title(*n*).

Under a condition inserted in a contract that recitals twenty years old shall be taken to be conclusive evidence of the facts recited, it is the opinion of good conveyancers that only those recitals are within this condition which set out the facts so as to enable the purchaser to judge for himself as to their legal effect or result, and that he would not be bound by a recital containing a mere conclusion, as, for example, a recital of heirship without disclosing the facts and circumstances upon which it is based(o). And by parity of reasoning (the provisions of the Vendor and Purchaser Act being merely general conditions of sale applicable to all contracts) it is submitted that recitals of conclusions, results or effects, without giving the facts on which they depend, ought not to be binding. And certainly the question of seisin in fee is not such a matter of fact, as distinguished from matter of law, as would be left to a jury.

The recital that a person is seised in fee simple is a recital of a conclusion of law mixed with infcrences of fact. Its truth cannot be ascertained without an examination of the deeds, and may wholly depend upon their construction, in which case it would be a pure question of law. If the

(*n*) *Bryant* v. *Busk*, 4 Russ. 1.

(*o*) 2 Byth. & Jar. 676; Dart V. & P. 6th Ed. 166. See also *Palmer* v. *Palmer*, L.R. 1 Q.B. 321.

purchaser would not he bound to accept tbe sworn evidence of the vendor upon the validity of the title, nor the opinion of counsel, neither should he be obliged to accept the statement contained in a recital which stands upon the same plane with other species of evidence.

3. *Contents of abstract.*

A point of commencement having been fixed upon, the abstract should show in chronological order every devolution of the estate by deed, will, or other instrument, or by inheritance, including all incumbrances, whether discharged or existing, but excluding leases which have expired by effluxion of time(*p*). A document recited in another document is not sufficiently abstracted by abstracting the reciting document. The purchaser is entitled to a statement of the effect of the recited instrument, and not merely a statement of what some other instrument recites as tbe effect of it; and therefore a material document recited in another must itself be abstracted in chief(*q*). It is to be borne in mind that it is for the vendor to state the facts connected with the title, and for the purchaser to judge of their materiality. And on an open contract the vendor must abstract at his own expense every deed forming part of the title, though he may not be in possession of the same(*r*).

(i) *Equitable interests.*

There may, however, be many documents connected with the title of which a purchaser need not be informed; for instance, declarations of trust or settlements which affect the beneficial ownership of lands or funds, the legal estate of which is in trustees by means of instruments upon which the trusts are not disclosed; and generally any documents

(*p*) Prid. Con. 17th Ed. 131, 132.
(*q*) *Re Stamford, etc., & Knight's Contract*, L. R. (1900) 1 Ch. 287.
(*r*) *Re Johnston & Tustin*, 30 Ch. D. 42.

creating equitable charges or interests(*s*). All documents dealing with the legal estate which have lost their priority or their efficacy for want of registration are innocuous if knowledge of them is withheld from the purchaser; and, therefore, as far as he is concerned, they need not be abstracted. But documents registered by persons having no apparent title form a cloud upon the title by reason of their registration, and should be abstracted.

Whether or not documents creating equitable charges or interests which have been satisfied should be abstracted has been questioned, Mr. Dart maintaining that all defunct equities may well be suppressed, though V. C. Wood held the contrary in *Drummond* v. *Tracey*(*t*). This case, however, has been overruled by *Re Ford & Hill*(*u*), in which the Court of Appeal held that the purchaser was not entitled to an answer to the following requisition:—"Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract?" And by the Registry Act(*v*), "no equitable lien, charge or interest affecting land shall be deemed valid in any Court in this Province, as against a registered instrument executed by the same party, his heirs or assigns;" and it is not desirable that the purchaser should be informed of them if existing(*w*). Mr. Dart formerly recommended a general requisition limited to any document, judgment or charge affecting the title or property, not noticed in the abstract, which *if remaining undisclosed* might prejudicially affect the pur-

(*s*) *Re Harman & Uxbridge, etc. R. Co.*, 24 Ch. D. 725; Prid. Conv. 17th Ed. 131, 132.

(*t*) Johns. 608.

(*u*) 10 Ch. D. 365.

(*v*) R.S.O. cap. 136, sec. 98.

(*w*) See further as to equitable interests, Chapter IV. sec. 4. *Agra Bank* v. *Barry*, L.R. 7 H.L. 135.

chaser(*x*). But since the decision in *Re Ford & Hill* it is no longer advised(*y*).

With respect to charges or incumbrances, if the purchaser has searched for them in the public offices and has found none, he is not obliged to inquire further, and will not be affected by those of which he has no notice. And it is to be observed that a vendor may truly answer the requisition in the negative, even though there be in existence unregistered incumbrances or charges on the land of which the purchaser is unaware. For, even if any such exist, they will not affect the purchaser *if undisclosed*, and therefore the vendor will not disclose them. It is quite possible, however, for a purchaser to be misled by failure to discover a registered instrument which has not been indexed, and whose existence may be well known to the vendor who withholds it; and the requisition, if unanswered, or untruly answered, would effectually bring the vendor or his solicitor within the terms of the Act about to be mentioned.

(ii) *Concealment of documents.*

By statute(*z*), if a vendor or mortgagor or his solicitor or agent conceals from the purchaser or mortgagee any settlement, deed, will, or other instrument material to the title, or any incumbrance, or falsifies any pedigree upon which the title depends, in order to induce him to accept the title offered or produced to him, with intent to defraud, he is liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under them for any loss sustained by them in consequence of the instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of the pedigree; and in estimating such

(*x*) Dart V. & P. 5th Ed. p. 450.
(*y*) Dart V. & P. 6th Ed. p. 516.
(*z*) R.S.O. cap. 119, sec. 39.

damages where the estate is recovered from such purchaser or mortgagee, or from those claiming under them, regard is to be had to any expenditure by them in improvements on the land. It is to be observed that it is seldom (if indeed it can ever happen) that the concealment of a document or an incumbrance can prejudicially affect a careful purchaser, the policy of our registry laws being to avoid all instruments which are unregistered, and of which there is no notice, as against the registered title; and documents so concealed would not be material to the title as far as the purchaser is concerned. But the registry laws afford no protection against such a fraud as the falsification of a pedigree, and so, in order to cover such a case, the general requisition should extend to any omission, matter or thing affecting the title or the property not noticed by the abstract. In addition to being liable in an action for damages the offender in such a case is guilty of an indictable offence and may be punished by fine or imprisonment or by both(*a*). The prosecution cannot be commenced without the consent of the Attorney-General, given after previous notice to the person intended to be prosecuted of the application for leave to prosecute(*b*); and a written demand for an abstract must have been served before the completion of the purchase or mortgage(*c*). It is probable that the Act does not apply to the concealment of documents prior to the title agreed to be deduced(*d*).

What effect the Vendor and Purchaser Act(*e*) may have upon the enactments just referred to may give rise to serious questions. The Act materially lessens the obligations of the vendor as to proof of the title deduced, and allows him to remain passive while it casts upon the purchaser the bur-

(*a*) *The Criminal Code, 1892*, sec. 370; see also s. 353.
(*b*) *Ibid.* sec. 548.
(*c*) *Ibid.* sec. 370.
(*d*) *Smith* v. *Robinson*, 13 Ch. D. 148.
(*e*) R.S.O. cap. 134.

den of disproving many things which the vendor but for the Act would have been obliged to establish. It is not an uncommon condition of a sale of land that certain recitals shall be deemed to be concluaive evidence of the matters recited, and in other ways the liability of the vendor is often restricted. No objection has ever been urged to such conditions, as far as the writer is aware, on account of the Act in question, though there are many cases in which sales have been set aside for misrepresentations in the particulars aud conditions. If then the vendor may limit his responsibility by contract, may not the Vendor and Purchaser Act have a like effect?

(iii) *Perfect abstract.*

When the abstract, commencing with a proper root, and continuing the history of the title down to the contract, showa that the vendor either is, or will be, able, at or before the time fixed for completion, to convey to the purchaser the legal and equitable estates in the land, even although the absence of parties or other circumstances may considerably delay the conveyance, it is said to be a perfect abstract(*f*). An abstract may be sufficient for the purpose of delivery if it refers to all the documents in the possession or control of the vendor at the time of its delivery(*g*). If the abstract is perfect on its face but omits a material deed it is insufficient(*h*). And as the purchaser is entitled to have everything displayed on the abstract which is material in forming a judgment upon the title, he is entitled to assume that there is nothing in the deeds abstracted which is material to the title but what appears on the abstract;

(*f*) Dav. Conv. 4th Ed. 525. And see *Lewin* v. *Guest*, 1 Russ. 325; *Lord Braybrook* v. *Inskip*, 8 Ves. 436; *McManus* v. *Little*, 3 Ch. Ch. 263; *Avarne* v. *Brown*, 14 Sim. 303.

(*g*) *Blackburn* v. *Smith*, 2 Ex. 783; *Want* v. *Stallibrass*, L.R. 8 Ex. at p. 184; and see *Pryce-Jones* v. *Williams*, L.R. (1902) 2 Ch. at p. 521.

(*h*) *Steer* v. *Crowley*, 11 W.R. 861. And see *Re Johnson & Tustin*, 30 Ch. D. 42.

and if anything material is omitted the abstract is insufficient(*i*).

It is believed that no case is reported in Ontario in which the question of the sufficiency or insufficiency of an abstract has been determined. But the writer ventures the opinion that an abstract which exhibits the title as registered (including all instruments registered against the *land* whether properly part of the title or not) would be a sufficient and perfect abstract, if the registered title shows that the vendor can convey or procure the conveyance of the legal and equitable estates to the purchaser, unless indeed the purchaser is aware of unregistered instruments or other matters affecting the title. In *Laird* v. *Paton* (*j*) (decided since the first edition of this work was published in which the above opinion was ventured) it appeared that one of the deeds in the chain of title was not registered before the action was brought for specific performance. On the ordinary reference as to title the Master reported that a good title was not shown before the registration of the deed, on account of the want of registration, and on appeal this was affirmed. It follows, therefore, that an abstract is not perfect if there are extant unregistered instrumenta essential to the title which ought to be registered, whether it shows them on its face or not.

(iv) *Matters of title and matters of conveyance.*

The design of the abstract is to show the title to be in the vendor, or his ability to procure a conveyance as a matter of right, and to exhibit thereon all those documents and matters which he must afterwards prove in order to establish his right to convey, or procure the land to be conveyed, to the purchaser. It will be convenient at this point then, to call attention to the difference between matters of title

(*i*) *Burnaby* v. *Eq. Rev. Int. Soc'y*, 54 L.J. Ch. 466.
(*j*) 7 Ont. R. 137.

and matters of conveyance. Where the legal estate is outstanding, but the vendor, having the equitable estate, has the right to call it in, an abstract disclosing this shows a good title(*k*); even though it will involve expense in getting the conveyance on account of the circumstances or position of the holder(*l*). It is a mere question of obtaining a conveyance and not an objection to the title; and it is so also with regard to incumbrances though they may in fact exceed the amount of the purchase money(*m*). But the abstract must show where the legal estate is, otherwise it will be an objection to the title(*n*). And where a loan company advanced the money of a lender as her agent and took a mortgage, and it was afterwards assigned by a private Act of Parliament, and the mortgagor released his equity of redemption to the assignee, it was held that the lender, not being named in the Act was not bound, but she had a title to the mortgage and would, if she adopted the act of her agent in taking a release of the equity of redemption, have a title to the land; consequently, an objection to the title of the assignee, though holding a release of the equity of redemption, was an objection to title and not to conveyance(o).

But if the person holding the legal estate holds it subject to duties to be performed by him, it is an objection to the title. So, where a debtor executed a conveyance to an assignee for creditors and was afterwards declared a bankrupt, but this had not the effect of divesting the assignee of the property, it was held that the assignees in bankruptcy could not make a good title. Lord Langdale, M.R., in

(*k*) *Avarne* v. *Brown*, 14 Sim. 303; *Berkeley* v. *Dash*, 16 Ves. 380; *Jumpson* v. *Pitchers*, 1 Coll. 23; *Savory* v. *Underwood*, 23 L.T.R. 141; *Robinson* v. *Harris*, 21 Ont. R. 43.

(*l*) *Avarne* v. *Brown*, 14 Sim. at p. 309.

(*m*) *Townsend* v. *Champerdown*, 1 Y. & J. 449; Dart V. & P. 6th Ed. 324, 1181.

(*n*) *Wynne* v. *Griffith*, 1 Russ. 283, 289.

(*o*) *Macklin* v. *Dowling*, 19 Ont. R. 441.

distinguishing between matters of conveyance and matters of title, said, "I apprehend a question of conveyance arises in this way. Where an interest is vested in a party to secure a right, the satisfaction of which right entitles the party who has sold the estate to call for a conveyance, then the court considers it a question of conveyance only, but I think it has never gone further than that. If the estate be vested in a person, not for the purpose of securing a right, but for the purpose of enabling that person to perform a duty to others, then until that duty has been performed there can be no right to call for a conveyance"(*p*). In this case, it appeared on Further Directions that the assignee would concur in the conveyance, and it was held that a good title could be made(*q*).

Where land devolved upon the personal representative under *The Devolution of Estates Act* (before the amendment by which it shifts into the beneficiaries without conveyance), and the debts were all paid, thus entitling the beneficiaries to call for a conveyance, on a sale by the beneficiaries, that being shown, the question was said to be one of conveyance merely(*r*); but in the absence of any information as to payment of debts, the objection that the legal estate was outstanding in the personal representative was said to be an objection to title(*s*). The determination of this point was not essential to the disposition of *Martin* v. *Magee*, as the refusal to procure a proper conveyance was sufficient to determine the plaintiff's right; but it would seem that the ability of the personal representative to make a sale to an innocent purchaser, and convey to him the whole legal and beneficial interests, and give a valid discharge for the purchase money, would indicate that the

(*p*) *Sidebotham* v. *Barrington*, 3 Beav. 524, 528.
(*q*) *Ibid.* 4 Beav. 110.
(*r*) *Per* Osler, J.A., *Martin* v. *Magee*, 18 App. R. at p. 389.
(*s*) *Per* Maclennan, J.A., *Martin* v. *Magee*, *Ibid.*, at p. 398.

objection for want of a conveyance from him was a question of title(*t*).

Since the amendments of the Act, by which the powers of the personal representative are limited, and the concurrence of the beneficiaries or of the Official Guardian is required in order to enable him to sell(*tt*), if a beneficiary should sell, after payment of debts, and before vesting in him, the objection that the personal representative should join would probably be one of conveyance only.

Where it is the owner of the legal estate who sells, he must be able also to convey the beneficial interest in the land and give a discharge for the purchase money. And if he cannot do so, the objection goes to the title, and not merely to the conveyance(*u*).

A title is first *shown* when the abstract states all the matters which if proved make a good title. A title is *made* when these matters are proved(*v*).

Upon receiving the abstract the purchaser's solicitor should carefully peruse it, noting as he reads all matters which require explanation. He should then examine the title as registered, either personally searching the registry or procuring a registrar's abstract from the Crown, or from a certificate under the Quieting Titles Act, if there be one. He will then be in a position to accept or reject the abstract, or if satisfied with the abstract to make requisitions upon the title.

4. *Delivery of abstract—Serving objections.*

The periods of time within which the abstract is to be delivered, and the objections or requisitions served, are the

(*t*) See *Forbes* v. *Peacock*, 12 Sim. at p. 548.

(*tt*) R.S.O. cap. 129, secs. 16, 19, 20.

(*u*) *Forbes* v. *Peacock*, 12 Sim. 528; *Page* v. *Adam*, 4 Beav. 269, 285.

(*v*) *Parr* v. *Lovegrove*, 4 Drew. 170; *Granger* v. *Latham*, 14 Gr. 209; *Laird* v. *Paton*, 7 Ont. R. 137.

subject of contract, and may be defined by the conditions of sale. If no time is fixed for delivery of the abstract and delay occurs, the purchaser may by a notice limit the time within which the abstract is to be delivered, failing which he will not be bound, and if not delivered within that time he will be free from the contract(*vv*). If a day is fixed for delivering the abstract, and an imperfect or improper abstract, or no abstract, be delivered upon that day, time will not run against the purchaser for serving his objections or requisitions(*w*). But if a perfect abstract be delivered, the purchaser should serve his objections within the time specified for so doing. A condition that objections must be made within a specified time from the delivery of the abstract means the delivery of a perfect abstract(*x*).

(i) *Practice between parties.*

Unless expressly stipulated, the times for the delivery of the abstract and serving objections are not of the essence of the contract; and the mere mention of the dates will not suffice to make them of its essence(*y*). And if the delivery of the abstract be unavoidably prevented the vendor will not thereby forfeit his right to enforce the contract(*z*), even though by the conditions of sale the time for its delivery is made of the essence of the contract(*a*). Or if it appears to the Court that the dates are not material to the contract it may be enforced notwithstanding delay(*b*).

But where one party has not observed his part of the contract he cannot insist upon its strict performance by the

(*vv*) *Compton* v. *Ragley*, L.R. (1892) 1 Ch. 313.

(*w*) Dart V. & P. 6th Ed. p. 346.

(*x*) *Rhicklow* v. *Laws*, 2 Ha. 40; *Hobson* v. *Bell*, 2 Beav. 17; *Oakden* v. *Pike*, 11 Jur. N.S. 666.

(*y*) *Roberts* v. *Berry*, 3 D.M. & G. 284, 292; *Boehm* v. *Wood*, 1 J. & W. 419.

(*z*) *Roberts* v. *Berry*, supra; *Lloyd* v. *Collett*, 4 Bro. C.C. 469; S.C. 4 Ves. 690 *n*.

(*a*) *Upperton* v. *Nicholson*, 6 Ch. App. 443.

(*b*) *Wynn* v. *Morgan*, 7 Ves. 202; *Seton* v. *Slade*, 7 Ves. 265.

other(*c*). So, where a vendor failed to deliver an abstract within the time limited by the contract (the time for the delivery being of the essence of the contract), the purchaser gave notice that he would not complete the purchase; the vendor subsequently delivered an abstract, and the purchaser still refusing, he brought an action for specific performance. The action was dismissed(*d*). But the delay of one party, or his non-observance of the terms of the contract, may be waived by the other party(*e*).

If no dates are fixed by the contract, or if the parties have so dealt with each other that the terms of the contract with respect to the dates have been waived, then the parties must be governed by the general principles of the Court(*f*).

The conduct of the parties and their dealings must determine their respective rights in every case(*g*).

In practice, a period of ten days or a fortnight is usually given in matters not before a Master for making requisitions on title, either by the conditions of sale or by a notice served upon the purchaser at the time of delivering the abstract. The mere service of such a notice upon the purchaser who is not bound by the contract to make his objections within a specified time cannot of course limit his right; but as the Court would regard the time fixed by the rules of Court for making objections as a reasonable time, it would not be safe for the purchaser wilfully to disregard a notice which specified an equal or greater time for serving his objections. But, notwithstanding a condition for making objections within a certain time and failure to do so, the purchaser may still show that the vendor has a bad or

(*c*) *Upperton* v. *Nicholson*, 6 Ch. App. 443.

(*d*) *Venn* v. *Cattel*, W.N. (1872) p. 183; *Compton* v. *Bagley*, L.R. (1892) 1 Ch. 313.

(*e*) *Pincke* v. *Curteis*, 4 Bro. C.C. 339; *Cutts* v. *Thodey*, 13 Sim. 206; *Eads* v. *Williams*, 4 D.M. & G. 674; *Seton* v. *Slade*, 7 Ves. 265.

(*f*) *Upperton* v. *Nicholson*, 6 Ch. App. 443.

(*g*) See *ante* p. 23, *et seq.*

doubtful title, and may refuse to complete the purchase(*h*). The objection, however, must go to the root of the title, and will not be allowed unless it does(*i*).

But if the contract is rescinded on account of the purchaser's default, he cannot afterwards recover his deposit by showing that the vendor had in fact a bad title; nor could he do so after conveyance(*j*). In judicial sales the Court is more generous in dealing in these respects with a purchaser than on a sale by private contract(*k*).

(ii) *Practice in Master's office.*

In all cases of reference to a Master as to title, the practice is laid down by the consolidated rules of practice(*l*). The vendor is to deliver an abstract forthwith on demand to the purchaser, who must serve objections within seven days or he will be deemed to have accepted the abstract as sufficient. If he serve one or more objections the abstract is open as to these, but he is to be deemed to have accepted it as sufficient in other respects(*m*). And the Master has no power, after the time has expired for serving objections, to allow the purchaser to make other objections; though on a proper case being made for it leave may be granted by a Judge(*n*), unless the reference was taken upon a judgment referring particular objections only(*o*). If the purchaser

(*h*) *Wardle* v. *Dickson*, 5 Jur. N.S. 345; *Want* v. *Stallibrass*, L.R. 8 Ex. 175; *Warren* v. *Richardson*, You. 1; *Brown* v. *Pears*, 12 P.R. 396; *Nixon* v. *Armstrong*, 22 Ont. R. 542; 21 App. R. 183; 25 S.C.R. 263.

(*i*) *Re Thompson & Curzon*, 52 L.T.R. 498. *Re National Prov. Bank of England & Marsh*, L.R. (1895) 1 Ch. 190; *Armstrong* v. *Nixon*, 25 S.C.R. 263; *Pryce-Jones* v. *Williams*, L.R. (1902) 2 Ch. 517. See *Imp. Bank* v. *Metcalfe*, 11 Ont. R. 467, where, on a reference which was said to have been taken on objections delivered before action, further objections in the Master's office were not allowed to be taken.

(*j*) *Soper* v. *Arnold*, 37 Ch.D. 96; affirmed H.L., W.N. (1889) p. 186.

(*k*) *Else* v. *Else*, L.R. 13 Eq. 196.

(*l*) Rules 735 *et seq.*

(*m*) *McManus* v. *Little*, 3 Ch. Ch. at p. 267; and see *Bank of Montreal* v. *Fox*, 6 P.R. 217.

(*n*) *Clark* v. *Langley*, 10 P.R. 208.

(*o*) *Imp. Bank* v. *Metcalfe*, 11 Ont. R. 467.

serves objections the vendor is to answer them within fourteen days. As soon as the purchaser accepts the abstract the vendor proceeds to verify it. The purchaser may then serve objections to the proof; and the same practice prevails again (*p*).

The whole practice under these rules is very succinctly stated in *McManus* v. *Little*(*q*), and is summed up as follows:—"Under these orders, then, as I construe them, the Master has to determine according to circumstances and upon the particular points in question, (1) whether the abstract delivered is complete or not, and thereupon allow or disallow all objections raised and unsettled out of court as to its sufficiency in form; (2) if he disallows the objections he is to certify that the abstract is perfect (i.e., as against the objections), and if the seven days have elapsed, then the purchaser cannot object on any ground to the abstract unless he successfully appeals from the decision, or unless he has also objected to the title manifested in the abstract; (3) if the Master allows the objections, then he is at the purchaser's request to require the vendor to make the abstract as perfect as he can, and when that is done he is to certify to that effect, and then a new point of time is given for making objections to the new and complete abstract; (4) when a proper abstract is delivered he is to determine the questions raised upon the objections as to title or conveyancing in respect of it, and to allow or disallow them (in such case not certifying on the abstract at all, as to its perfectness, which, as I take it, belongs to a prior stage of enquiry)." It appears that the Master instead of reporting against the title upon objections to the title should "allow" or "disallow" them, and an appeal should be taken upon the specific objections(*r*).

(*p*) Rules 739, 740.
(*q*) 3 Ch. Ch. 263.
(*r*) *Cockenour* v. *Bullock*, 12 Gr. 73.

CHAPTER IV.

REGISTRATION.

1. *Summary of Registry Acts.*
2. *What constitutes registration.*
3. *Leaseholds.*
4. *Equitable interests.*
   (i) *Tacking.*
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5. *Registrar's Abstract.*
6. *Right to inspect books.*
7. *The search.*
8. *Notice; priorities.*
   (i) *Registered and subsequent claimants.*
   (ii) *Claimants under competing instruments.*
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   (iii) *Registered owners and equitable interests.*
9. *Offences in connection with registration.*

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1. *Summary of Registry Acts.*

The abstract having been carefully perused, the purchaser's solicitor should, as we have said, search the registered title. A vendor cannot make a good title unless all the deeds are registered(*s*). A knowledge of the registry laws is therefore indispensable.

(*s*) *Kitchen* v. *Murray*, 16 C.P. 69; *Brady* v. *Walls*, 17 Gr. 703; *Laird* v. *Paton*, 7 Ont. R. 137.

The first Registry Act was passed in 1795 (*t*), and though there were various minor enactments in succeeding years, and a consolidation of the law in 1846(*u*), there was no change in the policy of the law until 1851(*v*). During this period registration was not in terms made imperative, but might be had at the election of the parties interested (*w*). The statutes had no operation until the patent from the Crown had issued, nor did they apply until after a memorial of some instrument had been registered. Before such a registration the title was an unregistered title; upon such a registration, it became a registered title, and all conveyances then had to be registered(*x*). The omission to register an instrument had the effect of avoiding it as against a subsequent purchaser of the same lands(*y*). Registration was, in consequence, rarely omitted, and the register was so much looked upon as exhibiting the true state of the title that Spragge, V.C., said it was no doubt the intention of the legislature that it should do so(*z*).

Registration, under these Acts, was not *per se* notice(*a*); and there was no express declaration that deeds should take effect by priority of registration. The Acts were intended to settle priorities, not between registered conveyances themselves, nor between unregistered conveyances themselves, but between registered and unregistered conveyances of the same land. The intention of the Act of Geo. III., as expressed in the preamble, was that when any conveyance of land was made, "a memorial of such transfer

(*t*) 35 Geo. III. cap. 5.

(*u*) 9 Vict. cap. 34.

(*v*) 13 & 14 Vict. cap. 63.

(*w*) *Jones* v. *Cowden*, 34 U.C.R. 345.

(*x*) *Jones* v. *Cowden*, 34 U.C.R. at pp. 352, 353; *Doe d. Hennessy* v. *Myers*, 2 O.S. 431; *Doe d. Aikins* v. *Atkinson*, 4 O.S. 140; *Neeson* v. *Eastwood*, 4 U.C.R. 271; *Doe d. Ellis* v. *McGill*, 8 U.C.R. 224; *Scott* v. *McLeod*, 14 U.C.R. 574; *Doe d. Shibley* v. *Waldron*, 2 C.P. 189.

(*y*) *Boucher* v. *Smith*, 9 Gr. 352.

(*z*) *Waters* v. *Slade*, 2 Gr. at p. 485.

(*a*) *Street* v. *Commercial Bank*, 1 Gr. 169.

or alienatiou shall he made for the better securing and more perfect knowledge of the same." The Act provided a security against purchasers being defeated by prior secret conveyances, by offering to all persons the opportunity of registering their deeds, under peril of their being considered fraudulent, if unregistered, as against subsequent registered conveyances. "Our preamble," said Robinson, C.J., "reaches no further, as I see, than an explanatiou of the expediency of this provision. I mean it does not obviously do so. It better secures the mortgage or alienation, certainly, if by placing it on record it is made safe against any prior secret conveyance which might otherwise have defeated it, and it tends to give '*more perfect knowledge of the same*.' without doubt, because all persons going to the office to search, may there gain knowledge of it"(*b*); and such was the force of the Act that in a Court of law, at least, the registration of a conveyance protected the person claiming under it against a prior unregistered conveyance of the same land of which he might have had full knowledge and notice(*c*).

The Act of 13 & 14 Vict. cap. 63, abolished the distinction between registered and unregistered titles(*d*), by enacting that after the grant from the Crown every deed unregistered should be adjudged fraudulent and void as against a subsequent registered deed made for value, and in that sense made registration compulsory. It settled priorities between registered conveyances, by declaring that they should be taken in Law and Equity according to the priority of the time of registering, and between unregistered conveyances, by declaring that they should take according to the priority of time of execution(*e*). By section

(*b*) *Street* v. *Commercial Bank*, 1 Gr. at p. 192.
(*c*) *Doe d. Major* v. *Reynolds*, 2 U.C.R. 319.
(*d*) *Jones* v. *Cowden*, 34 U.C.R. 345.
(*e*) Sec. 4.

8, registration was first made notice in Equity to all persons claiming any interest in the land subsequent to the registration(*f*).

Upon the consolidation of the Statutes in 1859, the various enactments above referred to, from 9 Viet. cap. 34, were embodied in one Act(*g*), with a few verbal alterations, and the law remained unchanged until 1865, when 29 Viet. cap. 24 was passed.

Up to this period the policy of the law had been to avoid disclosures to the public as to titles, but to give to intending purchasers or mortgagees such information as to the title as could be given consistently with this policy(*h*). The Act of 1865 made an important change in this respect by altering the method of registration; for while this had formerly been effected by means of memorials, it was provided by this Act that a duplicate original should be deposited in the registry office and transcribed at length in the books. Thus, the whole title is spread upon the books and is open to the public view.

By the same Act, the law as to notice by registration was continued unchanged; but the enactment that a prior unregistered instrument should be adjudged fraudulent and void as against a subsequent registered deed made for value, was qualified by saving the unregistered instrument if the subsequent purchaser had actual notice of it before registration of his deed.

In 1867 the Act 31 Viet. cap. 20 was passed, which superseded former enactments. No change, however, was made in the policy of the law. The result of this legislation

(*f*) *Reid* v. *Whitehead*, 10 Gr. at p. 452; *Boucher* v. *Smith*, 9 Gr. 352, 354.

(*g*) C.S.U.C. cap. 89.

(*h*) *Per* Strong, V. C., in *Lindsey* v. *City of Toronto*, 25 C.P. 345; *Macnamara* v. *McLay*, 8 App. R. 322.

is thus summarized by Hagarty, C.J., in *Millar* v. *Smith*(*i*):—

"1st. Priority of registration shall prevail.

2nd. But twelve months shall be allowed for registration of wills.

3rd. Registration shall in Equity be notice.

4th. Priority of registration shall in all cases prevail, except as against actual notice.

5th. Equitable lieus and charges shall not prevail in any Court against a registered instrument."

It will be noticed that though section 64 of the Act of 1865 (section 66 of the Act of 1867) made registration notice in Equity only, section 65 (section 67 of the Act of 1867) declared that priority of registration should in all cases prevail, except as against actual notice. The combined effect of these two sections was said by Richards, C.J., to have been to limit the power of a Court of Equity to give relief to cases of actual notice only, and not to extend to courts of law the power to relieve in cases of notice(*j*). But the Court of Common Pleas in *Millar* v. *Smith* (*k*), were of opinion that actual notice, under this enactment, was available in Courts of Law as well as in Equity to save the unregistered instrument. The Act, 36 Vict. cap. 17, sec. 4, amended section 66 of the Act of 1867 by making registration notice both at Law and in Equity.

No change has been made in this law on any of the revisions of the statutes. The policy of this legislation is to make the registration of an instrument *per se* notice to all persons subsequently dealing with the land; it is immaterial whether a search is actually made or not(*l*), for the statute proceeds upon this, that a party acquiring land

(*i*) 23 C.P. at p. 52.
(*j*) *Bondy* v. *Fox*, 29 U.C.R. at p. 72.
(*k*) 23 C.P. 47.
(*l*) *Dominion L. & S. Society* v. *Kittridge*, 23 Gr. 635.

ought to see whether there is anything registered against it, and he is in every case assumed to have searched whether he has actually done so or not(*m*).

The Act, 9 Vict. cap. 34, sec. 8, declared that a memorial should contain the date of the conveyance, the names and additions of the parties and witnesses, and their places of abode, and should mention the lands. The neglect to observe the requirements of this enactment rendered the registration defective and void. The omission of the occupation of a witness from the body of the memorial(*n*), the omission of the christian name of the mortgagor's wife from the memorial(o), and the insufficient description of the premises(*p*) were each held fatal, and the registration, in consequence, defective and void. But where an affidavit of execution did not state the place of execution it was held that it did not vitiate the registration, because the defect was not patent on the face of the instrument as recorded(*q*).

Defective registration was not notice(*r*). The doctrine of defective registration is now abolished, but it is the duty of the Registrar, notwithstanding this, not to register any instrument except on such proof as is required by the Act(*s*). Where, however, an instrument is in fact registered, whether proof of registration is properly made or not, it constitutes notice under the Act to persons subsequently dealing with the land(*t*). And where two instru-

(*m*) *Trust & Loan Co.* v. *Shaw*, 16 Gr. 446. See *Abell* v. *Morrison*, 19 Ont. R. 669, and *postea*, p. 87.

(*n*) *Robson* v. *Waddell*, 24 U.C.R. 574.

(*o*) *Boucher* v. *Smith*, 9 Gr. 347.

(*p*) *Read* v. *Whitehead*, 10 Gr. 446.

(*q*) *Magrath* v. *Todd*, 26 U.C.R. 87.

(*r*) *Boucher* v. *Smith*, 9 Gr. 347; *Read* v. *Whitehead*, 19 Gr. 446.

(*s*) *The Registry Act*, R.S.O. cap. 136, secs. 44, 84, 92, 93, 114, 116. And see *Stoddart* v. *Stoddart*, 39 U.C.R. 204. See also sec. 43 as to registration of documents given as security for goods sold to the person creating the charge.

(*t*) *Rooker* v. *Hoofstetter*, 26 S.C.R. 41.

ments were attached, and one of them only was proved for registration, but both were entered in the book, it was held that notice was given of both(*u*).

2. *What constitutes registration.*

Before the amending section 90 of *The Registry Act*(*v*), some difficulty was experienced in ascertaining what constituted regiatration. The duties of a Registrar in registering an instrument were thus defined by Harrison, C.J., in *Lawrie* v. *Rathbun*(*w*):—

"1. Enter the instrument in the registry book in the order in which it is received. 2. File the same with the affidavit of execution. 3. Endorse a certificate on the instrument. 4. Mention in the certificate the certain year, month, day, hour and minute in which said instrument *is entered and registered,* expressing also in what book the same has been entered and the number of the registration. These duties are of two classes: Those that relate to the registry, and those which are to follow registration, and are designed to evidence it. The first two requisites which I have mentioned strictly relate to the former class of duties, and are paramount; the last three to the latter class of duties, and are subordinate. In addition to these last-mentioned duties, there are duties of a still more subordinate character mentioned in the Act. Among these latter I class the duty to keep an alphabetical index and make entries therein. The object of the index is plain. It presupposes registration, and is designed to facilitate reference to the registration. It would be trifling with common sense to hold that the omission of such a duty avoids the registration." And again, "If the instrument be received by the registrar and entered in the register book and filed in the office, it is to be deemed registered, although there may be some defect in

(*u*) *Armstrong* v. *Lye*, 27 Ont. R. 511; 24 App. R. 543.
(*v*) R.S.O. cap. 136, sec. 96.
(*w*) 38 U.C.R. at p. 261.

the affidavit or other proof for registry. * * So, I think, on the same principle, the instrument must be deemed registered, although the Registrar or his deputy afterwards omit to index it in the alphabetical index"(*x*).

The remarks of the learned Chief Justice are confined to the provisions of section 66 of the Registry Act, in which are detailed the duties of the Registrar upon production to him of the original instrument. Since that judgment was delivered the duties of the Registrar in registering an instrument have been increased by section 36 of the present Act as amended, which requires him on production of the instrument to make an entry thereof in the abstract and alphabetical index books, and there are other sections of the Act also, apart from section 96, which have an important bearing upon the question.

Section 60 declares that "Unless where otherwise provided every instrument that may be registered under this Act shall be registered by the deposit of the original instrument or by the deposit of a duplicate or other original part thereof, with all necessary affidavits, and the same shall be registered at full length, including every certificate and affidavit, excepting certificates by the Registrar, accompanying the same, *upon and by* the delivery to the Registrar of the original instrument, when but one is executed, or when such instrument is in two or more original parts upon and by delivery of one of such parts."

Section 66 directs the Registrar to enter the instrument in the book in the order in which it is received, to file the same with an affidavit of execution, and to endorse thereon a certificate in which shall be mentioned the certain year, month, day, hour and minute, in which such instrument is *entered and registered*, and which shall also express in what book the instrument *has been entered*, and the number of registration.

(*x*) The point in issue was whether the Registar's omission of the instrument from the *abstract* index postponed the instrument. The reference to the *alphabetical* index is apparently an error in reporting.

Section 36 requires the Registrar to keep an abstract index book in which every instrument registered shall be entered "in addition to all entries by law required."

Adopting the obvious division of the Registrar's duties into those which pertain to registry, and those which are designed to evidence it, we must make a further division of the first class into those which are essential to complete registration, and those which are not essential, but for omission or breach of which an action will lie. The question is thus narrowed down to the consideration of whether delivery to the Registrar is sufficient, or whether something additional is to be done by the Registrar before registration is complete.

Under the sub-heading, "Manner of Registering" which in the revision of 1877 had a still further sub-division under the heading "How various instruments are to be registered," we find that Crown grants are to be registered by producing to the Registrar the grant or an exemplification with a sworn copy; and the copy is to be filed(*y*). Orders in Council are to be registered by the deposit of a certified copy of the order(*z*). "Every will shall be registered at full length by the production of the original will and the deposit of a copy"(*a*). Letters of administration may be registered in the same manner as probates of wills(*b*). Municipal by-laws may be registered; and "for the purpose of registration a duplicate original of such by-law shall be made out, certified under the hand of the clerk and the seal of the municipality, and shall be registered without any further proof"(*c*). If the question depended upon these sections of the Act it might reasonably be argued that the deposit of the instrument was sufficient, and that upon the deposit the party registering would be entitled to evidence

(*y*) Sec. 68.
(*z*) Sec. 69.
(*a*) Sec. 70.
(*b*) Sec. 71.
(*c*) Sec. 86.

of registration. Whatever may be the true interpretation of these clauses, it is certain that in practice Crown grants are never, while wills are always, entered in full in the books. Yet both stand in the same position under the words of the Act. But little reliance can be placed upon these clauses in striving for a solution of the question, for they in fact refer to the preparation for registry of various peculiar instruments of which the originals cannot be parted with, and of which duplicate originals are never made. Other duties than the mere receipt of these documents are to be performed by the Registrar, and we must still look to the other and more general clauses to ascertain whether the performance of these duties is essential to complete registration.

Section 60 is the only section of the Act which approaches a definition of registration, but it is most ambiguous. The expression "upon and by" is misleading. If, instead of using the expression "upon and by," the word "upon" had alone been used, the section would have been directory, merely requiring the Registrar to register, *i.e.*, transcribe or enter the instrument at full length when produced, omitting his own certificate. The use of the expression "upon and by the delivery to the Registrar" imports that, when the act of delivery is complete, thereupon and thereby registration is effected. But this construction cannot with certainty be placed on the clause, inasmuch as it declares that the instrument shall be registered "at full length, including every certificate and affidavit, excepting certificates by the Registrar, accompanying the same," which clearly imports transcribing or entering the instrument at full length in the book upon delivery.

If we reject altogether the signification of the word "by" in this clause, we have left a mere direction to the Registrar to enter the instrument at full length. This direction is repeated in section 66, and some additional duties

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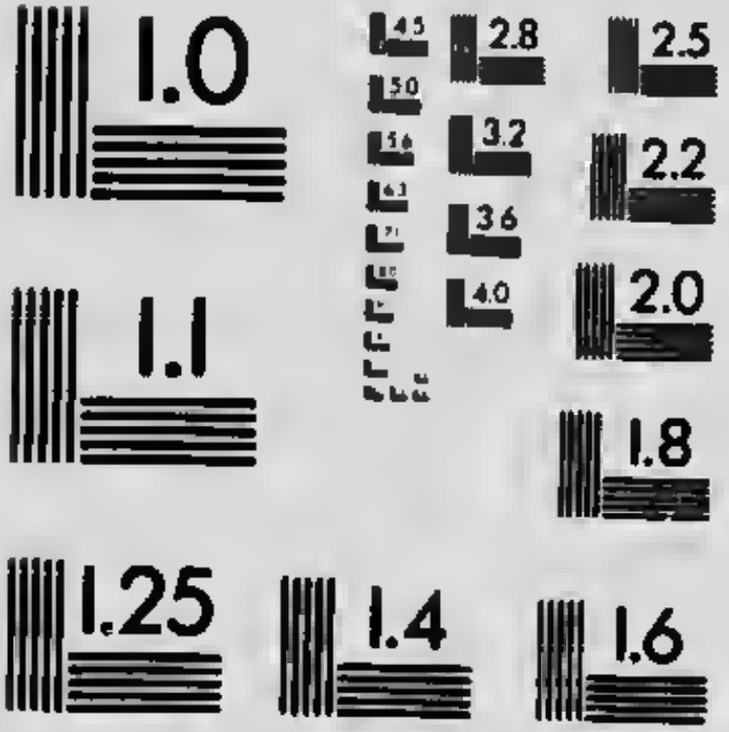

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are required, by the same section, to be performed. Section 36, as we have seen, directs the Registrar to enter in the abstract index the particulars of the instrument and its registration, "in addition to all entries by law required." All the duties required by sections 36, 60 and 66 stand upon the same footing. As far as the words of the statute are concerned, one is as important as another. The classification of these duties into those that relate to registry and those that are designed to evidence it, is one that is so obvious that it forces itself upon us; and we are thereby enabled to reject, as not being essential to registration, those acts which are merely intended to evidence it. But this classification leaves all the duties relative to registry, *i.e.*, entry at full length, filing and indexing, classed together as duties of equal importance and essential to registration, or else it is left to judicial discretion to determine which are essential and which are not.

According to Harrison, C.J., the entry at full length and filing are absolutely necessary; and since the recent Act(*d*), the entries in the abstract and alphabetical index books are also necessary. The duty of entering the particulars in the abstract index was before this Act said not to be essential, for it presupposed registration. That was not, however, an inevitable rendering of the Act. Section 32 of the old Act, which required entry in the abstract index, did not presuppose either filing or entry at full length, unless they are included in the signification of the word "registration" as used in that clause. But we cannot concede that point when the very question for determination is the meaning of the word "registration." And as it is the first duty to be performed under the Act as amended, it manifestly does not presuppose them now. In order that the Registrar may make the entries required by section 36, two things must have been determined, viz., the registration number of the

(*d*) 52 Vict. cap. 19, sec. 5, sub-sec. 4. Now sec. 66.

instrument and the date of its registration. It is a plausible argument to say that this presupposes registration. But it is quite consistent with the hypothesis that the entry in the abstract index, especially since the amending Act was passed, is an essential part of registration. If indeed it were the only duty required of the Registrar the clause would be quite intelligible. The duties of the Registrar cannot all be performed literally *upon* production to him of the instrument, as section 66 words it. That section directs that he shall, *upon* production of the instrument, endorse on it the day, hour, and minute in which the instrument *was entered* and registered, and also in what book the same *has been entered*. This clause cannot be literally satisfied, for the entry at full length and filing of the instrument take place some time after the delivery of the instrument to the Registrar. In order, therefore, to give full effect to this group of clauses, we must resort to the fiction that all the duties of the Registrar are supposed to be performed simultaneously as soon as he has received the instrument. And there is no doubt that, by the amending Act requiring immediate entry in the abstract index it was intended that the registration should date from that entry.

Upon the literal interpretation of section 66 the Registrar cannot endorse the certificate of registration upon the instrument until after it has been transcribed at full length in the proper book for entry; because he has to indicate the book in which it has been entered, and the "certain year, month, day, hour and minute in which such instrument is entered and registered." The entry and registry are here spoken of as one act. The form of the certificate prescribed by this section provides for the insertion of but one date, *i.e.*, the actual minute of the day of the entry and registration. No reference, it will be observed, is made to the filing of the instrument; the entry is deemed to be the matter to be particularly certified. The Registrar can therefore give

a true certificate without actually filing the instrument, and the certificate presupposes that registration is complete. If the minute of the entry is to be fixed when the copyist begins to transcribe the instrument, the filing (by which is meant, the depositing of the instrument in a place prepared for it) cannot take place until after registration; nor can the instrument be filed simultaneously with the completion of the entry in the book, as a matter of physical possibility, if we take that minute as the minute of registration. Again, one is forced to say, this clause cannot be literally satisfied. And the opinion may be ventured that the duty of filing the instrument said by Harrison, C.J., to be paramount, *i.e.*, essential, might be found not to be absolutely necessary in order to perfect registration.

We have seen that as the duties of the Registrar are to be performed at different times, *i.e.*, as the receipt, indexing, entry at full length, and filing of the instrument must of necessity be performed at successive intervals of time, the actual minute of registration cannot be determined if these acts are all essential to registration, unless we resort to the fiction that they are all supposed to be performed simultaneously upon receipt of the instrument. The minute in which he receives the instrument would on this hypothesis be the minute which the Registrar must certify as the time of registration.

It is not a matter of purely theoretical interest to ascertain the precise time at which registration is complete; it is a matter of practical, and sometimes of vital, importance. And a consideration of the clauses of the Act grouped under the sub-heading, "Registration and its effect"(*e*), will show that there existed strong arguments in favour of the view that registration was complete, even before the amendment, in so far as the party offering an instrument for registration was concerned, as soon as he had delivered the instrument to the Registrar.

(*e*) Secs. 87, *et seq.*

By section 89, all wills are to be registered within the space of twelve months next after the death of the testator, or within the same period of time after the removal of any impediment to registration; otherwise the will shall not be valid as against subsequent purchasers or mortgagees. If a will had been delivered to the Registrar on the last day of the twelve months, but had not been entered at full length and filed until the next day, could a purchaser for value from the heir, who had previously registered without notice of the will, claim that it had not been registered within the twelve months? If entry at full length and filing were absolutely essential to registration there would be a great deal to be said in his favour. And even if the Registrar, anticipating the book in which the will would necessarily be entered, had given his certificate of registration as of the time of delivery, it would still be open to the purchaser to show that the registration actually took place at a later date. For the Registrar's certificate is only *prima facie* evidence, and may be shown to be untrue(*f*).

So with regard to Treasurers' deeds for taxes, Sheriffs' deeds of lands sold under process, provided for by section 90.

By section 97, "Priority of registration shall prevail, unless before the prior registration there has been actual notice of the prior instrument by the party claiming under the prior registration." The effect of this section was considered in *Millar* v. *Smith*(*g*), where Gwynne, J., said "To give literal effect to this clause would be to deprive a purchaser for valuable consideration *without any notice* whatever of the prior instrument before he got his deed and paid his purchase money, if actual notice of such prior instrument should be brought home to him in the interval

(*f*) Secs. 63, 66; *Doe d. McLean* v. *Manahan*, 1 U.C.R. 491; *Robson* v. *Waddell*, 24 U.C.R. 580.

(*g*) 23 C.P. 47, 57.

between his getting his deed and putting it on registry." The Court held this to be the inevitable construction of the Act. Notice then becomes effectual if brought home to the subsequent purchaser at any time before *registration* of his conveyance. If registration was complete only upon the indexing, entry at full length and filing of the instrument, a purchaser without notice might have been deprived of the benefit of his deed upon receiving notice at any time after delivery of the instrument to the Registrar and before entry at full length and filing, by the production to him of a prior secret conveyance. And it is evident that the Registrar's certificate endorsed upon his conveyance would be no protection to him, if in fact the instrument had not actually been transcribed in the books and filed. So, indexing without entry in the books, entry without indexing or without filing, or filing without indexing or entry in the books would be sufficient to destroy completely the effect of the Registrar's certificate of registration if these duties were both essential to complete registration.

On the other hand, it might well be argued that a person searching the registry and finding no original instrument filed in the proper place, and no entry at full length in the books, was completely protected by purchasing and registering his conveyance, notwithstanding that a prior purchaser held a conveyance endorsed by the Registrar with a certificate of registration. And so it was held in *Doe d. McLean* v. *Manahan*(*h*), decided under the Act, 35 Geo. III. cap. 5, sec. 5. There is no direction in this Act as to the manner in which registration was to be effected; but the Registrar was to endorse a certificate on the deed of the day, etc., on which the memorial was entered and registered, expressing also in what book it was entered. In this case there was no entry in the books, and no memorial was filed in the office, but a marginal note was found in one of the books giving the number of the deed, day and hour of regis-

(*h*) 1 U.C.R. 491.

tration, and pages of the book in which it was certified to have been registered. It was held that there was no registration, and that a subsequent registered deed took priority. Both grantees were perfectly innocent. The Court refused to regard the certificate of registration as conclusive, declaring that to do so would be to determine that all persons held "their estates at the mercy of a Registrar, who could give effect to deeds at his pleasure by giving false certificates of registry never made." While trying to avoid this result the Court in effect actually attained it when they arrived at the decision which was given: for the prior grantee had done all that he could do by delivering his conveyance to the Registrar and demanding and receiving evidence of registration. Under this decision a purchaser was completely at the mercy of the Registrar, and held his estate by a precarious tenure indeed. The Registrar had power by delay or neglect, very trifling it may be, to postpone indefinitely the period of time up to which a purchaser might be affected by notice; and he had power, by omitting to transcribe the instrument or to file it, to make it fraudulent and void as against a subsequent instrument which he did transcribe and file. And apparently there was no power to relieve against this except as against the Registrar, for it is enacted that priority of registration shall prevail except in cases of actual notice.

As a matter of practice registration was always considered complete when the instrument had been received by the Registrar. It was the universal practice amongst conveyancers, having regard to the fact that a purchaser is affected by notice at any time before registration, not to pay over purchase money until after delivery of the instrument to the Registrar, but after such delivery payment was considered to be safe. It was also a universal practice for the Registrar to certify the registration as having taken place at the moment when the instrument was received for

registration. The particularity of the Act in requiring him to certify the very minute in which the instrument is registered, and the duty cast upon him to index it upon receipt, point to an instantaneous, or brief, act on the part of some one; and the entry and filing, as we have seen, are successive acts, not to be performed in a minute. Again, the diligence of the parties was of no avail if the Registrar by the internal regulations of his office could settle priorities between parties. Priority was intended by the Act to be determined by the delivery to the Registrar, and he was to enter the instruments in the order in which they were received by him. But if he did not do so were the priorities altered?

If, on the other hand, we look upon delivery to the Registrar as sufficient to complete registration, so as to entitle the party registering to evidence of registration, the minute in which the delivery takes place is the minute which is to be certified on the instrument; and that no doubt will now be construed as the moment at which registration is effected under the amending section 96 already referred to, in so far as the party offering the instrument for registration is concerned. The section is as follows:—

"Every instrument capable of registration and having the proper affidavit of execution attached thereto, shall be deemed to be registered when and so soon as the same is delivered either personally or by letter to and received at his office during office hours by the Registrar or some officer or clerk in his office on his behalf, and a tender or payment made of the proper fees therefor, etc."

The evident intention of this section is to endeavour to harmonize the conflicting expressions in the Act, and as regards the interests of competing parties, or the saving of time where a time limit is fixed by the Act, to date the moment of registration from the delivery to the Registrar.

Whatever may be the true construction of the Act, if a

party were injured by the Registrar's omission he had a cause of action against him(*i*), if the damage accrued before he had notice of the omission(*j*). And an action will also lie against the Registrar for a wrongful act(*k*). The liability of Registrars is, however, practically reduced to liability for wilful wrong by the present Act.

By section 27, sub-section 3, no Registrar shall be liable in respect of entries of instruments or errors or mistakes in the entries of instruments or in respect of omissions by any of his predecessors in the office of Registrar, nor for any defect or inaccuracy in any abstract or certificate arising from such error, mistake or omission, unless he had become aware or had knowledge of the error or mistake in the said entries, or unless such abstract or certificate shall be defective or inaccurate to the knowledge of the Registrar or his deputy, or the clerk by whom such abstract or certificate is made or signed.

3. *Leaseholds.*

The Act of 1795, 35 Geo. III. cap. 5, sec. 11, excepted from its operation leases at a rack rent, and every lease for a term not exceeding twenty-one years, where the actual possession and occupation went along with the lease.

The Act of 1846, 9 Vict. cap. 34, sec. 18, enacted that its provisions should not extend to any lease for a term not exceeding twenty-one years, when the actual possession went along with the lease.

The Act of 1865, 29 Vict. cap. 24, sec. 67, declared that it should not extend to any lease for a term not exceeding seven years, where the actual possession went along with the lease; but it was expressly declared to extend to every

(*i*) *Harrison* v. *Brega*, 20 U.C.R. 324; *Green* v. *Ponton*, 8 Ont. R. 471.

(*j*) *Brega* v. *Dickey*, 16 Gr. 494.

(*k*) *Ontario Industrial Loan Co.* v. *Lindsey*, 4 Ont. R. 473.

lease for a longer term than seven years; and that enactment still remains in force(*l*).

When a lease is made for a term less than that excepted by the Act, but contains a covenant for renewal for a term, which, when added to the original term makes a period longer than that excepted by the Act, it does not require registration if the lessee is in possession(*m*). So, a lessee in possession under an unregistered lease for four years, containing a covenant for renewal for four years more, was held entitled to his renewal as against a mortgagee who registered during the first term of four years(*n*).

The possession which is required of the lessee is possession under the lease by which he claims. Where he claims under a present possession and a lease for a term to commence *in futuro*, his title will not prevail against a conveyance registered before the commencement of the term. "The unregistered lease and the possession," said Draper, C.J., "are connected together, and the *two united* prevail against the registered title"(*o*). Therefore, where a tenant in possession under a current lease for five years procured a second lease for four years, to commence on the day following the day on which the current lease would expire, and before the second term commenced a mortgage made by the lessor and registered during the currency of the first lease became absolute, it was held that the mortgagee was entitled to possession as against the tenant claiming under the second lease. The possession of the tenant at the time of the registration of the mortgage was a possession under the first lease, and did not go along with the second lease under which, as yet, he had no right to possession, and

(*l*) Now R.S.O. cap. 136, sec. 39.

(*m*) *Doe d. Kingston Building Society* v. *Rainsford*, 10 U.C.R. at p. 2 .

(*n*) *Latch* v. *Bright*, 16 Gr. 653.

(*o*) *Davidson* v. *McKay*, 26 U.C.R. at p. 310.

therefore the second lease, being unregistered, was void as against the registered mortgage(*p*).

The possession of a lessee under a lease within the exception is a substitute for registration. The lessee, in order to retain priority, must therefore either register his lease or take possession. If a subsequent grantee or lessee without notice of the first lease registers, either before the first lessee registers or before he takes possession, he will gain priority.

So, as between assignees of a term claiming under the same lessee, if the first assignee would retain priority over a second assignee without notice, he must either take possession or register his assignment. If he takes possession, his possession goes along with the lease and he is protected(*q*).

The occupation of the tenant, apart from the effect of the Registry Act, is notice to a purchaser of all the tenant's rights, but not of the lessor's title(*r*). But if it be taken in its fullest sense that possession under a lease is equivalent to registration of the lease, the purchaser is necessarily affected with notice of who is the lessor, and may therefore be bound to make enquiries as to whom the tenant holds from.

An assignment of a lease does not require to be registered merely because the lease has been unnecessarily registered(*s*). And a lease which does not require registration need not be registered merely because it contains an agreement to pay compensation to the lessee for a termination of the lease before the expiration of the term, and a license to the lessee to remove any buildings he might erect(*t*).

(*p*) *Davidson* v. *McKay*, 26 U.C.R. 306.

(*q*) *Doe d. Kingston Building Society* v. *Rainsford*, 10 U.C.R. 236.

(*r*) *Hunt* v. *Luck*, L.R. (1901) 1 Ch. 45.

(*s*) *Doe d. Kingston Building Society* v. *Rainsford*, 10 U.C.R. 236.

(*t*) *Latch* v. *Bright*, 16 Gr. at p. 656.

4. *Equitable interests.*

Before the Act of 1865, equitable interests were not affected by the registry laws. It is true that the Act, 13 & 14 Viet. cap. 63, in express terms declared that nothing contained in it should affect either the equity doctrine of purchase for value without notice, or the rights of equitable mortgagees as recognized in the Court of Chancery. But there is no apparent difference in the cases decided before, and those decided after, this Act. Indeed, Esten, V.C., said that the mention of the rights of equitable mortgagees was only *exempli gratia*(*u*). Hence it was said that, as between persons having equitable interests, priority might be gained by prior registration, subject to its effect being defeated by notice(*v*).

An equity to reform a conveyance in trust for creditors, by inserting a parcel of land omitted by mistake, was under the old law enforced as against a subsequent registered judgment creditor(*w*). Even as against a subsequent grantee, however innocent, the equity would have been kept alive(*x*). And an equitable sub-mortgage created by deposit of mortgage deeds, accompanied by a memorandum in writing, signed by the mortgagor, agreeing to execute a power of attorney to empower the mortgagee to transfer or control the mortgages so deposited, was held not to require registration(*y*).

In 1865 the Act, 29 Viet. cap. 29, was passed, by section 66 of which it was enacted, that "no equitable lien, charge or interest affecting land shall be deemed valid in any Court

(*u*) *McMaster* v. *Phipps*, 5 Gr. 361.

(*v*) *Bethune* v. *Calcutt*, 1 Gr. 81. The contest in this case was between third and fourth mortgagees, whose interests, though in fact equitable, were evidenced by instruments capable of registration and therefore within the Act.

(*w*) *McMaster* v. *Phipps*, 5 Gr. 253.

(*x*) *Wigle* v. *Setterington*, 19 Gr. 519.

(*y*) *Harrison* v. *Armour*, 11 Gr. 303.

in this Province, as against a registered instrument executed by the same party, his heirs or assigns." This enactment was continued by the Act of 1867, and is reproduced in section 98 of the present Registry Act(*z*).

This enactment was said by Mowat, V.C., not to be retrospective(*a*), but in subsequent cases(*b*), this view was not adopted. In *Bell* v. *Walker*, Blake, V.C., said, "It is said the registry laws do not apply, because the equity of the plaintiff had arisen before the passing of the Act under which the defendant seeks protection. The first of these Acts which was passed on the 18th September, 1865, did not come into force until the 1st January, 1866. Over two months were thus given in which to assert these rights and after that period they were not to be deemed valid in any Court in the Province. It is clear this clause strikes at all such claims, no matter when they may have arisen. To hold otherwise would be to postpone for many years the full effect of this salutary enactment, without anything in the Act to warrant such a construction." It will be noticed that this section of the Act deals with the case of an equity as against a registered instrument(*c*). Priorities between competing instruments capable of registration are dealt with by section 97(*d*). It was suggested by Mowat, V.C., that it is not every equitable interest that is avoided as against the registered title(*e*); and he instanced conveyances and mortgages of equities of redemption, interests arising under trust deeds, written contracts for the sale of

(*z*) See *Can. Perm. L. & S. Co.* v. *McKay*, 32 C.P. 51; *Cooley* v. *Smith*, 40 U.C.R. 543; *Bank of Montreal* v. *Stewart*, 14 Ont. R. 482. See a short review of the legislation by Patterson, J. A., in *Peterkin* v. *McFarlane*, 9 App. R. at p. 459.

(*a*) *McDonald* v. *McDonald*, 14 Gr. 133.

(*b*) *Bell* v. *Walker*, 20 Gr. 558; *Grey* v. *Ball*, 23 Gr. 390; *Miller* v. *Brown*, 3 Ont. R. 210; *Core* v. *Ont. L. & I. Co.*, 9 Ont. R. 236.

(*c*) See *Grey* v. *Ball*, 23 Gr. at p. 394; *Bridges* v. *Real Estate L. & D. Co.*, 8 Ont. R. 493.

(*d*) *Per* Strong, J., *Rose* v. *Peterkin*, 13 S.C.R. at p. 707. See *postea*, p. 90.

(*e*) *Forrester* v. *Campbell*, 17 Gr. at p. 385.

lands. With regard to all equitable interests created by deed or other instrument capable of registration, it may be said that they do not come within the section under consideration. Section ninety-seven of the Registry Act enacts that "priority of registration shall prevail, unless before the prior registration there has been actual notice of the prior instrument by the party claiming under the prior registration." By this section the priorities of competing equities created by instruments capable of registration are settled; for it manifestly refers to instruments capable of registration whether they create legal or equitable interests. A distinction must therefore be drawn between such equities and those which are not evidenced by instruments capable of registration(*f*). The former are governed by section ninety-seven of the Act, while the latter appear to be dealt with by the ninety-eighth section. A second mortgagee loses his priority if he does not register before a third mortgagee without notice—not because his estate is an equitable one, but because priority of registration is to prevail(*g*).

It is evident therefore, that those equitable liens, charges, or interests which are aimed at by this section are such equities only as are incapable of registration(*h*)—such equities as those mentioned by Blake, C., in *McMaster* v. *Phipps*(*i*)—equitable rights arising out of parol agreements partly performed, resulting trusts where land has been purchased with the money of one and the conveyance taken in the name of another, an equitable right to set aside a deed for fraud, or undue influence, or on grounds of public policy, a vendor's lien, or an equity to reform a deed or mortgage. Or, as described by Strong, C.J., equitable mort-

(*f*) *Peterkin* v. *McFarlane*, 9 App. R. at pp. 443, 461, 462; S. C. *Sub Nom. Rose* v. *Peterkin*, 13 S.C.R. at p. 707, *per* Strong, J.

(*g*) See *Cooley* v. *Smith*, 40 U.C.R. 553.

(*h*) *Forrester* v. *Campbell*, 17 Gr. at p. 385.

(*i*) 5 Gr. at p. 258.

gages, vendor's liens, parol contracts partly performed, and interests having their origin in verbal agreements, and such like interests(*j*). Such equities are not created by written instruments and are incapable of registration. They do not all however come within the peculiar wording of the section. For instance, a purchaser's right to enforce specific performance of a parol agreement to sell land partly performed, is not an equity that can by any possibility conflict with "a registered instrument executed by the same party." And the like must be said of a resulting trust. On the other hand, an equitable right to set aside a deed obtained by fraud or undue influence, or a right to enforce a vendor's lien where the conveyance has been delivered and registered, are both rights which are necessarily set up against instruments executed by the parties complaining. No distinction, however, can be made between them, both classes being undoubtedly void and incapable of enforcement as against the registered title(*k*).

(i) *Tacking*

Amongst other equities there is the right of a mortgagee to tack, which has been destroyed in so far as it interferes with the registered title. Before 13 & 14 Vict. cap. 63, registration not being compulsory, and not being *per se* notice, the doctrine of tacking was not affected by the registry laws(*l*). But by section four of this Act it was recited that the doctrine of tacking had been found to be productive of injustice, and it was enacted that thereafter conveyances should be taken according to priority of registration. It also abolished tacking as between unregistered mortgagees, for it declared that where the conveyances were unregistered they should be taken in order of the time of their execution. The law remained thus until 31 Vict. cap. 20,

(*j*) *Toronto* v. *Jarvis*, 25 S.C.R. at p. 243.
(*k*) As to the effect of the notice of an equity, see *Postea*, p. 98.
(*l*) *Street* v. *Commercial Bank*, 1 Gr. 169.

when it was enacted by section 68 of that Act that tacking should not prevail against the provisions of the Act, and all previous Acts were repealed. The result of this is that tacking may take place apart from the Registry Act, but as against that enactment it shall not prevail. The enactment is reproduced in the latter part of section 98 of the present Act(*m*).

(ii) *Consolidation.*

Consolidation must not be confounded with tacking, though it was attempted in one case(*n*), where the plaintiff company claimed to consolidate their mortgages, to show that the provisions of the Registry Act as to tacking prevented it.

Though there is no express legislation respecting consolidation, it is affected indirectly by the Registry Act. Spragge, C., laid it down that "the policy of our legislation has been to allow no effect to occult equities, and in the case of transfers of real estate, whether absolutely or by way of mortgage, that men dealing in real estate should be able to find the state of the title by search in the registry office, and in one or two other public offices"(*o*). The right to consolidate is a mere equity, and though it may be enforced against the mortgagor, the mortgagee claiming the right as against a registered puisne incumbrancer of one estate must establish notice of the equity as against him(*p*). And so where the plaintiff held three mortgages upon estate A., and the defendants held a first mortgage thereon, and also a mortgage upon estate B. from the same mortgagor for a different debt, it was held that they could not consolidate as against the plaintiff, he having taken his mortgages of

(*m*) See *Dominion Savings Society* v. *Kittridge*, 23 Gr. at p. 634.

(*n*) *Dominion Savings Society* v. *Kittridge*, 23 Gr. 634. And see *Brower* v. *Can. Perm. Building Society*, 24 Gr. 570.

(*o*) *Johnston* v. *Reid*, 29 Gr. 299.

(*p*) *Dominion Savings Society* v. *Kittridge*, 23 Gr. 635.

estate A. without notice of the defendants' right of consolidation as against the mortgagor(*q*).

5. *Registrar's abstract.*

By section 27 of the Act, the Registrar shall, when required, furnish abstracts of or concerning all instruments or memorials registered, mentioning (i) any lot of land as described in the patent thereof from the Crown; or (ii) any lot described by number or letter on any registered map or plan, subsequent to the registration of such map or plan; or (iii) any part of a lot where the same is clearly described and can be identified in connection with the chain of title or has been ascertained by actual survey; and of and concerning all wills, deeds, orders or other instruments recorded as may be requested of him in writing, if a writing is demanded by the Registrar.

The Registrar must certify as to *all instruments registered*; it is not sufficient for him to certify that "the above conveyances appear of record;" and a mandamus will lie to compel the delivery of a proper abstract(*r*). The Registrar is not bound to give extracts or certificates of such portions of the lot as are not asked for, nor can he compel a person to pay for them. His extracts should be confined to that part which is asked for(*s*).

If the Registrar omits any registered instrument from his abstract he is liable to an action of damages(*t*), provided that the omission is knowingly made(*u*). But where a Registrar omitted a mortgage from his abstract, a purchaser who relied on the abstract was not protected in

(*q*) *Brower* v. *Can. Perm. Building Society*, 24 Gr. 509; *Johnston* v. *Reid*, 29 Gr. 293; see further as to consolidation, *Fraser* v. *Nagle*, 16 Ont. R. 241; *Smith* v. *Smith*, 18 Ont. R. 205; *Scottish American Inv. Co.* v. *Tennant*, 19 Ont. R. 263.

(*r*) *Re Registrar of Carleton*, 12 C.P. 225.

(*s*) *Hope* v. *Ferguson*, 17 U.C.R. 219.

(*t*) *Harrison* v. *Rrega*, 20 U.C.R. 324.

(*u*) See ante, p. 71.

respect of payments made after he had discovered the mistake; and the Registrar having bought the omitted mortgage after he discovered his error was held entitled to foreclose it(*v*).

A Registrar's abstract is not evidence of title(*w*), or of a registered instrument(*x*).

The abstract should be made up from the registered instruments themselves and not from the abstract index, but it is frequently a mere copy of the latter, and, as such, is almost useless for the purpose of aiding an investigation of the title. The abstract index seldom shows all the names of the parties, and never shows whether words of inheritance are used in the deed, nor does it show the covenants or other essential portions of the deeds. The Registrar should be asked to furnish all the essential particulars of the registered instruments affecting the title, if it is intended to rely upon his abstract: and apparently he can be compelled so to make up his abstract(*y*).

6. *Right to inspect books.*

By the 35 Geo. III. cap. 5, sec. 8, the Registrar was directed to make searches "as often as required," and to "give certificates under his hand, if required by any person." The statute 9 Vict. cap. 34, sec. 15, was to the like effect. There was no specific direction that the books or memorials should be exhibited to any person who desired to search. By the 13 & 14 Vict. cap. 63, sec. 8, registration of a deed was to constitute notice in equity of the registered deed. This was the state of the law when *Re Webster & Registrar of Brant* (*z*) was decided, wherein it was held

(*v*) *Brega v. Dickey*, 16 Gr. 494; see *Green* v. *Ponton*, 8 Ont. R. 471.

(*w*) *Gamble* v. *McKay*, 7 C.P. 319.

(*x*) *Reed* v. *Ranks*, 10 C.P. 202.

(*y*) Sec. 27; *Re Registrar of Carleton*, 12 C.P. 225.

(*z*) 18 U.C.R. 87.

that the Registrar was not bound to permit inspection of the books by the person searching.

By the Act 29 Vict. cap. 24, sec. 18, it was enacted as follows: "The Registrar shall, when required, and upon being tendered the legal fees for so doing, make searches and furnish copies and abstracts * * and shall exhibit the original registered instrument, and also the books of the office relating thereto when the party desires to make a personal inspection of such books, etc." This clause was re-enacted in 31 Vict. cap. 30, sec. 20, and is reproduced in the present Act(*a*). In *Ross* v. *McLay*(*b*), Galt, J., thought that the abstract index should be exhibited to any person desiring to search if required. Hagarty, C.J., was not clear, but stated his strong impression to be that the index was open to the public as being one of the "books of the office," made up at the public expense and not expressed to be for the convenience of the Registrar alone. In *McNamara* v. *McLay*(*c*), the Court of Appeal was equally divided on the same question, Burton and Morrison, JJ.A., holding that the index was not open to inspection, while Spragge, C.J.O., and Patterson, J.A., held that it was, as being one of the books of office. It is conceded that access may be had to all other books and to the original instruments themselves, but as opinion is unsettled as to the right to inspect the Abstract Index it is proposed to give reasons for an opinion in favour of the right to inspect it.

(i) It is one of the books of office. The Act, 29 Vict. cap. 24, was the first Act which required the Registrar to exhibit the original instruments and books of office relating thereto. The Act is divided into groups of clauses distinguished by head lines, and in the group which is entitled "Books of office" we find it enacted(*d*), that the Registrar

(*a*) Sec. 27.
(*b*) 26 C.P. 190.
(*c*) 8 App. R. 319.
(*d*) Sec. 36.

shall compile a book to be called the Abstract Index, in addition to all other books required to be kept. It is a rule of construction that where a statute is divided into groups of clauses distinguished by headlines, the headlines are considered to be portions of the Act, and are to be read as explaining the sections which follow them(*e*). Thus, in *Wood* v. *Hurl*(*f*), it was held that the headline controlled and limited the operation of a clause of an Act which, but for the headline, would have been unlimited in its application(*g*). Applying this rule to the Act in question it is impossible to arrive at any other conclusion than that the Abstract Index is one of the books of the office. This grouping has been continued and reappears in the Revised Statute.

(ii) It relates to the original instruments. By section 36 of the present Act, the Registrar is to keep an Abstract Index and "every instrument registered * * and the names of every person to each instrument, and the nature of it, * * the numbers of registration of all such instruments, * * and the day, month and year of their registration, and the consideration or mortgage money mentioned therein, and such a sufficient description of the land therein mentioned as will readily identify its location, shall by the Registrar in addition to all entries by law required, be entered in regular order and relation under the proper heading of each such separate parcel or lot of land mentioned in such instrument." It will be observed that the Abstract Index is to be made up from the original instruments themselves, and therefore it relates thereto. And by section 66 of the Act, it is made the first duty of the Registrar on receipt of an instrument for registration to enter it on the Abstract Index as the first step in registering it.

(*e*) *Eastern Counties R. W. Co.* v. *Marriage*, 9 H.L.C. 32.

(*f*) 28 Gr. 146.

(*g*) See also *Lang* v. *Kerr*, 3 App. Cas. 529; *Regina* v. *Playter*, 1 O.L.R. 360. But see *Regina* v. *Currie*, 31 U.C.R. 582, where a headline was held manifestly not to control succeeding clauses.

(iii) The direction to the Registrar to make searches is cumulative to the public right to do so, not exclusive of it. The Registry Act(*h*) requires two things of the Registrar, (1) to make searches when required, (2) to exhibit the original instruments and the books relating thereto "when the party desires to make a personal inspection thereof." The ordinary interpretation of this enactment gives the party searching the right to elect whether he will personally make the search or require the Registrar to make it. If he elects to make a personal search the Registrar is to exhibit all the books and instruments relating to the title; but if the Registrar is required to make the search he is bound to comply with the requisition. It has been said that inasmuch as under the old law (as interpreted by *Webster's Case*), the Registrar had the exclusive right to make searches, the amendment which gives the public the right to inspect the books is not to be construed as interfering with his right, but merely gives the party searching the new right to inspect each book or instrument after the Registrar has selected it as relating to the title. The old statute, however, is open to a more liberal construction than that placed upon it in *Webster's Case*. The books are kept for the convenience and information of all interested persons, who have an indisputable right to a knowledge of their contents upon payment of proper fees. Assuming this right to exist, apart from the express words of the statute, they have by the express words of the statute the additional right to the assistance of the Registrar when required. The words "when required" are superfluous unless they refer to the right of the party searching to demand the assistance of the Registrar as a right cumulative to his right to make a personal inspection.

(iv) Registration is *per se* notice, and therefore the books should all be open to inspection. It seems to have

(*h*) Sec. 27.

escaped observation at the time *Webster's Case* was decided that registration was *per se* notice in equity. The enactment as to notice made a complete change in the policy of the Registry laws, and compelled a party dealing with land to make himself acquainted with all instruments registered at the time of his becoming interested in the land; and the law assumed that he had knowledge of them whether he actually saw them or not. To withhold from the inspection of a person searching the books and instruments which relate to the title is inconsistent with the policy of the law which makes the contents of the books notice to him whether he sees them or not. If *Webster's Case* correctly states the law, "then all people would hold their estates at the mercy of the Registrar who could give effect to deeds at his pleasure by giving false certificates of registry never made"(*i*), or by inadvertence in overlooking registered instruments(*j*), or by misapprehension of their nature or effect. The policy of the registry laws has been from time to time to increase the facilities for acquiring information as to titles and the enactment which required all instruments to be registered at full length has been followed by one extending the effect of registration and making it notice *per se* in all Courts. It is therefore submitted that *Webster's Case* does not express the law as declared by the present Act.

The danger of mutilation of the books by the public referred to in *Webster's Case,* if it ever was a valid reason for refusing inspection can no longer be so urged. The right undoubtedly exists to inspect all books other than the Index, and there is nothing to indicate that the Index is to be differently treated. The right also exists to inspect the original documents; and if the danger of multilation was ever contemplated by the legislature they at least would

(*i*) *Per* Robinson, C.J., in *Doe d. McLean* v. *Manahan*, 1 U.C.R. at p. 498.

(*j*) *Harrison* v. *Brega*, 20 U.C.R. 324.

have been withheld or their inspection placed under stringent regulations; for their loss would be irretrievable, while a mutilated book could be replaced or restored by copies from the original instruments.

7. *The search.*

It is not unusual for solicitors to confine their search to the Abstract Index, satisfying themselves with the discovery of a continuous chain of title from name to name, and taking it for granted that every conveyance is a conveyance in fee simple. Nothing is more hazardous than such a practice, and the failure to peruse each instrument as registered amounts to nothing short of gross negligence. The Registrar is not bound to enter in the Index the operative words, the limitations of the estate, or the covenants, and without a knowledge of these matters the solicitor must necessarily be in almost entire ignorance of the title.

In practice it will be found convenient when searching the Abstract Index to make a note of the registered number of each instrument which appears to affect the title; and when all the numbers have been noted to commence reading the instruments as copied in the books, striking off each number as the instrument is read and noted or rejected. When the instrument has been read there should be noted the following facts:—Date of instrument; date of registration; whether made in pursuance of any Act; the recitals, if any; the parties; the consideration; whether there is a receipt clause in the body of the deed(*k*); the operative words; the words of limitation; a description of the land; the habendum; the release of dower, if any; and a memorandum of the covenants. If there are any special covenants or stipulations in the deed they should be copied in full. Note then whether the deed has been executed by all

(*k*) See R.S.O. cap. 119, sec. 5. See also R.S.O. (1877) cap. 109, sec. 1, sub-sec. 4, omitted from the revision of 1887, cap. 112.

proper parties; and if it has been registered by memorial, whether the memorial has been executed by the grantor or the grantee. If the purchaser has been furnished with a solicitor's abstract these matters will appear upon it, and it will be sufficient to examine and compare the entries in the books with the abstract. But if no abstract has been furnished full notes should be taken. If the instruments thus abstracted do not make a complete chain of title, the Index should be again examined and the search continued until all registered instruments have been found.

In examining old deeds executed by married women the certificates endorsed upon them should be carefully perused; for the Act which was intended to validate them excepts conveyances with invalid certificates where the married woman or those claiming under her are in actual possession or enjoyment of the property(*l*), and a case recently arose in which the Act was held not to validate such a deed(*m*).

The particulars of mechanics' liens, discharges of mortgages, and other instruments which derive their operation from statutes should be carefully noted to see that they comply with the requirements of the statutes under which they operate. And wills should be carefully read with regard to the formalities attending execution in order to ascertain whether they comply in that respect with the law in force at the time of execution.

And finally a search should be made in the alphabetical index to ascertain whether the parties whose names appear on the title have made any conveyances which may not have been entered in the Abstract Index.

3. *Notice; priorites.*

Under the present Registry Act questions of notice and its effect, and priority, arise in three different classes of

(*l*) R.S.O. cap. 165, sec. 6, sub-sec. 2, sec. 7, sub-sec. 2.
(*m*) *Elliott* v. *Brown*, 11 App. R. 228.

cases, namely, (i) as between a registered claimant and a person dealing subsequently with the land; (ii) as between persons claiming under competing instruments capable of registration; (iii) as between a registered claimant and a person claiming an equitable interest.

(i) *Registered and subsequent claimants.*

Section 92 provides that "the registration of any instrument, under this Act, or any former Act shall constitute notice of the instrument, to all persons claiming any interest in the lands subsequent to such registration." This section presupposes the existence of registered instruments, and of a person acquiring or claiming some interest subsequent thereto in the land affected thereby, and deals with their competing claims. A person acquiring such subsequent interest is assumed to have searched, whether he has actually done so or not, and is charged with knowledge of the registered title(*n*). An instrument which is in fact registered, though the proof of registration may be defective, constitutes notice(*o*). And where two instruments were attached and one only was proved for registration, but both were entered in the books, it was held that persons subsequently dealing with the lands were affected by notice of both(*p*). And the registered owner is made absolutely secure by the registration of the instrument under which he claims(*q*).

In *Abell* v. *Morrison*(*r*), the Chancellor in delivering the judgment of the Divisional Court attempts to detract,

(n) *Trust & Loan Co.* v. *Shaw*, 16 Gr. 446; *Bell* v. *Walker*, 20 Gr. 558; *Haynes* v. *Gillen*, 21 Gr. 15; *Dom. L. & S. Society* v. *Kittridge*, 26 Gr. 635; *Gray* v. *Coughlin*, 18 S.C.R. at p. 570, *per* Strong, J.

(o) *Rooker* v. *Hoafstetter*, 26 S.C.R. 41.

(p) *Armstrong* v. *Lye*, 27 Ont. R. 511; 24 App. R. 543.

(q) *Gilleland* v. *Wadsworth*, 1 App. R. 82.

(r) 19 Ont. R. 669. See *McLeod* v. *Wadland*, 25 Ont. [illegible] where relief under similar circumstances was refused on the ground of acquiescence.

to some extent, from the effect of notice by registration, as declared by the Act, and settled by a series of decisions. He says, "The Registry Act, which declares (sec. 80) (*s*), that registration shall constitute notice does not preclude inquiry as to whether there was knowledge in fact, and the Act itself (sec. 82) (*t*), makes the distinction between actual notice and the implied or imputed notice which, in certain cases, flows from registration. I do not feel compelled, as a conclusion of law, to say that this defendant had notice of what he was doing, and so cannot plead mistake." The notice proved was notice by registration only, and, however this case may on its own peculiar facts be viewed, it seems clear that it is in direct conflict with prior decisions, sanctioned by the Court of Appeal and the Supreme Court (*u*), as to the effect of notice by registration. It was always theretofore held that notice was sufficiently proved by proving registration; nor does the Court observe the distinction between the two utterly distinct classes of cases provided for by sections 80 and 82 (now sections 92 and 97) respectively; and it is respectfully submitted that the use of the word "actual" as qualifying the notice required under section 97, does not warrant the conclusion that section 92, for want of it, may be held to make notice by registration constructive notice only. Even if it were, the failure to search has been held by the Court of Appeal (*v*), to charge the party refraining from searching with the consequences, as against a claimant who has secured his priority by registration. And the duty to search continues up to the moment of registration by the party to be affected (*w*).

(*s*) Now sec. 92.

(*t*) Now sec. 97.

(*u*) See *dictum* of Strong, J., in the Supreme Court, *Gray* v. *Coughlin*, 18 S.C.R. at p. 570; *Rooker* v. *Hoofstetter*, 26 S.C.R. at pp. 45, 46, *per* Gwynne, J.; see also *ante* p. 87, note (*n*).

(*v*) *Gilleland* v. *Wadsworth*, 1 App. R. 82.

(*w*) *Millar* v. *Smith*, 23 C.P. 47.

Where an equitable interest in fee was created by an informal registered instrument containing incorrect recitals as to title, it was held by the Judicial Committee of the Privy Council that the incorrect recitals could not be relied upon by a purchaser of the legal estate with notice of the deed as nullifying the deed, but that he took with full notice of the equitable title under the deed, and was bound to convey the legal estate to the persons claiming under it(*x*).

Registration of a mortgage before delivery to the mortgagee is sufficient to preserve the priority thereof and to constitute notice to persons subsequently dealing with the land(*y*).

The Act which makes registration notice, is retrospective, and makes all registrations notice whether effected before or since the Act(*z*). It will be observed that registration affects with notice only those dealing with the land subsequent to the registration; and it affects those only who are acquiring interests in the land, not those who are parting with them(*a*). And therefore, where a mortgagee released a portion of the mortgaged premises to the detriment of one who had, subsequently to the mortgage, purchased a portion of the mortgaged lands, it was held that registration of the conveyance to the purchaser was not notice to the mortgagee of his position, and relying on that alone he could not obtain any relief against the mortgagee(*b*). Notice is effective if brought home to the purchaser at any time before registration of his conveyance(*c*).

(*x*) *Trinidad Asphalt Co.* v. *Coryat*, L.R. (1896) A.C. 587. See also *McKay* v. *Bruce*, 20 Ont. R. 709, 718.

(*y*) *Muir* v. *Dunnett*, 11 Gr. 85.

(*z*) *Vance* v. *Cummings*, 13 Gr. 25.

(*a*) *T. & L. Co.* v. *Shaw*, 16 Gr. 446; *Gilleland* v. *Wadsworth*, 1 App. R. at p. 91.

(*b*) *Beck* v. *Moffatt*, 17 Gr. 601; following *T. & L. Co.* v. *Shaw*, 16 Gr. 446.

(*c*) *Millar* v. *Smith*, 23 C.P. 47; but see *Sanderson* v. *Burdett*, 16 Gr. 119.

(ii) *Claimants under competing instruments.*

(a) *Purchasers.*

Under the old registry laws, it was held that constructive notice of a prior unregistered instrument capable of registration was not sufficient to postpone a subsequent registered conveyance, even though there was possession under the prior instrument(*d*). That notice, which would have been sufficient in other cases to put the party acquiring it on further inquiry was uniformly held not to be such notice as should prevail against the registered title(*e*). The subsequent purchaser might have actual knowledge that the prior claimant had some title, yet he was not affected if he was ignorant of the nature of his title(*f*).

The rights of competing purchasers under the present law are regulated by sections 87 and 97 of *The Registry Act*. By section 87, "after any grant from the Crown of lands in Ontario, and letters patent issued therefor, every instrument affecting the lands or any part thereof comprised in the grant shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered, in the manner herein directed, before the registering of the instrument under which the subsequent purchaser or mortgagee claims;" and by section 97, "priority of registration shall prevail, unless before the prior registration, there has been actual notice of the prior instrument by the party claiming under the prior registration." The latter section presupposes the existence of two executed instruments in competition with each other before registration, and deals with the rights of parties claiming

(*d*) *Soden* v. *Stevens*, 1 Gr. 336; *McCrumm* v. *Crawford*, 9 Gr. 337; *Waters* v. *Shade*, 2 Gr. 457.

(*e*) *Soden* v. *Stevens*, 1 Gr. 348.

(*f*) *McCrumm* v. *Crawford*, 9 Gr. 337.

under them after registration of the one subsequent in date. The policy of the Act being to protect purchasers against secret or concealed conveyances, the person claiming under any conveyance must register it under the penalty of being charged by a subsequent purchaser with collusion with his grantor, or carelessness or neglect in himself(*g*). And the operation of the statute is to make the prior deed, as against the subsequent purchaser, fraudulent and void, and so to deprive the prior grantee of his estate in so far as it is necessary to give full effect to the second conveyance.

At common law, after a conveyance in fee simple, the grantor has no estate left in him, and a subsequent deed is therefore absolutely void and conveys nothing. But by the operation of the Registry Act the second deed, which was wholly void as a conveyance before registration, becomes by registration a good conveyance, and the first deed is (as regards the second one) deemed fraudulent and void(*h*). In *Doe d. Major* v. *Reynolds*(*i*), Robinson, C.J., said, "I consider the effect of the Registry Act to be, that the deed which is defeated by its provisions, is not merely to be looked upon as fraudulent and void after the registry of the subsequent conveyance, having been good and valid before; but that it must be taken to have been fraudulent and void from the beginning, as a conveyance intended to be kept secret, to deceive purchasers, and that no estate ever passed by it." That the *principle* of the Act is to treat the unregistered conveyance as fraudulent *ab initio* is true enough; but that this is its *operation* or effect is not so clear. The first conveyance is beyond all question good at common law from the time of its delivery, and conveys the legal estate; and under it the grantee could maintain an action

(*g*) *Waters* v. *Shade*, 2 Gr. 482, 483, citing *Warburton* v. *Loveland*, 2 Dow & Cl. 480.

(*h*) *Bruyere* v. *Knox*, 8 C.P. 522, 523; *Waters* v. *Shade*, 2 Gr. 458.

(*i*) 2 U.C.R. at p. 318.

for the land against any one but a subsequent registered purchaser. The fee is (as the learned Judge shows immediately after the passage quoted), in the first grantee until registration of the second conveyance. Until that event the second conveyance is inoperative, because the fee is in the first purchaser. It is the registration of the second conveyance that gives it validity, avoids the prior deed, deprives the first purchaser of his estate, and vests it in the second grantee to the extent necessary to give full effect to his conveyance. It is therefore, perhaps more correct to say that the operation of the Act is, that upon registration of the subsequent conveyance, the legal estate shifts from the prior to the subsequent grantee, to an extent sufficient to serve the second conveyance.

The Act does not avoid altogether the first conveyance, but makes it void only as against the subsequent purchaser or mortgagee. Therefore, where the second conveyance purports to convey a less estate than the prior deed, the latter is avoided only in so far as it is necessary to give full effect to the subsequent conveyance. Thus, a tenant for life claiming by prior registration of a conveyance made after a conveyance in fee, would be amply protected by holding the prior conveyance in fee to be a valid conveyance of the reversion expectant on his estate. So, as between a prior purchaser and a subsequent mortgagee in fee (claiming by prior registration), the latter would be subject to redemption by the former; and to that extent only would the purchaser's deed be void. And as between two mortgages in fee, it is possible to rank them so as to give full effect to each mortgage as a charge upon the land; but as between themselves the prior mortgage is postponed to the second one as being, in its character of a first mortgage, fraudulent and void as against the second(*j*). To the case put by the

(*j*) See *Maclennan* v. *Gray*, 16 Ont. R. 321; 16 App. R. 224; *Gray* v. *Coughlin*, 18 S. C. R. 553.

court in *Weir* v. *Niagara Grape Co.*(*k*), the answer is obvious. Their Lordships put the case thus, that as between competing mortgagees, the second mortgagee who registers first could not maintain an action to vacate the subsequent registration of the first mortgage, on account of its being fraudulent and void as against him. Plainly not. But, in its character of first mortgage, the prior instrument is fraudulent and void as against him, and to that extent the second mortgagee is undoubtedly entitled to relief, and to the consequent declaration of priority. But as against a subsequent conveyance in fee which gains priority by registration, any prior unregistered conveyance must from the nature of the case be wholly void; for it is impossible that any estate in, or charge upon, the land, could exist after an unincumbered estate in fee simple.

As between parties claiming under competing conveyances the doctrine of estoppel has no place; their rights under the Registry Act are purely statutory(*l*).

The grant of a parcel of land carrying with it an easement not specifically described, and arising by express grant, has been held to be sufficiently registered if the entries are made in the register against the dominant tenement only; and a subsequent purchaser of the servient tenement is charged with notice of the existence of the easement by such registration of the deed. If the easement arises by implied grant it is not within the Registry Act, but still prevails over a subsequent purchaser without notice(*m*).

In the case last cited the easement arose by the severance of a tenement by the common owner of the whole; and in such a case it might be well argued that, as the purchaser of part had necessarily express knowledge of the

(*k*) 11 Ont. R. at p. 716.

(*l*) *Doe d. Major* v. *Reynolds*, 2 U.C.R. at p. 316.

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

severance, he had notice that easements arising by severance might exist.

A judgment for alimony registered against the land of the defendant is in the same position as a charge created by the owner, and takes priority over an assignment for creditors under the Act respecting Assignments(*n*), notwithstanding section 11, which enacts that such an assignment shall take precedence of all judgments and executions not completely executed by payment(*o*).

Under the present law, the notice which a subsequent registered purchaser for value must have in order that his title may be affected is actual notice, express and direct, and not merely a knowledge of facts which may put him on further inquiry(*p*).

Suspicion, or even constructive notice, or any notice less than actual notice will not avail as against the registered title(*q*). Such notice as will make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent is indispensable(*r*). And where a purchaser knew of an agreement by the vendor to pay an annuity, but did not know that it charged the land with payment, being told that it merely created a personal obligation, it was held that he was not affected with notice(*s*).

Possession is constructive notice only(*t*), and not sufficient to postpone a subsequent registered instrument(*u*),

(*n*) R.S.O. cap. 147..

(*o*) *Abraham* v. *Abraham*, 19 Ont. R. 256; 18 App. R. 436; see *Union Bank* v. *Neville*, 21 Ont. R. 152, and *Re Ass. & Pref. Act*, 20 App. R. 489; L. R. (1894) A. C. 189 as to the constitutionality of this section.

(*p*) *Sherbonneau* v. *Jeffs*, 15 Gr. 574.

(*q*) *Cochrane* v. *Johnson*, 14 Gr. 177.

(*r*) *New Brunswick R. Co.* v. *Kelly*, 26 S. C. R. 341.

(*s*) *Coolidge* v. *Nelson*, 31 Ont. R. 646.

(*t*) But see as to leaseholds, *ante*, p. 71.

(*u*) *Harty* v. *Appleby*, 19 Gr. 205; *Sherbonneau* v. *Jeffs*, 15 Gr. 574; *Grey* v. *Ball*, 23 Gr. 390; *New Brunswick R. Co.* v. *Kelly*, 26 S. C.R. at p. 343.

even when the grantee is aware that some one other than his grantor is in possession(*v*). The Act in avoiding the prior unregistered deed avoids also the possession under it, and the grantor is in the event deemed to have been always in possession(*w*). But where the person in possession claims under a registered document which is defective or informal, the subsequent purchaser is affected with notice of it, and may possibly be bound to enquire of the occupant as to his title(*x*).

The absence of an endorsed receipt upon a registered conveyance was held at most to be constructive notice of a vendor's lien for the unpaid purchase money and not sufficient to affect the registered title(*y*). And now the endorsed receipt may be altogether dispensed with, inasmuch as the usual acknowledgment in the body of a registered deed that the purchase money has been received is a sufficient discharge to the person paying or delivering the same without any further receipt being endorsed on the conveyance, and in favour of a subsequent purchaser, not having notice of non-payment, is sufficient evidence of the payment(*z*). A conveyance by way of quit claim only is not sufficient to put a subsequent purchaser on inquiry as to the title of the person so conveying(*a*). A recital of an unregistered mortgage in a registered deed has been said to be constructive notice only of the mortgage to persons dealing subsequently with the land(*b*). But where an equitable interest in fee was created by an informal registered instrument containing recitals as to title, it was held by the Judi-

(*v*) *Roe* v. *Braden*, 24 Gr. 589.

(*w*) *Waters* v. *Shade*, 2 Gr. at p. 464.

(*x*) *Trinidad Asphalt Co.* v. *Coryat*, L. R. (1896) 587, at p. 593.

(*y*) *Baldwin* v. *Duignan*, 6 Gr. 598.

(*z*) R. S. O. cap. 119, sec. 5. See *Lloyd's Bank* v. *Bullock*, L. R. (1896) 2 Ch. at p. 197.

(*a*) *Graham* v. *Chalmers*, 7 Gr. 597.

(*b*) *Foster* v. *Beall*, 15 Gr. 244; *sed quaere;* see *Parker* v. *Brooke*, 9 Ves. at p. 587.

cial Committee of the Privy Council that a subsequent purchaser of the legal estate took with full notice of the equitable title and could not rely upon the incorrect recitals(*c*). And where a registered deed, absolute in form, was in reality a mortgage, and was so declared in an action brought for that purpose and a conveyance was made, which was also registered, reciting these facts, it was held that notice of them was thereby effectually given to persons subsequently dealing with the land(*d*). And a *lis pendens* (before the Act permitting a certificate thereof to be registered) was constructive notice only(*e*).

When a subsequent purchaser has notice of a prior unregistered deed he takes subject to whatever the deed contains, and is bound at his peril to ascertain its full scope and effect(*f*). So, where a subsequent purchaser was aware that his vendor had made a previous conveyance to some one unknown to him, it was held to be no defence for him to say that he had no correct information of who the true owner was(*g*).

A party claiming under a subsequent conveyance by reason of its prior registration must show that he is a purchaser for value(*h*). The consideration must be a valuable one and not nominal(*i*); and the production of the subsequent deed, stating on its face a valuable consideration, has been held not to be sufficient as against a stranger to the

(*c*) *Trinidad Asphalt Co.* v. *Coryat*, L. R. (1896) A. C. 587.

(*d*) *McKay* v. *Bruce*, 20 Ont. R. 709, 718.

(*e*) *Ferrass* v. *McDonald*, 5 Gr. 310.

(*f*) *Severn* v. *McLellan*, 19 Gr. 220; and see *Clark* v. *Bogart*, 27 Gr. 450; *Smith* v. *Bonnisteel*, 13 Gr. at p. 34; see, however, *Coolidge* v. *Nelson*, 31 Ont. R. 646.

(*g*) *McLellan* v. *McDonald*, 18 Gr. 502.

(*h*) *Doe dem. Russell* v. *Bodgkiss*, 5 U. C. R. 348; *Leech* v. *Leech*, 24 U. C. R. 321; *McKenney* v. *Arner*, 8 C. P. 46; *Barber* v. *McKay*, 19 Ont. R. 46.

(*i*) *Doe dem. Major* v. *Reynolds*, 2 U. C. R. 311.

deed(*j*); nor against a prior unregistered deed competing with it(*k*).

(b) *Volunteers and purchasers.*

Before the Act, 31 Viet. cap. 9(*l*), a voluntary deed, which was under the Statute of Elizabeth(*m*) "void, frustrate, and of none effect" as against a subsequent purchaser for value, did not acquire validity from registration; and a subsequent purchaser for value was preferred to the volunteer even though he had notice of the voluntary deed(*n*). But by this Act "no conveyance, grant, charge, lease, estate, incumbrance, limitation of use or uses which is executed in good faith, and duly registered in the proper registry office before the execution of the conveyance to, and before the creation of any binding contract for the conveyance to any subsequent purchaser from the same grantor of the same lands, tenements or hereditaments, or any part or parcel thereof, or any rent, profit or commodity in or out of the same shall be, or be deemed, or taken to be merely by reason of the absence of a valuable consideration void, frustrate, or of none effect as against such purchaser or his heirs, executors, administrators or assigns, or any person claiming by, from, or under any of them." But the Act does not protect a voluntary conveyance if made with intent to defraud(*o*). It will be noticed that the Act requires registra-

(*j*) *Doe dem. Cronk* v. *Smith*, 7 U. C. R. 376; see R. S. O. cap. 119, sec. 5.

(*k*) *Barber* v. *McKay*, 19 Ont. R. 46.

(*l*) R. S. O. cap. 115, sec. 1.

(*m*) 27 Eliz. cap. 4; now R. S. O. cap. 334, sec. 5 *et seq.*

(*n*) *Miller* v. *McGill*, 24 U. C. R. 597; *Buchanan* v. *Campbell*, 14 Gr. 163. But a purchaser from the volunteer took a good title; *Doe dem. Matlock* v. *Disher*, 4 U.C.R. 14.

(*o*) *Richardson* v. *Armitage*, 18 Gr. 512.

tion of the voluntary conveyance before the creation of any binding contract for the conveyance, and before the execution of the subsequent conveyance for value, and not before its registration merely.

(iii) *Registered owners and equitable interests.*

Section 98 declares that "no equitable lien, charge or interest affecting land shall be deemed valid in any Court in this Province, as against a registered instrument, executed by the same party, his heirs or assigns."

When the party having the prior equity claimed under a title incapable of registration, it was held, under the old law, that constructive notice was sufficient to save it as against a subsequent registered purchaser(*p*). The change in this respect, however, was made by the Act of 1865, and is continued by the above section in the present legislation.

This section deals with an equity as against a registered instrument; and although its literal effect is to avoid all equitable interests absolutely as against the registered title, it has been uniformly held that a party claiming under a registered instrument taken and registered with notice of a prior equity takes subject to the equity(*q*). The conscience of the party so claiming under a registered instrument is affected by the notice which he has acquired, and "it never was the intention of the legislature to give a priority of right to commit a fraud"(*r*).

Under this law actual notice of the prior equity is neces-

(*p*) *McCrumm* v. *Crawford*, 9 Gr. 337; *Grey* v. *Coucher*, 15 Gr. 419; *Moore* v. *Bank of B. N. A.*, 15 Gr. 508.

(*q*) *Forrester* v. *Campbell*, 17 Gr. 379; *Wade* v. *Setterington*, 19 Gr. 512; *Bank of Montreal* v. *Baker*, 9 Gr. 298; *Peterkin* v. *McFarlane*, 9 App. R. 429; S. C. *sub-nom.*, *Rose* v. *Peterkin*, 13 S.C.R. 677; and see *White* v. *Neaylon*, 11 App. Cas. 171.

(*r*) *Latouche* v. *Lord Dunsany*, 1 Sch. & L. at p. 159.

sary in order to save it as against the registered title(*s*); and possession is constructive notice only(*t*).

The evidence of notice must be express and direct, and not such notice only as arises out of circumstances or facts which should merely put the party on enquiry, and which in fact is constructive notice only(*u*).

9. *Offences in connection with registration.*

By *The Criminal Code, 1892*(*v*), every one is guilty of an indictable offence, who, acting either as principal or agent, in any proceeding to obtain the registration of any title to land or otherwise, or in any transaction relating to land which is, or is proposed to be, put on the register, knowingly and with intent to deceive, makes or assists, or joins in, or is privy to the making of any material false statement or representation, or suppresses, conceals assists or joins in, or is privy to the suppression, withholding or concealing from any judge or registrar, or any person employed by or assisting the registrar, any material document, fact or matter of information.

And by *The Registry Act*, sections 95 and 96, any person (other than the Registrar, or other officer, when he is entitled by law so to do), who alters any of the books, records, plans or registered instruments in any registry office, or makes any memorandum, words or figures in writing thereon, and whether in pencil or ink, or by any other

(*s*) *Wigle* v. *Setterington*, 19 Gr. 512; *Bell* v. *Walker*, 20 Gr. 558; and see *Sydney and Sub. Mut. B. & Inv. Assn.* v. *Lyons*, L.R. (1894) A.C. 260.

(*t*) *Cooley* v. *Smith*, 40 U. C. R. 543. But see as to leaseholds *ante* p. 71.

(*u*) *Sherbonneau* v. *Jeffs*, 15 Gr. 574; *Hollywood* v. *Waters*, 6 Gr. 329.

(*v*) Sec. 371.

means, or in any way adds to or takes from the contents of such book, record, plan or registered instrument, or alters any instrument capable of registration after delivery to the Registrar for registration, shall, on summary conviction thereof, before a justice of the peace forfeit and pay a penalty of not less than five dollars, and not more than one hundred dollars, besides the costs, and in default of payment thereof, he shall be imprisoned in the county gaol of the county in which the offence was committed for a period of not less than three months, to be kept at hard labour in the discretion of the convicting justice.

CHAPTER V.

VERIFICATION OF THE ABSTRACT: PRIMARY EVIDENCE.

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1. *Production of deeds.*
   (i) *Mortgaged lands.*
2. *Records.*
   (i) *Memorials.*
   (ii) *Deeds registered at full length.*
   (iii) *Certified copies.*
3. *Execution of deeds.*
4. *Execution by attorney.*
5. *Recitals, etc., 20 years old.*
6. *Miscellaneous.*

When a good title has been shown by the abstract, it is the duty of the vendor in the absence of stipulation to the contrary to prove the various statements and matters contained in it. This is called verifying the abstract, and is done by the production of deeds, declarations and other evidence.

The vendor has up to the time fixed for completion for perfecting his title, and so, where a purchaser agreed to buy on condition that a mortgagee of the property would leave the same amount on mortgage as was due at the date of the contract, and the mortgagee refused, but before the time fixed for completion the vendor procured his consent

thereto, it was held that the purchaser could not treat the refusal of the mortgagee as ground for rescission, but was bound to complete(*w*).

In admitting evidence conveyancers are more lax than Courts, though in weighing its sufficiency they are more strict(*x*). If evidence is admissible in an action, it is *a fortiori* admissible as between vendor and purchaser(*y*); but a great deal of evidence is admissible in conveyancing matters which could not be used in an action; and it is therefore quite possible that a purchaser might be compelled to complete a contract upon evidence which would not enable him to recover the estate in an adverse action agninst a hostile party in possession(*z*).

It is true that by the *Vendor and Purchaser Act*(*a*), it is enacted that "in actions it shall not be necessary to produce any evidence which, by section 2 of this Act, is dispensed with as between vendor and purchaser, etc." But this refers not so much to the form in which the evidence is presented, as to its quality and weight when in proper form. That is to say, those facts shall be sufficient in an action which are sufficient between vendor and purchaser, though many of the facts would necessarily be given under oath in an action(*b*). Thus, a title by possession may be sufficiently proved by statutory declarations; but if the purchaser is dissatisfied with the weight or value of the evidence, he may bring an action in order to obtain evidence upon oath, which would be sufficient if expressed in the same words as the declarations, but would enable him to test the whole evidence by cross-examination; and on the other hand, if

(*w*) *Smith* v. *Butler*, L.R. (1900) 1 Q. B. 694.
(*x*) *Re Higgins*, 19 Gr. at p. 310.
(*y*) Lee Abst. 267.
(*z*) Lee Abst. 23.
(*a*) R. S. O. cap. 134, sec. 3.
(*b*) See *R.* v. *Guthrie*, 41 U. C. R. at pp. 151, 152.

the vendor relied on recitals in deeds twenty years old, this would be sufficient both in form and substance in an action, if sufficient between vendor and purchaser.

1. *Production of deeds.*

As the vendor in the absence of any limitation is bound to abstract all the deeds material to the title, though they may not be in his possession(*c*), so he is bound to produce the deeds although they are not in his possession, and though the purchaser may not be entitled to them on completion(*d*), and is bound also to give *prima facie* proof of their registration(*e*); and a failure to produce them or to account satisfactorily for their non-production and give secondary evidence of them entitles the purchaser to be relieved of the contract(*f*). But it does not follow that the vendor cannot prove his title because he has not in his possession all the deeds necessary for that purpose. The loss of the deeds does not of itself entitle the purchaser to be relieved of the contract; for the vendor may within the proper time be able to prove the loss and give secondary evidence of their contents(*g*).

In order to deprive the purchaser of his right to the production of the deeds the most clear and unambiguous condition is necessary. In *Southby* v. *Hutt*(*h*), the purchaser bought under the following condition:—"The vendor will deliver up * * all the title deeds and copies of deeds

(*c*) *Ante* p. 41.

(*d*) Sug. 429; *Re Duthy & Tesson's Contract*, L. R. (1898) 1 Ch. 419.

(*e*) *McIntosh* v. *Rogers*, 12 P. R. 389.

(*f*) *Bryant* v. *Busk*, 4 Rus. 1; *Berry* v. *Young*, 2 Esp. 640 *n*. Material changes in this respect have been made by the Vendor and Purchaser Act which will be presently noticed, *post*, p. 110, *et seq*.

(*g*) *Re Halifax Com. Bank & Wood*, 15 Times L.R. 106.

(*h*) 2 M. & Cr. 207.

and other documents in his custody, but shall not be bound or required to produce any original deeds or other documents than those in his possession and set forth in the abstract, etc." And there was a prior condition by which the vendor undertook to deduce a good title. It was argued that the word "produce" had a more general meaning than "deliver," and that it was intended to apply to production for the purpose of proving the abstract and not to production only for the purpose of delivery. But on the conflict of conditions it was held that the purchaser was not bound to complete his contract until a good title had been proved, either by the production of the deeds professed to be abstracted, or by such other evidence as would satisfactorily prove the statements in the abstract to be correct, although he might not be entitled to delivery of the deeds on completion(*i*).

If the original deeds cannot be produced the purchaser may require the vendor to produce copies of registered instruments certified by the Registrar(*j*). But unless the purchaser consents to accept certified copies they would, in the absence of stipulation, be insufficient to verify the abstract.

The vendor, in addition to producing the deeds, must show that they have been registered, as without registration he cannot, as we have seen, make out a good title. And so, when a conveyance was produced which was said to have been registered, but did not bear upon it a certificate of registration, it was held that the vendor was bound to prove the registration either by procuring a certificate to be endorsed on the deed, or by producing a copy certified

(*i*) See remarks on this case in *McIntosh* v. *Rogers*, 14 Ont. R. at p. 100.

(*j*) *Re Bobier & Ont. Inv. Ass'n.*, 16 Ont. R. 259.

by the registrar to establish the identity of the registered deed with that produced(*k*).

Under the common condition, that the vendor will not be bound to produce any evidence of title other than that in his possession, the purchaser is still entitled to production of the deeds to verify the abstract, unless there is some other condition to limit its effect, and cannot be compelled to complete without it; but the vendor may decline to produce it and retire from the contract without being made liable for damages(*l*).

If the vendor has not the deeds in his possession but has a covenant to produce them, he must obtain production for the purchaser; for the holder of the deeds might refuse to show them to the purchaser applying alone(*m*).

Attention must now be directed to *The Custody of Title Deeds Act*(*n*). By this enactment any document which is an "instrument" as defined by *The Registry Act*, and any certificate, affidavit, statutory declaration, or other proof as to birth, baptism, marriage, divorce, death, burial, descendants or pedigree of any person, or as to the existence or non-existence, happening or non-happening of any fact, event or occurrence upon which the title to land may depend, and notices of sale, or other notices necessary to the exercise of any power of sale or appointment or other powers relating to lands, may be deposited for safe custody by any person having such document or evidence in the registry office of the registration division in which the document has been registered, or in which the land lies if the document has not been registered. Provision is made for notifying any other Registrar if the documents include

(*k*) *McIntosh* v. *Rogers*, 12 P. R. 389.

(*l*) *McIntosh* v. *Rogers*, 14 Ont. R. 97; *Martin* v. *Magee*, 18 App. R. at p. 396, *per* Maclennan, J.A.

(*m*) Sug. 431.

(*n*) R.S.O. cap. 161.

other lands. Upon deposit, any person shall be entitled to inspect and make or obtain copies of or extracts from the deposited documents; but the documents are not to be deemed registered by reason of the deposit, nor are the admissibility or value of the documents as evidence to be deemed improved or affected by the deposit.

The effect of the deposit is declared by section 12, which is as follows:—"The deposit of a document, under the provisions of this Act, shall, while the same continues so deposited, be deemed a sufficient compliance with, and fulfilment of, any covenant or agreement theretofore entered into by any person to produce or allow the inspection of the document, or the making of any copy of or extract from the same, and shall absolve any person liable for the production or custody thereof from any further liability in respect of such custody or production." In order to make the Act applicable, then, it seems that there must be (1) a covenant or agreement to produce or allow the inspection of, or the making of a copy of, a document; (2) a deposit made after the covenant or agreement. The deposit is then a discharge or fulfilment of the covenant. Thus, if a vendor, who owns lots 1, 2 and 3 under the same title, sells lot 1, and retains the deeds, giving a covenant to produce them to his purchaser, he discharges himself from any liability on the covenant by depositing the deeds under the Act. But if he subsequently sells lot 2 without protecting himself, the purchaser can require the production of the deeds in the usual way, for two reasons, first because the Act does not appear to include the case of proving a title by deposit of deeds, and secondly, because if it does, the deposit was made before, and not after, the agreement for the sale of lot 2; for it must be noticed that the deposit is a satisfaction only of an antecedent covenant or agreement. Even if the concluding clause of the section could be tortured into a construction which would enable the vendor to deposit the docu-

ments in the registry office in fulfilment of his obligation to prove title, it would be of no benefit to him; for it is as easy to deliver them to the purchaser as to deposit them in the registry office. But the clause is scarcely susceptible of this construction, as it appears to refer to *such* production as is spoken of under the covenant to produce in the previous part of the section. And the section, if it was intended to deprive a purchaser of his common right to the deeds, is altogether too indefinite and ambiguous to convey such a meaning, and to deprive a purchaser of a right so strongly insisted upon both in practice and the decisions of the Courts.

To pursue the case above put a little further. If the purchaser of lot 1 sells it without protecting himself, he cannot call upon his vendor to produce the deeds to his purchaser, because the covenant to produce has been satisfied by the deposit in the registry office. It would appear, therefore, that whenever a deposit has been made, anyone dealing thereafter with the land must protect himself from liability to produce the deeds unless he can bring himself within section 15 to which reference will now be made.

By section 15 provision is made for withdrawing the deeds at any time within five years from their deposit. "Any person" may make the application which is to be to the High Court, or the County Court of the county in which the deposit is made, or to a Judge of either of these Courts.

Where the document relates to lands in which the applicant alone is interested, the Judge must be satisfied (1) that the applicant would, but for the deposit, be solely entitled to the possession of the document, and (2) that the deposit was made without his consent, or the consent of any person entitled at the time of the deposit to any interest therein. It is difficult to see what cases would come within

this part of the enactment. The original depositor, being under a covenant to produce, would, but for the deposit, be solely entitled, and so within the section, but for the second requirement. He is a consenting party to the deposit, and therefore is excluded by the second requirement. And inasmuch as a covenant to produce is never given except when several owners of separate parts are interested in the deeds, one can hardly conceive of a case falling within the first requirement, unless it be the case of a purchaser who has subsequently acquired all the lands described in the deeds, and desires to bring them into his own custody, or the purchaser of the last parcel of land divided into parcels and sold, who might become entitled to the sole custody.

Where the document relates to other lands than those in which the applicant is interested, the Act seems to contemplate the concurrence of the first two requirements, and also that there are reasonably important grounds for removing the documents from the custody of the Registrar.

(i) *Mortgaged lands.*

Where the deeds are in the hands of a mortgagee, if the mortgage was made on or before the 1st July, 1886(*o*), the mortgagee cannot be compelled (unless he has bound himself in some way by consent) to allow them to be inspected, though an assignee of the equity of redemption offers to pay the interest if shown the mortgage deed(*p*), or even if he is asked for them for the purpose of paying him off in full(*q*); nor will he be compelled to exhibit the mortgage deed for the purpose of showing what land is comprised in it(*r*). The general rule is that the mortgagee

(*o*) See 49 Vict. cap. 20; now R. S. O. cap. 121, sec. 3.

(*p*) *Browne* v. *Lockhart*, 10 Sim. 421.

(*q*) *Damer* v. *Lord Portarlington*, 15 Sim. 380.

(*r*) *Addison* v. *Walker*, 4 Y. & C. 442.

must be paid off before he can be compelled to show the deeds(*s*), and then he is no longer mortgagee. In *Patch* v. *Ward*(*t*), it was said that the rule does not extend to the mortgage deed itself, but this case has not been followed(*u*). But by the *Conveyancing Act* of 1886, section 8, now R.S.O. cap. 121, sec. 3, a mortgagor, whose mortgage has been created since the Act, 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'a costs to inspect and make copies or abstracts of or extracts from the documents of title in the custody or power of the mortgagee.

2. *Records.*

If the vendor cannot produce the original instruments, aa in the case of wills and records, he cannot require the purchaser to send to the various offices to examine the records and compare the abstract with them, even though he is willing to pay the expense of the attendances; but he must procure office copies or extracta, as the case may require, in order to enable the purchaser'a solicitor to examine the ahatract with them, and if necessary to lay them before counsel(*v*). In Lee on Abstracta, it is aaid that "the instruments to which the exception appliea, being records or in the nature of records, are fines and recoveries, proceedings in Courta of Law or Equity, or other Courts of Record, enrolments of deeda and other documents, probatcs of willa, and lettera of adminiatration, and perhaps copies of Court rolls and some other puhlic documents"(*w*). Lord St.

(*s*) *Howard* v. *Robinson*, 4 Drew. at p. 525; *Browne* v. *Lockhart*, 10 Sim. at p. 425; *Cannock* v. *Jauncey*, 1 Drew. 507.

(*t*) L. R. 1 Eq. 440.

(*u*) See *Chichester* v. *Lord Donegall*, 5 Chy. App. 502; *Bell* v. *Chamberlen*, 3 Ch. Ch. 429. But see *West of England, etc., Bank* v. *Nicholls*, 6 Ch. D. 613; *Phillips* v. *Evans* 2 Y. & C.C.C. 647.

(*v*) Sug. 431; Dart. V. & P. 6th Ed. 472.

(*w*) Lee Abs. 373. And see Cov. Con. Ev. 121.

Leonards states that the rule seems to extend to instruments not strictly of record as deeds enrolled for safe custody in a Court of Record, or wills registered and accessible, which latter though not in a Court of Record yet in common parlance are treated as on record(*x*). But Mr. Dart says that the practice in this respect is not settled(*y*). The true distinction is said by Lord St. Leonards to be between what is in private custody and what is of public access(*z*). Deeds enrolled under a statute which requires enrolment are records(*a*). And so, a registered statutory discharge of mortgage which derives its operation solely from registration is probably a record as the term is understood by conveyancers. And as to all such the vendor verifies the abstract by producing certified copies(*b*). But where a deed is produced without showing a certificate of registration thereon, the vendor cannot require the purchaser to examine it with the registered instrument to establish its identity, but must himself prove the registration, or produce a certified copy from the registry office(*c*).

(i) *Memorials.*

Before the Vendor and Purchaser Act(*d*) it was held that memorials of registered deeds were not records, and therefore that the deeds must be produced or attested copies furnished to the purchaser(*e*). The memorials themselves were at best but secondary evidence of the deeds. Since the passing of the Vendor and Purchaser Act if the

(*x*) Sug. 448.

(*y*) Dart. V. & P. 5th Ed. 677. See also 9 Jarm. Conv. by S. 1.

(*z*) Sug. 445. And see *Moulton* v. *Edmonds*, 2 D. F. & J. at p. 249.

(*a*) *Cooper* v. *Emery*, 1 Ph. 388; *Campbell* v. *Campbell*, Sug. 449.

(*b*) *Cooper* v. *Emery*, 1 Ph. 390; and see *Leighton* v. *Leighton*, 1 Str. 210.

(*c*) *McIntosh* v. *Rogers*, 12 P. R. 389.

(*d*) R. S. O. cap. 134.

(*e*) *Re Charles*, 4 Ch. Ch. 19.

deeds are in the possession or power of the vendor they must be produced or attested copies furnished. But if not in his possession or power the registered memorials of all discharged mortgages, and registered memorials twenty years old(*f*) of other instruments are made primary evidence(*g*) of the deeds to which they relate (i) where they are executed by the grantor, (ii) in other cases when possession has been consistent with the registered title(*h*).

The other enactments making certified copies of memorials evidence are as follows:—

It is the duty of the Registrar to give certified copies of all registered instruments(*i*). This clause of *The Registry Act* merely provides for giving out certified copies and does not state what use may be made of them. Section 28 provides that certified copies from a registry office shall, subject to section 47 of *The Evidence Act*(*j*), be received as *prima facie* evidence in every Court in Ontario, in the same manner and with the same effect as if the original were produced. The section of *The Evidence Act* mentioned provides that a notice of intention to use certified copies may be given ten days before a trial, and unless the opposite party gives a notice within four days that he disputes the validity of the original instruments, the instruments may be proved by certified copies. This seems to be inapplicable to matters between vendor and purchaser. The effect of the two enactments is that certified copies can be used as evidence only upon the conditions stated.

(*f*) As the law respecting registration at full length came into force on 1st January, 1866, all memorials are now twenty years old.

(*g*) *Van Velsor* v. *Hughson*, 9 App. R. 401.

(*h*) *McDonald* v. *McDougall*, 16 Ont. R. 401.

(*i*) R. S. O. cap. 136, sec. 27 *ad fin.* See *Appleton* v. *Lord Braybrook*, 6 M. & S. 38; *Doe d. Wheeler* v. *MacWilliams*, 2 U. C. R. at p. 80.

(*j*) R. S. O. cap. 73.

Section 46 of the Evidence Act provides that certified copies shall be evidence, in every Court in Ontario, of the original instrument or memorial, "except in the cases provided for in section 47." What was probably intended was that they should be evidence except in the cases which are *excepted* by section 47. That being so, section 46 does not advance the matter, for it is a mere repetition of the provision that they shall be evidence only upon the conditions mentioned in section 47, viz., after giving a prior notice and not receiving a counter-notice.

There is therefore no statutory direction making certified copies evidence of memorials in the chain of title, except the Vendor and Purchaser Act.

But they are of course the only evidence of registered memorials which a vendor can produce, if the purchaser insists that he is not bound to verify the abstract himself by comparing it with the originals in the registry office; and on that account, apart from statutory enactment, they must necessarily be admitted to verify the abstract. Copies certified by the Registrar are sufficient without proof of the execution of the originals(*k*).

Before the Vendor and Purchaser Act mere length of possession and dealing with the property waa hardly considered to be sufficient when taken with a memorial signed by the grantee as evidence of a conveyance in fee simple. For various cases might arise in which a party having a less estate than a fee simple might make a memorial as of a grant to him in fee, register it, destroy the deeds and convey in fee(*l*). Possession might go with the title thus registered for a great many years, and the rights of those in remainder would not arise until the death of the person en-

(*k*) *Marvin* v. *Hales*, 6 C. P. 211; *Lynch* v. *O'Hara*, 6 C. P. 267; *Doe d. Prince* v. *Girty*, 9 U. C. R. 41.

(*l*) A life tenant would be entitled to the custody of the deeds. See *Else* v. *Else*, L. R. 13 Eq. 196, for one instance of a very long holding of a life estate.

titled to the prior estate, or, if they were then under disability, until a later date(*m*). Bearing this in mind, the words of the Act, "if possession has been consistent with the registered title," ought not to receive too liberal an interpretation in favour of the vendor. It is submitted that it would not be sufficient to show merely that possession had gone with the registered title of the grantee who registered the memorial. And even if it were shown that possession continued to be consistent with the registered title from the time of registering the memorial signed by the grantee, it is possible that a case of the kind above mentioned might arise.

The memorials are presumed to contain all the material contents of the instruments to which they relate(*n*). In some cases the memorials contain a copy of the deed at length. But they were required by law only to show the date of the instrument, the names and additions of the parties, the names and additions of the witnesses, and their places of abode, and the lands as described in the instrument(*o*); and a memorial drawn according to the requirements of the Act solely would not show the limitations of the estate, the covenants, provisoes, or any special matters agreed to between the parties. It is possible therefore that the Act may make them negative evidence of the non-existence in the instrument of what they do not contain themselves(*p*). But in a case where a conveyance of land was made to a railway company for their track and they constructed a subway beneath their track from one part of the

(*m*) Leith R. P. Stat. 441.

(*n*) R. S. O. cap. 134, sec. 1, sub-sec. 3.

(*o*) C. S. U. S. cap. 89, sec. 19.

(*p*) Cf. the rule by which a purchaser receiving an abstract is entitled to assume that there is nothing in the deeds abstracted which is material to the title except what has been abstracted; *Barnaby* v. *Eq. Rev. Int. Socy*, 54 L.J. Ch. 466.

farm of the grantor to the other, which was used for more than twenty years by the successor in title of the grantor, it was held (the deed being lost and being registered by memorial only) that a presumption arose in favour of the grantor and his assigns, that the deed contained a reservation of the right to use the subway, though the memorial contained no mention of it(*q*).

(ii) *Deeds registered at full length.*

Where an instrument in one part only has been registered at full length under the present law it is the only original evidence of itself extant, and being in the custody of the Registrar, it may be proved by a certified copy on the same principle as may a registered memorial of a lost deed.

Where an instrument has been made in duplicate and has been registered at full length under the present law, a question might be raised, as to whether that part which remains with the Registrar is to be regarded as a record, so as to entitle the vendor to verify the abstract by means of a certified copy, without accounting for the non-production of the duplicate original which should be in his possession or power. It is submitted that it is not. If the duplicate original is in the vendor's possession or power the purchaser has an unquestionable right to its production, for he is not bound to accept any evidence but the best that the vendor can give him. This is a different case from that of an instrument in one part only of which there is no original extant but itself, and that being in the custody of a public officer, the vendor is never able to put into the hands of the purchaser for the purposes of the abstract any better evidence than a certified copy(*r*). In the case of a registered deed in duplicate that part which is, or should be, in the

(*q*) *Wells* v. *Northern R. Co.*, 14 Ont. R. 594.

(*r*) *See Leighton* v. *Leighton*, 1 Str. 210.

possession of the vendor is as good evidence as that which remains with the Registrar(*s*); it is, or should be, possible therefore for the vendor to give better evidence than a certified copy, and if the original cannot be produced by the vendor, its absence should be accounted for before a certified copy is admitted. The fact that the duplicate original in the custody of the Registrar is as good evidence as that part which the vendor should have does not aid him; for, as we have seen, the purchaser is not bound to visit the public offices for the purpose of verifying the abstract(*t*).

(iii) *Certified copies.*

Attention must now be called more particularly to the provisions of the Registry and Evidence Acts relating to certified copies. By the Registry Act(*u*), a copy of a registered instrument certified by the Registrar is to be received subject to section 47 of the Evidence Act, as *prima facie* evidence of the original "in the same manner and with the same effect as if the original thereof in his office was produced." As this enactment originally appeared it was not subject to the provisions of *The Evidence Act*. If it had stood alone the certified copies of deeds would be primary evidence of the deeds, and would be admitted to verify the abstract without any account being given of the original deeds. What is admissible in an action is *a fortiori* admissible between vendor and purchaser(*v*). But by section 47 of the Evidence Act it is enacted that "in any action where it would be necessary to produce and prove an original instrument which has been registered in order to establish

(*s*) See R. S. O. cap. 136, sec. 63.

(*t*) And see *Barr* v. *Doan*, 45 U. C. R. 498, where it is said that as against the vendor there is no legal obligation to search the register at all.

(*u*) R.S.O. cap. 136, sec. 28.

(*v*) Lee Abs. 267. See R. S. O. cap. 134, sec. 3.

such instrument and the contents thereof, the party intending to prove such original instrument may give notice to the opposite party ten days at least before the trial, or other proceeding in which the said proof is intended to be adduced, that he intends at the trial or other proceeding to give in evidence as proof of the original instrument a copy thereof certified by the Registrar under his hand and seal of office, and in every such case the copy so certified shall be sufficient evidence of the original instrument, and of its validity and contents, unless the party receiving the notice within four days after such receipt, gives notice that he disputes the validity of the original instrument, in which case the costs of the producing and proving the original may be ordered by the Court or Judge to be paid by any or either of the parties as may be deemed right." The following paraphrase is ventured as showing the true construction of this section:—"In every action where it would be necessary to produce and prove any original instrument, a certified copy from the registry office shall be sufficient evidence of the original instrument if the party intending to prove such original instrument gives notice, etc., and if no notice disputing the validity, etc., is given by the opposite party." That is to say, in all cases where certified copies may be used in lieu of the originals they shall be evidence only when the required notice is given and the validity of the originals is undisputed. This makes the certified copies primary evidence of the deeds only at the option of the party against whom the proof is to be given. The Registry Act makes the copies evidence subject to *The Evidence Act*; the Evidence Act prescribes the conditions upon which they shall be admitted. It is submitted with great diffidence that no other construction is possible that does not do violence to the words of the Act. As has already been stated this legislation seems not to be applicable to conveyancing matters. Though it is necessary to produce, it is not necessary to

prove, the original deeds in conveyancing matters; the purchaser on their production, if there is nothing suspicious about them, never disputes their validity but accepts them as genuine(*w*). It may also well be argued that the purchaser is entitled to know at a much earlier stage than it may happen under this clause, whether he is to get production of the original deeds or is to be satisfied with copies only. If then this clause is not applicable, or if being applicable the purchaser gives a counter notice disputing the validity of the original deeds, the vendor will not be able to use certified copies as primary evidence of the deeds, but must prove his title apart from the Act and lay a proper foundation for admitting copies. In that view the certified copies would be good secondary evidence of the deeds(*x*). This perplexing state of the law should be remedied by an enactment similar to that in the Vendor and Purchaser Act, whereby certified copies of deeds registered in full should be admissible where the originals are not in the possession or power of the vendor. In *Re Bobier & Ont. Inv. Ass'n.* (*y*), the purchaser having insisted upon being furnished with certified copies of registered deeds, the originals [illegible] in the possession or power of the vendor, he was [illegible] to them; but this case must not be taken as deciding that the vendor could force them upon the purchaser in lieu of the originals.

3. *Execution of deeds.*

The purchaser cannot compel the vendor to prove the execution of deeds produced—unless there is some special reason for it(*z*). As a general rule apart from the Registry

(*w*) See the next section.

(*x*) R.S.O. cap. 136, sec. 27 *ad fin.*; see *Appleton* v. *Lord Braybrook*, 6 M. & S. 38.

(*y*) 16 Ont. R. 259.

(*z*) *Brady* v. *Walls*, 17 Gr. 699; *Thomson* v. *Miles*, 1 Esp. 184; Sug. 438.

Act if the deeds purport on their face to be properly executed, free from erasures and other suspicious circumstances, the conveyancer takes for granted that the signatures are genuine. But where deeds are registered at full length under the present law the certificate of registration is evidence of the due execution as well as of the registration(*a*): and that, too, notwithstanding that material alterations appear on the face of the instrument, for whenever alterations appear, the making of which on a completed deed would constitute an offence, the presumption is that they were made un' such circumstances as not to constitute an offence, *i.e.*, before execution(*b*). The certificate is *prima facie* evidence only(*c*), and it is open to the party against whom it is used to disprove the registration or the execution. Deeds thirty years old prove themselves on production from the proper custody(*d*).

4. *Execution by attorney.*

Where a deed is executed by an attorney, if it is thirty years old, its production proves only that it was executed as on its face it appears, by the attorney asserting himself to be the attorney of the party. It does not establish that he was the attorney properly appointed(*e*). That should be proved by the production of the power of attorney or by other evidence if it cannot be produced. Where a deed executed by attorney has been registered at length under the present law the certificate of registration, it is submitted, goes no further than to prove that it has been executed as

(*a*) R. S. O. cap. 136. sec. 63. See also, *The Evidence Act*, R. S. O. cap. 73, sec. 45; *Can. Perm. L. & S. Co.* v. *Page*, 30 C.P. 1.

(*b*) *Graystock* v. *Barnhart*, 26 App. R. 545.

(*c*) *Doe d. McLean* v. *Manahan*, 1 U. C. R. 491.

(*d*) Cov. Con. Ev. 4.

(*e*) *Jones* v. *McMullen*, 25 U. C. R. 542. But see Cov. Con. Ev. 37.

it purports to have been, viz., by an attorney. The power of attorney may be proved by registration(*f*).

A power of attorney given for valuable consideration is irrevocable except by the death of the constituent(*g*); but where there is no valuable consideration, the power may be revoked at any time. By the Act, 29 Vict. cap. 28, sec. 23(*h*), if a power of attorney provides that the same may be exercised in the name and on behalf of the heirs or devisees, executors or administrators of the person executing the same, or provides by any form of words that it shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual to all intents and purposes. If there is no such provision in a power of attorney every payment made and act done under the power after the death of the constituent or after some act done by him to avoid the power is valid as respects every person party to such payment or act to whom the fact of the death or of the doing of such act was not known at the time thereof, and as respects all claiming under them; the act or payment must have been done or made in good faith(*i*). If the power was given for valuable consideration in cases without the Act, proof should be given that the constituent was alive at the time of the exercise of the power; in cases within the Act, that the donor was alive, or that the act done under the power was done in ignorance of the death of the constituent, unless it is provided by the power that it may be exercised after the death of the constituent. If the power was without consideration, inquiry should be made whether it was revoked prior to its exercise(*j*); and

(*f*) R. S. O. cap. 136, secs. 2, 60 & 63.

(*g*) *Smart* v. *Sanders*, 5 C. B. 917, n.; 3 J. & L. 603, 613.

(*h*) R. S. O. cap. 116, sec. 1.

(*i*) R. S. O. cap. 116, sec. 2.

(*j*) Dart V. & P. 6th Ed. 352.

in cases within the Act whether the act done under it was done in ignorance of the death of the constituent or of any act done by him to avoid it, unless it is exercisable after death(*k*).

5. *Recitals, etc., 20 years old.*

Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament or statutory declarations twenty years old at the date of the contract are, unless and except so far as they are proved to be inaccurate, to be taken to be sufficient evidence of the truth of such facts, matters and descriptions(*l*). In *Bolton* v. *London School Board*(*m*) it was held that a recital in a deed twenty years old that the grantor was seised in fee simple was not a recital of a conclusion of law but a recital of a fact or matter within the meaning of the statute, and that the vendor need not prove, or even abstract, the antecedent title(*n*). The manner in which conditions of sale of a like character have been construed may furnish a key to the construction of this enactment. With respect to conditions making recitals conclusive evidence of the facts and matters recited it has been doubted (bearing in mind that conditions must be in the most clear and unambiguous language to bind a purchaser) whether they would bind the purchaser to accept as conclusive evidence a recital of a conclusion of law though of the required age, if the facts upon which the conclusion is based were not recited. Thus, a statement of a pedigree is necessary in order to enable one to draw a proper conclusion as to heirship. Apart from the

(*k*) For remarks upon this legislation see Watters R. P. Stat. p. 303.

(*l*) R. S. O. cap. 134, sec. 2, sub-sec. 1.

(*m*) 7 Ch. D. 776; followed in *Macklin* v. *Dowling*, 19 Ont. R. 441.

(*n*) Reasons for doubting the soundness of this decision have been given, *ante*, p. 38.

statute and in the absence of any condition respecting it, if a vendor attempted to prove an heirship by a solemn declaration that A. B. was heir at law of C. B. the proof would not be accepted under any circumstances. The pedigree would have to be proved step by step in order to enable the purchaser to judge for himself whether the vendor's conclusion was correct. And if a recital in the same words were offered in evidence under a general condition that all recitals should be evidence of the facts and matters recited it should not have any more potent effect than the same words would have in another form of evidence. "The proper construction of a condition making recitals evidence of the facts and matters recited would seem to be, that the recitals must state every fact and matter which, in the absence of such a condition, counsel advising on the title would require to be stated on the abstract and to be proved in order to enable him to draw the required conclusion"(*o*). It is submitted that the Act should be construed in the same way. It merely makes standing conditions for every contract; it creates a new species of evidence; it makes that evidence which before was inadmissible; but it does not create a species of evidence of so high a character that it is unnecessary to show the manner in which conclusions are arrived at. If the recitals are such that, if they were statements contained in statutory declarations they would be sufficient proof of the facts required by the abstract to be proved, they are evidence which is binding on the purchaser. If they are mere conclusions of such a nature that, if they were contained in statutory declarations, they would not be accepted as sufficient proof without disclosing the facts upon which they are founded, then it is submitted that the purchaser is not bound by them(*p*).

(*o*) 9 Jarm. by S. 4.

(*p*) Compare the rule as to presumptions, *Emery* v. *Grocock*, 6 Mad. 54.

6. *Miscellaneous.*

When a registered conveyance acknowledged payment of the consideration money, such acknowledgment was sufficient evidence of payment, except so far as it was proved to be inaccurate under the Vendor and Purchaser Act(*q*). The clause containing this provision was omitted from the revision of 1887; but by another enactment still in force(*r*) a receipt for consideration money or securities contained in the body of a conveyance is a sufficient discharge to the person paying or delivering the same, without any further receipt being endorsed on the conveyance and is in favour of a subsequent purchaser not having any notice that the money or other consideration was not in fact paid or given wholly or in part, sufficient evideuce of the payment or giving of the whole amount thereof(*s*).

Every memorial of a deed to be registered was required to be attested by two witnesses, one of whom was a witness to the execution of the deed, and he was required to prove upon oath the execution of the deed to which the memorial related. All affidavits of registered memorials contain in some form of words the statement that the deeds to which they relate were duly executed; and all such statements twenty years old are perhaps, under the Act, primary evidence(*t*) of the execution of the deeds to which they relate.

All statutes, whether public or private, were formerly proved by the production of a copy printed by the Queen's Printer; and every copy purporting to be printed by the Queen's Printer was deemed to be so printed unless the

(*q*) R. S. O. (1877) cap. 109, sec. 1, sub-sec. 4.

(*r*) R. S. O. cap. 110, sec. 6.

(*s*) See *Lloyd's Bank* v. *Bullock*, L.R. (1896) 2 Ch. at p. 197.

(*t*) *Vanvelsor* v. *Hughson*, 9 App. R. 401.

contrary were shown(*u*). A private Act does not bind parties who are not mentioned therein(*v*).

Official and public documents which would be evidence on production may be proved by copies certified under the hand of the proper officer or person in whose custody such documents are placed. And by-laws and other proceedings of corporations created by charter or statute in Ontario may be proved by a copy certified by the presiding officer or secretary under his hand and the seal of the corporation without proof of the seal or signature(*w*). A Registrar's abstract is not admissible in evidence under this Act(*x*).

Books and documents receivable in evidence on production on account of their public nature may be proved by examined copies or extracts, or by copies or extracts certified by the proper custodian(*y*).

Copies of records, documents, books, or papers belonging to, or deposited, in the Crown Lands Department, attested under the signature of the Commissioner or Assistant-Commissioner, are competent evidence where the originals would be received in evidence(*z*). A certified copy of a patent is not primary evidence, because it is but a copy of the copy entered in the books of the office, and the books if produced would not themselves be evidence(*a*).

Proceedings in the Courts are proved by the production of the originals. The signatures of Judges appended to judicial or official documents are recognized without proof

(*u*) R. S. O. (1887) cap. 1, sec. 8, sub-sec. 37 *ad fin.* This is now repealed. All Acts being public acts, and therefore to be judicially noticed, it is probable that the provision mentioned in the text was repealed as being useless. See 60 Vict. cap. 17, sec. 9; R.S.O. cap. 1, sec. 39.

(*v*) *Re Goodhue*, 19 Gr. 366; *Macklin* v. *Dowling*, 19 Ont. R. 441.

(*w*) R. S. O. cap. 73, sec. 26.

(*x*) *Gamble* v. *McKay*, 7 C. P. 319.

(*y*) R.S.O. cap. 73, sec. 29.

(*z*) R. S. O. cap 28, sec. 47; *Nicholson* v. *Page*, 27 U. C. R. 318.

(*a*) *Prince* v. *McLean*, 17 U. C. R. 463.

(*b*); and the seals of the Courts do not require proof. Where the originals cannot be produced by reason of their being in the custody of an officer, they may be proved by exemplifications or by office copies(*c*).

A notarial copy of any act or instrument in writing made in the Province of Quebec before a notary, filed, enrolled, or enregistered by such notary, is received in evidence in lieu of the original, if the instrument is of such a nature as may by the law of Quebec be taken before, or filed, enrolled, or enregistered by a notary(*d*).

Patents are proved by the originals, or by exemplifications without accounting for the non-production of the originals(*e*); but it may be sufficient for the vendor merely to refer the purchaser to the public record of the patent in the Provincial office(*f*). A Registrar's abstract referring to a patent is not evidence of it(*g*); and a certified copy being but a copy of the copy entered in the books is secondary evidence only(*h*).

A Registrar's certificate of the registration of a discharge of a mortgage endorsed upon the mortgage is evidence of the discharge, and therefore of the reconveyance of the land, without proof of the execution of the discharge(*i*).

Wills may be proved by a copy sealed with the seal of the Surrogate Court(*j*), and if registered perhaps by a copy certified by the Registrar(*k*).

(*b*) R. S. O. cap 73, sec. 30.
(*c*) Dart V. & P. 6th Ed. 316, 359. And see Con. Rule, 496.
(*d*) R. S. O. cap. 73, sec. 32.
(*e*) *Prince* v. *McLean*, 17 U. C. R. at p. 464.
(*f*) Dart V. & P. 6th Ed. 359.
(*g*) *Reed* v. *Ranks*, 10 C. P. 202.
(*h*) *Prince* v. *McLean*, 17 U. C. R. 463.
(*i*) *Doe dem. Crookshank* v. *Humberstone*, 6 O.S. 103.
(*j*) R. S. O. cap. 59, sec. 4.
(*k*) R.S.O. cap. 136, sec. 24. See remarks at p. 115.

Births, deaths and marriages are required to be registered with the clerks of the various municipalities who return the same to the Provincial Secretary(*l*). These returns are kept on record, and all persons are entitled to access thereto and to receive extracts certified by the Registrar-General (the Provincial Secretary), or the Inspector; and such certificates are *prima facie* evidence in any Court of the Province of the facts stated in the certificate(*m*).

When the purchaser is entitled to evidence of facts not established by the deeds, and not of such a nature as to be susceptible of proof by official certificates, they may be proved by statutory declarations(*n*). A declaration under the original statute(*o*) had formerly to be made before a Notary Public or Justice of the Peace. A Commissioner for taking affidavits was not a functionary within the meaning of the Act, and a declaration made before him did not sustain a charge of misdemeanour under the Act(*p*). But by the amending Act(*q*) such declarations are sufficient if made before a Commissioner for taking affidavits in Provincial Courts; and by R.S.O. cap. 74, sec. 13, it is enacted that Commissioners for taking affidavits shall be deemed to have power within their respective counties and districts, to take statutory declarations in all cases in which statutory declarations may be taken, or may be required under *The Devolution of Estates Act*, or under any Act from time to time in force in this Province.

When a title by possession is offered the purchaser is not bound to accept this species of evidence but may insist upon

(*l*) R. S. O. cap. 44.

(*m*) Section 7, sub-sec. 2.

(*n*) Per Blake, V.C., *Re Hudson & Simpson*, 23rd December, 1876.

(*o*) R. S. C. cap. 141, sec. 3.

(*p*) So ruled by Patterson, J.A., *Regina* v. *Monk*, Whitby Assizes, 19th October, 1876.

(*q*) 53 Vict. cap. 37, sec. 41; now *The Canada Evidence Act*, 1893, 56 Vict. cap. 31, sec. 26.

having affidavits, and he is also entitled to cross-examine the deponents thereon(*r*). But if he is too exacting and gains nothing by a reference upon which he may test the evidence on oath he may be ordered to pay the extra expense occasioned by his demand(*s*).

Declarations and affidavits should state the means of knowledge of the declarants and deponents to the facts proved(*t*), and should if possible be made by disinterested persons(*u*).

It is sometimes necessary for the vendor to produce documents as negative evidence. For instance, a person claiming as heir-at-law as against a will said to be invalid (*v*), or by reason of the land in question not being affected by the will, must produce it(*w*).

(*r*) *Re Boustead & Warwick*, 12 Ont. R. 498; *Scott* v. *Nixon*, 3 Dr. & War. at p. 402.

(*s*) *Dame* v. *Slater*, 21 Ont. R. 375.

(*t*) *Re Harding*, 3 Ch. Ch. 233.

(*u*) *Hobson* v. *Bell*, 2 Beav. 17.

(*v*) *Stevens* v. *Guppy*, 2 S. & St. 439.

(*w*) Hayes Conv. 4th Ed. 444.

CHAPTER VI.

VERIFICATION OF THE ABSTRACT: SECONDARY EVIDENCE AND PRESUMPTIONS.

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1. *Secondary evidence.*
   - (i) *Loss or destruction of deeds.*
   - (ii) *Search.*
   - (iii) *Memorials.*
   - (iv) *Certified copies.*
   - (v) *Recitals.*
2. *Presumptions.*
   - (i) *Things rightly done—Deeds.*
   - (ii) *Identity of persons.*
   - (iii) *Officials and official acts.*
   - (iv) *Life, death and survivorship.*
   - (v) *Women past child-bearing.*
   - (vi) *Legitimacy and marriage.*
   - (vii) *Satisfaction of mortgage.*
   - (viii) *Miscellaneous.*

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1. *Secondary evidence.*

We have seen that where the vendor has not the deeds in his possession or power, the registered memorials of those which have been so registered are primary evidence of the deeds if signed by the grantor, or in other cases if possession has been consistent with the registered title. But where possession has not been consistent with the registered title

and the memorials are not signed by the grantors, the original deeds must be produced or their absence accounted for and secondary evidence given. Where deeds have been registered at full length we have also seen that secondary evidence may have to be given.

(i) *Loss or destruction of deeds.*

To the admission of secondary evidence proof of the loss or destruction of the original document is a necessary preliminary. Proof of the destruction more readily lets in the secondary evidence of a copy than proof of the loss, which must ever be incomplete and exceptionable(*x*). Before the secondary evidence can be received, the same evidence of their loss and contents must be given as at a trial. The first step is to show that such a deed once existed(*y*). The next is to show in whose custody it was last seen or known to be, if that can be done; or to show who was the person entitled to the custody, and that being discovered, to make search there; and if it cannot be found on diligent search then secondary evidence may be given(*z*).

(ii) *Search.*

The degree of diligence to be used in seeking for an original document, before a party can give secondary evidence of its contents, must depend, in a great measure, upon the circumstances of each particular case. If a paper be of considerable value, or if there be reason to suspect that the party not producing it ha· strong interest which would induce him to withhold it, a very strict examination would properly be required; but if a paper has been abandoned or treated as useless, so as to increase the probability of its loss

(*x*) Cov. Con. Ev. 312.

(*y*) *Doe d. Padwick* v. *Whitcomb*, 6 Ex. at p. 606; 4 H. L. Ca. 431; *Re Bell*, 3 Ch. Ch. 241; *Ansley* v. *Breo*, 14 C.P. 371.

(*z*) *Gordon* v. *McPhail*, 31 U. C. R. 484; *Re Bell*, 3 Ch. Ch. 241.

or destruction, or if the party could not have any interest in keeping it back, or if the facts raise a probability of its destruction(*a*), a much less strict search would be necessary to let in secondary evidence of its contents(*b*). The point to guard against in this respect is a pledge or deposit of the original instrument(*c*).

It must be remarked, however, that under our system of registration a deposit of title deeds gives but a slight security and is in consequence rarely met with; and even if such a deposit had actually been made, and a purchaser took and registered without actual notice he would be protected. Indeed the purchaser may, if he choose, rely upon the registered title alone, and is not bound to insist upon the production of the deeds(*d*). Much less evidence of a search may therefore be sufficient to let in secondary evidence than in a similar case under English law.

Parties searching for a missing deed should remember that the person entitled to the first immediate legal estate of freehold is entitled to retain the title deeds as against those entitled in remainder or reversion, and the deeds are presumed to follow the title and go into the custody of those entitled(*e*). The presumption that the deeds follow the title may be destroyed, as, for instance, by the fact that they covered other lands retained by the vendor, or that some prior owner on sale of a portion gave a covenant to produce them(*f*).

(*a*) *Ferguson* v. *Freeman*, 27 Gr. 211.

(*b*) Cov. Con. Ev. 312; *Bratt* v. *Lee*, 7 C. P. 283.

(*c*) Cov. Con. Ev. 313.

(*d*) *Agra Bank* v. *Barry*, L. R. 7 H. L. 135. See *Oliver* v. *Hinton*, L.R. (1899) 2 Ch. 264; but it must be borne in mind in considering this case that almost implicit reliance may be placed on the register.

(*e*) Leith R.P. Stat. 427; *Webb* v. *Lymington*, 1 Eden 8; *Garner* v. *Hannyngton*, 22 Beav. 444. And see Tay. Ev. secs. 430 *et seq.*

(*f*) Leith R. P. Stat. 427, 428.

When lands descend to real representatives, they and not the personal representatives, are entitled to the deeds, though for greater certainty a search with the latter would be advisable, especially in the case of a missing mortgage(*g*). Trust estates before *The Devolution of Estates Act* descended to the eldest son, being excepted from the operation of the Act respecting inheritance(*h*). But under *The Devolution of Estates Act* they now devolve upon the personal representative, and search should be made with him.

Upon the death of a bare trustee of any corporeal or incorporeal hereditaments of which he was seised in fee, such hereditaments shall vest in the legal personal representative, from time to time, of such trustee(*i*). Where any person has entered into a contract in writing for the sale and conveyance of real estate, and has died intestate or without providing by will for the conveyance of the land, then if the deceased would have been liable to execute a conveyance the executor, administrator or administrator with the will annexed shall make the conveyance(*j*). And in some other cases(*k*) the personal representative may sell and convey. By *The Devolution of Estates Act*, 1886, the real property of any one dying on or after the first of July, 1886, devolves upon the legal personal represenatives from time to time(*l*). In cases under this Act search for deeds should be made with the personal representatives. By the Acts of 54 Vict. cap. 18, and 56 Vict. cap. 20 (*m*), the land vests in the beneficiaries, unless a caution is registered by the personal representative within a year from the death

(*g*) Leith R. P. Stat. 427.

(*h*) R. S. O. cap. 108, sec. 49; now R. S. O. cap. 127, sec. 50.

(*i*) R. S. O. cap. 129, sec. 7. The section does not apply expressly to intestacies only. See *Re Pilling's Trusts*, 26 Ch. D. 432.

(*j*) R. S. O. cap, 129, sec 24.

(*k*) R.S.O. cap. 129, sec. 16 *et seq.*

(*l*) 49 Vict. cap. 22, secs. 4, 9; now R. S. O. cap. 127.

(*m*) Now R. S. O. cap. 127, sec. 13.

of the owner, and in the case of persons who have died within a year before 17th March, 1902, and thereafter the land vests at the end of three years from the death(*n*); and following the devolution of the estate under these Acts, search should be made with each person in whom the estate might vest, bearing in mind the rule that the deeds are presumed to follow the title.

Where the document, if in existence, should be in the possession of the party who desires to give secondary evidence of its contents, the proper course is that he should search with a witness, and that the search should be so conducted, and in such places, as to afford reasonable ground for concluding that it was made *bona fide*, both as regards the witness and the party, by giving and using all possible facilities to make it effectual(*o*). It is not sufficient for the vendor to search alone or to give only his own evidence of loss(*p*). Each case must depend upon its own circumstances, but the party is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him(*q*). The search need not have been a recent one, or made for the purposes of the matter in question, though the latter course would be more satisfactory(*r*).

(iii) *Memorials.*

Where sufficient evidence has been given of destruction of the original document, or of search and loss, to let in secondary evidence, memorials were, before the Vendor and Purchaser Act, a frequent means of furnishing such evi-

(*n*) 2 Edw. VII. cap. 17, sec. 3.
(*o*) *Bratt* v. *Lee*, 7 C. P. 280; Leith R. P. Stat. 428, 429.
(*p*) *Re Chamberlain*, 2 Ch. Ch. 352.
(*q*) Tay. Ev. sec. 429.
(*r*) Tay. Ev. sec. 435.

dence. The subject is very fully and ably treated of by Mr. Leith in his work on the Real Property Statutes(*s*). His conclusions may be stated as follows:—1. Where the memorial is signed by the grantor, it was evidence against him and all persons claiming under him. If he was in possession, and the execution of the memorial was against his interest, it was probably evidence against third persons. If he was not in possession, and it was not against his interest, it was only a link in a chain of circumstances which, when taken with those circumstances, might prove the existence of a deed. 2. Where the memorial was executed by the grantee it was undoubtedly secondary, if not primary, evidence against him and all persons claiming under him. 3. If executed by the grantee and not against his interest it was merely a link in the chain of circumstances which taken altogether might establish the existence of a deed.

The Vendor and Purchaser Act makes memorials twenty years old signed by the grantor primary evidence of the deeds to which they relate if the original deeds are not in the possession or power of the vendor(*t*); and so, where a registered memorial over twenty years old was produced by trustees for sale, reciting the trust for sale, it was held that they were not bound to produce the original deeds creating the trust, they not being in the possession or power of the vendors(*u*). If signed by the grantee and possession has been consistent with the registered title they are also primary evidence(*v*). It is only when the memorials are signed by the grantee and possession has not been consistent with the registered title that they will be resorted to as

(*s*) P. 427. See also Tay. Ev. sec. 419.

(*t*) *Reg.* v. *Guthrie*, 41 U.C.R. 148.

(*u*) *Re Ponton & Swanston*, 16 Ont. R. 669.

(*v*) R. S. O. cap. 134, sec. 1. sub-sec. 3; *Vanvelsor* v. *Hughson*, 9 App. R. 390, 461; *McDonald* v. *McDougall*, 16 Ont. R. 461. See Leith R.P. Stat. 433 *et seq.*, as to when the evidence of possession is sufficient; and *ante* p. 111.

secondary evidence. If they are against the interest of the party executing them they are, as Mr. Leith says, undoubtedly secondary, if not primary, evidence against all persons claiming under the party executing. Otherwise, they are of no value standing alone, but may be of assistance, when taken with other circumstances, in establishing the existence of a deed.

(iv) *Certified copies.*

Secondary evidence of deeds is usually given by producing copies certified by the Registrar where they have been registered at length. The copies should be made from the original deeds, and so certified, and not from the copy entered in the book, which is only a copy of the original(*w*). And with respect to copies generally, it is to be observed that a copy of a copy is not evidence, for the best evidence which the nature of the thing admits is always required; and the further off anything lies from the original truth, the weaker must be the evidence; and indeed there would be a break in the chain if a copy of a copy were given in evidence, for it would not appear that the first was a true copy.

Where memorials are admissible as secondary evidence, copies certified by the Registrar may be used without proof of the execution of the originals(*x*). But in proving the execution of the deeds to which they relate, the statements in the affidavits attached to the memorials, to the effect that the deeds were duly executed, may perhaps be used as evidence of the execution of the deeds, if they are twenty years old(*y*).

An abstract which has been made up from the deeds themselves, or which has been examined with the deeds, and

(*w*) *Prince* v. *McLean*, 17 U.C.R. 463.

(*x*) *Marvin* v. *Hales*, 6 C. P. 211; *Lynch* v. *O'Hara*, 6 C. P. 267; *Doe d. Prince* v. *Girty*, 9 U. C. R. 41.

(*y*) R. S. O. cap. 134, sec. 2, sub-sec. 1.

can he shown to correctly state their contents may be used as secondary evidence of the contents, though the execution may have to he proved hy other means(*z*).

(v) *Recitals.*

As a general rule the recitals in a deed are evidence only hetween parties and privies(*a*). And they are evidence only of what is actually recited(*b*). They are always taken as admissions of those who are parties to the deed and interested in the property. Thus, where a recital occurred in a deed of settlement that the owner of the property had given a hond to another party which hond was not produced, and the execution could not he proved, the recital was held to he evidence of the execution of the bond(*c*). But though a recital may he evidence as against parties executing the deed containing the recital of a prior instrument, yet there ought to he some further proof to estahlish entirely the execution and validity of the recited deed(*d*). But where there are other facts, such as entries in a solicitor's hooks of charges for procuring the execution of the deed, which corrohorate the recitals, or where there is other evidence that the instrument recited did exist, then the recital may he taken not only as evidence of the existence, hut as against the parties to the deed containing the recital, as evidence of the execution of the recited instrument(*e*). And since the Vendor and Purchaser Act, if the recital is contained in a

(*z*) *Bryant* v. *Busk*, 4 Russ. at p. 4; *Moulton* v. *Edmonds*, 1 D. F. & J. 246.

(*a*) *Moulton* v. *Edmonds*, 1 D. F. & J. 251; *Burnett* v. *Lynch*, 5 B. & C. 601; *Battersbee* v. *Farrington*, 1 Swan. 166.

(*b*) *Gillett* v. *Abbott*, 7 Ad. & E. 786; *Ford* v. *Lord Grey*, 6 Mod. 45. But see *Alexander* v. *Crosby*, 1 J. & L. 666.

(*c*) *Marchioness of Annandale* v. *Harris*, 2 P. Wms. 434.

(*d*) *Ford* v. *Lord Grey*, 6 Mod. 4.

(*e*) *Skipwith* v. *Shirley*, 11 Ves. 64; *Burnett* v. *Lynch*, 5 B. & C. 601.

deed twenty years old, it would no doubt be evidence of the execution of the deed recited(*f*).

Recitals in a deed prepared by direction of a Court and settled by an officer of the Court, are more to be relied on than other deeds in consequence of the care with which facts and statements are required to be verified(*g*).

Where facts have been mis-recited, the true state of facts may be shown(*h*).

2. *Presumptions.*

Many matters of fact arise affecting titles of which no direct evidence can be given, and thus titles will often be dependent on conclusions of fact founded upon presumptions.

It has been said that there can be no presumption unless there is belief that the thing presumed has actually taken place. But it is because there are no means of creating belief or unbelief that presumptions are raised upon subjects of which there is no record. Presumption takes the place of belief(*i*). The foundation of the doctrine is that a man will naturally claim or enjoy that which belongs to him, according to all human experience. And so, in the absence of all direct evidence, presumption may, after a great lapse of time aided by other corroborative facts, such as uninterrupted enjoyment for a length of time and acquiescence or apparent acquiescence of those whose claims are adverse, be relied on, particularly where the importance of the fact is inconsiderable(*j*). In the absence of all proof or knowledge of facts there can be no presumption except what the law itself points out. But inferences raising presumptions may be drawn from nothing being known to the contrary of an existing state of facts.

(*f*) See *Re Ponton & Swanston*, 16 Ont. R. 669.
(*g*) Lee Abs. 363.
(*h*) *Roe* v. *McNeill*, 14 C. P. 424.
(*i*) *Hillary* v. *Waller*, 12 Ves. at p. 266.
(*j*) Lee Abs. 363.

The inability of the Court in many cases to gain a sufficient knowledge of facts upon which to base a conclusion, has been one of the most frequent elements in the foundation of the doctrine of doubtful titles; for the Court has refused constantly to act upon slender evidence and leave the title open to doubt or suspicion. The general rule as to presumptions is, that if the case be such that, sitting with a jury, it would be the duty of a judge to give a clear direction in favour of the fact, then it is to be considered as without reasonable doubt; but if it would be the duty of a judge to leave it to the jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser(*k*).

A mere presumption, however violent, is always liable to be answered because it may be against the truth. In a remarkable case in this Province a husband left his home in search of employment. His wife, after the lapse of seven years, believing him to be dead, married again, and with her supposed second husband mortgaged the husband's land. The only daughter, the presumed heir-at-law, conveyed her interest to the mortgagees. The latter sold the land under the power of sale in their mortgage to the defendant. After a lapse of more than thirty years the husband returned, brought ejectment for his land, and recovered, on the ground that his wife's possession which had been continuous was his possession(*l*).

(*k*) *Emery* v. *Grocock*, 6 Mad. at p. 57; *Cooke* v. *Soltau*, 2 Sim. & St. 163; *Hillary* v. *Waller*, 12 Ves. at p. 254.

(*l*) *McArthur* v. *Eagleson*, 43 U. C. R. 406; 3 App. R. 577. It seems that in this case the Court presumed that the wife was holding for her husband, which would also necessitate the presumption that, while holding for her husband, she must have supposed him to be alive; which in turn, necessarily entails the supposition that believing him to be alive she went through the form of marriage with another man; the conclusion being that the Court presumed a state of facts which necessitated a presumption of bigamy. This is against the ordinary rule as to presumptions. Again, no stress seems to have been laid upon the possession for more than ten years of the supposed second husband, as extinguishing the husband's title.

(i) *Things rightly done—Deeds.*

The law never presumes that acts are wrongly done, or that fraud has been committed, unless there is good ground for believing such to be the fact; presumptions, if made where nothing is known, are always that things are rightly done, or in favour of order and regularity(*m*).

There is a presumption in favour of the formalities of deeds; as of sealing and delivery on proof of signing(*n*); that they are genuine if they come from the proper custody(*o*) and bear nothing on their face to raise suspicion(*p*); and that they have been delivered on the day of their date(*q*). And when they are thirty years old they are presumed to be valid without any proof(*r*). But, if registered, the certificate of registration proves the execution. Where a conveyance, dated 17th July, 1875, was registered on 21st July, 1875, and a discharge of a mortgage existing at the date of the conveyance was also registered on 21st July, 1875, it was presumed that the conveyance was delivered before registration, so that the discharge operated as a reconveyance to the grantee(*s*). And there is also a presumption in favour of the regularity of a vesting order(*t*).

Where there is nothing to raise a doubt as to the identity of the persons named in the deeds, it will be presumed

(*m*) Lee Abs. 465; *Allison* v. *Rednor*, 14 U. C. R. 459; *Monk* v. *Farlinger*, 17 C.P. at p. 51; *Henderson* v. *Spencer*, 8 P.R. 402; *Dickson* v. *Kearney*, 14 S. C. R. 743.

(*n*) Dart V. & P. 6th Ed. 369.

(*o*) *Orser* v. *Vernon*, 14 C. P. 573; *Rogers* v. *Shortiss*, 10 Gr. 243.

(*p*) Lee Abs. 436.

(*q*) *Hayward* v. *Thacker*, 31 U. C. R. 427.

(*r*) Cov. Con. Ev. 13; *Doe d. Maclem* v. *Turnbull*, 5 U.C.R. 129; *Re Higgins*, 19 Gr. 310; *Monk* v. *Farlinger*, 17 C. P. 41.

(*s*) *Imp. Bank* v. *Metcalfe*, 11 Ont. R. 467.

(*t*) *Henderson* v. *Spencer*, 8 P. R. 402. See also R. S. O. cap. 51, sec. 58, sub-sec. 11, and *Re Hewish*, 17 Ont. R. 454; *Re Morse*, 8 P. R. 475.

from the identity of names(*u*); and the possession of a deed or deeds by the person whose identity is in question makes the presumption stronger(*v*). Proof of execution of a deed includes proof that the party by whom the deed purports to be executed is not only a person of that name but the identical person in whom was vested the estate which the deed purports to convey(*w*); and the fact that a party was described as of York in one deed and as of Niagara in another was held not to be sufficient to rebut this presumption. So, in a case where the patentee, Francis Weis, conveyed to L.C. as "Francis Weast," and executed by making his mark (his description being the same in both the patent and the conveyance), it was held that evidence of the deed having been in the custody of the heir-at-law of L.C. was sufficient evidence of the identity of the grantor with the patentee of the Crown(*x*).

But where a deed was executed in a foreign country during the progress of an investigation for quieting a title, for the purpose of removing a blot on the title, satisfactory evidence of identity and execution was required(*y*).

(iii) *Officials and official acts.*

It is presumed that persons occupying official positions and known by reputation as the persons who have been appointed thereto were duly appointed(*z*). Copies of registered instruments certified by the Registrar, and the Regis-

(*u*) *Nicholson* v. *Burkholder*, 21 U. C. R. 108. And see Lawson Pres. Ev. 248, *et seq.*

(*v*) *Doran* v. *Reid*, 13 C. P. 393.

(*w*) *Rogers* v. *Shortiss*, 10 Gr. 243.

(*x*) *Wallbridge* v. *Jones*, 33 U.C.R. 613. See also *Brown* v. *Livingstone*, 20 U.C.R. 520; *Simpson* v. *Dismore*, 9 M. & W. 47; *Sewell* v. *Evans*, 4 Q.B. 626; *Hamber* v. *Roberts*, 7 C.B. 861.

(*y*) *Re Hay*, 29th January, 1869.

(*z*) *Hall* v. *Jarvis*, Drs. 190; *Smith* v. *Redford*, 12 Gr. 316; *Regina* v. *Fee*, 3 Ont. R. 107; *School Trustees* v. *Neil*, 28 Gr. 408; Lawson Pres. Ev. 47, *et seq.*

trar's certificate endorsed on registered instruments are always received without proof that the person certifying is the Registrar. But in a recent case in Manitoba a copy of a book which would have been evidence if produced (under 14 & 15 Vict. cap. 99, sec. 14, Imp.), certified by "A. Russell, Acting Surveyor-General," was rejected without proof that A. Russell was the custodian(*a*). By statute the certificates of various public officers are receivable without proof of signature(*b*). And there is a presumption that all things done by public officers are rightly done until the contrary is proved(*c*).

(iv) *Life, death and survivorship.*

There is a presumption that life continues(*d*). Love of life is presumed. And a person proved to have been alive at a former time is presumed to be alive at the present time, until death is proved or a presumption of death has arisen(*e*).

As to presumptions of death the rule has been thus stated by a writer in the United States of America:—"An absentee shown not to have been heard of for seven years by persons, who if he had been alive would naturally have heard of him, is presumed to have been alive until the expiry of such seven years, and to have died at the end of that term"(*f*). And in *Re Benham's Trust*(*g*), Malins, V.C.,

(*a*) *McKilligan* v. *Machar*, 3 Man. L. R. 418. And see *Nicholson* v. *Page*, 27 U.C.R. 318.

(*b*) See *ante* p. 123.

(*c*) *Allison* v. *Rednor*, 14 U.C.R. 450; *Monk* v. *Farlinger*, 17 C. P. at p. 51.

(*d*) *Major* v. *Ward*, 5 Ha. pp. 603, 604.

(*e*) Lawson Pres. Ev. 192; *Henderson* v. *Spencer*, 8 P.R. 402.

(*f*) Lawson Pres. Ev. 200.

(*g*) L.R. 4 Eq. 416. This case was reversed on appeal, and further inquiries directed, on the ground that there was no evidence for the Court to act upon. See *Re Phené's Trusts*, L.R. 5 Eq. at pp. 144, 145; *Re Westbrook's Trusts*, W.N. 1873, p. 167.

while agreeing that in the probabilities of the case the absentee may be supposed to have died within the seven years, as that would account for his silence, for convenience sake thought that there should be a presumption of death at the end of the seven years, and that those asserting that the death took place within that period should prove it. But it must be taken as established now that while the presumption of death arises at the end of the seven years, it is not a matter of presumption as to what time during that period he died; the person on whom is the onus of proving the time of death must establish it by evidence, otherwise no judgment can be formed(*h*).

If the absentee went away temporarily the presumption arises as stated above; but if he went away with the intention of acquiring a new domicile the presumption does not arise until inquiry has been made at the new domicile(*i*).

When a man who was absent in British Columbia for several years, corresponding regularly with his family, wrote that he intended leaving about a certain day to return home, and was never afterwards heard from, evidence having been given that about the time mentioned in his letter he was seen at San Francisco to go on board the steamer *Golden Gate,* which was on the same voyage lost off the coast of Mexico, his name appearing in the list of passengers returned to the steamship company with the word "lost" written after it, and diligent inquiry having been made for him without success, his death was, in a proceeding under the Act for quieting titles, presumed after nine years(*j*).

(*h*) *Wing* v. *Angrave*, 8 H.L.C. 183; *Doe d. Knight* v. *Nepean*, 5 B. & Ad. 86; 2 M. & W. 894; *Re Green's Settlement*, L.R. 1 Eq. 288; *Re Phené's Trusts*, 5 Ch. App. 139; *Re Lewes' Trusts*, 6 Ch. App. 356; *Neville* v. *Benjamin*, 18 T. L. R. 283.

(*i*) Lawson Pres. Ev. 212.

(*j*) *Re Harris*, 1872.

An heir-at-law entitled to the benefit of a contract to purchase land, was, after an absence unheard of for twenty-five years, presumed to have abandoned his contract; and purchasers from the brothers of the heir-at-law, who had adopted the contract and paid the purchase money, were held entitled to conveyances from the original vendor(*k*).

But where a purchaser who had taken possession and remained for some time, and paid all the instalments except one, left the land four years after the date of the contract, and two years afterwards the vendor, being unable to find him, let the land to a tenant, it was held that there was not sufficient to raise a presumption of abandonment of the contract(*l*).

Continued absence unheard of for more than seven years of the demandant's husband has been held sufficient to raise a presumption of his death so as to sustain an action of dower(*m*).

One who is proved to have been unmarried when last known to be alive will be presumed to have died childless; but it is otherwise when he or she was married when last known to be alive(*n*). Where there was evidence of a negative sort, which, though not conclusive, was sufficient to warrant the presumption of the death of certain parties in a partition matter, and also that they died intestate, Blake, V.C., in the absence of positive proof refused to presume that they had died unmarried and without issue(o).

There is no presumption as to the order in which two or more persons died who are shown to have perished in the same accident, shipwreck or battle. The question is one purely of fact, and in the absence of evidence to establish

(*k*) *Burns* v. *Canada Co.*, 7 Gr. 587.
(*l*) *Cornwall* v. *Henson*, L.R. (1899) 2 Ch. 710; (1900) 2 Ch. 298.
(*m*) *Giles* v. *Morrow*, 1 Ont. R. 527.
(*n*) Lawson Pres. Ev. 197, *et seq.*
(o) *McDonald* v. *Forbes*, 1 C.L.T. 333.

what is asserted the party asserting it must fail. There is no presumption, arising from age or sex, as to survivorship among persons whose death is occasioned by one and the same cause, nor is there any presumption that they died at the same moment(*p*). The matter is in fact incapable of being determined where there is no evidence. The party alleging survivorship must prove it(*q*).

Upon an application for a grant of letters of administration to a man and his wife who were both alleged to have been killed in a general massacre of foreigners in China, the Court allowed the form of oath to lead grants to be varied by stating that the husband and wife died on or about the alleged date, and that after due inquiries there was no reason to believe that either survived the other(*r*). But it is apprehended that this would not vary the rule as to onus of proof.

The one who was last seen or heard of alive in a case where many have perished together will perhaps be presumed to have survived the others(*s*); but it is a question of fact to be determined as other questions of fact upon evidence.

As between vendor and purchaser the rules as to presumptions of death are said to be guides to the convey-

(*p*) *Wing* v. *Angrave*, 8 H.L.C. 183.

(*q*) In 1882 the steamer *Asia* was lost in a storm on Lake Superior. The passengers and crew took to the boats. Owing to the high sea which was running the boats were capsized several times, and on each occasion several of their occupants were drowned, some being stunned by the blows of the gunwale as the boats capsized. The survivors were finally reduced to two passengers, a boy and a girl, who were ultimately rescued. The chances were naturally in favour of the seamen who were inured to hardship as against the passengers, and amongst the latter in favour of the males as against the females. But the result shows that if a rule were laid down as to presumptions it would be purely arbitrary.

(*r*) *In bonis Beynon*, L.R. (1901) P. 141. See *Henning* v. *McLean*, 2 O.L.R. 169; 4 O.L.R. 666, as to the meaning in a will of the words dying "at the same time."

(*s*) Lawson Pres. Ev. 246.

ancer rather than authorities which would be held binding on a purchaser(*t*).

(v) *Women past child-bearing.*

There is a presumption frequently acted upon that women of advanced age are incapable of having issue. On this presumption money has been paid out of Court to parties entitled in default of issue on their undertaking to return the money if issue should be born(*u*). But the circumstances may justify a payment without an undertaking(*v*). In one case a widow of fifty-three years of age who had never had any children was held entitled, on this presumption, to a reconveyance from trustees of land conveyed by her to them in settlement on her marriage, the remainder after the death of herself and her husband being limited to her issue(*w*). And the same rule is followed as to spinsters(*x*). And in a recent case a woman and one of her children petitioned for registration as owners with absolute title under *The Land Titles Act*, under the following circumstances:—The petitioner, S.G., was devisee for life with remainder to her children surviving her in fee simple. All but her co-petitioner had conveyed their interests to her. She was fifty-six years of age, and adduced medical evidence which convinced the Court that it was a natural impossibility that she should have any more children. And an order was made for the registration(*y*). Forty-nine years

(*t*) Dart V. & P. 8th Ed. 389.

(*u*) *Leng* v. *Hodges*, Jac. 585, and notes; *Brown* v. *Pringle*, 4 Ha. 124.

(*v*) *Mills* v. *Knight*, 12 Jur. 606.

(*w*) *Farrell* v. *Cameron*, 29 Gr. 313. See also *Re Lowman*, L.R. (1895) 2 Ch. 348; *Re Hocking*, L.R. (1898) 2 Ch. 567; *Re White*, L. R. (1901) 1 Ch. 570.

(*x*) *Re White*, L.R. (1901) 1 Ch. 570.

(*y*) *Re G.*, 21 Ont. R. 109.

and nine months is the earliest age at which the presumption has been acted on; that being the case of a married woman who had never had children(*z*). Lord St. Leonards thought that the presumption should not be made against a purchaser; but Mr. Dart thinks it might be acted upon(*a*). If registration under *The Land Titles Act* is permitted upon such a presumption, a title ought to be forced on a purchaser under the same circumstances, for the registration under that Act is a quasi-judicial record of absolute right.

(vi) *Legitimacy and marriage.*

In matters of pedigree there is a presumption that a child born in wedlock, even a day after the marriage, is the child of the husband(*b*). It may be rebutted by proof of the husband's incompetency, or his absence at the time during which the child must in the course of nature have been begotten, or his presence under such circumstances only as afford clear and satisfactory proof that there was no sexual intercourse(*c*). This presumption cannot be rebutted by the admissions or declarations of the husband or wife as to non-access, even when the child was conceived before but born after the marriage(*d*).

In questions relating to property, cohabitation and general reputation of marriage are sufficient to raise a presumption of marriage(*e*); and when the cohabitation has

(*z*) See Dart V. & P. 6th Ed. 391, and notes.

(*a*) See *Re G.*, 21 Ont. R. 109, 111.

(*b*) Dart V. & P. 6th Ed. 381; Lawson Pres. Ev. 108, *et seq.*

(*c*) Dart V. & P. 6th Ed. 381. And see *Evans* v. *Watt*, 2 Ont. R. 166, and cases there cited.

(*d*) *Ryan* v. *Miller*, 21 U.C.R. 202; 22 U.C.R. 87; *Evans* v. *Watt*, 2 Ont. R. 166. See *Mulligan* v. *Thompson*, 23 Ont. R. 54.

(*e*) Lawson Pres. Ev. 104; *Doe d. Wheeler* v. *McWilliams*, 2 U.C.R. at p. 80; *Baker* v. *Wilson*, 8 Gr. 276; *Graham* v. *Lair*, 6 C.P. 310; *Beatty* v. *Beatty*, 17 C.P. 484.

been long continued the presumption is stronger(*f*). This presumption may be rebutted by the proof that the woman formerly lived with another man in such a manner as to raise the same presumption of marriage with him(*g*). But the presumption is strong in favour of the regularity of the marriage and very clear evidence must be given to rebut it(*h*). Where a marriage in fact has been proved evidence of reputation and cohabitation is not sufficient to establish a prior marriage(*i*). And where evidence of reputation and cohabitation was given, and a certificate of the marriage was also given in evidence, it was held unnecessary to prove publication of banns(*j*). Nor is it necessary to prove the authority of the clergyman who officiates(*k*). And in a case where a Roman Catholic priest celebrated a marriage on one publication of banns, the Roman Catholic Archbishop having assumed to dispense with the others, it was held that the Act, 37 Vict. cap. 6, sec. 1(*l*), remedied any defect in the marriage, that the *onus* lay on the party denying the validity of the marriage to establish it, and that the invalidity was not established, as there was no proof that no license had been issued(*m*).

(vii) *Satisfaction of mortgages.*

Where a mortgagor continued in possession for more than twenty years after the mortgage (under the old law as

(*f*) *Doe d. Breakey* v. *Breakey*, 2 U.C.R. 354.

(*g*) *George* v. *Thomas*, 10 U.C.R. 604.

(*h*) *Doe d. Breakey* v. *Breakey*, 2 U.C.R. 354; *O'Connor* v. *Kennedy*, 15 Ont. R. 20.

(*i*) *Doe d. Wheeler* v. *McWilliams*, 3 U.C.R. 165.

(*j*) *Doe d. Wheeler* v. *McWilliams*, 2 U.C.R. 77. See *O'Connor* v. *Kennedy*, 15 Ont. R. 20.

(*k*) *Baker* v. *Wilson*, 8 Gr. 378.

(*l*) See also 38 Vict. cap. 8, sec. 6.

(*m*) *O'Connor* v. *Kennedy*, 15 Ont. R. 20.

to limitations of actions) without paying interest it was presumed that the money was paid on the day and that the mortgagee had no subsisting title(*n*).

Where a mortgage was satisfied, before the day for redemption, by the conveyance of the mortgaged lands to a nominee of the mortgagee, who took and maintained possession for thirteen years, and subsequently the mortgagee affected to make title under the mortgage, it was held that a conveyance from the mortgagee to the assignee of the equity of redemption might be presumed as against the assignee of the satisfied mortgage(*o*). And where the mortgage deed is in the possession of the mortgagor, or some one claiming under him, it affords a fair presumption that the mortgage has been satisfied, and a reconveyance made (*p*). But the mere fact that a mortgage was over thirty years old was held not necessarily to raise a presumption of payment, when the terms of payment were of such a nature that they might have been extended over a long period, and the mortgage was referred to in modern conveyances as a subsisting incumbrance(*q*).

(viii) *Miscellaneous.*

Where one to whom a devise is made, being aware of it, neither expressly rejects nor accepts it, he will be presumed to accept it(*r*).

A person in possession is presumed to claim by a rightful and not by a wrongful title(*s*). And so, where a person had been for a number of years in possession as a trespasser,

(*n*) *Doe d. Dunlop* v. *McNab*, 5 U.C.R. 239; *Doe d. McGregor* v. *Hawke*, 5 O.S. 496; *Imp. Bank* v. *Metcalfe*, 11 Ont. R. 467.

(*o*) *Doe d. McLean* v. *Whitesides*, 5 O.S. 92.

(*p*) *Collins* v. *Dempsey*, 14 U.C.R. at p. 395.

(*q*) *McIntosh* v. *Rogers*, 12 P.R. 289.

(*r*) *Re Defoe*, 2 Ont. R. 623; *Re Dunham*, 20 Gr. 258.

(*s*) *Re Dunham*, 20 Gr. 258; *Kent* v. *Kent*, 20 Ont. R. 445; 19 App. R. 352.

but not long enough to acquire a title, and took a conveyance from one who had but a life estate in the land, it was held that he must be presumed to claim the life estate under the deed, and that he could not rely on his possession (which had subsequently extended to a period long enough, but for the deed, to have given him a title) as having barred those in remainder(*t*).

Intestacy depends upon negative proof, *i.e.*, that the deceased did not make a will, and therefore is incapable of actual demonstration. Letters of administration are, in the absence of special circumstances, accepted by conveyancers as sufficient to raise the presumption, or a will not affecting the land in question or putting the heir to his election(*u*).

(*t*) *Gray* v. *Richford*, 2 S.C.R. 431.
(*u*) Dart V. & P. 6th Ed. 380.

CHAPTER VII.

INCUMBRANCES.

1. *Mortgages and incumbrances generally.*
2. *Taxes.*
3. *Local improvements—Drainage—Sewers.*
4. *Executions.*
   - (i) *General Remarks.*
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5. *Registered clouds.*
6. *Vendor's lien.*
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8. *Lis pendens.*
9. *Dower.*
10. *Curtesy.*
11. *Easements.*
12. *Mechanics' liens.*

It is the purchaser's duty to examine the register, to inquire at the Sheriff's office for executions against the lands of his vendor, and to search for arrears of taxes. He is assumed to have actual notice of all registered instruments, whether he searches or not(*v*). But, this being done, he is under no obligation to ask for unregistered incumbrances or interests if he has no actual notice of them

(*v*) *T. & L. Co.* v. *Shaw*, 16 Gr. 446; *Dominion L. & S. Soc'y.* v. *Kittridge*, 23 Gr. 635. And see *ante*, p. 87.

(*w*). He is entitled to rely upon the registered title, and to assume that if any unregistered interests do actually exist they will be fraudulent and void as against his conveyance when registered; the policy of our law being that purchasers should be able to ascertain the actual state of the title by search in the public offices(*x*).

The proposition that the purchaser is assumed to have notice of registered interests whether he searches for them or not, is to be taken as affecting only the relationship between himself and the owners of the registered interests; for, as against the vendor, the purchaser is under no obligation to search, and if the vendor makes any misrepresentation whereby the purchaser is induced to accept the title he will be held responsible for the injury thereby done to the purchaser. So, where a fourth mortgagee represented that his security was a second mortgage, and thereby induced the plaintiff to purchase it, the latter was held entitled to a return of the money paid on discovering that the mortgage was worthless, though he might have ascertained the truth by a search in a registry office(*y*). And the vendor and his solicitor are also under a statutory liability, both civil and criminal, for concealment of documents and falsification of pedigrees(*z*).

1. *Mortgages and incumbrances generally.*

If the property is to be sold free from incumbrances, it is not necessary that anything should be said about them in the particulars of sale, because if there are any they must be removed or paid by the vendor, or may, if the purchaser chooses, be removed or paid out of the purchase money(*a*).

(*w*) *Bennetto* v. *Holden*, 21 Gr. at p. 227; *Agra Bank* v. *Barry*, L.R. 7 H.L. at p. 157.

(*x*) *Johnston* v. *Reid*, 29 Gr. 299.

(*y*) *Barr* v. *Doan*, 45 U.C.R. 491.

(*z*) *Ante*, p. 43.

(*a*) *Torrance* v. *Bolton*, L.R. 14 Eq. 124, affirmed 8 Ch. Ap. 118.

Consequently, when an estate is offered generally for sale the purchaser has a right to assume that the title is good, and that it is free, or will be freed, from incumbrances, and he has a right to require this to be shown or done before he can be compelled to pay any part of his purchase money(*b*).

As Sir George Jessel, M.R., said in *Cato* v. *Thompson*(*c*), a man may buy knowing "that the property is incumbered up to the hilt, but he does not take a conveyance subject to the incumbrances." And if on a sale of a fee simple, unincumbered, it appeared that the vendor could convey only an equity of redemption, the purchaser, if he had not waived his right, was formerly able to rescind.

But, since 1886, when provision was made for directing payment into Court of enough money to secure the incumbrancers, and enabling the Court to declare the land free from the incumbrances(*d*), it does not follow that a purchaser can rescind; for application may now be made to the Court to sell free from the incumbrance, and until such an application is disposed of, or the vendor refuses to make it, the purchaser would no doubt be kept to his contract(*e*).

As we have seen already(*f*), an outstanding incumbrance is a mere question of conveyance as distinguished from a question of title, and the purchaser may assume that the vendor will procure the incumbrancer to join in the conveyance at the proper time, when the title is made out; and indeed the purchaser may perhaps (though it has not been decided), insist upon a reconveyance from the incum-

(*b*) *Gamble* v. *Gummerson*, 9 Gr. 200; *Cameron* v. *Carter*, 9 Ont. R. 431.

(*c*) 9 Q.B.D. at p. 620.

(*d*) R.S.O. cap. 119, sec. 15.

(*e*) *Re Freme's Contract*, L.R. (1895) 2 Ch. 256. See *postea*, p. 152 and Chap. XIV. sub title "Vesting Orders."

(*f*) *Ante*, p. 46.

brancer to the vendor or himself, instead of leaving the vendor to rid the title of the mortgage by the usual statutory discharge(*g*). The purchaser therefore need not make objection to the title on account of the existence of incumbrances, unless there is something in them very special or complicated which involves the question of title. It would be prudent, however, if he desires to have a reconveyance instead of a statutory discharge, to require this in making requisitions on the title. Though it is not clear that he can insist upon it, it is clear that the vendor can do so as against the incumbrancer.

As the vendor has a lien on the estate for his purchase money, so the purchaser has, as against the vendor, a lien on his purchase money for the discharge of incumbrances which the vendor ought to remove(*h*). And so, when an incumbrance is discovered before conveyance and payment of purchase money, the vendor must discharge it, whether he has or has not agreed to covenant against incumbrances, before he can compel payment of the purchase money(*i*); and the purchaser may, though he is not bound to(*j*), apply the unpaid purchase money in removing incumbrances(*k*). And where the purchase money is not payable immediately, but the time for payment is deferred by the agreement, or where it is payable by instalments, the purchaser is still entitled to an enquiry as to title, and if it appear that there are incumbrances outstanding, he is entitled to be secured against them or to pay his money into Court to create a fund for their discharge, even though they may mature before his purchase money becomes

(*g*) *McLennan* v. *McLean*, 27 Gr. 54.

(*h*) *Gamble* v. *Gummerson*, 9 Gr. 201.

(*i*) Sug. 548; *McDermott* v. *Workman*, 24 U.C.R. 467.

(*j*) *Gamble* v. *Gummerson*, 9 Gr. 198.

(*k*) *Waters* v. *Shade*, 2 Gr. 467; *Tully* v. *Bradbury*, 8 Gr. 564; *Church Society* v. *McQueen*, 15 Gr. 281; *Henderson* v. *Brown*, 18 Gr. 80.

due(*r*). And in one case where a decree for specific performance directed a conveyance free from incumbrances, the Court, on the vendor's default, limited a time within which he should discharge an incumbrance against the land, failing which the purchaser was to be at liberty to procure an assignment or discharge and take his remedy against the vendor for the amount necessary to be paid, the purchase money in Court being applied *pro tanto* to satisfy the incumbrance(*s*).

As has already been pointed out, since 1886 the Court has power, on an application being made, to order a sufficient amount of money into Court to secure the incumbrancer, and to declare the land free from the incumbrance(*t*).

It is not obligatory upon the Court to act upon the application, and in one case where the incumbrance was an onerous rent charge, and the amount necessary to remove it would have exceeded the amount of the purchase money, the Court refused to direct its removal; but in this case there was a condition that the vendor might rescind upon the purchaser taking any objection which he was unable or unwilling to remove(*u*).

After payment of the purchase money but before conveyance the purchaser may recover the purchase money, though the intended covenants are not to extend to the title under which the purchaser is threatened(*v*), unless the statute referred to is taken advantage of.

After conveyance the purchaser is, as a general rule,

(*r*) *Cameron* v. *Carter*, 9 Ont. R. 426, overruling *Chantler* v. *Ince*, 7 Gr. 432; *Thompson* v. *Brunskill*, 7 Gr. 542; *Wardell* v. *Trenouth*, 24 Gr. 465.

(*s*) *Stammers* v. *O'Donohoe*, 29 Gr. 64.

(*t*) *Ante*, p. 159.

(*u*) *Re G. N. R. Co. & Sanderson*, 25 Ch. D. 788. See *Milford Haven R. & E. Co.* v. *Moweatt*, 28 Ch. D. 402, and *Re Freme's Contract*, L.R. (1895) 2 Ch. 256, where the statute was acted on.

(*v*) Sug. 549.

confined to his remedy upon the vendor's covenants(*w*). If the vendor and purchaser are both ignorant of any incumbrances, and the vendor is entirely innocent, the purchaser, after conveyance, has no remedy whatever against the vendor if he is obliged to pay off an incumbrance subsequently discovered, unless it be one within the vendor's covenants(*x*).

Where the purchaser has actual knowledge of an incumbrance and does not insist upon its being discharged by the vendor, or paid out of the purchase money, but completes the purchase by taking a conveyance and securing the purchase money, taking from the vendor an indemnity against the incumbrance, he will be considered as having elected to rely on the indemnity(*y*).

In one case the purchaser paid his purchase money and took a conveyance with a covenant for further assurance on the verbal agreement of the vendor to remove a mortgage disclosed at the time of sale; and it was held that a bill would lie to compel the removal of the incumbrance, and that the vendor was bound to remove it by his covenant for further assurance(*z*).

As long as the mortgage for the purchase money remains in the hands of the vendor, the purchaser has a potential equity to a lien thereon to the extent of any incumbrances which the vendor ought to discharge(*a*); but the relief which he may obtain by asserting his lien will be granted only to prevent unnecessary circuity of action(*b*), and if

(*w*) *Re Kennedy*, 26 Gr. 35, 36; *Re Wilson & Houston*, 20 Ont. R. at p. 537. See *Thomas* v. *Powell*, 2 Cox 394.

(*x*) *Re Buck*, *Peck* v. *Buck*, 6 P.R. 98; *Urmston* v. *Pate*, Cru. Dig. Tit. 32, cap. 25, sec. 90.

(*y*) *Tully* v. *Bradbury*, 8 Gr. 564; *Egleson* v. *Bowe*, 3 App. R. 575; *Whitehouse* v. *Roote*, 20 U.C.R. 76, 78.

(*z*) *Tripp* v. *Griffin*, 5 C.L.J. 117. And see *Clark* v. *Bogart*, 27 Gr. 450.

(*a*) *Per* Strong, V.C., in *Henderson* v. *Brown*, 18 Gr. 95.

(*b*) *Tully* v. *Bradbury*, 8 Gr. 565; *Egleson* v. *Bowe*, 3 App. R. 575.

the vendor appropriate the purchase money by assigning his right to it, or by assigning his security, the purchaser will be relegated to his original right of action against the vendor, and will not be entitled to assert his lien against the assignee(*c*) unless he is a volunteer(*d*). And though the assignee may have notice of the prior incumbrance, the purchase, the covenant for payment of the purchase money in the mortgage securing it, and the covenant to indemnify the purchaser against the prior incumbrance, he is not bound to infer that it was the intention of the parties that the purchaser should have the right to apply his unpaid purchase money upon the outstanding incumbrance(*e*). But if the purchaser has paid the outstanding incumbrance before the assignment of the mortgage, so as to give him a right of set off, he will be entitled to relief as against the assignee(*f*).

When the vendor is aware of an incumbrance or defect which he conceals from the purchaser, then, whether it is or is not within his covenants, the purchaser on discovery thereof is, even after conveyance, entitled to rescission of the contract and to recover his purchase money on the ground of fraud(*g*). And where a conveyance was made to a married woman by the appointment of her husband, containing a covenant against incumbrances, and the husband joined with his wife in a mortgage to secure the purchase money and covenanted to pay it, it was held that neither the vendor, nor a volunteer to whom the vendor had assigned the mortgage, could compel payment thereof with-

(*c*) *Fully* v. *Bradbury*, 8 Gr. 561, approved in *Egleson* v. *Howe*, 3 App. R. 566, overruling *Church Society* v. *McQueen*, 15 Gr. 281, and *Henderson* v. *Brown*, 18 Gr. 79, for the reasons stated in the dissenting judgment of Strong, V.C., in the latter case; *Wood* v. *Page*, 26 Gr. 305.

(*d*) *Lovelace* v. *Harrington*, 27 Gr. 178.

(*e*) *Egleson* v. *Howe*, 3 App. R. 576.

(*f*) *Per* Strong, V.C., in *Henderson* v. *Brown*, 18 Gr. at p. 91, citing *Watson* v. *Mid-Wales R. W. Co.*, L.R. 2 C.P. 593.

(*g*) *Edwards* v. *McLeay*, Coop. 308; *Re Buck, Peck* v. *Buck*, 6 P.R. 99.

out giving credit for the amount of an incumbrance created by the vendor which the latter had concealed(*h*).

It has been held that a purchaser cannot after conveyance set off against or retain from the purchase money unascertained damages, in consequence of sales of the land being prevented by the existence of incumbrances which the vendor ought to have discharged(*i*); and in a foreclosure suit the defendant was refused an account of damages for failure of title or on account of incumbrances(*j*). But in a late case where specific performance with compensation was asked, the decree directed the Master to make an allowance to the plaintiff for damages on account of misrepresentations of fact made by the defendant(*k*). And no doubt the cross relief could now be obtained in the same action.

Where there is a mere covenant to indemnify and save harmless the purchaser from an incumbrance, it is not broken by the maturing of the incumbrance unless the purchaser has been disturbed by the incumbrancer(*l*).

If the vendor intends to throw on the purchaser the obligation of paying off incumbrances, what is to be sold is in fact only an equity of redemption, and it is the duty of the vendor correctly to describe the estate which he proposes to sell in his particulars of sale(*m*). The purchaser ought also to be apprised of whether he is to assume liability for the incumbrances and indemnify the vendor against them, or take simply an equity of redemption without any obligation to assume responsibility for the incumbrances.

There is a distinction between a contract to purchase an

(*h*) *Lovelace* v. *Harrington*, 27 Gr. 178.

(*i*) *Stevenson* v. *Hodder*, 15 Gr. 570.

(*j*) *Hamilton* v. *Banting*, 13 Gr. 484.

(*k*) *Stammers* v. *O'Donohoe*, 28 Gr. 207.

(*l*) *Leeming* v. *Smith*, 25 Gr. 256. But *see Canavan* v. *Mc[illegible]*, 2 Ont. R. 626.

(*m*) *Torrance* v. *Bolton*, L.R. 14 Eq. 124, affirmed 8 Ch. Ap. 118. See also *Phillips* v. *Caldcleugh*, L.R. 4 Q.B. 159; *Esdale* v. *Stephenson*, 1 S. & St. 122; *Binks* v. *Ld. Rokeby*, 2 Swan. 223.

estate subject to an existing mortgage, that is, to purchase a mere equity of redemption, and a contract for the purchase of an estate in mortgage for a given sum of which the mortgage debt forms part, and which is to be retained by the purchaser out of the purchase money(*n*). In the former case the land remains the proper fund for the discharge of the mortgage: in the latter, the purchaser becomes personally liable to the vendor for the discharge of the outstanding mortgage. Thus, where a purchaser took a conveyance of land in consideration of "$1,050 and assuming the payment of the mortgages" which the vendor had covenanted with a previous owner to pay, it was held that, upon maturity of one of the outstanding mortgages and before its payment had been enforced, the purchaser was bound as against the vendor to pay it off and save him from personal liability thereon(*o*).

The purchase deed ought to show on its face whether or not the purchaser assumes liability for the incumbrance, that is to say, it should show either that the amount of the incumbrance is part of the purchase money, which amount the purchaser has retained to pay off the incumbrance at maturity, or else that he buys only an equity of redemption. If it is left open, or the conveyance is ambiguous in its terms, it becomes a question of fact to be determined from the surrounding circumstances, and the implication of liability to indemnify the mortgagor may be shown not to arise at all, or to be rebutted, by parol evidence(*p*). Thus, in *Corby* v. *Gray*(*q*), where land subject to mortgage was conveyed, the Court admitted evidence as to the true consideration and purpose of the conveyance, to rebut the pre-

(*n*) Coote on Mortgage, 5th Ed. 1845.

(*o*) *Canavan* v. *Meek*, 2 Ont. R. 626.

(*p*) *Beatty* v. *Fitzsimmons*, 23 Ont. R. 245.

(*q*) 15 Ont. R. 1. See also *Brit. Can. L. Co.* v. *Tear*, 23 Ont. R. 664.

sumption arising from the transaction that the grantee should indemnify his grantor against the mortgage. And in *Walker* v. *Dixon*(*r*), where the conveyance was made to a nominee of the purchaser it was held that he was not liable, not having been a party to the contract. On a purchase of land in mortgage, the amount of the incumbrance being retained by the purchaser, in the absence of any express covenant by the purchaser to pay off the incumbrance, the obligation to protect the vendor is an equitable one, arising from the nature of the transaction, and not a contract, and does not bind the separate estate of a married woman(*s*).

When the purchaser assumes the obligation to indemnify the vendor, he is not, in the absence of a direct stipulation with the holder of the incumbrance, or dealings with him, showing an intention to give him the benefit of the purchaser's personal responsibility, liable personally to the mortgagee(*t*) though he may be compelled by his grantor to pay off the incumbrance at maturity(*u*). But if he enters into a binding agreement directly with the mortgagee he of course becomes liable thereon. In the absence of any specific discharge of the mortgagor, he still remains liable on his covenant; but if the agreement between his assignee and the mortgagee is for an extension of time, the mortgagee cannot, during its currency recover the mortgage money from the mortgagor(*v*).

Payment of interest by the assignee of the equity of redemption, to the mortgagee, being made for the purpose of

(*r*) 20 App. R. 96.

(*s*) *Per* Osler and Maclennan, JJ.A., in *McMichael* v. *Wilkie*, 18 App. R. 464.

(*t*) *Aldous* v. *Hicks*, 21 Ont. R. 95; *Frontenac L. & I. Co.* v. *Hysop*, 21 Ont. R. 577, and cases cited therein.

(*u*) *Canavan* v. *Meek*, 2 Ont. R. 636.

(*v*) *Mathers* v. *Hellwell*, 10 Gr. 572. See this case explained in *Forster* v. *Ivey*, 32 Ont. R. 175; 2 O.L.R. 480.

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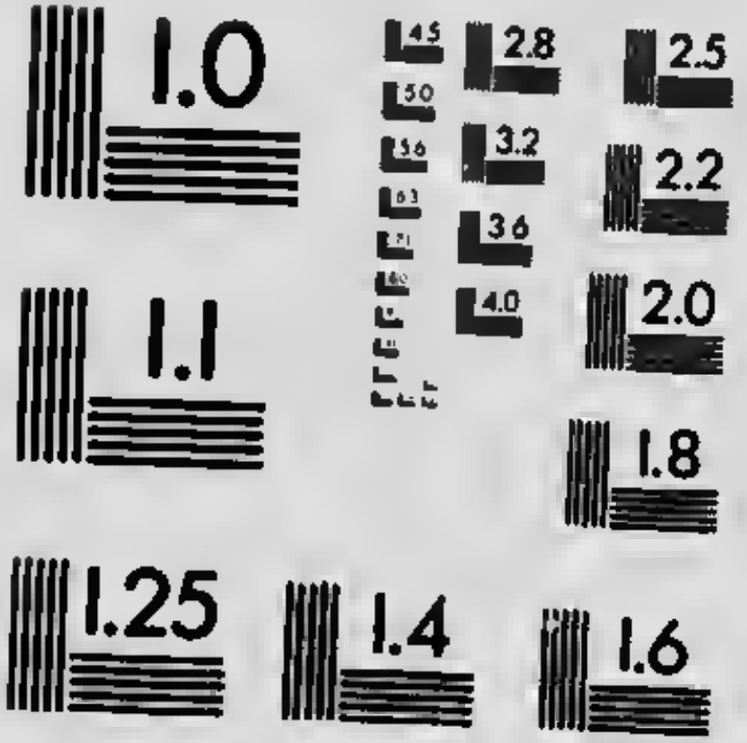

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saving the equity of redemption, does not render him liable to the mortgagee(*w*).

In one case(*x*) where a purchaser took a conveyance which described the land as being "subject to a mortgage," it was held, upon administration of his estate, that the mortgagee was entitled to prove on the general estate for the amount of the mortgage. This case has not been followed, however, and must be considered as overruled(*y*). The acceptance of such a deed implies an agreement to indemnify the vendor, but does not amount to an undertaking to pay the mortgagee.

The relationship of principal debtor and surety, with the mortgagee as creditor, does not arise from the mere assignment of the equity of redemption, even where the assignee agrees with the mortgagor to pay the mortgage. There is no contract between the assignee and the mortgagee, and therefore no debt. The mortgagor, being under a covenant to pay the mortgagee, remains liable as long as the covenant endures, and on payment the mortgagee can reconvey the land to him and his right of indemnity against his assignee is unimpaired(*z*).

The liability of one who purchases land in mortgage and incurs an obligation to remove the vendor's mortgage, exists after he has parted with the estate, and if the vendor is sued upon the mortgage he may recover from the purchaser the debt and his costs of suit(*a*). But in such a case where a purchaser subject to a mortgage sold the land, and afterwards bought it under a decree obtained by the mortgagee on his mortgage for a sum less than the mortgage debt, it was held that he was entitled to the land free from any lien

(*w*) *Re Errington*, L.R. (1894) 1 Q.B. 11.

(*x*) *Re Cozier, Parker* v. *Glover*, 24 Gr. 537.

(*y*) See *Frontenac L. & I. Co* v. *Hysop*, 21 Ont. R. at pp. 579, 580.

(*z*) *Forster* v. *Ivey*, 32 Ont. R. 175; 2 O.L.R. 480.

(*a*) *Joice* v. *Duffy*, 5 C.L.J. 141.

for the balance of the mortgage debt; for though the mortgagee might sue the mortgagor for the balance due, the mortgagor might never ask relief over against the purchaser(*b*). And where mortgagees sold under the power of sale in their mortgage, and one of the mortgagors bought the land, but the mortgagees, instead of carrying out the sale, threatened the first assignee of the equity of redemption with proceedings at the request of the mortgagors, and he paid the arrears, and sued one to whom he had conveyed, it was held that he could not recover, because the sale under the power could not be treated as a nullity and the payment was therefore a voluntary one(*c*).

Where a vendor sells portions of land under mortgage, taking covenants from the purchasers to pay proportionate parts of the mortgage debt, he cannot compel them to pay their proportionate parts without himself paying his proportion. And, probably, any purchaser who paid the proportion due by any other purchaser would be entitled to stand in the place of the mortgagee *pro tanto* as against the one whose proportion he paid(*d*). But where a vendor sold the whole mortgaged premises in two parcels to Costello and Norris, the one becoming liable to him for a mortgage of $1,600, and the other for a mortgage of $500, and Costello having made default the mortgagee sold the land under the power of sale in his mortgage, and Norris bought to save himself, it was held that he had no recourse against Costello(*e*).

If a purchaser takes land subject to an incumbrance, inquiry should be made of the incumbrancer as to the amount due thereon(*f*); and though it may be that a mort-

(*b*) *Forbes* v. *Adamson*, 1 Ch. Ch. 117.
(*c*) *Patterson* v. *Tanner*, 22 Ont. R. 364.
(*d*) *Clemow* v. *Booth*, 27 Gr. 15.
(*e*) *Norris* v. *Meadows*, 7 App. R. 237.
(*f*) *Ibbotson* v. *Rhodes*, 2 Vern. 554.

gagee need not answer any inquiry as to the particulars of his security unless the applicant is entitled and offers to redeem him(*g*), yet if he does answer he will be bound by his reply(*h*). But a statement made to the vendor (mortgagor) by a mortgagee was held not to bind him in the absence of evidence that the inquiry by the vendor had been made on behalf of the purchaser, and that the mortgagee was aware of it(*i*).

A mortgage, though on its face made to secure payment of a specific amount, may be proved by parol evidence to be for a running account, and intended as a continuing security. In *McMaster* v. *Anderson*(*j*), a mortgage having been given by Anderson to McMaster for £125, payable at a certain time, the mortgagor afterwards sold the equity of redemption to Nigh, at the same time showing him a receipt in full of all indebtedness signed by the plaintiff and dated subsequent to the mortgage. On a bill being filed for foreclosure after the mortgagor's death, Spragge, V.C., admitted parol evidence to show that the mortgage, although given for a specific sum, was in fact intended as a continuing security for the mortgagor's indebtedness from time to time, not exceeding £125. His Lordship said, "I think Nigh can stand in no better position than Anderson. It was his duty to have inquired of the mortgagee."

In England it is held that where a second mortgage is created after a first mortgage for a fluctuating sum, and the first mortgagee has notice of the second mortgage, all sums advanced by the first mortgagee after such notice rank after the second mortgage(*k*); and that too, even though the first mortgagee has agreed to make further advances, for the

(*g*) Dart V. & P. 6th Ed. 517.

(*h*) *Ibbotson* v. *Rhodes*, 2 Vern. 554.

(*i*) *Mowat* v. *Bank of U. C.*, 5 Gr. 374

(*j*) Ms. 22nd May, 1865.

(*k*) *Rolt* v. *Hopkinson*, 3 DeG. & J. 177; 9 H.L.C. 514; *Menzies* v. *Lightfoot*, L.R. 11 Eq. 459.

making of the second mortgage by the mortgagor releases the first mortgagee from his obligation to make the further advances(*l*).

In Ontario the question arose in *Pierce* v. *Can. Perm. L. & S. Co.*(*m*), and Ferguson, J., held in the first instance that each new advance was a new acquisition of interest in the land, and that the registration of the second mortgage was therefore notice to the first mortgagee when making the subsequent advances. This view was not adopted in the Divisional Court, and it was held that in order to postpone the first mortgage there must be actual knowledge of the second mortgage, and that the title of the first mortgagee was complete upon registration. This decision was followed by an enactment which provides as follows:—"Every mortgage duly registered against the land comprised therein is, and shall be deemed as against the mortgagor, his heirs, executors, administrators, assigns and every other person claiming by, through or under him to be a security upon such lands to the extent of the mo or money's worth actually advanced or supplied to the mortgagor under the said mortgage (not exceeding the amount for which such mortgage is expressed to be a security) notwithstanding that the said moneys or money's worth, or some part thereof, were advanced or supplied after the registration of any conveyance, mortgage or other instrument affecting the said mortgaged lands, executed by the mortgagor, his heirs, executors or administrators, and registered subsequently to such first mentioned mortgage, unless before advancing or supplying such moneys or money's worth the mortgagee in such first mentioned mortgage had actual notice of the execution and registration of such conveyance, mortgage or other instrument; and the registration of such conveyance, mortgage

(*l*) *West* v. *Williams*, L.R. (1898) 1 Ch. 488; (1899) 1 Ch. 132.
(*m*) 24 Ont. R. 426; 25 Ont. R. 671; 23 App. R. 516.

or other instrument after the registration of such first mentioned mortgagee, shall not constitute actual notice to such mortgagee of such conveyance, mortgage or other instrument"(*n*).

The result of this statute is that a mortgagee is sufficiently protected by the registration of his mortgage, and may go on making his advances up to the limits prescribed by his security until he is actually notified of a second mortgage, in which case he cannot make any further advances in priority to the second mortgage. The question whether or not the subsequent advances are or are not additional acquisitions of interest so as to charge the first mortgagee with notice by registration of the second mortgage, is no longer open for discussion, since this enactment declares that the registration of the second mortgage is not notice to the first mortgagee.

In *Stark* v. *Shepherd*(*p*) a purchaser took a conveyance of land subject to a building society mortgage, paying a portion of the purchase money in cash, assuming the mortgage "on which $664 is yet unpaid," and giving a mortgage for the balance. It appeared on inquiry that the building society claimed a number of small instalments amounting in all to $1,189.25. It was held that the purchaser was entitled to retain the cash value of the mortgage at the date of the purchase if the society would accept it, but if not then such sum as with interest on it would meet the accruing payments.

2. *Taxes.*

Taxes are a lien on the land, and have priority over any claim, lien, privilege or incumbrance of any party except the Crown, and do not require registration to preserve pri-

(*n*) R.S.O. cap. 136, sec. 99.

(*p*) 29 Gr. 316.

city(*q*) and as between vendor and purchaser they are an incumbrance, and if there are any in arrear, the vendor should remove them(*r*). Search should, therefore, be made in the County Treasurer's office, and a certificate obtained from him. The certificate should show on its face that the statement of taxes in arrear for the preceding year has been returned by the Township Treasurer to the County Treasurer(*s*). If it did not show this, then a certificate should be procured from the Township Treasurer also, in which it should be stated that the collector's roll has been returned by that officer to the Treasurer(*t*). If the roll has not been returned, the collector's receipt for the taxes of the past year will be sufficient; but the County Treasurer's certificate should be got in every case to show that there are no arrears. In practice it is usual to accept the collector's receipts with the County Treasurer's certificate without procuring a certificate from the Township Treasurer. After the Collector's roll has been returned to the Township Treasurer, and before the latter has made his return to the County Treasurer, arrears may be paid to the Township Treasurer; but after he has made his return to the County Treasurer, no one but the latter has any authority to receive arrears(*u*).

Search should also be made to ascertain whether there has been any sale of the land for taxes during the preceding eighteen months. This period is fixed by the Registry Act(*v*), which provides that every deed made by a Treasurer or other officer for arrears of taxes shall be registered within eighteen months after the sale, otherwise the party

(*q*) R.S.O. cap. 224, sec. 149. See, however, *Caston* v. *Toronto*, 30 S.C.R. at pp. 398, 399.

(*r*) *Haynes* v. *Smith*, 11 U.C.R. 57.

(*s*) R.S.O. cap. 224, sec. 157.

(*t*) R.S.O. cap. 224, sec. 144 (1).

(*u*) R.S.O. cap. 224, sec. 160.

(*v*) R.S.O. cap. 136, sec. 90.

claiming under any such deed shall not be deemed to have preserved his priority as against a purchaser in good faith who has registered his deed prior to the registration of such tax deed.

Taxes for any year are considered to have been imposed and to be due on the first day of January of the current year, unless otherwise provided for by the enactment or by-law under which they are directed to be levied(*w*). In the absence of agreement to the contrary the vendor assumes the payment of the proportion of the taxes for the year up to the completion of the title, the purchaser assuming the remainder(*x*).

In *Re Wilson & Houston*(*y*), a vendor, holding two mortgages on the land, sold under the power of sale in the second mortgage, under the following amongst other conditions:—"1. The vendor merely exercises his right to sell under said mortgage, all the estate or interest which he is thereby empowered to sell, and subject to a mortgage for $5,000 and interest * * 2. The property will be offered for sale, subject to a mortgage and lien to the vendor for $5,000 and interest thereon at the rate of nine per centum per annum from the 13th day of December, 1889; but that mortgage may be paid off forthwith, if the purchaser so desires, the amount being now due." The purchaser elected not to pay off the first mortgage. It was held that the vendor should pay off the taxes due and apportionable up to the day of sale, though the vendor, under the stipulation in his first mortgage, might afterwards add the taxes thereto and be redeemed of the whole amount.

Taxes for the current year, though due by statute on the

(*w*) R.S.O. cap. 223, sec. 409.

(*x*) *Peoples' Loan Co.* v. *Bacon*, 27 Gr. 294; *Bank of Montreal* v. *Fox*, 6 P.R. 217; *Re Alger & Sarnia Oil Co.*, 23 Ont. R. at p. 590; *Harrison* v. *Joseph*, 8 P.R. 293, must be considered as overruled by *People's Loan Co.* v. *Bacon;* it was never acted upon in practice.

(*y*) 20 Ont. R. 532.

first day of January, and before they are actually imposed, are not "in arrear" during the year; and therefore a covenant against arrears of taxes contained in a deed is not broken by non-payment of taxes for the current year(*z*).

If the purchaser completes the contract by paying or securing his purchase money, and taking a conveyance, he will have no recourse against the vendor in the absence of fraud, except under his covenants. And so, where the covenants are limited to the acts of the vendor there is no breach if the taxes accrued previous to the vendor's ownership(*a*). But at a judicial sale a purchaser was allowed compensation for taxes even after a vesting order had issued(*b*).

3. *Local improvements—Drainage—Sewers.*

Municipal Councils have power under *The Municipal Act*(*c*), to pass by-laws for deepening or straightening streams, removing obstructions therefrom, and draining lands(*d*), for constructing bridges and culverts and opening streets, etc.(*e*), and for this purpose to determine what lands will be benefited by the works, and to assess and levy a special rate upon the lands so benefited in the same manner as taxes are levied.

Every township, city, town and incorporated village may pass by-laws for ascertaining what lands will be immediately benefited by any proposed improvements and for assessing the lands benefited(*f*); and may also, upon petition, pass by-laws for sweeping, watering and lighting streets, cutting grass and weeds thereon, and assessing the

(*z*) *Corbett* v. *Taylor*, 23 U.C.R. 545. 454

(*a*) *Harry* v. *Anderson*, 13 C.P. 476; *Silverthorne* v. *Love*, 10 U.C.R. 73; *Re Kennedy*, *Wigle* v. *Kennedy*, 26 Gr. 33.

(*b*) *Stewart* v. *Hunter*, 2 Ch. Ch. 335.

(*c*) R.S.O. cap. 223.

(*d*) *Ibid.* sec. 664.

(*e*) *Ibid.* sec. 674.

(*f*) *Ibid.* sec. 664.

lands fronting thereon in order to defray the expense(*g*). The councils of townships and incorporated villages may also pass by-laws for lighting, and for the construction of waterworks, and may assess the property benefited for the cost(*h*).

Every county council has power to pass by-laws for levying by assessment on property within any particular part of one or parts of two townships the money necessary to defray the expenses of making, repairing, or improving any road, bridge, or other public work within one township or between parts of such two townships, by which the inhabitants of such parts will be specially benefited. They may also acquire roads, bridges and public works lying within one or more townships, towns or incorporated villages, and assess therefor the land which will be immediately benefited thereby(*i*).

The council of every city, town and incorporated village may pass by-laws for compelling the removal by the owners or occupiers of premises, of snow and ice from the roofs of premises occupied by them, and of snow, ice and dirt, and other obstructions from the streets adjoining them, and to provide for the cleaning of side walks and streets adjoining vacant property, and to remove snow, ice and other obstructions at the expense of the owner or occupant, in case he does not do so, and to charge such expenses as a special assessment against such premises to be recovered in like manner as other municipal rates(*j*).

In all such cases the rates imposed are a charge upon the land, the arrears of which the vendor should remove, unless it is agreed that the purchaser shall assume them.

There were, however, some municipal rates which were not a charge upon lands. The rent payable for a sewer

(*g*) *Ibid.* sec. 686.
(*h*) *Ibid.* sec. 687.
(*i*) R.S.O. cap. 223, secs. 691, 692, 693.
(*j*) R.S.O. cap. 223, secs. 496, 559, 682(3).

which was formerly imposed under the section corresponding to section 496, sub-section 34 of the Municipal Act, is the personal debt of the owner of the property and does not charge the land(*k*); but such rates are now made a charge upon the land(*l*). So, also, under a repealed section of the Municipal Act, the expense of filling in, clearing, etc., grounds, yards, vacant lots, cellars, private drains, etc., might have been assessed upon the owner or occupier, or upon the land(*m*). If assessed upon the owner or occupier, such expenses would of course be a personal charge only.

In cities and towns it may often happen that a particular locality has been so improved by paving, lighting, draining, and other local works, that the value of the land has been largely increased, and purchasers will be found who will, on that account, give a larger price than if the improvements had not been made. At the same time the land is burdened with the additional local rate which has been imposed in order to defray the expenses of the improvement.

Where such improvements have been completed before the agreement for sale, it is to be supposed that the advantage thereby bestowed upon the property has been taken into account in fixing the price; and, consequently, where by-laws charging the land have been passed prior to the contract, or where the work has been done before the contract, though the by-law may have been passed subsequent thereto, the rates thereby imposed are an incumbrance which the vendor ought to remove, the charge coming into existence upon the completion of the work(*n*); but if the

(*k*) *Moore* v. *Hynes*, 22 U.C.R. 107; *Re McCutcheon & Toronto*, 22 U.C.R. 606; *Squire* v. *Oliver*, 24 Gr. 441; *Bank of Montreal* v. *Fox*, 6 P.R. 217; *Re Armstrong*, 12 Ont. R. 457.

(*l*) R.S.O. cap. 223, sec. 387.

(*m*) 46 Vict. cap. 18, sec. 496, sub-s. 40, repealed by 47 Vict. cap. 32, sec. 13.

(*n*) *Re Graydon & Hammill*, 20 Ont. R. 199; *Armstrong* v. *Auger*, 21 Ont. R. 98.

work is done after the contract, the vendor is not bound to remove the charge(*o*). And this is so, although it is a condition of the sale that the "taxes" are to be apportioned, or that the purchaser is to pay the "taxes" from the date of the agreement, the word "taxes" being referable to the annual levies for the public purposes of the municipality. And it seems, from the same authorities, that it is immaterial whether the work is done in consequence of a petition of the property owners or is initiated by the municipality.

The existence of such a charge imposed in consequence of a petition of land owners, of which the vendor was a signatory, was also held to be a breach of his covenant against incumbrances in the conveyance; and the purchaser was held entitled to damages for the breach, which were assessed at the smallest amount necessary to remove the charge(*p*).

By *The Municipal Act*(*q*), however, it is enacted that where local improvements benefiting real property have heretofore been, or shall hereafter be made, the costs whereof, in whole or in part, have been charged upon the real property, "the petitioning for or procuring to be made, or the making of any such local improvements, or the charging the costs thereof upon or against such real property, or the fact that they are a charge upon or against such real property, *shall not be deemed to be a breach of the covenant by a vendor or person agreeing to sell, that he has done no act to incumber the real property*, except to the extent that the annual or other payments in respect of such charge are in arrear, and unpaid." That is to say, the future rates are not an incumbrance within the meaning of the covenant, though the arrears are.

The matter, however, as it exists between vendor and purchaser before completion by delivery of the conveyance,

(*o*) *Armstrong* v. *Auger*, 21 Ont. R. 98.
(*p*) *Cumberland* v. *Kearns*, 18 Ont. R. 151; 17 App. R. 281.
(*q*) R.S.O. cap. 223, sec. 681.

has not been touched by the statute which is expressly confined to the remedy on the covenant: and the question still remains whether the vendor should not remove the whole charge, future rates as well as past, if the purchaser requires it before completion. It was pointed out by Boyd, C., in *Re Graydon & Hamm*(*r*), that the case between vendor and purchaser before completion differed materially from the case of an action on the covenant against incumbrances in the purchase deed, the purchaser's right in the latter case being strictly limited by the scope of the covenant; and although in the case before him, possibly, the Court might not have been able to interfere if the conveyance had been executed, yet before conveyance the purchaser had a right to have the charge removed, although it had been imposed by the municipality without application from the landowners. There are, undoubtedly, cases where the purchaser would be entitled, before conveyance, to the removal of an incumbrance, although after conveyance he would be without remedy(*s*). Thus, if there were arrears of taxes which accumulated and were charged upon the land before the vendor acquired it, the purchaser would, as we have seen, have an undoubted right to their removal before he could be compelled to complete; but if he took his conveyance without discovering them (and no element of fraud entered into the case), he would have no remedy upon the covenant, on account of its being limited to the acts and omissions of the vendor. There is no inconsistency then in leaving the parties to contract as they please regarding local improvement rates, and at the same time fixing the purchaser with liability therefor if he completes his purchase without having them removed. It cannot be gathered from the words of

(*r*) 20 Ont. R. at p. 204.

(*s*) See *ante*, pp. 152, 153; see *Carroll* v. *Prov. Nat. Gas Co.*, 26 S.C.R. 181, as to the effect of completion of a contract by conveyance upon the rights under the contract.

the Act that the intention was to place these rates on the same footing as the annual taxes, and consequently the cases of *Re Graydon & Hammill* and *Armstrong* v. *Auger*, are still authorities for the proposition, that before completion, in the absence of an agreement to the contrary, the purchaser may require the vendor to remove the charge created by local improvement rates(*t*).

The by-laws imposing a frontage rate, as a rule, confine their description to the frontage without mentioning any depth; and where that is done the owner is entitled to assume that the smallest lot or parcel of land that will answer the particulars filed in the clerk's office under section 623 of the Municipal Act should be taken as the land charged with the rate(*u*). And where the land is afterwards divided into smaller lots the whole land originally charged remains liable, and the municipality ought not to attempt to levy the whole rate on one lot, leaving the owner to his recourse against others for contribution, but the clerk should bracket on the roll the different sub-divisions with the names of the persons assessed for each parcel, and the annual sum charged against the original parcel as that for which the sub-lots and persons assessed for them are liable under the rate(*v*).

4. *Executions.*

(i) *General Remarks.*

A judgment without execution will not bind lands. In England a judgment creditor was said to have a general lien by virtue of his judgment on the lands of his debtor(*w*), and a purchaser with notice of a judgment

(*t*) See also *Stock* v. *Meakin*, L.R. (1900) 1 Ch. 683, and *Re Leyland & Taylor's Contract*, 16 T.L.R. 566, respecting the vendor's duty as to disclosure of the notice given for a local improvement.

(*u*) *Capon* v. *Toronto*, 26 Ont. R. at p. 183.

(*v*) *Capon* v. *Toronto*, 26 Ont. R. 178.

(*w*) Prid Jud 23.

could not be compelled to take the land until the judgment was satisfied, though for want of execution or docketing it did not form a specific lien on the land(*x*). But in this Province the remedy by execution against land was given by the Imperial Statute, 5 Geo. II. cap. 7, sec. 4(*y*), which made lands in the British plantations in America assets for the satisfaction of debts, but "subject to the like remedies, proceedings and process in any Court of law or equity in any of the said plantations respectively for seizing, extending, selling or disposing of any such houses, land, negroes and other hereditaments and real estates, towards the satisfaction of such debts, duties and demands, and in like manner as *personal estates* in any of the said plantations respectively are seized, extended, sold or disposed of for the satisfaction of debts."

By the Statute of Frauds(*z*), the writ against goods bound them, as against a purchaser, only from the delivery to the sheriff(*a*), and therefore the judgment itself did not form a lien or charge upon them. And as the remedies against lands given by the Act are the "like remedies, proceedings and process" as those against goods, it follows that a judgment in this Province does not bind lands(*b*). It has been held in England that a judgment creditor has no lien on a term without execution(*c*), and that the existence of old judgments entered up against a vendor of leaseholds is no objection to the title unless executions are in the sheriff's hands, and that a purchaser knowing of the judgments

(*x*) *Davis* v. *Strathmore*, 16 Ves. 419.

(*y*) See *Doe d. McIntosh* v. *McDonell*, 4 O.S. 195.

(*z*) Now, R.S.O. cap. 338, sec. 11.

(*a*) *Doe d. McIntosh* v. *McDonell*, 4 O.S. at p. 201.

(*b*) *Doe d. McIntosh* v. *McDonell*, 4 O.S. 195; *Doe d. Auldjo* v. *Hollister*, 5 O.S. 730; *Gardiner* v. *Jason*, 2 E. & A. 204.

(*c*) *Shirley* v. *Watts*, 3 Atk. 200; *Forth* v. *Duke of Norfolk*, 4 Mad. 506.

will notwithstanding be compelled to complete his purchase(*d*).

Search should therefore be made in the office of the sheriff of the county in which the lands lie, to ascertain whether there are in his hands any writs of execution against the lands of the vendor, and a certificate obtained. If the land has been recently purchased by the vendor, search should also be made for executions against his vendor. In practice the search is usually confined to those names which appear on the title within a year preceding the contract.

To cover the contingency of writs returned by the sheriff for renewal, the certificate should state not only that there is no execution in his hands at its date, but that there has been none for thirty days. It should also state that there has been no sale of the land under execution during the preceding six months.

A writ of execution against land, when placed in the sheriff's hands, constitutes a lien on the land of the debtor, for the amount of the judgment debt, within the meaning of *The Real Property Limitation Act*, and after the expiration of ten years from the delivery of the writ to the sheriff without any proceedings for sale taken thereon, and without any payment or acknowledgment by the debtor, it ceases to be a lien or charge on the land; and a purchaser of the land after the lapse of ten years takes free therefrom and is entitled to restrain proceedings under it(*e*).

By the Registry Act(*f*), every deed of land sold under process is to be registered within six months of the sale, otherwise the purchaser will not be deemed to have preserved his priority as against a purchaser in good faith

(*d*) *Causton* v. *Macklew*, 2 Sim. 242. And see *Williams* v. *Craddock*, 4 Sim. 313.

(*e*) *Neil* v. *Almond*, 29 Ont. R. 63.

(*f*) R.S.O. cap. 136, sec. 90.

who has registered his deed prior to the registration of the sheriff's deed(*g*).

As regards purchasers, lands are bound by an execution only from the time of its delivery to the sheriff(*h*). But as between the plaintiff and the defendant the writ is binding from the teste; and so if a writ be tested in the lifetime of the debtor it may be delivered to the sheriff and executed after his death and will bind the lands which were his in his lifetime(*i*). The signing of judgment and issuing of the writ are judicial acts, and by fiction of law relate back to the earliest moment of the day of their date. And so if judgment be signed and execution issued on the day of the defendant's death, though after it has happened, they are good, and the execution will bind his lands though in fact his representatives succeeded to them immediately upon his death(*j*). But the delivery of the writ to the sheriff is not a judicial act, but that of the party himself(*k*).

As soon as a conveyance is delivered the estate passes to the grantee, and a writ against the lands of the vendor placed in the sheriff's hands after delivery but before registration of the deed will not bind them(*l*). But if the legal estate be in an execution debtor (purchaser) for a moment while there is an execution in the sheriff's hands it attaches on the land, and takes precedence of a mortgage to secure the purchase money(*m*). But a vendor under such cir-

(*g*) See *Doe d. Brennan* v. *O'Neill*, 4 U.C.R. 8; *Bruyere* v. *Knox*, 8 C.P. 520; *Waters* v. *Shade*, 2 Gr. 457.

(*h*) *Doe d. McIntosh* v. *McDonell*, 4 O.S. 195; *Doe d. Auldjo* v. *Hollister*, 5 O.S. 739; *Doe d. Burnham* v. *Simmons*, 7 U.C.R. 196; *Gardiner* v. *Juson*, 2 E. & A. at p. 204.

(*i*) *Doe d. Hagerman* v. *Strong*, 4 U.C.R. 510.

(*j*) *Converse* v. *Michie*, 16 C.P. 167, and cases there cited.

(*k*) *Converse* v. *Michie*, 17 C.P. 174.

(*l*) *Russell* v. *Russell*, 28 Gr. 419; *Bank of Montreal* v. *Baker*, 9 Gr. at p. 107.

(*m*) *Ruttan* v. *Levisconte*, 16 U.C.R. 495. See also *Parke* v. *Riley*, 12 Gr. 71; 3 E. & A. 215.

cumstances would have an equitable right to assert a lien upon the land for the purchase money if the conveyance and mortgage were one transaction(*n*). And in one case where an execution was put in the sheriff's hands against the land of a mortgagor, and the latter sold and conveyed the land to a purchaser, the mortgagee took a mortgage from the purchaser for the amount of his existing mortgage debt and released the old mortgage, and it was held that he had not, by doing so, lost his priority over the execution(*o*).

By *The Judicature Act*, sec. 35, "An order or judgment for alimony may be registered in any registry office in Ontario, and the registration shall, so long as the order or judgment registered remains in force, bind the estate and interest of every description which the defendant has in any lands in the county or counties where the registration is made, and operate thereon in the same manner and with the same effect as the registration of a charge by the defendant of a life annuity on his lands." It has been held that such a registered judgment is not a judgment or execution within the meaning of the Act respecting assignments(*p*), by section 11 of which the assignment for creditors is to take precedence of all judgments and executions not completely executed by payment(*q*).

(ii) *Mortgaged Lands.*

When land is in mortgage the effect of a writ of execution depends upon the construction of the statute making the equity of redemption saleable(*r*). This enactment provides that the sheriff may seize and sell "(in like manner as any other real estate might be seized or taken in execution, sold and conveyed), all the legal and equitable interest

(*n*) *Per* Burns, J., *Ruttan* v. *Levisconte*, 16 U.C.R. at p. 499.
(*o*) *Fisher* v. *Spohn*, 4 C.L.T. 446.
(*p*) R.S.O. cap. 147.
(*q*) *Abraham* v. *Abraham*, 19 Ont. R. 256; 18 App. R. 436.
(*r*) R.S.O. cap. 77, secs, 29-32.

of such mortgagor in the mortgaged lands and premises." The purchaser in such a case becomes liable for the mortgage debt, and if the mortgagee enforces payment against the mortgagor, he is to repay the mortgagor, and in default of payment within one month after demand, the mortgagor may recover the amount from the purchaser in an action, and until recovery the debt forms a charge upon the land in favour of the mortgagor.

The equity of redemption, in order to be saleable under this Act, must appear on the face of the instrument; and so, if land has been conveyed as security by deed absolute in form, the writ will not attach(*s*).

The interest of a dowress in an equity of redemption before assignment of dower, where she might have elected to take a share under *The Devolution of Estates Act*, is not exigible under this Act; nor has the widow any estate in the land which can be sold except under equitable execution(*t*).

The decisions upon this Act have established that the intention of the legislature was to provide for the simple case of land under one mortgage, or the case of one mortgagor and one mortgagee; and the interest to be sold is not the interest of any one or more persons in the mortgaged land, nor a portion of the mortgaged land(*u*), but the value of the whole land over and above the mortgage debt(*v*), or rather the right to redeem the land(*w*). And so when tenants in common have mortgaged their joint estate, a writ against the land of one of them will not bind his share(*x*); though it will if he make a separate mortgage of his un-

(*s*) *McCabe* v. *Thompson*, 6 Gr. 175; *McDonald* v. *McDonnell*, 2 E. & A. 393; *Fitzgibbon* v. *Duggan*, 11 Gr. 188.

(*t*) *Canadian Bank of Commerce* v. *Rolston*, 4 O.L.R. 106.

(*u*) *Van Norman* v. *McCarty*, 20 C.P. at p. 46.

(*v*) *Cronn* v. *Chamberlain*, 27 Gr. 555.

(*w*) *Samis* v. *Ireland*, 28 C.P. 484.

(*x*) *Cronn* v. *Chamberlain*, 27 Gr. 551.

divided share(*y*). The reason for this is that the equity of redemption is a unit, whole and indivisible, and anyone having an interest is entitled to redeem the whole(*z*). If then a portion of the mortgaged lands were sold, the purchaser would have the right to redeem the whole mortgage, and to call upon the mortgagee to reconvey not only the portion which he had bought under the writ, but also that portion which remained in the mortgagor's hands unsold. On the other hand the mortgagor on redeeming might claim the same right(*a*). Again, as the purchaser is bound to indemnify the mortgagor against the mortgage debt, the latter could, if the mortgagee enforced payment against him, compel the purchaser of a portion to repay him, and so throw the whole of the mortgage debt upon the portion sold to the relief of the portion remaining unsold(*b*). And it follows that if the mortgaged lands lie in different counties and are comprised in one mortgage, the writ will not attach, for neither sheriff could sell more than a portion(*c*).

Where there are two or more mortgagees upon the land in different hands it has been held that the sheriff cannot execute the writ(*d*), even when the execution creditor is himself one of the mortgagees(*e*). These decisions are not however satisfactory, and are not regarded as safe authorities on account of the doubt expressed in *Somis* v. *Ireland* (*f*), whether the Act does not in effect, though not in its strict letter, extend to such cases.

But where the mortgages are both in one hand there is

(*y*) *Rathbun* v. *Culbertson*, 22 Gr. 465.

(*z*) *Faulds* v. *Harper*, 2 Ont. R. 405, and authorities there cited; 9 App. R. 537; 11 S.C.R. 639.

(*a*) *Heward* v. *Wolfenden*, 14 Gr. 188; *Shaw* v. *Tims*, 19 Gr. 496.

(*b*) *Van Norman* v. *McCarty*, 20 C.P. at pp. 44, 45.

(*c*) *Heward* v. *Wolfenden*, 14 Gr. 188.

(*d*) *Wood* v. *Wood*, 16 Gr. 471; *Donovan* v. *Bacon*, in note to last case. *Re Keenan*, 3 Ch. Ch. 285.

(*e*) *Kerr* v. *Styles*, 26 Gr. 309.

(*f*) 4 App. R. 118.

no reason why the Act should not apply(*g*). And where a portion of a lot owned by the debtor is mortgaged, the writ will bind both the incumbered and unincumbered portions(*h*).

Before this statute a writ of execution did not bind an equity of redemption(*i*), and a purchaser without notice was not affected by the writ, and the mere delivery of the writ to the sheriff was not notice to him(*j*). And so in cases not within the Act the writ has no greater effect than is given to it by the statute of Geo. II. that is, its effect is the same as that of a writ against goods; and the effect which a writ against goods has upon a mortgaged term of years may be taken as illustrating the operation of a writ against an equity of redemption not within the Revised Statute(*k*).

A judgment is at law no lien upon a legal term; and where the interest of the debtor is legal a judgment is no lien in equity(*l*). And where the interest of the debtor is an equity of redemption in a term the creditor has no lien in equity until execution(*m*), and then only a general lien which he must assert by action(*n*).

A purchaser registering without actual notice of the writ should not be bound thereby, but with notice would seem to take a good legal title, subject only to the equitable right of the creditor to assert his claim against the pur-

(*g*) *Donovan* v. *Bacon*, 16 Gr. at p. 473.
(*h*) *Samis* v. *Ireland*, 4 App. R. 118.
(*i*) *Simpson* v. *Smyth*, 1 E. & A. 1.
(*j*) Sug. 521.
(*k*) Leith R. P. Stat. 313.
(*l*) *Forth* v. *Duke of Norfolk*, 4 Mad. 506.
(*m*) *Shirley* v. *Watts*, 3 Atk. 200. But see *Johnson* v. *Bennett*, 9 P.R. 337.
(*n*) *Burdon* v. *Kennedy*, 3 Atk. 739.

chase money, if the purchaser received notice before payment of the consideration(*nn*).

Whether a purchaser of an equity of redemption not saleable under a writ would be justified in refraining from searching for executions will depend upon circumstances. If he refrain solely upon the ground that the land which he is buying is so charged that an execution will not affect it, and if he has no actual notice, he will apparently take a good title free from the judgment. But if he has actual notice of the existence of a writ he will take subject to the right of the creditor to proceed against the purchase money, whether he searches or not.

When land is so mortgaged that a writ will not bind it the judgment creditor sometimes foregoes issuing a writ and applies for equitable execution, either by commencing an action for sale of the equitable estate of the debtor or by applying to the Court in the action in which judgment has been entered for the appointment of himself as receiver of the rents and profits of the land, subject to existing incumbrances.

In the former case a certificate of *lis pendens* is usually registered and purchasers are thereby put on inquiry. In the latter case it has not been usual hitherto to register the receiving order, though that course is advisable.

There is no doubt that such an order amounts to an execution, and upon the receiver taking possession by compelling tenants to attorn to him, the land may be said to have been delivered in execution to the plaintiff(*o*). But it is also an instrument within the Registry Act capable of being registered(*p*), and therefore should be registered in order to entitle the judgment creditor to priority as against a purchaser without notice.

(*nn*) *Forth* v. *Duke of Norfolk*, 4 Madd. 505; *Parke* v. *Riley*, 12 Gr. 71; 3 E. & A. 215.

(*o*) *Re Pope*, 17 Q.B.D. 743.

(*p*) R.S.O. cap. 136, sec. 2, sub-sec. 1.

(iii) *Equitable Estates.*

By the tenth section of *The Statute of Frauds*(*q*), the sheriff is empowered to deliver execution of all such lands, tenements, rectories, tithes, rents, and hereditaments as any person should be seised or possessed of in trust for the debtor, like as if the debtor had been seised of such lands, etc., of such estate as they be seised of in trust for him at the time of such execution sued. It has been held that a trust estate, to be saleable under this section, must be one in which the debtor has the sole beneficial interest, and not an estate of which the trustee is seised for the debtor jointly with another(*r*); or where the trust is for a special purpose, as to divide the estate amongst children(*s*).

Where a vendor has made an agreement to sell, and a writ issues against his lands before conveyance, it has been held that it does not bind the legal estate in his hands, and a sale thereof by the sheriff under the writ passes nothing(*t*). And so also where the administrator of a deceased person contracts to sell land, an execution issued thereafter does not charge the land(*u*).

Similarly the equitable right of a purchaser under an agreement to buy land, is not saleable under writs of *fieri facias*. And an objection by a sub-purchaser on account of the existence of writs in the sheriff's hands against his vendor was disallowed(*v*).

In a subsequent case, this decision was said to have been inadvertently given or reported, and it was held that the

(*q*) Now R.S.O. cap. 338, sec. 9.

(*r*) *Doe d. Hull* v. *Greenhill*, 4 B. & Ald. 684; *Simpson* v. *Smith*, 1 E. & A. at p. 44.

(*s*) *McLean* v. *Fisher*, 14 U.C.R. 617; *Re O'Donohoe*, 23 Gr. at p. 407.

(*t*) *Parke* v. *Riley*, 12 Gr. 71; 3 E. & A. 215.

(*u*) *Re Trusts Corp'n & Boehmer*, 2 Ont. R. 191.

(*v*) *Re Prittie & Crawford*, 9 C.L.T. Occ. N. 45. See and consider *Re Flatt & Prescott*, 18 App. R. 1.

interest of a purchaser was saleable under execution(*w*). It is submitted, however, with deference, that the equitable right of a purchaser to enforce a contract is not "property" and is not the subject of sale under execution. A writ of *fieri facias* bound legal estates and interests only. Equitable, or trust estates, were first made exigible, as we have just seen, by *The Statute of Frauds*, *i.e.*, where one held land in trust for the debtor, the equitable estate of the debtor might be sold. But a vendor does not hold in trust for the purchaser, he has himself a beneficial interest in the land, and the purchaser is not entitled until he, on his part discharges all the obligations that he has contracted(*x*). And in a recent case, where the purchaser left the land after having paid a large portion of the purchase money, and the vendor, supposing him to have abandoned it, leased the land, and the purchaser then sued for specific performance, it was held that he was not entitled to it, but must rest satisfied with damages(*xx*). *Rose* v. *Watson*(*y*), was cited in which it was said that there was a proportionate vesting of the land in the purchaser on payment of each instalment of the purchase money. If the theory that the vendor is trustee for the purchaser was ever applicable in its literal sense, it was in this case; and yet it was treated as if the purchaser had no equitable interest in the land, but only a right of action upon a broken contract. The case of a purchaser's interest seems hardly to fall within *The Statute of Frauds*, as, in any event it is not the case of a simple trust such as is required by the cases decided under that enactment. Section 33 of *The Execution Act*(*z*) refers exclusively to legal interests and powers, viz., contingent, executory and future

(*w*) *Ward* v. *Archer*, 24 Ont. R. 650.

(*x*) *Rayner* v. *Preston*, 13 Ch. D. 1; *Commissioners of Inland Rev.* v. *Angus*, 23 Q.B.D. at pp. 583, 585.

(*xx*) *Cornicall* v. *Henson*, L.R. (1899), 2 Ch. 710; (1902), 2 Ch. 298.

(*y*) 10 H.L.C. 672.

(*z*) R.S.O. cap. 77.

interests, etc., and powers unexecuted. If that section were sufficient to cover an equitable cause of action, interest or right, the section making equities of redemption saleable would have been unnecessary. It is, therefore, submitted with deference that the equitable right of a purchaser, which is a mere right to ask for specific performance, is not saleable under execution.

But in such cases if the creditor begun an action for equitable execution in aid of his legal process he would establish a lien on the proceeds(*a*).

Where lands were conveyed to and held in trust for the purchaser thereof, and he died leaving writs of *fieri facias* in the sheriff's hands, a purchaser from his administrator was held entitled to have the writs removed before carrying out the purchase, though the trustee could have conveyed the legal estate free from incumbrances(*b*).

(iv) *Free Grant Lands.*

By *The Free Grants and Homesteads Act*(*c*), it is enacted: (1) "That no land located as aforesaid, nor any interest therein, shall in any event be or become liable to the satisfaction of any debt or liability contracted or incurred by the locatee, his widow, heirs or devisees, before the issuing of the patent for the lands."

(2) "After the issuing of the patent for any land, and while the land or any part thereof, or interest therein, is owned by the locatee or his widow, heirs or devisees, such land, part or interest, shall during the twenty years next after the date of the location be exempt from attachment, levy under execution, or sale for payment of debts, and shall not be or become liable to the satisfaction of any debt

(*a*) *Moore* v. *Clarke*, 11 Gr. 497; *Gor* · *Bowser*, 3 Sm. & Gif. 1.
(*b*) *Re Trusts Corporation & Me* ·· nt. R. 538.
(*c*) R.S.O. cap. 29, sec. 25.

or liability contracted or incurred before or during that period, save and except a debt secured by a valid mortgage or pledge of the land made subsequently to the issuing of the patent."

The exemption of the land from liability for debt extends to the land, or any interest therein, as long as it is held by the original location title, and this whether before or after the patent. But if the claim of privilege is broken by a valid alienation of any part of the land, then the exemption or privilege ceases. Thus, where a valid alienation of the land having taken place, a mortgage has been taken on the land to secure the purchase money, it becomes an ordinary security for money, and is not such an interest in the lands as is exempt from execution within the meaning of this enactment.

The interest also which the Act contemplates as exempt from execution is such a beneficial interest as would pass to the widow and heirs on the death of the patentee, and not a security for money which would rather be regarded as personalty(*d*).

A contract to sell free grant lands and to procure the patent therefor is enforceable against the locatee after he has obtained his patent(*e*).

5. *Registered Clouds.*

The existence on the register of a deed which does not form a link in the chain of title constitutes a cloud which the purchaser should require to be removed.

The decisions on deeds of this character are by no means satisfactory, and it is to be hoped that in future a more liberal judicial policy in dealing with such cases will take the place of the narrow principles which have heretofore been laid down.

(*d*) *Cann* v. *Knott*, 19 Ont. R. 422.
(*e*) *Meek* v. *Parsons*, 31 Ont. R. 54, 529.

In considering the subject it may be well to adopt a division which results from a classification of decided cases, and is as follows:—1. Fraudulent deeds. 2. Deeds made by persons having no apparent title, sometimes called bastard deeds. 3. Deeds void on their face. 4. Voluntary deeds.

1. Fraudulent deeds. In cases of fraudulent deeds Courts of Equity have always exercised jurisdiction, and upon proof of the fraud have decreed their cancellation(*f*). And so where it was alleged in the bill that a grantor had made a second deed "intending to defraud the plaintiffs of their security," and the second grantee caused his deed to be registered, whereby "he acquired the legal estate in the premises in fraud of the plaintiffs," it was held on a motion for a decree *pro confesso* that the fraud being admitted the deed should be cancelled(*g*).

2. Bastard deeds. Where a deed appears upon the register made by a person who has no apparent title the Courts have held that the owner of the land has a right to its cancellation. The reason for this is thus put by Spragge, V.C.:—"In this case there would be an apparent defect. It would be in the absence of a link in the chain of title between the grantee in the last registered deed and the grantor in the next, *i.e.*, Scott the grantor to Wales; but it would not follow necessarily that Scott could not have had title, for he might, *e.g.*, have had it by descent; and if he had, a conveyance from him would of course be good without showing upon the face of it how he derived his title"(*h*); and the Court decreed the cancellation of the deed. So where a person having no title whatever to land registered a document containing a declaration that he intended, upon a cer-

(*f*) *Harkin* v. *Rabidon*, 6 Gr. 405; 7 Gr. 243.

(*g*) *Ross* v. *Harvey*, 3 Gr. 649.

(*h*) *Dynes* v. *Bales*, 25 Gr. 593, 596. See also *Shaw* v. *Ledyard*, 12 Gr. 593; *McGregor* v. *Robertson*, 15 Gr. 543.

tain event, to assert and establish his title thereto, and cautioning all persons against dealing with the land, it was held that the instrument should be cancelled. But the decision was based upon the ground that the instrument was one whose registration was not contemplated by the Registry Act(*i*).

3. Deeds void on their face. When a deed is void upon its face the Courts have refused to interfere with it. So, in *Hurd* v. *Billinton*(*j*), where a conveyance was made by one who had a power of attorney to make contracts for sale only, but not to execute deeds, it was held that, though the conveyance was not void upon its face, yet upon reference to the power of attorney it would be seen to be void, and therefore it did not form a cloud upon the title. The Court, however, accompanied the dismissal of the bill with a declaration of the reasons for so doing, and so indirectly gave the plaintiff the relief asked for.

4. Voluntary deeds. In *Buchanan* v. *Campbell*(*k*), the Court, following *Hurd* v. *Billinton*, refused to decree the cancellation of a voluntary deed on the ground that, as against a *bona fide* purchaser for value, it was void. A distinction was drawn between this case, and *Ross* v. *Harvey*(*l*), where the deed was voluntary, but was also alleged to have been executed in fraud of the plaintiff. A voluntary deed, however, is not now void as against a subsequent purchaser for value merely on account of want of consideration, if it has been executed in good faith and registered before the execution of the second deed(*m*). It is not always possible to ascertain from an examination of the registered title whether a voluntary deed is or is not valid. For

(*i*) *Ontario Industrial L. & I. Co.* v. *Lindsey*, 4 Ont. R. 473; 3 Ont. R. 66.

(*j*) 6 Gr. 145.

(*k*) 14 Gr. 163.

(*l*) 3 Gr. 649.

(*m*) *Ante*, p. 97.

it frequently happens that a conveyance is executed pending an investigation of title, but is not dated until completion; and a voluntary conveyance executed and registered after the execution of the conveyance for value, but registered before the registration of the latter, would appear on the register to have been registered before the execution of the conveyance for value. In many deeds also the true consideration is not inserted; and a deed voluntary upon its face may be a conveyance for value, and *vice versa*. And great latitude is allowed in admitting evidence to show what the true consideration is(*n*).

The true state of facts in many cases cannot be ascertained without a judicial investigation; and therefore it is submitted that the jurisdiction of the Court should be exercised to declare the rights of the parties and adjust them on the register, even when a deed appears on its face to be voluntary.

These cases (except those of bastard deeds) have all been decided upon English authority, and the relief asked was in each case the cancellation of the deed or similar relief. But a principle more applicable to our system of registration is that enunciated by Mowat, V.C., in *Shaw* v. *Ledyard*(*o*), and Strong, V.C., in *Truesdell* v. *Cook*(*p*), namely, that the *registration* of a deed, though it may be void in itself or the claim of the grantee thereunder entirely unfounded, tends to embarrass the title of the true owner, and entitles him to a judgment containing a declaration of the invalidity of the deed which he may register.

The Court compels a vendor to make out a good registered title to the purchaser by putting all necessary deeds upon registry(*q*), and it should give him the corresponding

(*n*) *Myles* v. *Noble*, 1 C.L.T. 214.

(*o*) 12 Gr. 382.

(*p*) 18 Gr. 537.

(*q*) *Kitchen* v. *Murray*, 16 C.P. 69; *Brady* v. *Walls*, 17 Gr. 703; *Laird* v. *Paton*, 7 Ont. R. 137.

relief of removing or nullifying the effect of deeds wrongly registered which form a cloud on his title. A vendor is unable in many cases without the aid of the Court to establish to the satisfaction of a purchaser that a deed wrongly registered is void and innocuous; and a well-advised purchaser will never take upon himself the responsibility of determining the validity or invalidity of a deed. The Court in one case(*h*), as we have seen, dismissed the owner's bill, but the decree was accompanied by a declaration that it did so because the deed in question was harmless. A judgment simply declaring such a deed void would be more in harmony with justice to the real owner; and whatever doubt may formerly have existed as to the jurisdiction of the Court to entertain such an action, there is no doubt now of the power to make a mere declaratory judgment(*i*). A recent case seems to carry out this view. Where a person, whose interest, if any, was acquired before the vendor's title accrued, gave a power of attorney to an agent to sell, and registered it, the Court held that a purchaser was entitled to the removal of the power of attorney as a cloud on the title; and certificates of *lis pendens* were treated in the same way(*j*).

The case of *Weir* v. *The Niagara Grape Co.*(*k*) cannot be accepted as a true exposition of the law. The plaintiff being a *bona fide* purchaser for value without notice of the defendants' agreement gained priority by registration, and the agreement was therefore fraudulent and void as against him. But the Court declared it fraudulent and void only on terms of his discharging it by payment of all sums due under it which formed a lien on the land. In other words,

(*h*) *Hurd* v. *Billinton*, 6 Gr. 145.

(*i*) R.S.O. cap. 51, sec. 57, sub-sec. 5.

(*j*) *Re Bobier & Ont. Inv. Ass'n.*, 16 Ont. R. 259.

(*k*) 11 Ont. R. 700.

the Court declared the agreement to be void on condition that the plaintiff should accept it as valid.

It may be that in this case the relief asked, namely, the cancellation of the agreement, was not the proper relief(*l*). The agreement itself was good between the parties, and should not have been cancelled; and in all cases of competing deeds under the Registry Act, the cancellation of the postponed deed would perhaps be improper. But as the Act declares the postponed deed to be fraudulent and void *as against a purchaser*, the purchaser has an undoubted right to a judicial declaration that the deed is as to him fraudulent and void, thus removing its detrimental effect upon the title of the true owner, while the deed remains a subsisting instrument *inter partes*.

6. *Vendor's Lien.*

As we have seen(*m*), no equitable lien, charge or interest affecting land is valid as against the registered title. Unless, therefore, a purchaser has express notice of a lien he takes free from it. And that is true also of a purchaser at a sheriff's sale, who, if he buys without notice of the vendor's lien, takes free from it; but if the execution debtor re-purchases the land, the lien again attaches on it(*n*). In *Watson* v. *Dowser*(o) a loan company advanced money to pay off a vendor who had agreed to sell by a registered agreement, and took a mortgage which they registered. The company's agent inquired of one who had the custody of two mortgages registered before the company's mortgage whether they were paid off, and was told that they were, and would be discharged. He then paid the vendor and a conveyance was made to the mortgagor. It was subse-

(*l*) This however might have been amended.
(*m*) *Ante*, p. 74.
(*n*) *Van Wagner* v. *Findlay*, 14 Gr. 53.
(o) 28 Gr. 478.

quently discovered that the two prior mortgages were not paid off, and the loan company then claimed to stand in the place of the vendor to the extent of the purchase money which they had paid him; but it was held that the lien was gone as they had not taken an assignment, and they were relegated to their position of third mortgagees(*p*). If they had taken an assignment they would have been entitled to the relief asked(*q*).

7. *Crown Bonds.*

Before the Provincial Act presently referred to, debts by bond to the Crown bound the debtor from the time of the instrument, even though no default should happen till many years afterwards, and though the debtor had alienated his lands to a purchaser before default(*r*).

By the Consolidated Statute of Upper Canada it was enacted that no bond, etc., whereby any obligation should be incurred to Her Majesty should be valid to charge lands as against any subsequent purchaser or mortgagee unless a copy were registered in the office of the Clerk of the Court of Queen's Bench at Toronto, before the execution of the conveyance to the subsequent purchaser or mortgagee. There was also a provision for a release of any lands from the operation of the bond.

By the Revised Statute of Ontario, chapter 113, bonds to

(*p*) See also *Imperial L. & S. Co.* v. *O'Sullivan*, 9 P.R. 102; *McMillan* v. *McMillan*, 23 Ont. R. 351.

(*q*) *T. & L. Co.* v. *Gallagher*, 8 P.R. 97; *Armstrong* v. *Lye*, 27 Ont. R. 511; 24 App. R. 543. See *Brown* v. *McLean*, 18 Ont. R. 533, and *Abell* v. *Morrison*, 19 Ont. R. 660. The former of these two cases may be supported on the ground that the discharge of mortgage passed the estate; but the authority of the latter case is to say the least doubtful. See *McLeod* v. *Woodland*, 25 Ont. R. 511, where under somewhat similar circumstances to those in the last two cases cited relief was refused on account of acquiescence.

(*r*) Leith R.P. Stat. 331.

the Crown made or entered into since the 15th August, 1866, or thereafter made, are to bind real property to no further, other, or greater extent than bonds between subject and subject; and the real estate of any debtor to the Crown is to be bound only to the same extent and in the same manner as the real estate of any debtor where the debt is due from one subject to another.

By the same Act, from and after 1st January, 1874, any lands theretofore bound by registration of any Crown bond, are released from the charge so created, so far as the same is within the authority of the Province.

There are many bonds registered which are given by public servants and officers of the Dominion, and which are therefore not within the scope of this Act. Search should therefore still be made for Crown bonds in the proper office at Osgoode Hall, Toronto, and if any are discovered which provide for the performance of duties by Dominion officers, they should be cancelled, or the land released from their operation.

The Referee of Titles under the Quieting Titles Act has a list of registered Crown bonds to which reference may be made in matters before him.

8. *Lis pendens.*

When an action is pending in which the title to land is called in question, it is necessary, in order to prevent defeat of the purpose of the action by alienation of the land, to treat any such alienation as void as against any judgment which may be pronounced against the defendant; and so a rule has been established that the purchaser is bound by the judgment delivered in the action. The rule was sometimes said to depend on notice, and to be based upon the fiction

that every man was presumed to be attentive to what passed in the Courts of Justice(*s*). But better authorities put it on the ground that the rule is not dependent upon notice(*t*), but is one of necessity, otherwise there would be no end to litigation. Lord Cranworth, in *Bellamy* v. *Sabine*(*u*), said "Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence." In the same case it was pointed out that the doctrine was not confined to Courts of Equity, but was common to all courts(*v*).

The filing of a bill, under the old chancery practice, calling the title in question constituted a *lis pendens*, although the subpœna had not been served(*w*); but as against a defendant not originally made a party, it was a *lis pendens* as to him only from the time of his being added as a party(*x*); and the principle of that decision would apply to the present practice. An administration suit or action is a *lis*

(*s*) Story Eq. Jur. sec. 405; *Hiern* v. *Mill*, 13 Ves. at p. 120.

(*t*) *Price* v. *Price*, 35 Ch. D. 302.

(*u*) 1 DeG. & J. 578, cited in *Price* v. *Price*, 35 Ch. D. at p. 302.

(*v*) See also *Metcalfe* v. *Pulvertoft*, 2 V. & B. 205; *Gaskell* v. *Durdin*, 2 B. & Beat. 169; Co. Litt. 102 a, b.

(*w*) *Drew* v. *Norbury*, 3 J. & L. 267; *Worsley* v. *Scarborough*, 3 Atk. 392; *Croft* v. *Oldfield*, 3 Swan. 278.

(*x*) *Juson* v. *Gardiner*, 11 Gr. 23.

pendens, where the object is to realize debts charged on land, *quoad* lands charged and sold under the decree or judgment(*y*), and presumably administration proceedings commenced by summary motion would also be a *lis pendens quoad* the property affected. But not where the purchaser has a right to believe that the sale is for the purpose of paying the testator's debts(*z*).

By the rules of practice(*a*) a summary proceeding by way of motion may be taken by a judgment creditor to set aside a void conveyance, or to render an interest, not saleable under legal process, liable to satisfy the debt; the notice of motion may contain a description of the lands and a certificate of *lis pendens* may issue for registration. The *lis pendens* would exist probably as soon as the necessary affidavits were filed for use on the motion, but it would affect parties not otherwise notified only from registration of the certificate.

Before the Act respecting registration of certificates of *lis pendens* the doctrine was a great hardship upon a *bona fide* purchaser. By this Act(*b*) "the instituting of an action or the taking of a proceeding, in which action or proceeding any title or interest in land is brought in question, shall not be deemed notice of the action or proceeding to any person not being a party thereto, until in cases where the land is registered under the Land Titles Act a caution is registered under that Act, nor in other cases until a certificate signed by the proper officer of the court has been registered in the Registry office of the Registry division in which the land is situate." Foreclosure and sale suits upon registered mortgages are excepted.

(*y*) *Drew* v. *Norbury*, 3 J. & L. 267; *Price* v. *Price*, 35 Ch. D. 297.

(*z*) *Price* v. *Price*, 35 Ch. D. at p. 301.

(*a*) Rules 1015, *et seq.*

(*b*) R.S.O. cap. 51, sec. 97.

It will be noticed that the mere bringing of the action or issuing of a writ is not to be notice; but if the purchaser has actual notice of the action or proceeding in any other way, it is conceived that he would be bound though a certificate of *lis pendens* was not registered. It will also be observed that the statute proceeds upon the assumption that the doctrine is founded on notice.

It has been said that a conveyance *pendente lite* is void(c); but this is to be taken in a qualified sense. It is treated as not affecting or varying the rights of the parties in the action, who are not bound to take any notice of the title of a purchaser so acquired(d). The purchaser takes subject to any judgment that may be pronounced against the party from whom he acquires title(e).

The remedy against a purchaser *pendente lite* is a summary one. In *Gaskell* v. *Durdin*(f), where the plaintiff established his title to the lands, a stranger who had taken a lease from the defendant *pendente lite* was dispossessed by injunction, and a motion to restore him to possession was refused, and he was left to his remedy against his landlord. But where a stranger to the suit took a lease *pendente lite* from a devisee with leasing power, it was held that a creditor coming in under a decree for sale of the lands, which were devised for payment of debts, could not eject the lessee on a summary motion, because he claimed under the same instrument which enabled the devisee to lease(g). He might, however, on a deficiency of assets, attack the lease in another suit. The Court in that case recognized the rule followed in *Gaskell* v. *Durdin*, and said further that

(c) *Walker* v. *Smallwood*, Amb. 676.

(d) *Metcalfe* v. *Pulvertoft*, 2 V. & B. 200.

(e) *Bp. of Winchester* v. *Paine*, 11 Ves. 197; *Garth* v. *Ward*, 2 Atk. 174.

(f) 2 B. & Beat. 167.

(g) *Moore* v. *McNamara*, 2 B. & Beat. 186.

the purchaser must bring a suit for the purpose of establishing his title if he could.

A certificate of *lis pendens* issued in an action in which the title to land does not properly come in question is an abuse of the practice of the Court, and will be set aside(*h*), and it will not of course affect a *bona fide* purchaser; and if the action be collusive, fictitious or illusory the certificate will be set aside and a purchaser will not be bound(*i*).

A certificate of *lis pendens* is a mere allegation of a fact, *i.e.*, that an action is pending, and the registration is designed to give notice to persons dealing with the land that some interest therein is called in question. And so it was uniformly held, before the Act to be presently noticed, that in a proper case for a certificate of *lis pendens* nothing could dissolve or discharge it but the termination of the action(*j*), even when an offer was made otherwise to secure the plaintiff(*k*). It has been likened to an injunction(*l*), and its design and operation is similar, and the plaintiff must be diligent in prosecuting his action(*m*), and in one case the Court dissolved an injunction against parting with the land in question in order that an advantageous sale might be carried out, on the ground of convenience(*n*).

By an Act, 53 Vict. cap. 33(o), however, provision is made for vacating certificates of *lis pendens*. This statute recognizes two classes of cases—first, those in which the plaintiff, or other party at whose instance the certificate was issued, does not in good faith prosecute the litigation; sec-

(*h*) *White* v. *White*, 6 P.R. 208.

(*i*) *Culpepper* v. *Astor*, 2 Ch. Ca. 116, 223; *Sheppard* v. *Kennedy*, 10 P.R. 242.

(*j*) *Sheppard* v. *Kennedy*, 10 P.R. 242.

(*k*) *Foster* v. *Moore*, 11 P.R. 447.

(*l*) *Per* Blake, V.C., *Finnegan* v. *Keenan*, 7 P.R. 386.

(*m*) *Preston* v. *Tubbin*, 1 Vern. 286.

(*n*) *Hadley* v. *London Bank of Scotland*, 3 D. J. & S. 63.

(*o*) Now R.S.O. cap. 51, sec. 98.

ondly, where the plaintiff's claim is not to recover the land *in specie*, but to recover a sum of money or money's worth which is chargeable on, or payable out of, the land, or for which he claims that the land should be subject to payment, or where he claims the land itself, or in the alternative, damages. In the first instance, which comprises all cases of neglect to prosecute, the Court or a Judge may make an order vacating the certificate of *lis pendens* at any time during the litigation; in the second, the certificate may be vacated upon such terms as to giving security or otherwise as may be deemed just. Thus, in an action for specific performance by a purchaser, the vendor might obtain an order vacating a certificate of *lis pendens* on establishing that the plaintiff was not in good faith prosecuting his action, leaving him to such other remedy as he might be advised to ask in his action. And where an action for equitable execution against land is brought, the Court has power to vacate the certificate of *lis pendens* on proper security being given, thus substituting the security for the land. In such a case, also, if the plaintiff did not in good faith prosecute his action, the certificate might be discharged without terms.

By section 99 of the Act the order vacating the certificate of *lis pendens* is not to be registered until the fourteenth day after it is made unless a Judge reverses the order meanwhile or postpones or forbids registration. This is a provision made for the protection of the plaintiff, or other person for whose benefit the certificate has been registered. Therefore, the plaintiff may himself obtain *ex parte* an order vacating his certificate, and register it forthwith, although the defendant objects. He is in the same position as if he had discontinued his action(*p*).

Where a certificate of *lis pendens* has been registered and the action is dismissed, it is not necessary to procure an

(*p*) *McGillivray* v. *Williams*, 4 O.L.R. 454.

order discharging the certificate. The dismissal of the action puts an end to the *lis*, and the certificate of the order or judgment dismissing the action may then be registered(*q*). And where a decree on further directions was registered, and the original decree was afterwards reversed, the registration of the reversing order was held to be sufficient to destroy the lien created by registration of the decree on further directions(*r*).

It has been held that the mere registration of a certificate of *lis pendens* does not create an incumbrance upon the land, apart from the equity on which the litigation is founded, that it is merely a notice of the plaintiff's claim, requiring all persons dealing with the land to look into the claim, and does not excuse a purchaser from completing his contract(*s*). But in a recent case(*t*) it was held that the vendor was bound to remove certificates of *lis pendens* in order to make a clear registered title.

9. *Dower.*

The inchoate right of a wife to dower in her husband's land is a species of incumbrance upon the estate, and a purchaser is entitled to have a release of dower by the vendor's wife or an abatement in the purchase money, even though the contract does not expressly provide that the vendor is to procure such a release(*u*).

And not only in the case of the vendor, but with respect to every devolution of the estate in the chain of title, should the purchaser assure himself either that dower has been barred or that no such right exists. If there exists any

(*q*) *Dexter* v. *Cosford*, 1 Ch. Ch. 22.

(*r*) *Graham* v. *Chalmers*, 2 Ch. Ch. 53.

(*s*) *Bull* v. *Hutchens*, 32 Beav. 615.

(*t*) *Re Bobier & Ont. Inv. Society*, 16 Ont. R. 259.

(*u*) *Van Norman* v. *Beaupre*, 5 Gr. 599. Where the wife joins in the contrac[illegible]ee is a necessary party to an action of specific performance; *Longhead* v. *Stubbs*, 27 Gr. 387.

deed in which there is no bar of dower, or if the title is derived under a will, or by inheritance or succession, inquiry should be made whether the grantor was married at the time of the conveyance, and if so whether his wife is dead; or if the testator or intestate left a widow. And if the widow of a testator is alive, the will should be read for the purpose of ascertaining whether she was put to her election, and if so, inquiry should be made as to whether she has elected.

The requisites of dower are: 1. Marriage. 2. Seisin of the husband. 3. Death of the husband.

As to marriage. In this Province the same evidence of marriage which is accepted in matters of pedigree is sufficient to sustain the marriage where the dower of the wife is in question. It is not necessary to prove the marriage strictly; evidence of cohabitation and reputation will be sufficient(*v*). The marriage need not be canonical(*vv*).

As to seisin. To entitle the widow to dower at law the husband must have been seised during the coverture; and seisin in law is sufficient. If the legal estate rests in the husband but for a moment the dower attaches and cannot be got rid of except by a release. And so, where a conveyance is made and a mortgage taken back immediately to secure purchase money, the dower of the purchaser's wife will attach(*w*). But the seisin of a grantee to uses will not entitle his wife to dower.

The husband must be seised of an estate of inheritance of such a nature that the issue of the wife, if any, might inherit. Thus if land be conveyed to A. and the heirs of his

(*v*) *Phipps* v. *Moore*, 5 U.C.R. 16; *Graham* v. *Law*, 7 C.P. 310; *Beatty* v. *Beatty*, 17 C.P. 484; *Losee* v. *Murray*, 24 U.C.R. 586; and see *ante*, p. 144.

(*vv*) *Re Murray Canal*, 6 Ont. R. 685. See further on this 1 C. L.T. 567, 567, 616, 665.

(*w*) *Potts* v. *Meyers*, 14 U.C.R. 499; *Norton* v. *Smith*, 26 U.C.R. 213.

body by his wife Jane, and Jane dies, and A. marries again, his second wife is not dowable of this land, for her issue could never inherit it(*x*).

Where the husband has been entitled to a right of entry or action in any land and his widow would be entitled to dower out of the same if he had recovered possession, she will be entitled to dower although her husband did not recover possession if she sues for it within the period during which her husband could have enforced his right of action(*y*). But if the husband is disseised during coverture the wife's right to dower is not affected. She occupies the same position as if her husband had conveyed without a bar of dower(*z*).

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 widow is not entitled to dower therein(*a*). Very strict evidence of the wild state of the land should be called for in a case of the kind, for the doweress is a favourite in law. Cutting down timber for sale only would seem not to be within the Act; but *any* work done with a view to cultivation or occupation, however insignificant, would give the wife a right to dower, her title depending upon principle and not upon degree.

The widow of a joint tenant has no dower in her husband's estate, for by the operation of the conveyance the whole estate vests in the survivor on his death and does not descend(*b*); but the widow of a tenant in common is dow-

(*x*) Cam. Dow. Chap. VIII.
(*y*) R.S.O. cap. 164, sec. 3.
(*z*) *McDonald* v. *McMillan*, 23 U.C.R. 302.
(*a*) R.S.O. cap. 164, sec. 4.
(*b*) *Haskill* v. *Fraser*, 12 C.P. 338.

able, for her husband's estate does not survive but devolves upon his representatives at his death(*c*).

If the husband's estate be a remainder or reversion in fee expectant on a life estate, his widow is not entitled to dower if he alien or die pending the life estate; for the seisin of the freehold is in the life tenant(*d*). But if a remainder or reversion be expectant on a term of years, the widow of the remainderman or reversioner is dowable, because the possession of the tenant is the seisin of the remainderman or reversioner.

If the husband makes a contract for sale of his land before marriage his widow is not dowable though he die before conveyance(*e*).

Where lands are bought with partnership moneys, either for the purposes of the partnership, or for speculation by the partners, even though the buying and selling of land be not within the scope of the partnership business, the wives of the partners are not dowable(*f*).

No dower is recoverable out of land which is granted by the Crown as mining land in case the land is on or after the 31st day of December, 1897, conveyed to the husband of the person claiming dower, and such husband does not die beneficially entitled thereto(*g*).

Where the husband's estate was an equitable one the wife, at common law was not dowable, because the seisin was in the trustee or other person having the legal estate. But by the Dower Act, "where a husband dies beneficially entitled to any land for an interest which does not entitle his wife to dower at common law, and such interest,

(*c*) *Haw* v. *Haw*, 14 U.C.R. 497.

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

(*e*) *Gordon* v. *Gordon*, 10 Gr. 466.

(*f*) *Re Music Hall Block*, 8 Ont. R. 225.

(*g*) R.S.O. cap. 164, sec. 5.

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 such land"(*h*).

The widow's right to dower does not arise under this clause of the Act unless the husband dies entitled; and so where the husband's estate is an equitable one (excepting the case of lands mortgaged by himself since 1879) he may convey without joining his wife to bar dower. For instance, if he makes a contract for the purchase of land he is equitably entitled to the land in fee simple, but his wife will not be entitled to dower unless he dies so entitled(*i*).

And this is so where a man purchases an estate in mortgage, or mortgages his land and then marries, or in any case where he acquires an equitable estate, not having been seised of the legal estate during the coverture; in all such cases his wife is not dowable, unless he dies beneficially entitled. Consequently he can alien such equitable estate without joining his wife in the conveyance(*j*). But where a husband contracted to purchase land, and before taking a conveyance, mortgaged it with a power of sale, and authorized the mortgagee to complete the purchase and get in the legal estate, and then died without having paid off the mortgage, but being beneficially entitled to the land, and the mortgagee sold under the power of sale, it was held that, although the husband died beneficially entitled, the power of sale related back to the time of its creation, and was such a valid alienation of his equitable estate in his lifetime as to deprive the widow of dower(*k*).

(*h*) R.S.O. cap. 164, sec. 2.

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

(*j*) *Gardner* v. *Brown*, 19 Ont. R. 298.

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

With regard to lands of which the husband has been seised during the coverture, and which he has mortgaged, his wife joining in the mortgage to bar dower, a distinction must be drawn between those cases which arose before the Act of 1879(*l*), and those which arose thereafter. Before that Act the only statutory enactment affecting such cases was the first (now the second) section of the Dower Act, which is quoted above. Where the wife joined with her husband in conveying the legal estate, his interest in the land was by the mortgage converted, with her consent, into an equitable estate, and unless he died beneficially entitled the wife was not dowable. Consequently he could, after such a mortgage, alien his equity of redemption without the necessity of the wife's joining to bar dower(*m*). In *Forrest* v. *Laycock*(*n*), the contrary opinion was expressed, but that case contains other elements upon which the decision of the principle point in issue might rest. And in *Black* v. *Fountain*(o), *Fleury* v. *Pringle*(*p*), and *Re Robertson*(*q*), it was agreed that the wife was dowable in an equity of redemption, where she joined her husband in making the mortgage, only in case he died beneficially entitled to the land; and in *Beavis* v. *McGuire*(*r*), the same principle was affirmed by the Court of Appeal.

By the Act of 1879, which now forms part of the Dower Act(*s*), the second section does not affect cases of mortgaged land where the wife bars her dower by the mortgage, and a different rule now applies to all such cases. Section 7

(*l*) 42 Vict. cap. 22.
(*m*) *Moffat* v. *Thomson*, 3 Gr. 111.
(*n*) 18 Gr. 611.
(o) 23 Gr. 174.
(*p*) 26 Gr. 67.
(*q*) 25 Gr. 276; affirmed *ibid.* 486; see also *Re Hewish*, 17 Ont. R. 454.
(*r*) 7 App. R. 704.
(*s*) R.S.O. cap. 164.

(1) enacts that, "No bar of dower contained in any mortgage, or other instrument intended to have the effect of a mortgage or other security, upon real estate, shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument." Sub-section 2 enacts that, "In the event of a sale of the land comprised in such mortgage or other instrument, under any power of sale contained therein, or under any legal process, the wife of the mortgagor or grantor who shall have so barred her dower in such lands, shall be entitled to dower in any surplus of the purchase money arising from such sale, which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land from which such surplus purchase money shall be derived had the same not been sold."

The original Act was held to relate only to mortgages made after it was passed, viz., 11th March, 1879(*t*).

After its enactment opinion fluctuated a good deal as to its construction. In *Smart* v. *Sorenson*(*u*), *Re Music Hall Block*(*v*), and *Calvert* v. *Black*(*w*), the opinion was expressed that after the wife had joined in a mortgage to bar dower, she was entitled to dower in the equity of redemption only in case of her husband's dying entitled thereto, the second section of the Act applying to cases of this kind, in the same manner as to all other cases of equitable estates. In *Re Croskery*(*x*), however, it was held by Boyd, C., that inasmuch as the bar of dower was only effectual for the purposes of the mortgage, the wife had a residue, namely, the equity of redemption, in which dower was not barred, and

(*t*) *Martindale* v. *Clarkson*, 6 App. R. 1.
(*u*) 9 Ont. R. 64.
(*v*) 6 Ont. R. 225.
(*w*) 8 P.R. 255.
(*x*) 16 Ont. R. 207.

therefore in any subsequent conveyance it would be necessary for her to join in order to free the equity of redemption from her claim for dower. Cases of this class are by this decision treated as an exception to the general rule laid down by section two of the Act, and as being more peculiarly within the provisions of section 7, sub-section 1.

The question finally came before a Divisional Court, in *Pratt* v. *Bunnell*(*y*), where it was held that the wife is a necessary party to a conveyance of the equity of redemption. Street, J., after referring to previous cases, proceeded thus:—"Section 5(*z*) appears to settle conclusively in favour of the wife the question as to the right of the husband to convey away, without his wife's concurrence, but free from her dower, the equitable estate remaining in him after a mortgage in which she had joined; because, to hold otherwise would be to hold that the bar of dower in the mortgage operated not only to give full effect to the right of the mortgagee under the mortgage, but also enabled the husband to deal with the equity left in him to the prejudice of his wife's dower in it; and this would be contrary to the express provision in the section. An equity of redemption created in this way, that is, by a mortgage of the husband's legal estate, the wife joining to bar dower, is, therefore, under section 5, an exception to the general rule contained in section 1 of the same Act, which gives a wife dower only in those equitable estates of which her husband dies seised."

In harmony with this the Court also decided that in ascertaining the *quantum* of the dower, the computation is to be made upon the surplus only, and not, as previously held, upon the whole value of the land.

This case was followed in *Gemmill* v. *Nelligan*(*a*), where, however, it was held that the dower is to be computed upon what would be the full value of the land if unincumbered,

(*y*) 21 Ont. R. 1.
(*z*) Now sec. 7 (1) of R.S.O. cap. 164.
(*a*) 26 Ont. R. 307.

and *Pratt* v. *Bunnell* was, on that point, overruled. In the same year (1895) another statute was passed(*b*) which re-enacted the provisions of the former Act, and added, "and the amount to which she is entitled shall be calculated on the basis of the amount realized from the sale of the land, and not upon the amount realized from the sale over and above the amount of the mortgage only." By sub-section 2 this enactment does not apply where the mortgage is for unpaid purchase money of the land.

The result is that where a mortgage with bar of dower has been made before the Act, and is still subsisting, the husband may alien the land and the wife will be bound though she does not join to bar dower. But since the Act, the wife has dower in the equity of redemption and should be a party to a conveyance thereof. And inasmuch as section 7 applies only to cases in which the wife joins to bar dower in a mortgage made by her husband, it is apprehended that if a man before marriage mortgages his land, he may after marriage, the mortgage still subsisting, alien without joining his wife(*c*).

And where a purchaser of land paid off a mortgage and took a statutory discharge, and on the same day took a conveyance from the vendor and gave back a mortgage for the remainder of the purchase money, and a sale subsequently took place under a subsequent mortgage, it was held that the wife was not entitled to dower, the husband never having had more than an equitable interest in the land(*d*).

Where a wife is confined in a lunatic asylum, and while so confined, the husband acquires land, he may during such confinement, convey the land free from dower(*e*).

Where a wife has been living apart from her husband under such circumstances as disentitle her to alimony, the

(*b*) 58 Vict. cap. 25, sec. 3; now R.S.O. cap. 164, sec. 8.
(*c*) *Gardner* v. *Brown*, 19 Ont. R. 202.
(*d*) *Re Luckhardt*, 29 Ont. R. 111.
(*e*) R.S.O. cap. 164, sec. 11.

husband may apply to a Judge of the High Court for an order to sell free from dower, and if the order is made, the husband may sell free from dower; but if the wife has not been living apart under such circumstanees as disentitle her to dower, the order is to provide for the value of the dower which is to remain a charge on the property or to be otherwise secured for the wife(*f*).

Where a wife is confined in a lunatic asylum, a similar order may be made to convey free from dower and to seeure the value to the wife(*g*). And a similar order may be made when the wife is not confined in an asylum, but is insane, upon evidence and examination of the wife(*h*).

Where a wife has been living apart from her husband for five years or more, and the husband sells and conveys, or mortgages his land, the wife not joining to bar dower, and the purchaser or mortgagee had no notice that the wife was living, the same proceedings may be taken as are provided where the wife was a lunatic(*i*). And so also where the husband is living with a woman who is not his wife, but recognizes her as his wife(*j*).

When land is sold by a sheriff under an execution against the husband the wife's dower is not barred(*k*); but a sale for taxes operates as an extinguishment of every claim and deprives the widow of dower(*l*).

Before the 11th of May, 1839, it was necessary to render a bar of dower effectual that the wife should be examined apart from her husband as to her consent, and a certificate of the examination and consent endorsed upon the deed. But since that date and before the *Married Women's*

(*f*) *Ibid.* sec. 12.
(*g*) *Ibid.* sec. 13.
(*h*) *Ibid.* sec. 14.
(*i*) *Ibid.* sec. 17.
(*j*) *Ibid.* sec. 17, sub-sec. 2.
(*k*) *Walker* v. *Powers*, R. & J. Dig. 1125.
(*l*) *Tomlinson* v. *Hill*, 5 Gr. 231.

Property Act, 1884, a married woman might bar her dower in any lands by joining with her husband in a deed in which a release of dower was contained(*m*).

By the Act respecting dower(*n*) it was enacted that a married woman might bar her dower by a deed to which her husband was not a party. It was required, however, to be made in conformity with *The Married Women's Real Estate Act*(*o*), in order to be effectual. The latter Act required the husband to be a party to the deed. This inconsistency has been removed by a repeal of that part of the latter Act which required the husband to join, and that part of the former Act which required the deed to be in accordance with *The Married Women's Real Estate Act*(*p*). And a married woman may now bar her dower by a deed containing a release to which her husband is not a party(*q*).

And any married woman, under twenty-one years of age, of sound mind, might, on and since the 5th of May, 1894, and now may bar her dower in any land or hereditaments by joining with her husband in a deed or conveyance thereof to a purchaser for value, or to a mortgagee, in which deed or conveyance a release or bar of her dower is contained, and she may in like manner release her dower to any person to whom such lands or hereditaments have been previously conveyed(*r*).

If the wife executes a deed by which her husband conveys land which contains a release of dower it is sufficient to bar her dower though she is not named in the deed as

(*m*) C.S.U.C. cap. 84, sec. 4; R.S.O. (1877) cap. 126, sec. 5; *Hill* v. *Greenwood*, 23 U.C.R. 404.
(*n*) R.S.O. (1877) cap. 126, sec. 6.
(*o*) R.S.O. (1877) cap. 127.
(*p*) 47 Vict. cap. 19, sec. 22.
(*q*) R.S.O. cap. 165, sec. 3.
(*r*) R.S.O. cap. 165, sec. 5.

a formal party(*s*); but the mere signing and sealing of a deed which does not contain a release of dower will not divest her of her right to dower(*t*).

Dower will be barred if no action be brought within ten years from the death of the husband of the dowress, notwithstanding any disability(*u*). But where the doweress has, after the death of her husband, actual possession of the land, either alone or with the heirs or devisees of the husband, the period of ten years is to be computed from the time when the possession ceased(*v*).

The Devolution of Estates Act(*w*), section 4, sub-section 2, declares that nothing in the Act shall be construed to take away a widow's right to dower. But she may by deed or instrument in writing, attested by at least one witness, elect to take one-third absolutely in the undisposed of realty of her husband in lieu of all dower.

It is essential that the election shall be clearly and actually made. Thus when a widow assumed that she was entitled to a distributive share in her husband's estate, and reciting that she was so entitled, made a mortgage in fee of a share in the land, it was held that there was no election or choice made, but a mere assumption that she was entitled to a share(*x*). An instrument in form provided by the statute is essential, and the verbal election of counsel in Court will not suffice(*y*). The election may be made by will(*z*); and it may be made at any time that the exigencies of administration of the estate permit(*a*).

(*s*) *Bonter* v. *Northcote*, 20 C.P. 76. And see *Bellamy* v. *Badgerow*, 24 Ont. R. 278.

(*t*) Cam. Dow. 395; and see *Thompson* v. *Thompson*, 2 Ch. Ch. 211.

(*u*) R.S.O. cap. 133, sec. 25. See *ante*, p. 197.

(*v*) R.S.O. cap. 133, sec. 26.

(*w*) R.S.O. cap. 127.

(*x*) *Thompson* v. *Mills*, noted in Armour on Devolution, 222.

(*y*) *Re Galway*, 17 P.R. 49.

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

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

A wife may deprive herself of the right to dower by a settlement(*b*).

10. *Tenancy 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 in fee simple or fee tail; and has by her issue born alive, which is 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(*c*).

There are four requisites, namely marriage, seisin of the wife, issue, and death of the wife. The marriage must be legal but need not be canonical(*d*).

The seisin of the wife must be an actual seisin or possession, and not a seisin in law; but where the wife's title originates in a deed or record, and not in descent, seisin in fact will be presumed until the contrary be shown; and where her title is by letters patent they of themselves constitute seisin in fact(*e*).

The issue must be born alive during the lifetime of the mother. And it must be capable of inheriting the mother's estate. So, if a woman be tenant in tail male, and has issue a female, the husband is not thereby entitled to be tenant by the curtesy.

By the birth of issue the husband becomes tenant by the curtesy initiate, and on his wife's death his estate is consummate.

The effect of the various decisions and Acts, respecting the property of married women, upon the estate by the curtesy may be shortly stated as follows:—In all cases in which the husband would be entitled to his estate by the curtesy

(*b*) *Toronto Gen. Trust Corp'n.* v. *Quin*, 25 Ont. R. 250.

(*c*) See R.S.O. cap. 330, sec. 5; Cru. Dig. Tit. V. cap. 1.

(*d*) *Re Murray Canal*, 6 Ont. R. 685. See also *Kidd* v. *Harris*, 3 O.L.R. 60.

(*e*) *Weaver* v. *Burgess*, 22 C.P. 104.

at common law, he will be entitled to it notwithstanding any of the Acts relating to married women's property, and he is also entitled though the wife's estate is equitable, subject, however, to the right of the wife to deprive him of his estate in her separate property, whether legal or equitable, either by instrument *inter viros* or by will. It will be necessary then to glance at the Married Women's Property Acts, in order to ascertain which do, and which do not, make married women's land separate estate.

The husband's right to this estate was expressly preserved by the first of our Acts respecting the property of married women(*f*), which took effect on the 4th May, 1859, and enabled married women to have, hold and enjoy their real and persoual property free from the debts and control of their husbands. It was held, moreover, that the estate of a married woman under this Act was not separate estate in the sense that she could dispose of it without her husband's consent(*g*). And she did not aequire the power to contract to any greater extent than she was able to contract before the Act(*h*); nor was any change made in the law of conveyance by married women(*i*). By the Act respecting the conveyauee of real estate by married women(*j*) it was necessary that her husband should join in her conveyance as a grantor(*k*), and that she should submit to examination as to her consent to the disposal of her property. In 1871 an amendment was made as to the mode of execution, but the joinder of the husband was retained as essential to the validity of the conveyance(*l*). At this period, then, a married

(*f*) C.S.U.C. cap. 73, secs. 4, 16.

(*g*) *Royal Can. Bank* v. *Mitchell*, 14 Gr. 412; *Chamberlain* v. *McDonald*, 14 Gr. 447.

(*h*) *Kraemer* v. *Gless*, 10 C.P. 470.

(*i*) *Emrick* v. *Sullivan*, 25 U.C.R. 105.

(*j*) C.S.U.C. cap. 85.

(*k*) *Ogden* v. *McArthur*, 36 U.C.R. 246.

(*l*) 34 Vict. cap. 24.

woman could hold her property free from the debts and control of her husband, but she could not make a valid conveyance without his assent; and he was a necessary party to the conveyance also for the purpose of conveying his own interest in the land.

The Married Women's Property Act, 1872 (*m*), was then passed, by which it was enacted as follows:—"After the passing of this Act, the real estate of any married woman, which is owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues and profits thereof respectively, shall without prejudice and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime, or as tenant by the curtesy, and her receipts alone shall be a discharge for any rents, issues and profits; and any married woman shall be liable on any contract made by her respecting her real estate, as if she were a *feme sole*."

Shortly after the passing of this Act, a state of facts arose which brought before the Court of Appeal the question whether the husband of a woman, who was married before the Act, but acquired land and died after the Act was passed, was entitled to an estate by the curtesy in the land. The Court held that the married woman's real property under this Act, had all the qualities of separate estate, including the *jus disponendi*; that the wife might either by instrument *inter vivos*, or by will, dispose of her real property without the consent or concurrence of her husband; but that, if she did not effect a disposition of her property, but left it to devolve according to law, the husband would be entitled to an estate by the curtesy therein(*n*). At this

(*m*) 35 Vict. cap. 16

(*n*) *Furness* v. *Mitchell*, 3 App. R. 510.

time the Act requiring the concurrence of the husband in a conveyance of the wife's property was unrepealed: but it was determined in the same case that the Act of 1872 made the wife's property separate estate in the largest sense of that term, and that there was annexed thereto the inseparable right of alienation without the consent of the husband.

In 1873 an Act was passed(*o*) which declared that any married woman of full age might convey her real estate by deed, but no deed was to be valid unless her husband was a party to and executed the deed. In *Furness* v. *Mitchell*, the opinion was expressed that this Act applied only to those women who were not within the operation of the Act of 1872(*p*), that is those who had acquired property under the Consolidated Statute.

The result of the legislation at this period was that a married woman who had acquired land before the Act of 1872, took it subject to her husband's estate by the curtesy; but if she acquired it after the Act of 1872, she took it as separate estate, and her husband, though entitled to an estate by the curtesy, was liable to be deprived of it, and would come into the enjoyment of it, only in case she died without having disposed of it by instrument *inter vivos* or by will.

In 1877, an amendment was made to section one of the Act of 1872(*q*), which was embodied in the Revised Statute(*r*), and declared that nothing in the Act contained should prejudice the right of the husband as tenant by the curtesy in any real estate of the wife which she had not disposed of *inter vivos* or by will. And by the same Act(*s*) it was declared, repeating the enactment of 1872, that any

(*o*) 36 Vict. cap. 17.

(*p*) *Per* Burton, J.A., 3 App. R. at pp. 522, 523; and see *per* Moss, C.J., at p. 517.

(*q*) 40 Vict. cap. 7, Sched. A (150).

(*r*) R.S.O. (1877) cap. 125, sec. 4.

(*s*) Sec. 10.

married woman should be liable on any contract made by her respecting her real estate, as if she were a *feme sole*.

Though the construction of section 4 of the Revised Statute of 1877, is determined by *Furness* v. *Mitchell*, which is fortified by the words added by the amendment of 1877, it is to be observed that a very important alteration was made as to its application; for, while the Act of 1872 applied to women married at any time, the Revised Statute restricts the operation of the clause in question to women married after 2nd March, 1872. Those who were married before that date, acquiring land after the coming into force of the Revised Statute, took it under the law as it existed before the Act of 1872. Those who were married after that date held their lands owned by them at the time of their marriage or acquired thereafter as separate estate, and the estate by curtesy would arise only in land undisposed of by instrument *inter vivos* or by will.

There remains, however, a third class as to which an important question arises, namely, women married before the Act of 1872, who acquired land after that Act, and retained it until after the Revised Statute of 1877 came into force. During the period between the Act of 1872 and the Revised Statute, they (on the authority of *Furness* v. *Mitchell*) held land thus acquired as separate estate; and the question arose on the coming into force of the Revised Statute, whether the third section, which applied to women married on or before 2nd March, 1872, and which was the same in effect as the Consolidated Statute, 1859, rendered their lands on that account subject to the estate by the curtesy in any event. An affirmative answer was given to this question in the case of *Godfrey* v. *Harrison*(*t*). In that case a woman was married in 1850 and acquired the land in question in July, 1872. In 1880 a bill was filed respecting

(*t*) 8 P.R. 272.

the same lands; and it was held that it was not her separate estate, and therefore that she should have sued by a next friend. This is not a satisfactory decision, however. The Revised Statutes, where they are not the same in effect as the Acts for which they are substituted, are prospective only, and not retrospective, in their operation(*u*); and all existing rights, titles and interests were saved(*v*). There should be no doubt that such a valuable right as that of a married woman with respect to her separate property, both as to the extent of her estate and her title to dispose of it, would be within these saving clauses; but even without such saving clauses, the Act should not have been construed as retrospective with the effect of disturbing vested rights(*w*). It is therefore submitted that a woman married before the Act of 1872, who acquired land after that Act, and retained it until after the Revised Statute of 1877 came into operation, would, notwithstanding the latter Act, still hold it as separate estate; and consequently that the estate by the curtesy would arise only in the event of her dying without having disposed of it by instrument *inter vivos* or by will.

By the nineteenth section, as we have seen, "any married woman" was made liable on any contract respecting her real estate as if she were a *feme sole*. Unless this section is restricted to the cases of women married after 2nd March, 1872, as by the Acts of 1872 and 1877 was apparently intended(*x*), and the Act requiring the joinder of the husband in his wife's conveyance(*y*) to those of women married on or before 2nd March, 1872, an intelligent construction of the Act seems impossible. For in cases of the second class the husband being a necessary party to the con-

(*u*) 40 Vict. cap. 6, sec. 10.
(*v*) 40 Vict. cap. 6, sec. 9.
(*w*) On the principle followed in *Furness* v. *Mitchell*, *supra*.
(*x*) 35 Vict. cap. 16, sec. 1; 40 Vict. cap, 7, Sched. A (156).
(*y*) R.S.O. (1877) cap. 127, sec. 3.

veyanee and not compellahle(*z*) to join unless a party to the contract, the wife's contract could not be enforced as that of a *feme sole*(*a*). And in cases within the first class, if the wife is liahle on her contract as a *feme sole* the husband cannot be a necessary party to her conveyance. And the fortieth section of *The Real Estate Succession Act*(*b*), which saved the estate by the curtesy, while pointing out the course of descent of real property, must be similarly confined in its operation.

In 1884 an Act was passed respecting the property of married women, which came into force on the 1st July, 1884(*c*). It repealed the Revised Statute respecting the property of married women(*d*), and provided that the repeal should not affect any act done or right acquired while the Act was in force, or any right or liahility of any hushand or wife married hefore the commencement of the Act, to sue or be sued under the provisions of the repealed Act, in respect of rights and liabilities which accrued hefore the commencement of the Act. It also repealed that part of section three of the Revised Act which required the joinder of the hushand in his wife's conveyance of her real estate, and other sections, and made her property separate estate.

When the statutes were again revised, in 1887, the clauses of the original consolidated statute of Upper Canada, and of the Act of 1872 as amended in the revision of 1877, were again inserted, although the Act of 1884 expressly repealed them, thus showing an apparent intention on the part of the Legislature to preserve the distinction as

(*z*) See *Furness* v. *Mitchell*, 3 App. R. at p. 517. Proudfoot, V.C., in *Boustead* v. *Whitmore*, 22 Gr. at p. 229, thought that if necessary the husband might be compelled to join, though his doing so under such circumstances would be an inane formality.

(*a*) *Furness* v. *Mitchell*, 3 App. R. at p. 517.

(*b*) R.S.O. (1877) cap. 105.

(*c*) 47 Vict. cap. 19.

(*d*) R.S.O. (1877) cap. 125.

to the various species of property which had been created by the passage of the various Acts, subject to this exception, however, that a woman entitled to property which, before the Act of 1884, was not separate property, could convey her interest in it without her husband's consent. In *Moore* v. *Jackson*(*e*), the defendant, a woman married in 1869, acquired land in 1879 and 1882, which, but for the Act of 1884, would not have been separate estate. That Act, however, by the repeal of the provision requiring the husband to join in order to make a valid conveyance, enabled her to convey her own interest, at least, separate and apart from him and without his consent; and that alienable interest of hers was held by the Supreme Court of Canada to be separate estate. It was not necessary for the disposition of the appeal, to decide whether or not she could, by her conveyance, deprive her husband of his estate by the curtesy. There is nothing in the Act to indicate that it is to have any retrospective operation(*f*), and to deprive of their vested interests the husbands of all women who had acquired property before the Act was passed. And, there being no judicial expression of opinion to the contrary, a purchaser may still assume, in such cases, that the estate of the husband exists, and, if well advised, will insist upon his joining in the conveyance in order to divest himself of his estate.

The Revised Statute of 1897(*g*) now contains the previous enactments in consolidated form, the various sections being made applicable to the period during which they were originally effective.

With regard to all other cases, those falling under the Acts of 1872, 1877 and 1884, which made the property of the wife separate estate in the full sense of the term, the

(*e*) 20 Ont. R. 652; 19 App. R. 385; 22 S.C.R. 210.

(*f*) *Scott* v. *Wye*, 11 P.R. 93, following *Turnbull* v. *Forman*, 15 Q.B.D. 234.

(*g*) R.S.O. cap. 163.

wife has undoubtedly the power by her own conveyance to deprive the husband of his estate by the curtesy. The reason for the decision in *Furness* v. *Mitchell* applies to the construction of these latter Acts as well as to that of 1872, with which it dealt particularly, and which gave to the wife's property the quality of separate estate, and so enabled her to dispose of it without her husband's consent and free from any estate of his. The words of Sir George Jessell, M.R., in *Cooper* v. *Macdonald*(*h*), are very apposite in dealing with this Act, although the question before the Court arose out of a settlement to the wife's separate use. "A gift of a fee simple estate or a gift of a capital sum of money to the separate use of a married woman gives her the same power of alienation over it as if she were a single woman. She is entitled to dispose of it as if she were not a married woman at all, and that at once gets rid of any notion of the husband having an interest. Whatever interest he would have had in the absence of disposition is got rid of by the disposition. * * It therefore appears to me that to carry that out, the right to the separate use entitled her to dispose of it as much against the husband's estate by the curtesy as against the son's estate as heir. It enabled her to make a pure and clear disposition of it, and in that way it was wholly independent of the husband. But that is no reason for carrying it a step beyond. The separate use, if I may say so, is exhausted when the wife has died without making a disposition. She enjoyed the income during her life, and she has not thought fit to exercise that which was an incident of her separate estate, the right of disposing of her property. * * And therefore it appears to me, if you decide on principle only, you will come to this conclusion, that where a wife, either by deed *inter vivos* or by will, disposes of the fee simple settled to her separate

(*h*) 7 Ch. D. at pp. 293, 296. See also *Re Lambert's Estate*, 39 Ch. D. 626.

use, that disposition takes effect free from any claim of the husband or the eldest son or other heir-at-law; but that where she dies without making any such disposition, the rights of the husband and rights of the heir are equally unaffected, and equity ought to follow the law."

And in *Hope* v. *Hope*(*i*), where the direct question arose between the heir and the husband, under the English Act of 1882, the same result was arrived at. We may therefore come to the conclusion that the wife may dispose of her separate real property by instrument *inter vivos* or by will, without her husband's consent, and so may deprive him of his interest therein; but if she dies intestate he will be entitled to an estate by the curtesy, subject to the provisions of section twenty-three of the Act in favour of her legal personal representative. As it was said in the cases cited, the Married Women's Property Act does not interfere with the course of devolution of the estate on the wife's death, but, in the absence of a disposition by the wife, leaves the estate to devolve in the ordinary course of law. Then, as between the heir and the husband, there is no reason for excluding the latter from his estate by the curtesy.

If she makes a contract for sale of her land, it may be enforced against her, or she may enforce it, as if she were a *feme sole*; and it must be conceded that if she has power to enforce such a contract against a purchaser, she must have power to convey to him an unencumbered fee simple, for he could not be compelled to take her land subject to an estate by the curtesy.

Attention must now be called to the twenty-third section of the present Revised Statute. By this section it is declared that "for the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and

(*i*) L.R. (1892) 2 Ch. 336.

he subject to the same jurisdiction as she would have or be if she were living"(*j*). This clause was in force for two years before *The Devolution of Estates Act* was passed, and in its operation affects the property of all married women who died during that period. Since the legal *personal* representative is here mentioned, the question immediately arises whether it was intended that the real property of a married woman on her intestacy should in all cases devolve free from any estate of her husband(*k*).

In order to give full effect to this section, and clothe the personal representative with all the rights and liabilities of the married woman, it seems to be necessary to accord to him all those rights, and visit him with all the liabilities, which arise out of those sections of the Act which define them with respect to the married woman herself, namely, the right to hold and dispose of her real property, make contracts respecting it, and sue and be sued apart from the husband—in short to deal in all respects with the land as if it had belonged to a *feme sole*. But to what extent and for what purpose do those powers exist?

In *Hope* v. *Hope*(*l*), the right of the husband as against the heir-at-law arose in a direct form, the action being a friendly one by the heir-at-law against the husband to try whether the estate by the curtesy existed; but the section in question, as far as the report shows, was not mentioned in the case. In *Re Bellamy*(*m*) and *Surman* v. *Wharton*(*n*), it was held that the husband of a married woman entitled to leaseholds dying intestate, succeeded to them *jure mariti* without taking out letters of administration; and in the latter case, that the property was in his hands as

(*j*) R.S.O. cap. 163, sec. 23.
(*k*) Lennard on position of married women, 107.
(*l*) L.R. (1892) 2 Ch. 330.
(*m*) 25 Ch. D. 620.
(*n*) L.R. (1891) 1 Q.B. 491.

personal representative of his wife, for the purpose of satisfying an obligation incurred by the married woman with respect to her separate estate. But in neither of these cases of course (the property being personalty) is the right of the husband to the estate by the curtesy mentioned.

The point is therefore untouched by authority; and the view here presented is offered with great diffidence. Although the clause in question does not expressly declare that the estate vests in the personal representative, it is a necessary inference that he must have either the power of voluntary alienation, or be subject to involuntary alienation at the suit of a creditor. A similar enactment is that which, without expressly declaring that the legal estate in lands held in mortgage vests in the executor or administrator of a mortgagee, enables his personal representative to convey, assign or release the mortgagee's estate in the lands(*o*).

If, then, the personal representative succeeds to the estate, he must hold it for the purposes of administration only. It may be that he has power, under this clause, to sell the land free from the estate of the husband (in the same manner as the married woman could have done) for the purpose of paying the obligations contracted by the married woman with respect to her separate estate; and the property may also be liable to be sold, under process against the administrator, free from any claim of the husband's. But if there are no liabilities to be satisfied, or if, after the liabilities have been satisfied, there is a surplus, the administrator would hold in trust for those persons whose rights are subordinate only to the claims of creditors. And, as the course of devolution of the estate is not otherwise interfered with by the Act, there is no reason for de-

(*o*) R.S.O. cap. 121, sec. 11. See also *The Trustee Act*, R.S.O. cap. 129, secs. 16, *et seq.*, as to artificial powers of personal representatives respecting land.

priving the husband of his life estate, and he would then be entitled to call for the proper conveyance(*p*).

By *The Trustee Act*(*q*), where the owner of land dies under a liability to convey in pursuance of a written contract, either intestate or without having made any provision by will for a conveyance, his personal representative is the proper person to convey. This enactment is wide enough to include the case of a married woman dying under such a liability; and reading the twenty-third section of *The Married Women's Property Act* with the statute last mentioned, there seems to be no doubt that under such circumstances, a conveyance would be made free from any estate of the husband.

Since the passing of *The Devolution of Estates Act, 1886*, the real estate of a married woman upon her death devolves upon her personal representative whether she disposes of it by will or dies intestate. And the right of the husband now depends upon the provisions of that Act.

The Act applies to "the estates of persons dying on or after" the first of July, 1886(*r*). By section five, "the real and personal property, whether separate or otherwise, of a married woman in respect of which she dies intestate, shall be distributed as follows: one-third to her husband if she leaves issue, and one-half if she leaves no issue, and subject thereto, shall go and devolve *as if her husband had pre-deceased her.*" The effect of this section is to make a distributive share in the wife's estate the primary right of the husband, and the only right, if he does not elect under section four, sub-section three, to take his previous interest in the real and personal property of his wife.

By that clause it is enacted that "any husband who, *if sections 3 to 9 of this Act had not passed,* would be entitled

(*p*) *Re Lambert's Estate*, 30 Ch. D. 626; *Re Bellamy*, 25 Ch. D. 620; *Surman* v. *Wharton*, L.R. (1891) 1 Q.B. 491.

(*q*) R.S.O. cap. 129, sec. 24.

(*r*) R.S.O. cap. 127, sec. 2.

to an interest as tenant by the curtesy in any real estate of his wife, may * * elect to take such interest in the real and personal property of his deceased wife as he would have taken if the said sections of this Act had not passed, in which case the husband's interest therein shall be ascertained in all respects as if such sections had not passed, and he shall be entitled to no further interest under the said sections of this Act."

In order to make this section operative the circumstances must be such that, if the Act had not been passed, the husband would have been entitled to an estate by the curtesy in his wife's land. Section five takes away this right only in cases of intestacy, providing, as it does, only for distribution of an intestate's estate. Given this condition, the next consideration is, between what interests the husband may elect. Section four, sub-section three, declares that he may elect against the Act and take "such interest in the real *and personal* property of his deceased wife as he would have taken if the said sections of the Act had not passed." There must, therefore, be an intestacy as to personalty, as well as realty, otherwise no election can take place. Whenever, then, the husband is entitled to an estate by the curtesy, and the circumstances are such that be can claim his previous share in both realty and personalty, he may elect to take it, and so by election may take curtesy(*s*). But where there is not a complete intestacy, the husband is by the Act deprived of his estate by the curtesy, and must take a distributive share.

In connection with *The Devolution of Estates Act* must be read section 23 of *The Married Women's Property Act* already referred to; but it does not affect to deprive the husband of any right, and leaves his interests to be dealt with under *The Devolution of Estates Act.*

(*s*) See further on this Armour on Devolution, chapters XIV. and XVIII.

Where the wife's estate is an equitable fee the husband will be entitled to be tenant by the curtesy under the same circumstances as would entitle him in case the estate were a legal one (*t*). But where land is settled upon trustees for the separate use of a wife, she has the right of disposing of it without her husband's consent, and he will be entitled to an estate by the curtesy only when she dies without having disposed of her estate by instrument *inter vivos* or by will (*u*).

In a settlement, the husband may be excluded either from any interest in the wife's life estate, or altogether from any interest in the fee. In the former case he is entitled to his estate by the curtesy if he survives his wife and the property has not been disposed of by her. In the latter case he takes nothing (*v*).

This is still of importance, for property in settlement is not affected in that respect by the Acts which have been referred to.

11. *Easements.*

Inquiry should be made whether the land is subject to any easements; for an easement may be acquired as against the registered title and a purchaser would take subject thereto. If an easement arises by implied grant, it is not within the Registry Act, and it will consequently prevail over the right of a subsequent registered purchaser without notice; and if it arises by express grant in a conveyance of the dominant tenement, it is sufficiently registered by the registration of the conveyance of the dominant tenement, though a search of the registered title of the servient tenement fails to disclose its existence (*w*). It is not strictly

(*t*) Challis on Real Property, 2nd Ed. 315, 316.

(*u*) *Cooper* v. *Macdonald*, 7 Ch. D. 288.

(*v*) *Bennet* v. *Davis*, 2 P. Wms. 316; *Morgan* v. *Morgan*, 5 Mad. 411; *Moore* v. *Webster*, L.R. 3 Eq. 267, and cases cited.

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

speaking an incumbrance, though its existence may depreciate the value of the property.

And an easement not known to either party at the time of the contract is a latent defect in the title as well as an error in description (*x*).

An easement is defined as a privilege without profit which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former. It must be distinguished from a *profit à prendre*, which is a right by which one person is entitled to remove and appropriate any part of the soil belonging to another man, or anything growing in or attached to or subsisting upon his land for the purpose of the profit to be gained from the property thereby acquired in the thing removed; and from a natural right, as the right to pure air, support of land, etc.; and from a licence.

An incorporeal hereditament cannot be appurtenant to another incorporeal hereditament. It cannot be attached to the public right of passage over a highway; and therefore the public as occupiers of the surface of a highway could not acquire a prescriptive right to discharge water from the highway upon a neighbouring proprietor's land(*y*). But a right of way may be united with a several fishery and exist as part of the right of fishing (*z*).

The right to the free and uninterrupted passage of air may be acquired as the right to the free passage of light might have been before the statute taking away the latter right. Inquiry should be made as to whether the land is subject to any such easement. The right to pure and un-

(*x*) *Ashburner* v. *Sewell*, L.R. (1891) 3 Ch. 405; *Re Puckett & Smith*, L.R. (1902) 2 Ch. 258.

(*y*) *Attorney-General* v. *Copeland*, L.R. (1901) 2 K.B. 101.

(*z*) *Hanbury* v. *Jenkins*, L.R. (1901) 2 Ch. 401.

polluted air is a natural right, which may be lost by some person acquiring a right to pollute the air which is an easement. Ordinary observation will in general detect circumstances which may give rise to the suspicion that such an easement may exist.

Upon a severance of a tenement by a grant of land in general terms, the grantee will not acquire the right to the access of air by way of easement except through a definite aperture in the nature of a window on the land conveyed. But when land was conveyed for a specific purpose (in this case for a timber yard), it was held that the grantor must abstain from so building on the remainder of his land as to prevent the land granted being used for the purpose of drying timber by the access of air to the drying sheds(*a*). The right to air being treated as distinct from the right to light, in a grant of land, it is apprehended that it may, as already remarked, still arise by prescription, although the right to light through the same channel can no longer arise in the same way.

The right to the enjoyment of the free passage of light has been destroyed by statute (*b*) in so far as the claim might arise by prescription. By that enactment it is declared that "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 section shall not apply to any such right which has been acquired by twenty years' use before the fifth day of March, 1880," the date of the passing of the Act. The circumstances attending the existence of such an easement may easily be discovered from observation, and full inquiry should be made as to the existence of any such right.

The right to enjoy the free access of light may, however, arise by implied grant on the severance of a tenement by

(*a*) *Aldin* v. *Latimer Clark*, L.R. (1894) 2 Ch. 437.
(*b*) 43 Vict. cap. 14, sec. 1; now R.S.O. cap. 133, sec. 36.

conveyance of one portion having buildings thereon. Thus, where the owner of a piece of land, upon a portion of which buildings are erected, conveys the latter portion, then if the windows of the buildings overlook the remaining portion of the land, neither the grantor nor those claiming under him can derogate from his grant by building on the vacant land so as to obstruct the windows(*bb*). And it apparently makes no difference that the obstructing building is so erected that space intervenes between it and the windows obstructed (*c*). But if the grantor desires to reserve any rights over the portion granted they must be expressly reserved and will not arise by implication. So, if the vacant portion of the land were granted first the purchaser would have the right to build so as to obstruct the lights of the building (*d*). And where the conveyances of the land with the buildings thereon and the vacant land are contemporaneous, each purchaser being aware of the conveyance to the other, the purchaser of the land is not entitled to build so as to obstruct the lights of the house (*e*).

But where vacant land is granted adjoining a piece upon which a house is to be built by the vendor, and it is agreed that the wall of the house to be built shall stand within the land sold, and shall have in it particular windows, and the house is consequently erected, the purchaser of the vacant land cannot so build as to obstruct the light (*f*).

And where a land owner contracted to grant a lease of vacant land when a house of a specified character should be

(*bb*) *Carter* v. *Grasett*, 11 Ont. R. 331.

(*c*) *Birmingham, etc. Co.* v. *Ross*, 38 Ch. D. 295. See *Broomfield* v. *Williams*, L.R. (1897) 1 Ch. 602, as to this case.

(*d*) *Wheeldon* v. *Burrows*, 12 Ch. D. 31; *Russell* v. *Watts*, 10 App. Ca. at p. 596.

(*e*) *Allen* v. *Taylor*, 16 Ch. D. 355.

(*f*) *Russell* v. *Watts*, 10 App. Ca. 590.

built upon it, it was held that he could not derogate from the grant by building so as to obstruct the windows (*g*).

The rights of the parties, where there is no express contract, arise not from the construction of the grant itself, but from the position in which the parties have placed themselves by the contract, taking into consideration all the surrounding circumstances(*h*). So, where land, with buildings erected thereon, was granted as part of a large tract which was evidently designed for building on, it was held that, as against the grantee of the buildings, whose windows overlooked the remaining portion, the grantors and those claiming under them were not precluded from erecting such buildings as they might choose upon the remaining portion; the extent of the right of the grantee of the buildings being to enjoy such an amount of light as would reach his windows after his grantors, or those claiming under them, had erected such buildings as they might choose in pursuance of their scheme.

But the building scheme must be established by evidence, and a plan merely showing building lots thereon and a building line extending through all the lots is not sufficient(*i*).

Similarly, where a railway company sold a house with surplus land, and the conveyance contained a recital that the remainder of the land acquired by them would be required for the purposes of the railway, it was held that the railway company were impliedly bound not to obstruct their grantee's light and air except by the construction of what might be reasonably required for the railway; but that the grantee of a portion of the remainder (which was subsequently found not to be necessary for the railway) was not

(*g*) *Pollard* v. *Gare*, L.R. (1901) 1 Ch. 834.
(*h*) *Birmingham, etc. Co.* v. *Ross*, 38 Ch. D. at pp. 308, 315.
(*i*) *Pollard* v. *Gare*, L.R. (1901) 1 Ch. 834.

entitled to build so as to obstruct the first grantee's lights (*j*).

The extent of the right to access of light and air, in such cases, is to be measured by the circumstances existing at the date of the grant (*k*).

In a similar manner, easements that are not apparent may arise from severance of a tenement. Thus in *Israel* v. *Leith* (*l*), the owner of two semi-detached houses sold one of them. This house drained under the other, and the pipes for its water supply were also laid under the other house. The second house was afterwards sold, and the grantee cut off the drain and water pipes under his house which served the house first sold. It was held that the right of drainage and aqueduct passed by the grant of the first house, and the conveyance being registered the grantee of the second house took subject to it, whether it arose by implication or by the express words of the grant.

Every owner of land has a natural right to sufficient support for his land from the subjacent and adjacent soil (*m*), and this right continues though buildings may be erected on the land (*n*). And after twenty years' uninterrupted enjoyment the right of support for the weight of the soil increased by the weight of buildings may be acquired, if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the buildings (*o*).

There are three kinds of rights which may be acquired in connection with water:—1. Rights relating to the flow of

(*j*) *Myers* v. *Catterson*, 43 Ch. D. 470. See *Broomfield* v. *Williams*, L.R. (1897) 1 Ch. 602, as to this case.

(*k*) *Birmingham, etc. Co.* v. *Boss*, 38 Ch. D. 295.

(*l*) 20 Ont. R. 361.

(*m*) See *Snarr* v. *Granite, etc. Co.*, 1 Ont. R. 102, as to providing artificial support.

(*n*) *Brown* v. *Robins*, 4 H. & N. 188; *Stroyan* v. *Knowles*, 6 H. & N. 454.

(*o*) *Dalton* v. *Angus*, 6 App. Ca. 740.

water. 2. Rights relating to the purity of the water. 3. Rights relating to the taking of water for use. Of these the first two are natural rights, which may be altered or destroyed by the acquisition of easements. The right to take or use water for turning a mill, or to pen it back so as to cause it to overflow the land of other owners are rights which may be acquired by user. The right to take water for consumption as it flows towards another's land is a natural right. The right to go on another's land and take water collected thereon is an easement.

Subterranean water flowing in a defined channel, the existence and course of which is not and cannot be ascertained or known except by excavation of the soil, is not the subject of riparian rights (*p*).

The right which one landowner has to pass over the soil of another person for the purpose of going to or from his estate is a right of way. And this right may be a limited one, for instance to pass upon foot only, or with horses only, or for a particular purpose only, or it may be general. Such a way may be acquired either by express grant or by user.

A right of way appurtenant to one piece of land cannot be used for another (*q*).

In addition to rights of way acquired by user and by express grant there are certain rights of way which arise by implied grant. For instance if a map or plan be exhibited as one of the particulars of sale, a purchaser buying according to the plan acquires such an interest in the streets or lanes shown upon the plan as to place them beyond the vendor's control to the injury of the purchaser (*r*). And so the vendor or any one claiming under him would be restrained from building upon a street to the injury of a

(*p*) *Corporation of Bradford* v. *Ferrand*, L.R. (1902) 2 Ch. 655.

(*q*) *Purdom* v. *Robinson*, 30 S.C.R. 64.

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

purchaser (*s*), or from otherwise obstructing them in such a manner as to interfere with the purchaser's lawful user of them (*t*). And where a vendor sold and conveyed a portion of his land on which were two houses, and one of the courses extended "to a lane produced six feet wide, then south . . . along the said lane, etc." (the lane being on the vendor's land, and being used as a means of access to the houses conveyed and so represented to the purchaser), it was held that the vendor, or any one claiming under him, could not interfere with the lane to the injury of the purchaser (*u*). But where the grantor does no more than express an intention to lay out a way he is at liberty to alter his intention as long as he does no damage. So, where a lease was made of premises abutting on "an intended way of thirty feet wide," no road being set out at that time, it was held that the lessee could only claim a convenient way, though for several years after the lease a road thirty feet wide had been in fact used. The declaration of an intention does not amount to an implied grant (*v*).

But where land is sold according to a plan upon which streets and lanes are shown, each purchaser does not acquire an easement in all the streets and lanes, but only in those abutting on his land and necessary for the material enjoyment of his property, unless he expressly stipulates for the right to use others (*w*).

And so, where a parcel of land was shown on a registered plan as "the parade," but no representation was made that

(*s*) *Rossin* v. *Walker*, 6 Gr. 619; *Espley* v. *Wilkes*, L.R. 7 Ex. 298.

(*t*) *Sklitzsky* v. *Cranston*, 22 Ont. R. 590.

(*u*) *Adams* v. *Loughman*, 39 U.C.R. 247; *Cheney* v. *Cameron*, 6 Gr. 623; *Roberts* v. *Karr*, 1 Taunt. 495; *O'Sullivan* v. *Cluxton*, 26 Gr. 612.

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

(*w*) *Carey* v. *City of Toronto*, 11 App. R. 416, affirmed by the Supreme Court on other grounds, though three Judges of the Court agreed with this view; 14 S.C.R. 172.

it would be kept open always for the benefit of persons buying lots according to the plan, it was held that a purchaser of a lot several hundred yards away from the parade was not a "party concerned" to whom notice ought to be given of an application to the County Judge to close up the parade, and that it might be closed up without his consent (*x*).

When the plan is a registered one the relative rights of vendor and purchaser are not thereby altered (*y*). A registered plan is not binding on the person registering it until a sale has been made according to it; but it then becomes binding on the vendor and can not be altered by him without the order of a Judge (*z*).

The position of land which is laid out with streets and lanes shown on a registered plan, and the relative rights of the vendor, the purchaser, and the public, have been much discussed. As soon as a plan is registered, there is an offer of dedication of the streets to the public. The owner, however, retains an interest in the streets, for he is not bound by the plan until he has made a sale thereunder. Even after a sale, he can, on notification to all parties concerned, where it is deemed expedient, procure an order of a County Court Judge to alter the plan and even the streets(*a*). Who are the parties concerned is a question of fact in each case (*b*). Municipalities which acquire an interest in the streets, are parties concerned, and ought to be notified (*c*). But when an order has been made closing a street, the municipality has no authority to declare it open by by-law,

(*x*) *Re McIlmurray & Jenkins*, 22 App. R. 398.

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

(*z*) R.S.O. cap. 136, sec. 110. See *Re Chisholm & Oakville*, 9 Ont. R. 274; 12 App. R. 225.

(*a*) R.S.O. cap. 136, sec. 110; *Roche* v. *Ryan*, 22 Ont. R. at p. 109.

(*b*) *Re McIlmurray & Jenkins*, 22 App. R. 398.

(*c*) *Re Waldie & Burlington*, 13 App. R. at p. 110; *Re Ontario Silver Co. & Bartle*, 1 O.L.R at p. 144.

but must expropriate the land if it desires to re-open the street(*d*).

Owners of contiguous parcels may join in making and registering a single plan of their lands; but each is entitled to apply to alter the plan as to his own portion without the consent of the other, though the other is a party concerned and entitled to notice of the application(*e*).

And it was held, before the enactment to be presently noticed, that the registration of a plan and sales made in accordance with it did not constitute a dedication of the streets and lanes as highways (*f*). And that was the case with regard to registered plans in townships before the Act presently to be mentioned was amended.

With regard to cities, towns, and incorporated villages (*g*), it is enacted that, "All allowances for roads, streets or commons, surveyed in cities, towns, villages and townships (*h*), or any part thereof, which have been or may be surveyed and laid out by companies and individuals and laid down on the plans thereof, and upon which lots of land fronting on or adjoining such allowances for roads, streets or commons have been or may be sold to purchasers, *shall be public highways*, streets and commons; and all lines which have been or may be run, and the courses thereof given in the survey of such cities, towns, villages and townships, or any part thereof, and laid down on the plans thereof, and all posts or monuments which have been or may be placed or planted *in the first survey* of such cities, towns, villages and townships, or any part thereof, to designate or define any allowances for roads, streets, lots or commons, shall be the true and unalterable lines and boundaries thereof respec-

(*d*) *Re Waldie & Burlington*, 13 App. R. 104.

(*e*) *Re Ontario Silver Co. & Bartle*, 1 O.L.R. 140.

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

(*g*) Hamlets, or unincorporated villages, are not included in this enactment; *Sklitzsky* v. *Cranston*, 22 Ont. R. 590.

(*h*) Townships were included by 60 Vict. cap. 27, sec. 20.

tively'' (*i*). It has been held that this enactment applies to a private survey, or sub-division of land in a municipality which has been already laid out, and is not confined to an original survey of such city, town, or village, notwithstanding the reference to the boundaries and monuments in the first or original survey; but only to such roads and streets to the use of which purchasers of land abutting thereon are entitled (*j*). Consequently, the streets become vested in the Crown or the municipality, at any rate are subject to the control of the municipality, by the registration of the plan, but the municipality is, by the same enactment, not liable to keep them in repair until established by by-law of the corporation, or otherwise assumed for public use by such corporation as provided in *The Municipal Act*.

The unsatisfactory result of these decisions is, that upon registration of a plan, the streets become public highways and vest either in the municipality or the Crown (*k*); but the municipality is not liable to repair them unless and until it has accepted them by by-law or otherwise assumed them as highways. Notwithstanding this, the owner retains such an interest in them that he can on a proper application to a County Judge have them altered or closed; and a purchaser from him of a lot fronting on a street has such an easement that he can prevent the user, to his injury, of all such as are convenient and necessary for the enjoyment of his land.

Where roads or streets laid out upon a plan are public highways, but the municipality has not assumed them for public use, then in case they are closed up, the land becomes the land of the adjoining owners (*l*).

A public highway may be created by dedication as well as by the reservation of roads by the Crown and the estab-

(*i*) R.S.O. cap. 181, sec. 39.

(*j*) *Gooderham* v. *Toronto*, 21 Ont. R. 120; 19 App. R. 641: 25 S.C.R. 246; *Roche* v. *Ryan*, 22 Ont. R. 107.

(*k*) R.S.O. cap. 223, secs. 599, 601.

(*l*) 63 Vict. cap. 17, sec. 22.

lishment of them by municipalities. A highway is not acquired by user—a right of public way is not acquired under the Prescription Act. But dedication may be proved by user (*m*). And where an owner had given for the purpose of extending a street a strip of twenty feet off his land which was laid out on a plan, and the adjoining owner also gave twenty feet and theu made a plan showing a street sixty feet in width; and the plan was authorized by the municipal council to be registered and they accepted the street as forty feet in width; and where there was evidence of user of the width of sixty feet and the expenditure of public money on it, it was held that the whole sixty feet had been dedicated as a highway (*n*).

A way of necessity is where a man grants a piece of land which is surrounded hy other lands of his, so that the grantee cannot reach his land without going over the surrounding land, then he has a way of necessity over the surrounding land to and from the land-locked parcel. It exists only when a grant can be implied (*o*), and arises only upon a grant of the legal estate (*p*). And where a testator devised one hundred acres to his two sons, to each of them fifty acres, and they partitioned the land in snch a way that one of them had to pass over the other's portion so as to reach the highway, it was held that the effect of the devises and partition was to create a way of necessity to and from the land-locked parcel (*q*). There must be an actual necessity for such a way, for convenience only will not confer the

(*m*) *Attorney-General* v. *Esher Linoleum Co.*, L.R. (1902) at p. 650.

(*n*) *Pedlow* v. *Renfrew*, 31 Ont. R. 499; 27 App. R. 611.

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

(*p*) *Saylor* v. *Cooper*, 2 Ont. R. 398; 8 App. R. 707. See *Lupton* v. *Rankin*, 17 Ont. R. 599.

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

right (*r*); nor will the right arise where the necessity is created by the grantee's own act, as where he builds his house so that he requires to go across another's land in order to get to the highway (*s*).

Where three sides of a piece of land were surrounded by navigable water, it was held that a way of necessity did not exist over the lands abutting on the fourth side(*t*). And where the land-locked parcel is enclosed on three sides by the land of the grantor and on the fourth by the land of a stranger there is no way of necessity over the grantor's land (*u*).

Where a grantee is entitled to a way of necessity over the grantor's land the latter has the right to select the way (*v*); but it need not be the most convenient one for the grantee (*w*), though a reasonably convenient one should he assigned to him (*x*); and if the grantor does not select a way the grantee may do so (*y*).

The right to such a way is co-extensive with the necessity and exercisable only while the necessity exists; and so, when the owner of the dominant tenement acquires the means of passing to the highway without using the way, the necessity for the way heing gone the right ceases with it(*z*). But changing the locality of the way from time to time does not destroy the right of way; nor where a grant of a specific

(*r*) *City of Hamilton* v. *Morrison*, 18 C.P. at p. 224; *Holmes* v. *Goring*, 2 Bing. 76; *Dodd* v. *Burchell*, 1 H. & C. 113; *Pheysey* v. *Vicary*, 16 M. & W. 484; *Fitchett* v. *Mellow*, 29 Ont. R. 6.

(*s*) *Roberts* v. *Karr*, 1 Taunt. at p. 498; *Barlow* v. *Rhodes*, 3 Tyr. at p. 284, where Bayley, B., in answer to the argument that there was a way of necessity, because a blind wall abutted on the highway, said the defendant might make a way by breaking through his wall.

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

(*u*) *Titchmarsh* v. *Royston Water Co.*, L.R. (1899) W.N. 256.

(*v*) *Bolton* v. *Bolton*, 11 Ch. D. 968.

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

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

(*y*) *Fielder* v. *Bannister*, 8 Gr. at p. 261, citing *Packer* v. *Walstead*, 2 Sid. 111; *Dixon* v. *Cross*, 4 Ont. R. 465.

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

way is made, and a purchaser of the dominant tenement buys it without notice of the grant, is the way by necessity lost (*a*). It is said that the way must be suitable for the purposes of the person requiring it at the time it is created and not for all purposes; or, in other words, the right is to be measured by the necessity of the dominant tenement at the time of the creation of the way; thus if the land is agricultural land there is only such a right of way as is suitable for the enjoyment of the land in that condition; and the owner of the dominant tenement cannot subsequently claim a right of way suitable to the user of the close as building land (*b*).

When the owner of a close grants the surrounding land, so that he must go across some portion of it in order to arrive at his close, then, though he creates the necessity by his own act, it has been held that he is entitled to a way of necessity by implied reservation (*c*). The modern authorities are founded upon cases (*d*) which contain mere *dicta* in support of the right and which have been sharply criticised by Serjeant Williams in his note to *Pomfret* v. *Ricroft* (*e*). "As if," says the learned Serjeant, "a self-created necessity could be, either in law or reason, any justification of a trespass committed on another's land." *Pinnington* v. *Galland* (*f*), which professes to follow Serjeant Williams as an authority, does not observe that he disapproves of the doctrine entirely. And in *Wheeldon* v. *Burrows* the latter

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

(*b*) *Gayford* v. *Moffatt*, 4 Ch. App. 133; *City of London* v. *Riggs*, 13 Ch. D. 798; *Midland Ry. Co.* v. *Miles*, 33 Ch. D. at p. 644. Cf. *Birmingham etc. Co.* v. *Ross*, 38 Ch. D. 295.

(*c*) *Holmes* v. *Goring*, 2 Bing. 76; *Davis* v. *Scar*, L.R. 7 Eq. 427; *City of London* v. *Riggs*, 13 Ch. D. 798; *Turnbull* v. *Merriam*, 14 U. C.R. 265.

(*d*) *Clarke* v. *Cogge*, Cro. Jac. 170; *Staple* v. *Heydon*, 6 Mod. 1; *Chichester* v. *Lethbridge*, Willes, 72, 73.

(*e*) 1 Wms. Saund. 571.

(*f*) 9 Ex. at p. 12.

case is cited with approval as being founded on Serjeant Williams' note.

The existence of the right is certainly opposed to the doctrine that a man may not derogate from his own grant, and to the *dictum* of Lord Ellenborough that a man can not by his own act create a way of necessity (*g*).

It may also be worthy of observation that a way is not, properly speaking, the subject of either an exception or a reservation (*h*); and if it may not be expressly reserved or excepted it cannot be reserved or excepted by implication. An exception must be of a part of the subject of the grant which does not pass thereby but is severed and retained by the grantor (*i*); and a reservation is properly made of something issuing out of the thing granted (*j*).

If a way were expressed to be reserved or excepted the words might operate as a re-grant if the deed were executed by the grantee (*k*). It seems that such a way exists as incident to a grant and must be pleaded as arising out of grant (*l*). But if the deed is silent as to a way and is not executed by the grantee, it seems impossible to imply a re-grant. And if the right exists in such a case it must be based upon the bare necessity and not upon the implication that it arises by grant (*m*). The modern cases treat it, however, as arising by implied re-grant.

When a way arises by implied re-grant or reservation the grantor is limited to such a way as was necessary at the time of the grant and cannot claim a way for all purposes (*n*).

(*g*) *Roberts* v. *Karr*, 1 Taunt. at p. 498.

(*h*) See *Gurly* v. *Gurly*, 8 Cl. & F. at p. 704, as to the form of an exception.

(*i*) Touch. 77.

(*j*) Co. Litt. 47a, 143a; Touch. 80.

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

(*l*) *Pomfret* v. *Ricroft*, 1 Wms. Saund. 570, note; *City of London* v. *Riggs*, 13 Ch. D. at p. 806.

(*m*) *Pomfret* v. *Ricroft*, 1 Wms. Saund. 573, note.

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

12. *Mechanics' Liens.*

The most dangerous incumbrances are Mechanics' Liens, for they arise in favour of the lien-holders by virtue of their being employed upon the work of building, or of furnishing material, and they exist for thirty days after the completion of the work or the furnishing of the material without registration.

For the purposes of title the subject may be considered under the following heads:—

1. What constitutes a lien.
2. On what the lien attaches; duration of the lien; registration.
3. Mortgaged lands.

"Unless he signs an express agreement to the contrary, and in that case subject to the provisions of section 3, *any person who performs any work or service* (*o*) upon or in respect of, or *places or furnishes any materials* to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, or fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit and ornamental trees, or the appurtenances to any of them, for *any owner, contractor or sub-contractor, shall by virtue thereof* have a lien for the price of such work, service or materials upon the erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit and ornamental trees, and appurtenances thereto, and the lands occupied thereby or enjoyed therewith, or upon or in respect of which the said work or service is performed, or upon which such materials

(*o*) Architects were held to be within the previous act: *Arnoldi v. Gouin*, 22 Gr. 314; and no doubt are within this.

are placed, or furnished to be used, limited however in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (except as hereinafter provided) by the owner" (*p*).

The provisions of section 3, referred to in the section just quoted are, that every agreement made on behalf of any workman, servant, labourer, mechanic, or other person employed in any kind of manual labour, intended to be dealt with by the Act, by which it is agreed that this Act shall not apply, is null and void; except in the case of a foreman, manager, officer, or other person whose wages are more than $3 a day.

By section 2, sub-section 3, of the Act, "Owner" is defined as including any person, firm, association, body corporate or politic, including a municipal corporation and railway company "having any estate or interest in the lands upon or in respect of which the work or service is done, or materials are placed or furnished, *at whose request and upon whose credit* or on whose behalf or with whose privity and consent or for whose direct benefit" any such work, etc., is done.

By section 7 (1), "The lien shall attach upon the *estate or interest of the owner* as defined by this Act in the erection, building, etc., and the lands occupied thereby or enjoyed therewith."

Bearing in mind that the object of the Act is to create a lien on buildings and land, and that no one but a person having an interest in the land can charge it, and that the lien will attach only on the estate or interest of the owner as defined by the Act, it becomes of importance to observe the exact definition of owner given by the Act, not only as a person having an estate or interest in the land, but also as a person requesting or contracting for the work to be done.

(*p*) R.S.O. cap. 153, sec. 4.

The lien is created by performing work or furnishing materials "for any owner," and "owner" is defined as being a person having any estate or interest in the land at whose request, etc., the work is done.

In order to constitute a lien, therefore, there must be something in the nature of a contract, or at least a request, express or implied, for the work to be done, or materials to be furnished, by a person having an estate or interest in the land; and not merely knowledge of, or a consent to, the doing of the work or the furnishing of the materials(*q*). A request or contract by a stranger to the title does not constitute a lien: and so where a husband procured buildings to be erected on land which was his wife's separate estate, before the enactment giving a lien in such cases(*r*), it was held that there was no lien therefor(*s*).

Under the prior Revised Statute(*t*), the lien arose "by virtue of being so employed or furnishing"; and therefore the mere making of a contract, or of a request to perform work or furnish material, at once created a lien even before anything was done. By the present enactment, which was passed in 1896(*u*), it is declared that any person "who performs any work or service," "or places or furnishes any material," shall, "by virtue thereof," have a lien "upon the erection, building, etc., and the lands occupied or enjoyed therewith, or upon or in respect of which the said work or service *is performed*, or upon which such materials are placed or furnished, etc." If the strict wording of this enactment is followed, and due weight is given to the departure from the phraseology of the preceding Act, no lien will arise for work to be done by the mere making of a

(*q*) *Gearing* v. *Robinson*, 27 App. R. 364, and cases cited.
(*r*) R.S.O. cap. 153, sec. 5.
(*s*) *Wagner* v. *Jefferson*, 37 U.C.R. 557.
(*t*) R.S.O. (1887) cap. 126, sec. 4.
(*u*) 59 Vict. cap. 35, sec. 5.

contract to build, but only by the performing of the work, and then only when the work has been performed.

And with regard to furnishing materials, no lien will be created by the contract or request to furnish but only by the actual furnishing of materials.

Against this interpretation the clauses as to registration seem to militate by enacting that "a claim" for a lien "may be registered before the work begins" (*v*), and that "every lien which is not duly registered" shall cease (*w*), indicating the existence of a lien, or at least of a registrable right before anything is done (*x*).

It is of course impossible to forecast what would be the trend of judicial opinion upon this enactment. For the conveyancer it would be unsafe to rely upon that interpretation, though it is manifestly the fair meaning of the words.

To the rule that no person's interest can be charged unless he contracts for or requests work to be done, there is an exception. Where work is done or materials are furnished in respect of the lands of a married woman, with the privity and consent of her husband, "he shall be conclusively presumed to be acting as well for himself and so as to bind his own interest, and also as the agent of such married woman for the purposes of this Act, unless the person doing such work or service or furnishing such materials shall have had actual notice to the contrary before doing such work or furnishing such materials" (*y*).

While the right to the lien is, by force of the Act, attached to the contract, yet any person otherwise entitled to a lien under the Act may, by express agreement, deprive

(*v*) R.S.O. cap. 153, sec. 22.
(*w*) *Ibid.* sec. 23.
(*x*) See *postea*, p. 244, *et seq.*
(*y*) R.S.O. cap. 153, sec. 5.

himself of the right to a lien; but such an agreement will not deprive any party otherwise entitled to a lien of his right thereto who is not a party to the agreement(*z*).

2. On what the lien attaches; duration of the lien; registration.—Section 7 of the Act defines the property upon which the lien attaches, viz., "upon the estate or interest of the owner, as defined by this Act, in the erection, building, etc., and the appurtenances thereto, upon or in respect of which the work or service is performed, or the materials placed or furnished to be used, and the lands occupied thereby or enjoyed therewith."

In case a person having only a partial interest in the land were to make a contract for the building thereon, the question might arise, whether the lien would attach on the whole building, or on the estate or interest only of the owner in it, assuming that the building when erected became part of the freehold. Section 7 would probably govern. It defines with particularity that interest upon which the lien is to attach, while section 4 is a general enactment defining how the right to a lien shall arise, without making any reference to estates in the land.

In cases where the estate or interest charged is leasehold, the fee simple may also be charged, with the consent of the owner thereof, provided that such consent is testified by the signature of such owner upon the claim of lien at the time of registering it and is duly verified(*a*).

Where there are several owners of the fee, it would seem that only the interest of the person consenting will be charged, as the charge arises out of his consent, and it is the interest of "such owner," *i.e.*, the consenting owner, that is charged.

In order to charge the fee it is necessary that the provisions of the Act should be observed; and where the lien-

(*z*) R.S.O. cap. 153, sec. 6.
(*a*) *Ibid.* sec. 7 (2).

holder claimed a lien on the fee for furnishing bricks to a tenant for years with an option of purchase, it was held that the fee was not charged though the tenant in fee was aware of the building, which was in fact done in pursuance of a parol agreement made with him by his tenant(*b*).

In *Gearing* v. *Robinson*(*c*), lessees of certain land for the term of twenty-one years wrote to a proposing sub-lessee that they would advance $3,000 towards rebuilding and repairs on the property, the buildings having been partially destroyed by fire; and it was held that their term was not charged with a lien. The decision went upon the ground that they were not owners within the meaning of the Act at whose request and upon whose credit the work was done. It is presumed that a similar, or perhaps a stricter, principle will be applied to the case of a reversioner in fee, for the Act prescribes only one way in which his estate can be charged where the work is done for a tenant, viz., by signing a consent "upon the claim of lien at the time of the registering thereof."

Inasmuch as the lien is the pure creation of the Act, and power is given to charge the fee simple only by consent, it would seem that if a tenant for years held under a tenant in tail or for life, the estate of the latter could not be charged by consent, but only by a contract for building made with the tenant in tail or tenant for life.

When the lien attaches upon an estate or interest in land, the land subsequently devolves, after commencement of the work, or furnishing material, subject to the lien. Section 7 declares that it shall attach upon the estate and interest of the owner, and by section 2, sub-section 3, owner includes "all persons claiming under" the person whose

(*b*) *Graham* v. *Williams*, 9 Ont. R. 458.

(*c*) 27 App. R. 364.

contract creates the lien, "whose rights are acquired after the work or service in respect of which the lien is claimed is commenced, or the materials furnished have been commenced to be furnished." If the lien attaches as soon as the contract is made, as it did under the previous Act, then if the estate devolves upon another before the commencement of the work, it apparently passes free from the lien. If the lien attaches under the present Act, only when the work is performed or the material furnished, even then if the estate devolves before the commencement of the work, it would apparently devolve free from the lien. For, whether it attaches at the date of the contract or at the date of the commencement of the work, the statute includes those only whose rights arise after the commencement, and charges their estates or interests only. It will be seen, also, in dealing with registration of liens, that a purchaser without notice will gain priority if the lien is not registered.

The lien will not attach on lands which are not subject to execution; as a public school building and site(*d*); nor did it attach on lands of a railway company required for the purposes of the railway(*e*). But by the present Act railways are included, and also municipal corporations(*f*), but not public school or high school trustees.

As to the area or extent of land upon which the lien attaches. It will be observed that the Act gives a lien upon the erection, building, etc., and the appurtenances thereto, and the lands occupied thereby or enjoyed therewith. It must necessarily, therefore, be to some extent a question of fact as to how much land is enjoyed with the building. Where the land is divided into building lots, and a house is built on one of the lots, there would not be much diffi-

(*d*) *Robb* v. *Woodstock School Board*, Holm. Mech. L. p. 20.

(*e*) *Breeze* v. *Mid. R. Co.*, 26 Gr. 225; *King* v. *Alfrod*, 9 Ont. R. 643.

(*f*) Sec. 2, sub-sec. 3.

eulty in holding that the lot was subject to the lien. If more than one house were built on a lot, probably a proportionate division would be made. But if a second house were built on a lot under a separate contract after the first had been completed, and liens had attached under the first contract, complications would arise which could not easily be settled.

Where separate buildings are erected for the same owner under separate contracts, the contractor cannot claim a lien for one gross sum on the whole land, at any rate unless the claim shows how much is claimed under each contract. In such a case, Proudfoot, V.C., said, "There is nothing in the Act to show that it was intended to give a lien upon one piece of property for work performed upon another. If there be several contracts for the erection of buildings, I apprehend there must be a distinct registration as to each, or at all events there must appear in the instrument registered data from which it may be ascertained how much of the lien is applicable to each. * * Nor does the fact of the buildings being upon the same lot offer any reason for it. The buildings are distinct, the land occupied by them is distinct, and that usually enjoyed with them must, for this purpose, also be considered as distinct"(*g*).

But where a contract was made with two owners of houses contiguous to each other and under the same roof, for the repair of them after damage by fire, at one entire price, it was held that a lien attached on each parcel of land for the price of the amount of work performed and materials furnished in respect of each(*h*).

The effect of the registry laws upon liens must now be considered. *The Registry Act* may be treated as a fundamental or organic law affecting all dealings with land. But, notwithstanding that Act, if the liens created by the

(*g*) *Currier* v. *Friedrick*, 22 Gr. 243.
(*h*) *Booth* v. *Booth*, 3 O.L.R. 294.

Mechanics' Lien Act had been preserved by that Act as liens arising and existing apart from any written instrument, and by virtue only of the employment of labour or the furnishing of materials, it is probable that the *Registry Act* would have been held not to apply to them at all. Before the *Registry Act* affected equitable interests in land they were held not to be within its scope, if they were not evidenced by instruments capable of registration. Thus, an equity to reform a mortgage(*i*), and an equitable mortgage by deposit of title deeds(*j*), were held not to be within the *Registry Act*, and not affected by subsequent dealings with the land. And even under the present registry Act an easement created by severance of a tenement, not being capable of registration, is not within the Act, and is not defeated by subsequent dealings(*k*). The *Registry Act* provides for registration of *instruments*, not rights.

By the *Mechanics' Lien Act*, however, registration is applied to liens for two purposes: (i) in order to preserve the existence of the lien, and (ii) in order to preserve its priority.

(i) The preservation of the lien.—The lien, in the first place, is created and exists without writing. It may, however, be put in the form of a claim for registration(*l*). A claim for lien by a contractor or sub-contractor may be registered before or during the performance of the contract, or within thirty days after the completion thereof; a claim for lien for materials, before or during the furnishing or placing thereof or within thirty days after the furnishing or placing of the last material so furnished or placed; a claim for lien for services, at any time during the performance of the service or within thirty days after the completion of the ser-

(*i*) *McMaster* v. *Phipps*, 5 Gr. 361.
(*j*) *Harrison* v. *Armour*, 11 Gr. 303.
(*k*) *Israel* v. *Leith*, 20 Ont. R. 361.
(*l*) R.S.O. cap. 153, sec. 17.

vice; and a claim of lien for wages, at any time during the performance of the work for which such wages are claimed, or within thirty days after the last day's work for which the lien is claimed(*m*).

If registration does not take place as required, the lien absolutely ceases to exist on the expiry of the time limit for registration, unless in the meantime an action is commenced to realize the claim, or in which the claim may be realized upon it and a certificate of *lis pendens* registered(*n*). If the lien has been duly registered, it still expires, unless an action is commenced to realize the claim, or in which the claim may be realized, and a certificate of *lis pendens* is registered within ninety days after the completion of the work, etc., or the expiry of the period of credit, where the period is stated in the claim registered(*o*). And a registered lien expires at the end of six months from registration, unless it is again registered, or unless an action is brought on a certificate registered in the meantime(*p*). If there is no period of credit, or if the date of the expiry of the period of credit is not stated in the claim registered, the lien ceases after the expiry of ninety days from the completion of the work, etc., unless proceedings are in the meantime commenced and a certificate registered(*q*). If the requirements of the clauses respecting registration are not observed, then the lien ceases to exist as against the owner, using that term as defined by the Act.

(ii) Priority.—Inasmuch as the term "owner" includes those claiming under the original owner, whose rights are acquired after the commencement of the work or the furn-

(*m*) R.S.O. cap. 153, sec. 22.

(*n*) *Ibid.* sec. 23.

(*o*) *Ibid.* sec. 24.

(*p*) *Ibid.* sec. 24, sub-sec 2.

(*q*) *Ibid.* sec. 25. See *Burritt* v. *Renihan*, 25 Gr. 183; *Neil* v. *Carroll*, 28 Gr. 30, 339; *Summers* v. *Beard*, 24 Ont. R. 641.

isbing of material, their priority is thus indirectly affected by non-registration. Or rather, the lien having ceased to exist by non-registration, they may disregard any such claim when purchasing. It is when a transmission of interest takes place within the time for registration that difficult cases of priority arise.

As already shown, if the *Registry Act* had not been invoked by this Act, it is probable that it would not have applied, as the lien at first exists in a form incapable of registration. We must therefore consider how far this Act has made registration applicable for the purpose of preserving priority. The sections which provide for registration within a specific time, which have been already considered, were passed, it seems, for the purpose of preserving the existence of the lien beyond a certain period. The consequence of not registering is that the lien ceases to exist as against the first and all subsequent owners. This period is evidently not fixed as a period during which priority may be preserved. In the cognate cases of deeds of land sold under process, and deeds to carry out sales for taxes, the *Registry Act*, while allowing them to be registered within six and eighteen months respectively, expressly provides that if they are not registered within these periods the purchasers shall not be deemed to have preserved their priority as against purchasers in good faith who first register(*r*).

But nothing is specifically said in this Act as to priority, the penalty for non-registration within the period being loss of the lien altogether. We must look then to the 21st section as affected by the other clauses of this Act and the general registry law in order to ascertain how priority is affected. By the 21st section, the *Registry Act* "shall not apply to any lien arising under this Act, except as herein otherwise provided." What is "otherwise provided" in

(*r*) R.S.O. cap. 136, sec. 90.

tbe Act is, that the lien may be registered either before, or during the progress of, the work, or within thirty days thereafter, and that when registered, "tbe person entitled to the lien shall be deemed a purchaser *pro tanto*, and within the provisions of the *Registry Act*." The ordinary effect of declaring that an instrument may be registered is immediately to make applicable all the provisions of tbe *Registry Act*. The 21st section, above quoted, goes furtber and expressly makes the *Registry Act* applicahle, and further makes tlie lien holder a purchaser *pro tanto*.

It has alreadv been pointed out that the section creating the lien distinctly declares that it is the performing of the work, or the furnishing of the materials, which creates the lien, and that until the work has been actually performed or the materials actually furnished, there cannot be a lien. The section just quoted provides for registration of "a claim for lien," but the next section (the 23rd) speaks of a lien (not a claim) being duly registered, and the 24th section also speaks of registering a lien (not a claim for one). If any distinction between a claim for lien and a lien was intended by section 22, it seems to have been ohliterated by the following two sections. For conveyancing purposes it may be taken as certain that at whatever period a lien may arise, the claimant at any rate has a registrable right, and upon registration he is to he deemed a purchaser *pro tanto* under the Registry Act.

If he is to be taken (by relation back) as a purchaser from the time that he acquired the right to register his claim, he must, at the peril of losing his priority otherwise, exercise his privilege of registering immediately and before the work commences. If he becomes a purchaser for the first time upon registration, he takes his registered lien subject to all the prior dealings with the property of which he has notice by registration or otherwise. The result of the

cases upon this clause of the Act has been to declare that, in order to preserve his priority, the lien holder must register(*s*). Where a purchaser takes with notice of a lien, however, he does not gain priority by registration(*t*).

3. Mortgaged lands.—Where a mortgage is registered during the progress of the work, it seems therefore to retain its priority over unregistered liens, and as to all advances made thereunder from time to time the priority will be maintained as long as the mortgagee has no notice of claims for liens(*u*).

Where there is a prior mortgage on the land, and the selling value has been increased by the work or service, or the furnishing of materials, then the lien therefor ranks upon the increased value in priority to the mortgage(*v*).

Where materials were brought upon mortgaged land for the purpose of a building, but were never in fact incorporated in the building, and were removed and sold, it was held by a majority of a Divisional Court that the furnishing gave a lien on the increased value of the land. Meredith, C.J., dissented, on the ground that the Act creates a lien on the erection or building—the completed work—and the lands occupied thereby or enjoyed therewith, and that the loose materials must be incorporated in the building and become part of the land, before a lien can arise(*w*). If the writer may say so, with respect, this seems to be the better opinion. It is sections 4 and 7 (1) which create the lien,

(*s*) *Richards* v. *Chamberlain*, 25 Gr. 402; *Hynes* v. *Smith*, 27 Gr. 150; *McVean* v. *Tiffin*, 13 App. R. 1, overruling *Makins* v. *Robinson*, 6 Ont. R. 1; *Reinhart* v. *Shutt*, 15 Ont. R. 325; *Re Craig*, 3 C.L.T. 59.

(*t*) *Wamty* v. *Robins*, 15 Ont. R. 474; *per* Osler, J.A., *McNamara* v. *Kirkland*, 18 App. R. at p. 277.

(*u*) *Cook* v. *Belshaw*, 23 Ont. R. 545.

(*v*) Sec. 7, sub-sec. 3.

(*w*) *Larkin* v. *Larkin*, 32 Ont. R. 80.

and they distinctly say that it shall be upon the erection, building, etc. Sub-section 3 of section 7 postulates the existence of a lien—does not define it—and declares that "the lien under the Act," which arises under other phrasing shall be upon the increased selling value of the land. This sub-section does not attempt to define a lien.

A prior mortgage within the meaning of this section is a mortgage in fact existing on the property before the lien arises, not one for which priority is obtained by registration(*x*). And in order that the lien may rank on the increased selling value, it must appear that the selling value has in fact been increased and not only that the work has been done so as to entitle the workman to a lien. So, where a mill subject to a mortgage was to be converted from a stone flouring mill into a roller mill, and the plaintiff had completed his work so as to entitle him to a lien, though the whole scheme of conversion was not finished, and the mill in its unfinished state would probably not have sold for more than before the alterations were commenced. it was held that the priority of the mortgage was not affected(*y*).

A lien may be discharged by a receipt signed by the claimant or his agent duly authorized in writing, acknowledging payment, and verified by affidavit and registered. Upon application to the Court or Judge or other officer having power to try an action to realize a lien, security may be given, or money paid into Court, and the registration of the lien may thereupon be vacated. And power is given to vacate the registration of the lien upon any other ground(*z*). On an application by a mortgagee who had sold the land, the liens registered were vacated, the surplus

(*x*) *Cook* v. *Belshaw*, 23 Ont. R. 545.

(*y*) *Kennedy* v. *Haddow*, 19 Ont. R. 240.

(*z*) R.S.O. cap. 153, sec. 27.

moneys realized by the mortgage sale being ordered into Court(*a*).

And where an application is made to vacate registration on the ground that a certificate of *lis pendens* has not been registered within time, it may be made *ex parte* upon producing the certificate of the Registrar certifying the facts(*b*).

(*a*) *Finn* v. *Miller*, 10 Occ. N. 23.

(*b*) R.S.O. cap. 153, sec. 27 (4).

CHAPTER VIII.

PAYMENT AND DISCHARGES OF MORTGAGES.

1. *Right to reconveyance.*
2. *Effect of Statutory discharge.*
3. *Assignment in lieu of reconveyance.*
4. *Surviving mortgagees and executors.*
5. *Discharges by married women.*

1. *Right to reconveyance.*

The discharge of a mortgage is usually effected by means of the statutory certificate of a discharge which operates as a reconveyance upon registration, before which it is a mere receipt for the mortgage money(*c*). The party entitled to the equity of redemption is not obliged to accept a statutory discharge, however, but may require a reconveyance of the mortgaged premises with a covenant against incumbrances by the mortgagee(*d*), or an assignment of the mortgage pursuant to the provisions of *The Mortgage Act*.

2. *Effect of statutory discharge.*

By section 76 of *The Registry Act*, 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, in the

(*c*) *Re Music Hall Block*, 8 Ont. R. 225; *Trust & L. Co. v. Gallagher*, 8 P.R. 97.

(*d*) *McLellan v. McLean*, 27 Gr. 54.

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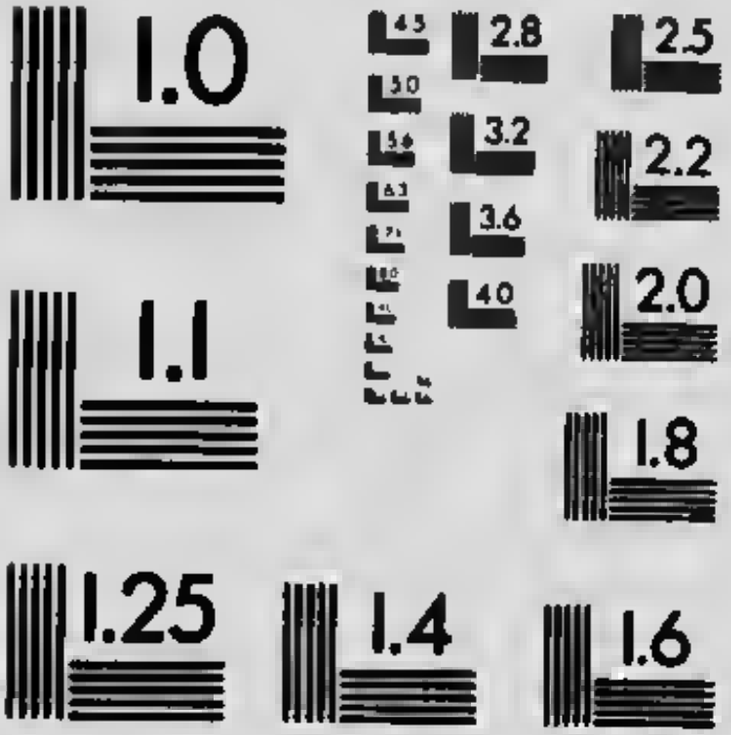

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form given by the Act, or to the like effect, shall if the assignment or other document of title of the assignee has been registered, register the same, "and the same shall be deemed a discharge of the mortgage, and the certificate so registered shall be as valid and effectual in law as a release of the 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."

And when a mortgage is paid off by any person advancing money by way of a new loan on mortgage of the same property, and the mortgage so paid off, or the discharge, is held by the mortgagee making the advances, the discharge is to be registered within six months from the date thereof, unless the mortgagor in writing authorizes the retention of the discharge for a longer period. The registration, however, is not to affect the right (if any) of any mortgagee or purchaser who may have paid off the mortgage to be subrogated to the rights of the mortgagee whose mortgage debt has been so paid(*e*).

Where the person entitled to receive the money and discharge the mortgage is not the mortgagee, he is to register at his own expense the instruments through which he claims title(*f*).

A certificate of discharge should relate to one mortgage only, and should not embrace several mortgages(*g*).

The certificate itself, being a mere receipt and containing no words of conveyance, derives its operation as a reconveyance solely from registration(*h*). And, inasmuch as the statute does not specifically state which, of all the persons mentioned, it is in whose favour the reconveyance operates,

(*e*) R.S.O. cap. 136, sec. 77.
(*f*) *Ibid.* sec. 78.
(*g*) *Re Smith & Shenston*, 31 U.C.R. 305.
(*h*) *Dilke* v. *Douglas*, 5 App. R. at p. 70.

it becomes necessary to inquire what is the effect of the reconveyance and to seek for a test to determine in whose favour it operates.

The registered discharge may be described as an automatic reconveyance vesting the estate in the person who is legally entitled to it. Just as, upon the death of an ancestor, the law cast the estate upon the heir-at-law though he might be unknown, and his identity might have to be ascertained by certain tests, so in the case of the discharge the statute infallibly vests the estate in that person of all those named in the Act who is legally entitled thereto, though certain tests may have to be applied to ascertain which of them it is in whose favour it operates. The effect of the discharge, however, is to revest the original estate of the mortgagor in him and not a new estate derived from the mortgagee(*i*). The conveyances of the equity of redemption may be so complicated "that until you get a decision of one or more courts on a variety of obscure instruments you cannot tell where it is," as Sir George Jessel, M.R., remarked in one case(*j*); and undoubtedly as remarked by Lord Cairns, in another case(*k*), it is "not a very convenient way for the Act of Parliament to have provided for the disposition of the legal estate—a disposition which very often could not be exactly determined except through the medium of a chancery suit."

In *Carrick* v. *Smith*(*l*), and *Brown* v. *McLean*(*m*), the discharge was said by Wilson, J., and Street, J., respectively, to vest the estate in the person, who has, subject to the mortgage, the right to the land, or the person best entitled to it. And the same principle pervades the deci-

(*i*) *Carter* v. *Grasett*, 14 App. R. 685.
(*j*) *Fourth City, etc. Bdg. Soc'y.* v. *Williams*, 14 Ch. D. at p. 145.
(*k*) *Pease* v. *Jackson*, 3 Ch. App. at p. 582.
(*l*) 35 U.C.R. 348.
(*m*) 18 Ont. R. at p. 535.

sions under the English statutes which provide that an endorsed receipt on a building society mortgage shall operate to vest the estate in the person for the time being entitled to the equity of redemption(*n*).

Perhaps the best mode of ascertaining who is the person best entitled to the estate is to regard the actual facts of the several cases in which the question has arisen.

A mortgagor paid off part of the mortgage moneys, and died intestate. The widow and the heirs-at-law paid the remainder, and took a statutory discharge. The estate vested in the heirs-at-law(*o*).

Smith mortgaged to Fisher in 1881. In 1882 executions issued against Smith's lands. Afterwards Smith conveyed to House, and in order to substitute House for Smith as mortgagor, Fisher took a mortgage from House and discharged Smith's mortgage. The estate was held to vest in House and not in Smith(*p*).

A stranger advanced money to pay off existing mortgages which were accordingly discharged. The opinion was expressed that the discharges operated to vest the estate in the person best entitled to it, namely, the new mortgagee(*q*).

A first and second mortgage existing on land, a stranger advanced money to pay off the first mortgage, which was held by a building society. The mortgage was paid off and a receipt duly endorsed. *Subsequently,* a mortgage was made to the person who had advanced the money. The legal estate vested in the second mortgagee, who was next entitled, and not in the stranger(*r*). In a similar case,

(*n*) 6 & 7 Wm. IV. cap 32, sec. 5; 37 & 38 Vict. cap. 42; *Hosking* v. *Smith,* 13 App. Ca. 582; *Robinson* v. *Trevor,* 12 Q.B.D. at p. 249.

(*o*) *Carrick* v. *Smith,* 35 U.C.R. 348.

(*p*) *Fisher* v. *Spohn,* 4 C.L.T. 446.

(*q*) *Brown* v. *McLean,* 18 Ont. R. 533.

(*r*) *Prosser* v. *Rice,* 28 Beav. 68.

where the person making the advance took his mortgage *before* paying the building society, who were first mortgagees, and took from the society the title deeds and an endorsed receipt on their mortgage, the estate vested in the new mortgagee(*s*).

Where a junior mortgagee advanced money to pay off a building society, without notice of the intermediate mortgages, the estate vested in him(*t*).

Land mortgaged to a building society was conveyed by the mortgaor. Without disclosing this conveyance the mortgagor made a subsequent mortgage, and this mortgagee paid off the building society, took an endorsed receipt and received the title deeds. The estate vested in him(*u*).

It thus appears that the ascertainment of the person in whom the estate vests depends to some extent on the right of redemption, having regard to priorities; and upon equitable principles—matters which are considered in the next section.

It is said that it is a matter of indifference as to whose name appears in the certificate of discharge as paying the mortgage money, as it does not operate to reconvey the land to the person named, but to the mortgagor or his assigns in deed or in law, as set out in the statute, according as they may be found entitled. It is even said that the name of the person paying may be omitted altogether(*v*). But, as the certificate until registration is a receipt for the money, it is advisable to truly state the name of the person paying the mortgage money.

Where a tenant in tail mortgages in fee simple, a statu-

(*s*) *Pease* v. *Jackson*, 3 Ch. App. 576.

(*t*) *Fourth City, etc. Bdg. Soc'y.* v. *Williams*, 14 Ch. D. 140. See also *Robinson* v. *Trevor*, 12 Q.B.D. 423; *Lawrence* v. *Clements*, 31 L. T.N.S. 670; *Hosking* v. *Smith*, 13 App. Ca. 585.

(*u*) *Sangster* v. *Cochrane*, 28 Ch. D. 295.

(*v*) *Carrick* v. *Smith*, 35 U.C.R. 348

tory discharge has the effect of reconveying to the mortgagor in fee simple(*w*).

It is the common practice of conveyancers, in drawing mortgages to trustees, not to disclose the trust, but to recite that the mortgagees advance the money on a joint account(*x*). And where this is done, payment to one of the mortgagees during the other's lifetime is a good discharge of the debt, but does not discharge the security except to the extent of the beneficial interest of the payee, according to English authority(*y*). If, however, the statutory discharge, which is a mere receipt, is a good discharge of the debt, it may be that its registration will effectually reconvey the land. The clause of the *Registry Act* which provides for this mode of re-conveyance declares that the statutory discharge may be made by "such * * person as may be entitled by law to receive the money and to discharge the mortgage." Where one mortgagee is entitled by law to receive the money, it would appear to be the effect of this statute to authorize him also to give a statutory discharge which, when registered, would operate as a re-conveyance(*z*).

3. *Assignment in lieu of reconveyance.*

The mortgagor may, instead of taking a reconveyance or a statutory discharge, require an assignment of the mortgage to be made. This right arises under the following enactment: (1) "Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of giving a certificate of payment or reconveying, and on the terms on which he would be bound

(*w*) *Lawlor* v. *Lawlor*, 10 S.C.R. 194. And see *Carter* v. *Grasett*, 14 App R. at p. 703.

(*x*) *Re Harman & Uxbridge*, 24 Ch. D. 725; *Carritt* v. *R. & P. Adv. Co.*, 42 Ch. D. 263.

(*y*) *Powell* v. *Brodhurst*, L.R. (1901) 2 Ch. 160.

(*z*) But see *postea*, p. 263.

to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly. (2) The right of the mortgagor under this section to require an assignment as aforesaid shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and as between incumbrancers a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbraucer. (3) This section does not apply in the case of a mortgagee being or having been in possession. This section shall have effect notwithstanding any stipulation to the contrary''(*a*). By the interpretation clause, ''mortgagor'' includes ''any person from time to time deriving title under the original mortgagor or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and 'mortgagee' includes any person from time to time deriving title under the original mortgagee.''

The purpose of this enactment, which was taken from an English Act, was to enable a person advancing money to pay off a mortgage at the request of the mortgagor to demand and receive an assignment of the mortgage. He might be unwilling to advance the money if the mortgage were discharged, and he were obliged to rely on a new mortgage from the mortgagor, fearing intermediate incumbrances. That danger did not exist in this province as their registration gave sufficent notice. But the statute enables a person advancing money, nevertheless, to insist upon an assignment of a first mortgage where there are subsequent incumbrances which are not to be paid off.

(*a*) R.S.O. cap. 121, sec. 2.

The Act was not intended to effect any change in the person entitled to call for the conveyance. The best explanation of it is given by Sir George Jessell, M.R., in *Teevan* v. *Smith* (*b*), as follows: "It says, 'where a mortgagor is entitled to redeem.' Every mortgagor is entitled to redeem, but there is a difference in their rights. Where there is one mortgagor and one mortgagee, there, of course, his right to redeem is absolute; but where there are successive mortgages the mortgagor can redeem the next to him without redeeming any other; but, if he wishes to redeem any anterior mortgage, he must also redeem all those who are between that mortgagee and himself. * * So that the words, 'where a mortgagor is entitled to redeem' really includes every mortgagor, except a mortgagor who is precluded by some special term in his mortgage deed from redeeming within a specific time. For, although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years; that is why the words 'where a mortgagor is entitled to redeem' are inserted. They mean, where a mortgagor is not precluded from redeeming for a certain time by some special stipulation. Then, it says, 'he shall have power to require the mortgagee instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person.' It is only 'instead of reconveying.' The section assumes two things: first, that the mortgagee is bound to reconvey to the person applying to him, and, secondly, that the transfer is to be instead of a reconveyance. Then see how it works. Where there are first and second mortgages, and the first mortgagee has notice of the second, when he is paid off he becomes a trustee of the legal estate for him. The word

(*b*) 20 Ch. D. at p. 720.

'reconvey' is the proper word to use; it is a strict reconveyance. If the first mortgagee is paid off by the mortgagor, he is not bound to reconvey the estate to him; but, if he is paid off by the second mortgagee he is bound to reconvey it to him. The second mortgagee is a mortgagor under the definition in the Act. He is an assign of the mortgagor and is entitled to redeem [sec. 1 sub-sec. 4]. It appears to me, that no person can avail himself of the [second section] who is not entitled to call for a reconveyance of the estate from the mortgagee. * * Every person who is behind the first mortgagee is entitled to redeem, and is a mortgagor within the meaning of the section, and if there are several successive mortgagees of the same mortgagor, which of them has a right in priority to the others to call upon the first mortgagee to assign the mortgage? It must be that one who is next to him. The first incumbrancer has the first right to redeem, and it is impossible to suppose that it was intended that a *puisne* mortgagee was to have the right to call for a transfer of the first mortgage, before one who is prior to himself."

It appears, then, that the right to direct an assignment is involved in the right of redemption. The person entitled to redeem, when he is entitled to redeem, may, instead of a reconveyance demand an assignment. In the case cited from, consequently, it was held that a mortgagor paying off a first mortgage could not claim an assignment of the mortgage to a nominee of his own, there being a subsequent mortgagee who was next entitled to the legal estate.

So, where a mortgage was made under a power, and subsequently, under the same power the equity of redemption was settled on a life tenant with remainders to other persons, and a remainderman bought up the mortgage and obtained a decree of foreclosure, it was held that the life tenant (mortgagor) on redeeming was not entitled to have

the mortgage transferred to a nominee of his. He could only get a transfer on the terms on which he could get a reconveyance, that is, upon the trusts of the settlement(*c*).

And where two mortgages were made to one mortgagee on the same land, and the first mortgage being overdue, an action was brought thereon, it was held that the mortgagor, on payment of the first mortgage, was not entitled to have it assigned to his nominee, as it would prejudice the mortgagee's second mortgage(*d*).

But where a mortgagor assigned his equity of redemption to several assignees, and one of them agreed with him to pay off the mortgage, and then some of the assignees erected other incumbrances, the first mortgagee, having sued the mortgagor, was held to be bound to assign his mortgage to a stranger who had advanced the necessary money to pay the first mortgage and save foreclosure(*e*). And in the opinion of the Chancellor, if the mortgagor had advanced the money himself, he would have been entitled to call for an assignment in order to keep the mortgage alive as against his assignees who were bound to indemnify him.

And where a mortgagor assigned his equity of redemption for a sum in excess of the mortgage, and the assignee raised the excess by a second mortgage to the holder of the first, and covenanted to indemnify the mortgagee against the first, it was held that the original mortgagor was on payment of the first mortgage at maturity entitled to an assignment to himself and was not bound to accept a statutory discharge(*f*).

(*c*) *Alderson* v. *Elgey*, 26 Ch. D. 567.

(*d*) *Rogers* v. *Wilson*, 12 P.R. 322, 548.

(*e*) *Queen's College* v. *Claxton*, 25 Ont. R. 282. See also *Stark* v. *Reid*, 26 Ont. R. 257.

(*f*) *Wheeler* v. *Brooke*, 26 Ont. R. 96

By *The Registry Act*(*g*), when any mortgage is paid off by any person advancing money by way of a new loan on mortgage of the same property, and the mortgage so paid off or the discharge is held by the mortgagor making the advance, the discharge is to be registered within six months from the date thereof, unless the mortgagor in writing authorizes the retention of the discharge for a longer period. But such registration is not to affect the right (if any) of any mortgagee or purchaser who may have paid off such mortgage to be subrogated to the rights of the mortgagee whose mortgage debt has so been paid(*h*).

This enactment by its terms is not to apply to the case of a mortgagee in possession. The reason for this appears to be that, upon an assignment, the mortgagee would still remain liable to an account of rents and profits notwithstanding the assignment, and the compulsion to assign would thus place him in an unfair position(*i*).

4. *Surviving Mortgagees and Executors.*

By the Revised Statute, cap. 121, sec. 14, it is enacted that "the *bona fide* payment of any money to * * and receipt by the survivor or survivors of two or more mortgagees or holders, or the executors or administrators of such survivors, or their or his assigns, shall effectually discharge the person paying the same, etc."

By the same Act, section 13, where a mortgage is made to secure an advance on a joint account, or where a mortgage is made to two or more persons jointly, and not in shares, the receipt in writing of the survivor of them or of the personal representatives of such survivors, shall be a complete discharge for all money due, notwithstanding any notice to the payer of a severance of the joint account. This

(*g*) R.S.O. cap. 136, sec. 77.
(*h*) See *Queen's College* v. *Claxton*, 25 Ont. R. at p. 290, *ad fin.*
(*i*) See *Hall* v. *Heward*, 32 Ch. D. 430.

enactment applies only if a contrary intention is not expressed in the mortgage, and it applies only to mortgages made after 1st July, 1886.

By *The Registry Act*, section 76, the certificate of discharge executed by such "person as may be *entitled by law to receive the money* and to discharge the mortgage"(*j*), is to operate as a discharge and reconveyance. The combined effect of these sections is, that payment made in good faith to a surviving mortgagee is a valid payment, and the surviving mortgagee, being so entitled to receive the money, may effectually reconvey and discharge the mortgage debt by the statutory discharge. "It is impossible," says Moss, C.J.O., in *Dilke* v. *Douglas*(*k*), "to draw any other conclusion than that the registration of a certificate given by the survivor, upon payment of the debt, effectually discharges the mortgage and revests the legal estate. The whole tenor of the statutory regulations excludes the supposition that the survivor was authorized to receive the money and discharge the debt without being empowered to reconvey the legal estate."

The payment, under such circumstances, must, however, be an actual payment, and not an arrangement by which other securities are substituted for the mortgage. Hence, it was held in the same case, that where a purchaser of part of the mortgaged land, who took a covenant from the mortgagor to procure a release of the mortgage, afterwards received a discharge executed by a surviving mortgagee, who had been given other security instead of payment in money, the land was still subject to the mortgage. But

(*j*) The words "and to discharge the mortgage" should have been omitted, unless they mean "to discharge the mortgage debt," leaving the discharge to be made by the person entitled by law to receive the money. It is idle to say that a discharge executed by the person entitled to discharge the mortgage shall operate as a discharge.

(*k*) 5 App. R. at p. 77.

where such a discharge had been registered, and another purchaser bought another parcel from the mortgagor without notice of the nature of the discharge, it was held that he took a good title free from the mortgage, being entitled to the protection of the Registry Act.

By the 12th section of the Mortgage Act(*l*), it is enacted that, "every certificate of payment or discharge of a mortgage * * by the mortgagee, or his assignee, his heirs, executors, administrators or assigns, *or any one of them*, at whatsoever time given, and whether before or after the time limited by the mortgage for payment * * shall, if in conformity with *The Registry Act*, be valid, to all intents and purposes whatsoever." Under this enactment, it has been held that a discharge of a mortgage which had been made to a testator, executed by two out of three of his executors, was a valid discharge(*m*).

Too much reliance, however, must not be placed on this case. The fact that a special enactment exists, enabling the survivor or survivors of two or more mortgagees or "holders" (which would include assigns whether in deed or in law) to discharge a mortgage, seems to indicate that any less number than the whole of those entitled should not, when they are all living, be able to reconvey. For if one of several mortgagees could so discharge a mortgage, his right could not be impaired by the death of another. If under this clause, one of several mortgagees or executors is enabled to discharge a mortgage, the enactment enabling a surviving mortgagee or executor to discharge would be unnecessary; and, on the other hand, if the only authority which a surviving mortgagee or executor has to discharge a mortgage is the enactment relating to survivors, then it seems manifest that the legislature did not intend one of

(*l*) R.S.O. cap. 121.

(*m*) *Ex parte Johnson*, 6 P.R. 225.

several living mortgagees or assignees to exercise the same right(*n*).

The phrase "any one of them," if literally taken might enable an intermediate assignee, or the original mortgagee after assignment to discharge; hut this plainly could not be the intention. A more probahle interpretation is, that the mortgagee, or his assign, or his executors or administrators, or any one of them, as the case may he, heing at the time the holder of the mortgage, exeeuting the discharge, shall thereby validly discharge the mortgage, whether the discharge is executed hefore or after the time limited for payment. The history of this section, which appears in the prior enactments(*o*), shows that the ohject of tbe section was to enable a discharge to be made, and to declare its effect, though it might have been executed after tbe estate had become absolute in the mortgagee. In these enactments the phrase in question does not appear. It was first inserted in the Act of 1867-8(*p*). Tbe section in question, though somewhat different from its original, still hears on its face evidence of an intention to make the discbarge effectual to reconvey, whenever exeeuted, whether hefore or after the time limited for payment, if only it conforms to the provisions of *The Registry Act*, rather than an attempt to define v'ho shall he the party to exeeute the discharge. Without greater weight of judicial opinion it would be unsafe to eonclude that any one of several mortgagees, or of severa! assigns in deed or in law, could effectually discharge a mortgage under the authority of this clause.

Where a mortgagor was appointed one of the mortgagee's exeeutors, and executed a discharge of his own

(*n*) See *ante*, p. 256.

(*o*) 9 Vict. cap. 34, secs. 23, 24; 10 & 11 Vict. cap. 16, secs. 1, 2; C.S.U.C. cap. 89, sec. 59.

(*p*) 31 Vict. cap. 20, sec. 62.

mortgage, it was douhted in one case whether it was valid(*q*). And in a later case, where one executor made a mortgage to his co-executor to secure repayment of funds horrowed from the estate, and, surviving his co-executor, executed a discharge of his mortgage in his own favour, it was held to be inoperative. Boyd, C., said, "The Registry Act contemplates the action of two parties: one to pay and the other to receive the mortgage money; one the mortgagor or his representative, the other the mortgagee or his representative. * * The Act never contemplated such an anomalous condition of affairs, that one individual should consummate a hilateral engagement in which he was to deal at arm's length with himself"(*r*). The remarks in this case would seem to resolve the doubt expressed in the former case into a certainty.

5. *Discharges by married women.*

The legislation respecting discharges by married women is in some confusion. The first enactment(*s*) simply declared that a discharge executed hy a married woman jointly with her hushand should have the same effect as any other certificate; and that it should not be necessary to produce a certificate of her examination touching her consent. Mr. Leith's opinion was that this restricted instead of enlarging the married woman's right. She had at the time the sole right to receive the money; the certificate was a simple receipt, which was quite valid when signed hy her alone, and the reconveyance took place by the registration. This enactment, then, placed the mortgage money in the husband's power, and made him a necessary party to the certificate(*t*). Upon the revision of the statutes in 1877

(*q*) *McPhadden* v. *Bacon*, 13 Gr. 591.
(*r*) *Beaty* v. *Shaw*, 13 Ont. R. at p. 27.
(*s*) 32 Vict. cap. 9, sec. 1.
(*t*) Leith R.P. Stat. 343.

it was enacted(*u*), that a certificate executed as therein mentioned should be deemed a discharge. The mode of execution was as follows:—Between 19th December, 1868 (the date of the previous Act), and 29th March, 1873 (the date of *The Married Women's Real Estate Act, 1873*), it was sufficient if executed jointly by the husband and wife; and from and after 29th March, 1873, if executed either jointly by the husband and wife, or pursuant to *The Married Women's Real Estate Act, i.e.*, still jointly by husband and wife; and no certificate of examination was necessary.

In 1884, the Revised Statute was amended by striking out the requirement as to the mode of execution in future, and it was declared that it should not be necessary for the husband to join. It was further enacted that any discharge theretofore executed by a married woman alone, and duly registered, should be as effectual to discharge the mortgage and reconvey the estate as if it had been executed by the husband and wife conjointly. This enactment should also have repealed that clause of the Revised Statute which declared previous discharges valid if executed jointly, and that future discharges should be valid if similarly executed. But not having done so, there were thus left in the statutes two entirely contradictory enactments, one declaring that all previous and future discharges should be deemed valid if executed by the married woman alone, and the other declaring them valid if executed by the husband and wife jointly.

These two inconsistent enactments were carried into the revision of 1887(*v*) and *The Registry Act, 1893*. In 1884 *The Married Women's Real Estate Act* was amended(*w*) by

(*u*) R.S.O. (1877) cap. 111, sec. 69.

(*v*) R.S.O. cap. 114, sec. 70.

(*w*) 47 Vict. cap. 19, sec. 22.

taking away the necessity for a husband to join in any deed of his wife'a for the purposc of making her conveyance valid. And in the revision of 1897 the reference to *The Married Women's Real Estate Act* was omitted(x). The combined effect, then, of the enactments respecting discharges and *The Married Women's Real Estate Act* is that any discharge by a married woman, since the date of the above amendment, is valid if executed either jointly with her husband or pursuant to *The Married Woman's Real Estate Act*, which allowa it is to be done by her alone. Before this amendment tbere is the inconsistency above pointed out which must be left to the contemplation of the reader simply as onc of the curiosities and inexplicable mysteries of our legislation.

(x) R.S.O. cap. 136, sec. 81 (2).

CHAPTER IX.

PURCHASER'S RIGHT TO DEEDS.

1. *Production.*
2. *Recovery after contract.*
3. *Custody, and covenant for production.*

1. *Production.*

Under our system of registration the production of deeds is not a matter of much moment, and the omission to insist upon their production, or perhaps even to ask for them, is not to be construed as negligence or indicative of suspicious conduct or fraud(*y*). The purchaser having searched the register and other public offices is entitled to assume that all deeds which are not registered, and all charges and interests which have not been similarly protected, if any exist, are as against him, fraudulent and void, and there is no duty cast upon him to make inquiries with a view to the discovery of unregistered interests(*z*). The production of the deeds has, therefore, become a matter of little importance. But a purchaser is, notwithstanding this, entitled to have production of all the deeds if not restricted by the contract. And upon completion of the contract he is en-

(*y*) *Agra Bank* v. *Barry*, L.R. 7 H.L. 135; *Waters* v. *Shade*, 2 Gr. at p. 464.

(*z*) *Per* Lord Selborne, *Agra Bank* v. *Barry*, L.R. 7 H.L. at p. 3[illegible].

titled to have delivered to him(*a*) all the deeds and evidence of title, except documents which have been produced as negative evidence to satisfy him that they contain nothing affecting the title(*b*); and he cannot be compelled to complete his contract unless the deeds are produced or deposited in a place where he may have access to them(*c*). But if the vendor retains land which is held under a common title with that sold to the purchaser he may retain the deeds. In the latter case the vendor must at his own expense furnish attested copies to the purchaser(*d*), and enter into a covenant to produce at the purchaser's expense all deeds except those which are of record. But the purchaser is not entitled to have copies of any instruments which have been produced merely to negative a possibility, and which he could not have compelled the vendor to produce had they not been in his possession(*e*). The covenant to produce extends only to those deeds which are necessary to make out a marketable title(*f*).

By *The Vendor and Purchaser Act*(*g*), the inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title, shall not be an objection to the title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

It was held in *Harrison* v. *Joseph*(*h*), that a purchaser had no right to certified copies of registered and other docu-

(*a*) Sug. 433.

(*b*) Sug. 360.

(*c*) *Shore* v. *Collett*, Coop. 234; *Dare* v. *Tucker*, 6 Ves. 460.

(*d*) *Dare* v. *Tucker*, 6 Ves. 460; *Boughton* v. *Jewell*, 15 Ves. 176; *Re Charles*, 4 Ch. Ch. 19.

(*e*) Dart V. &. P. 6th Ed 376, 764.

(*f*) *Cooper* v. *Emery*, 1 Ph. 388. See *ante*, p. 105, as to satisfaction of a covenant to produce by deposit in the registry office.

(*g*) R.S.O. cap. 134, sec. 1, sub-sec. 4.

(*h*) 8 P.R. 293.

ments procured at the expense of the vendors for the purpose of verifying the abstract. But this decision is contrary to authority(*i*). Unless they cover other land retained by the vendor it is difficult to see why they should not be delivered to the purchaser with the other evidence of title.

2. *Recovery after contract.*

If a purchaser omits to secure all the muniments of title at the time of completing the contract, he cannot afterwards recover from the vendor documents which may be required to establish some collateral matter; nor can he compel him to enter into a covenant to produce them even though the purchase deed contains a covenant for further assurance(*ii*).

But if any documents which directly relate to the land and are in fact title deeds have been retained by the vendor, the purchaser may recover them, for the title deeds are things which go with the inheritance, descend with it, and pass with it by conveyance without being named(*j*). And especially is this so if there has been any misrepresentation made by the vendor. So, where an abstract of title represented that a will had been proved, and it appeared subsequently that this was not the fact, but that the will was with the vendor, it was held that the purchaser was entitled to have it deposited with the Master in order that he might have access thereto at all times(*k*).

(*i*) See Sug. 448; Dart V. & P. 5th Ed. 677; *Re Charles*, 4 Ch. Ch. 19.

(*ii*) *Hallett* v. *Middleton*, 1 Russ. 243. In *Fain* v. *Ayers*, the report in 2 S. & St. 533 appears to contradict this, but in the note to *Hallett* v. *Middleton*, it is said that the case was determined on the purchaser's equity to the deeds, not on his right under the covenant for further assurance.

(*j*) Sug. 433.

(*k*) *Harrison* v. *Coppard*, 2 Cox 318, explained in *Hallett* v. *Middleton*, 1 Russ. at p. 258.

3. *Custody, and covenant for production.*

As a general rule every owner of property for the time being is entitled to the possession or custody of the title deeds relating to the property, whether his estate be in fee simple or fee tail, or a life estate, or an estate in mortgage(*l*). But where several persons take interests under the same deeds and have equal interests in obtaining possession thereof and using them, the title to the deeds is ambulatory, and he who first obtains them may retain them(*m*).

When the land is sold in different lots to various purchasers, he who buys the lot of the greatest value is entitled to the deeds upon entering into a covenant with the other purchasers for their production(*n*). And the vendor must, in the absence of express stipulation, furnish the other purchasers with attested copies of the deeds at his own expense, however inconvenient or expensive it may be for him(*o*). But it was suggested in *Dare* v. *Tucker* that the originals might be left in the Master's Office for the common use, or that some other proposal might be made by the vendor.

When the vendor sells land with respect to which he has retained deeds and has covenanted with a former purchaser to produce them, he cannot retain them but may require the covenant to be endorsed upon or recited in the conveyance, and might fairly require a covenant from the purchaser to perform it(*p*).

Covenants for production are real covenants and run with the land for the benefit of purchasers, but not for the

(*l*) Cov. Con. Ev. 135.
(*m*) *Foster* v. *Crabb*, 12 C.B. 136.
(*n*) *Griffith* v. *Hatchard*, 1 K. & J. 17; 3rd Rep. R.P. Com. 57.
(*o*) *Dare* v. *Tucker*, 6 Ves. 460; *Boughton* v. *Jewell*, 15 Ves. 176.
(*p*) Sug. 434.

benefit of vendors(*q*); in other words, purchasers from the covenantee may take advantage of them against the covenantor himself, but the liability will not extend to the covenantor's assignees(*r*). The covenant to produce is therefore commonly said to be lost by the holder alienating the lands in respect of which he was allowed the custody of the deeds(*s*). This, however, is hardly accurate. It is true that he may with the estate deliver over the deeds to a purchaser, but this does not exonerate him or his heirs from his covenant to produce the deeds. If he has neglected to take any legal obligation from the second purchaser to produce the deeds when he shall be called upon to do so, and cannot prevail upon him to produce them on any given occasion, then he, or his heirs, if bound, are liable to an action on the covenant to produce, and damages to the amount of the injury proved will be given against him(*t*).

It has been said that a covenant to produce all deeds, papers and writings generally, without a schedule, is a mere nullity(*u*); but if it can be shown that the covenantor is in possession of a document or set of documents relating to the lands, he would doubtless be held bound by his covenant(*v*).

The effect of *The Custody of Title Deeds Act* upon a covenant to produce has already been dealt with(*w*).

(*q*) *Barclay* v. *Raine*, 1 S. & St. 449.
(*r*) Platt Cov. 227.
(*s*) Cov. Con. Ev. 129.
(*t*) Cov. Con. Ev. 127, 130.
(*u*) *Shaw* v. *Shaw*, 12 Pr. 163.
(*v*) Cov. Con. Ev. 132.
(*w*) *Ante*, p. 105.

CHAPTER X.

DOUBTFUL TITLES.

1. *Origin of the doctrine.*
2. *Amount of doubt necessary.*
3. *Classification of doubtful titles.*

Lord Chief Baron Eyre, referring to the doctrine of doubtful titles, is reported to have said, "that though a conveyancer might have such doubts upon a title as to advise a purchaser not to accept it, yet that there could not be such a thing as a doubtful title in a Court of Justice—it must be either right or wrong, and the thickness of the medium through which the point was to be seen made no difference in the end. The Court might have some difficulty in clearing it, but, *at last*, the point must be taken as equally certain as if no such difficulty had existed"(*x*). This, however, is not the rule of the Court; as Sir William Grant, M.R., has remarked, "It has been said that every title is good or bad; and the Court ought to know nothing of a doubtful title; but the Court has adopted a different principle of decision"(*y*).

The principle referred to arises out of the jurisdiction exercised by the Courts in cases of specific performance. Where specific performance of an agreement to sell land is sought, it becomes necessary, of course, to look at the ven-

(*x*) *Gale* v. *Gale*, 2 Cox 145.
(*y*) *Sloper* v. *Fish*, 2 V. & B. 149.

dor's title. And so, out of the principal issue in the case, there arises a secondary but more important one—whether the vendor can make a good title to the estate which he has agreed to sell. Upon the investigation of the title the Court is not called upon merely to decide between the respective merits of the claims of two parties contending for the possession of the land, but must inquire into the absolute merits of the title itself in the absence of possible claimants against the vendor, and declare its validity as against all the world. This inquiry ranges over a period of at least sixty years, and matters of fact have to be investigated as well as questions of law determined. The result is that the Court is either enabled to say that the title is so clear that a purchaser ought to take it, or, without declaring it to be bad, finds such a reasonable doubt upon it that it will not force it upon him. In the former case, the title is said to be marketable—in the latter, unmarketable or doubtful.

1. *Origin of the doctrine.*

It appears to have been the practice of the Court of Chancery before Lord Somers' time to entertain a suit only where the plaintiff had recovered damages at law, but this limitation of its authority was not long observed(*z*). It is a matter of interest, however, in tracing the origin of doubtful titles. Lord Erskine said, "There is no doubt that this jurisdiction had its origin upon the foundation of a legal right: the law giving the title"(*a*). The effect of a judgment at law was to give judicial sanction to the title, and so the Court of Chancery was absolved in such cases from the duty of investigating it. Lord Somers is said to have been the first Chancellor who entertained jurisdiction where the plaintiff had not previously recovered damages at law(*b*).

(*z*) Fry Sp. Perf. sec. 60.
(*a*) *Halsey* v. *Grant*, 13 Ves. 176.
(*b*) *Dodsley* v. *Kinnersley*, Amb. 406.

In consequence of the change of practice, it became necessary, as we have seen, for the Court to look at the vendor's title before compelling the purchaser to accept it.

Shortly after Lord Somers' practice was established we find the first reported case, decided in 1723 by Sir Joseph Jekyll, M.R., where, "there being the opinion of learned men against the title," the Court did not think it reasonable to compel the purchaser to complete the purchase(*c*).

Lord Thurlow followed in 1780(*d*), and was said to have acted upon precedents of Lord Northington's(*e*), and the doctrine was repeatedly acted upon by Lord Hardwicke(*f*). Since that time many Judges have affirmed the principle, and it has received the sanction of the House of Lords(*g*).

The practice of the Court of Chancery, however, was not uniform. For the Court was not always wont to let the purchaser off upon a doubtful title, but was at one time accustomed to pronounce decisively upon it, and let the purchaser appeal if he would(*h*). And as late as 1813 Lord Eldon adopted this course and compelled a purchaser to take his opinion on the title unless he would reverse it(*i*), though the doctrine of doubtful titles was at that time at least ninety years old and firmly established.

And recently there was a return to this practice, as far as general questions of law are concerned, the Courts holding that as between vendor and purchaser they were bound to decide questions of law as between other litigating par-

(*c*) *Marlow* v. *Smith*, 2 P. Wms. 201.

(*d*) *Shapland* v. *Smith*, 1 Bro. C. C. 76.

(*e*) *Gale* v. *Gale*, 2 Cox 146. In Eden's note to *Cooper* v. *Denne*, 4 Bro. C.C. 88, it is said that no such decisions could be found amongst Lord Northington's MSS.

(*f*) *Sloper* v. *Fish*, 2 V. & B. 149.

(*g*) *Blosse* v. *Clanmorris*, 3 Bli. 62; and see *Parker* v. *Tootal*, 11 H.L.C. 158.

(*h*) *Biscoe* v. *Perkins*, 1 V. & B. 493; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 569; *Vancouver* v. *Bliss*, 11 Ves. 464; *Stapylton* v. *Scott*, 16 Ves. 273; Fry Sp. Perf. sec. 879.

(*i*) *Biscoe* v. *Perkins*, 1 V. & B. 493. And see Eden's note to *Cooper* v. *Denne*, 4 Bro. C.C. 88.

ties(*j*). But a disposition was shown quite recently to avoid the decision even of a general question of law arising upon the construction of a public statute, unless it appeared so clear to the Court that no one could doubt the decision(*k*). And in a still more recent case the question whether a common law condition was bad as offending the rule against perpetuities, was held to be a question which rendered a title doubtful, though the Court was of opinion that the condition was bad; because the decision being between vendor and purchaser would not bind the person entitled to enter for breach of the condition in case it were found to be good(*l*).

In matters of pure law there seems to have been some doubt originally as to the power of the Court of Chancery to bind by a decision(*m*). Lord Eldon, said, in dealing with a pure question of law under a statute, that if he were to give the relief asked for upon the construction pressed, he would make a declaration "at the hazard of what would be decided when the question was litigated in a Court of law"(*n*); and though he expressed his opinion, he suggested a case for the Court of King's Bench. A case could not, however, be sent to law without the purchaser's consent(o); and from an unwilling purchaser the necessary consent could not, of course, be obtained. Although if a case were sent to law the certificate of the Common Law Court might have been confirmed and acted upon(*p*), the Court might

(*j*) *Alexander* v. *Mills*, 6 Ch. App. 131; *Osborne* v. *Rowlett*, 13 Ch. D. 781; *Forster* v. *Abraham*, L.R. 17 Eq. 354; *Bull* v. *Hutchens*, 32 Beav. 619; *Wrigley* v. *Sykes*, 21 Beav. 348.

(*k*) *Re Thackeray & Young's Contract*, 40 Ch. D. at pp. 34, 39.

(*l*) *Re Hollis' Hospital & Hague*, L.R. (1899) 2 Ch. 540.

(*m*) *Cooper* v. *Denne*, 4 Bro. C.C. 87. But *quaere* whether the expression "no jurisdiction to bind the question" does not mean to bind absent parties.

(*n*) *Jones* v. *Parishes of Montgomery*, 3 Swans. 226; *Pelham* v. *Gregory*, 1 Eden 591. But see *White* v. *Lisle*, 3 Swans. 344.

(o) *Roake* v. *Kidd*, 5 Ves. 647; *Pyrke* v. *Waddingham*, 10 Ha. 11.

(*p*) *Wilkinson* v. *Chapman*, 3 Russ. 145, 148.

have refused to act upon it(*q*), for it appears that it did not bind either the Chancellor(*r*) or the parties(*s*). Indeed, it seems that the Court of Chancery was bound, notwithstanding the certificate, to form an opinion of its own and act accordingly(*t*). But where the opinion of the Court was fortified by the opinion of a Court of Law, specific performance was decreed(*u*).

The power to send a case to law was subsequently taken away from the Court of Chancery, and there was given to it as a sort of compensation power to request the attendance of a Common Law Judge(*v*).

Whatever part, if any, this want of power may have played in the origination of the doctrine of doubtful titles, there was ample power in the Court at a later period to decide pure questions of law without extraneous legal aid(*w*); and yet the doctrine suffered no immediate change on that account.

It will thus be seen that the doctrine is purely an equitable one(*x*). A decree for specific performance cannot be

(*q*) *Sheffield* v. *Lord Mulgrave*, 2 Ves. Jr. 526, 520.

(*r*) *Prebble* v. *Boghurst*, 1 Swans. 320.

(*s*) *Sharp* v. *Adcock*, 4 Russ. 375.

(*t*) *Lansdowne* v. *Lansdowne*, 2 Bli. 80; *Wykham* v. *Wykham*, 18 Ves. 395, where the King's Bench and Common Pleas each certified a different opinion, and Lord Eldon differing from both decreed according to his own view. See also *Duke of Norfolk's case*, 3 Ch. Ca. 1.

(*u*) *Rushton* v. *Craven*, 12 Pr. 589; *Charlton* v. *Craven*, 12 Pr 019; *Clonmert* v. *Whitaker*, 2 Jarm. Wills, 5th Ed. 1209, cited 10 Ha. 10.

(*v*) See dictum of Kindersley, V.C., in *Hughes* v. *C. & H. R. Co.*, 8 W.R. 337, upon 14 & 15 Vict. cap. 83, sec. 8.

(*w*) *Shrewsbury R. Co.* v. *Stour Valley R. Co.*, 2 D.M. & G. 880.

(*x*) There are cases at law in which the existence of a reasonable doubt upon the title has been held a sufficient defence to an action by the vendor for breach of the contract to purchase; *Hartley* v. *Pehall*, Peake, N.P.C. 178; and a good cause of action by the purchaser to recover his deposit; *Wilde* v. *Fort*, 4 Taunt. 331; *Elliott* v. *Edwards*, 3 B. & P. 181; *Curling* v. *Shuttleworth*, 6 Bing. 121. But see *contra*, *Romily* v. *James*, 6 Taunt. 263; *Bayman* v. *Gutch*, 7 Bing. 379, 390.

claimed as of right, but is in the discretion of the Court(*y*) (the discretion being, however, a judicial, and not a capricious one), and the Court is upon this theory under no obligation to decide conclusively upon the title for the benefit of the purchaser. It will be seen, however, that the rule of the Court has varied; and that where questions of law are raised the present practice is for the Court to dispose of them, unless there are *dicta* which would render the decision itself doubtful.

In dealing with questions of fact, however, cases must frequently occur in which it is not possible for the Court to arrive at any decision; for example, where a sufficient knowledge of the facts cannot be acquired, and there is not a strong enough presumption in favour of the title to induce the Court to force it on the purchaser. So, where parties interested, or apparently interested, are not before the Court, or are not *in esse*, and would not be bound by the decision—in such cases, it would be inequitable to compel the purchaser to take a title which might involve him in litigation and ultimate loss.

2. *Amount of doubt necessary.*

What may and what may not be a sufficient amount of doubt to justify a refusal of the title is itself a matter of doubt. Where the Court is not in possession of all the facts it cannot of course be expected to form an opinion. Where a question of pure law is raised, it must almost necessarily involve the question whether some third person, and not the vendor, has not some title to the land. In such cases it is said that the probability of litigation from such a source must be a reasonable probability of substantial, and not merely idle, litigation. But the probability of such litigation depends entirely upon the value of the objection

(*y*) Fry, Sp. Perf. secs. 44, *et seq.*

raised to the title(*z*), and so it is useless as a test. Again, it has been said that if the title is so free from doubt that the Judge himself would lend his own money on it, then it is to be considered as so free from doubt that a purchaser should be compelled to take it(*a*). But this is an unsafe guide: for it would make the validity of the title depend to a great extent upon the temperament of the Judge. Thus, in *Pyrke* v. *Waddingham*(*b*), Turner, V.C., though entertaining a favourable opinion as to the title, conceived it to be his duty to take into account what the opinion of other competent persons might be, and not being able to satisfy himself that such persons might not differ from him, refused to force the title on the purchaser. Subsequently, the same title came before Lord Romilly, M.R., in *Mullings* v. *Trinder*(*c*), and his Lordship said, "I adopt entirely the view expressed by Lord Justice, then Vice-Chancellor Turner, with respect to the species of doubt which ought to prevent the Court from enforcing specific performance in the way he expresses it. * * If the rule is that the Judge ought to enforce the title whenever he really and sincerely believes that a man of sense will not differ from him on the construction he has come to in that particular case, then, applying that rule to this case, I do not think any sensible man would differ from me in the conclusion I come to in this case." This is a very striking instance of the uncertainty that prevails, as the title was the same in each case. Again, it has been given as a reason for not forcing a doubtful title on a purchaser that it would leave it on his hands unmarketable; though it is evident that a decision in favour of the title would render it marketable. And inasmuch as a doubtful title is simply one that is not market-

(*z*) *Glass* v. *Richardson*, 9 Ha. 701; *Grove* v. *Bastard*, 2 Ph. 621.
(*a*) *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 569.
(*b*) 10 Ha. 1.
(*c*) L.R. 10 Eq. 449.

able, the inquiry whether or not it would be marketable in the purchaser's hands is simply an inquiry whether or not it is a doubtful title(*d*). But these questions may not be deemed of much importance if the rule is adhered to, that questions of law must be determined one way or the other. And with respect to questions of fact, the ability of the Courts to determine the matters in issue might be much enhanced if the practice of compelling the vendor to quiet the title were strictly adhered to.

3. *Classification of doubtful titles.*

There are very numerous cases of the application of the rule(*e*), all of which it is not necessary to consider in dealing with the principle. Primarily, doubtful titles may be divided into two classes, namely, those which depend upon facts, the truth or accuracy of which cannot be satisfactorily investigated, and those which depend upon questions of law. But, for the better consideration of the subject, the following more particular classification may be found useful(*f*):—

1. Where there is a probability of litigation.
2. Where there is a difference of judicial opinion.
   - (i) Between Courts of co-ordinate jurisdiction.
     - (a) Where a past adverse decision is doubted.
     - (b) Where a past favourable decision is doubted.
   - (ii) Between appellate and inferior Courts.
3. Reasonable doubt—difference of legal opinion.
4. Where the construction of an instrument is in question.
   - (i) Where there is a general principle involved.
   - (ii) Where the interpretation of the particular instrument only is involved.

(*d*) Fry, Sp. Perf. sec. 883.

(*e*) See note to Chapter XVIII. of Dart V. & P.

(*f*) See the classification in *Howarth* v. *Smith*, 6 Sim. 165, *et seq.*

5. Where a general prineiple of law is involved.

6. Where there is uncertainty of fact.
   (i) Defective proof—negative proposition.
   (ii) Presumptions.

7. Questions of conveyance.

1. *Probability of litigation.*—It has been said that the Court will not compel a purchaser to buy a lawsuit; that is, an estate will not be forced upon him which he can only acquire in possession by litigation, and judicial decision(*g*). But there must be "a reasonable, decent probability of litigation," that is, the purchaser must be exposed to substantial, and not idle, litigation(*h*). How to determine as a general rule when there is, and when there is not, a probability of litigation is a matter of impossibility, for it depends, as we have seen, entirely upon the value of the objection raised to the title. The Court has to determine, in the absence of a third party, by whom a claim is, or may be advanced, whether there is any just foundation for the claim. On the one hand, the Court has to take care that the just rights of the party asking for its interference are not defeated by the assertion of an unfounded claim; on the other hand, it has to take equal care that the party against whom its interference is sought is not exposed to the danger and expense of contesting a claim which may be founded on substantial grounds. The question in such cases is, what is the value of the objection(*i*). Where the Court could determine the question as to the third party, it appears to have been done in some cases. Thus, where a vendor claimed under a will which was disputed by the heir-at-law, who had already been defeated in an action of ejectment brought

(*g*) *Price* v. *Strange*, 6 Mad. 165; *Rose* v. *Calland*, 5 Ves. 168.

(*h*) *Pyrke* v. *Waddington*, 10 Ha. 10; *Cattell* v. *Corrall*, 4 Y. & C. 237; *Re Marshall & Salt's Contract*, L.R. (1900) 2 Ch. 202.

(*i*) *Glass* v. *Richardson*, 9 Ha. 701.

by him, the Court directed the vendor to file a bill against the heir-at-law to establish the will rather than leave that to the purchaser to do(*j*).

And in a recent case in the Supreme Court of Canada(*jj*), where the question between vendor and purchaser was whether a general restriction on alienation for twenty-five years, contained in a will, was a valid restriction or not, the Court, in the absence of the heirs who might object to a disposition in breach of the restriction, declared the restriction invalid and ordered the purchaser to take the title. In this case, however, it must be observed that the purchaser submitted to take the title if the Court held the restriction to be had.

In an English case, where the purchaser objected to the title, and a stranger to the proceedings would not have been bound, the Court refused to force the title; and no doubt that would still be the rule, wherever there was a reasonable probability of litigation from the stranger. The case in question was as follows:—A grant of a site had been made for a hospital, and the hospital trustees subsequently decided to sell the site; the purchaser objected on the ground that the deed was on condition, and the sale was a breach of the condition; and the Court refused to force the title on the purchaser, though of opinion that the condition was bad as offending the rule against perpetuities, because those entitled to enter for breach of the condition (assuming it to be good) would not be bound(*k*).

In the first edition of this work it was suggested that, as there was power to add third parties to an action under the rules of practice, in cases where it appeared that a ques-

(*j*) *Grove* v. *Bastard*, 2 Ph. 619.

(*jj*) *Blackburn* v. *McCallum*, to appear in 33 S.C.R.

(*k*) *Re Hollis' Hospital & Hague*, L.R. (1899) 2 Ch. 340. And see *Re Marshall & Salt's Contract*, L.R. (1902) 2 Ch. 702, as to the probability of litigation.

tion in the action should be determined, not only between the plaintiff and defendant, but between the plaintiff, defendant and any other person, there was no reason why advantage should not be taken of this practice, whenever feasible, in actions of specific performance; and further, that as the Court has power, in matters under the Vendor and Purchaser Act, to make any order that may be just, third parties might be brought in and bound by the decision on the presentation of a petition. A hint to the same effect appeared in the second edition of Lord Justice Fry's work on Specific Performance(*k*), but does not appear in the third edition.

In several cases, however, parties who had been served with the petition, though not parties to the contract, were dismissed as unnecessary; the practice upon vendor and purchaser applications being accommodated to the rule in actions of specific performance, *i.e.*, that only the parties to the contract should be parties to the proceeding(*l*). And in one case they were dismissed on the ground that the Court had no jurisdiction over them(*m*).

The effect of these decisions is that the petition is sufficient, if the parties thereto are the parties who would be sufficient in an action of specific performance. The rules in question do not affect the constitution of the action, however, which may be quite sufficient without the third parties, but enable parties to be brought into an action already sufficiently constituted, in order to clear up some matter which cannot be decided so as to bind them in their absence. Notwithstanding these cases, it is still open to the Court, if so minded, to call in third parties, and it is submitted that the rules could be resorted to with most bene-

(*k*) Secs. 878, 879.

(*l*) *Re Eaton*, 7 P.R. 396; *Re MacNabb*, 1 Ont. R. 94.

(*m*) *Re Lewis & Thorne*, 14 Ont. R. at p. 135.

ficial results in many cases of the kind where third parties are concerned.

And by *The Quieting Titles Act*(*n*), where a judgment is given for specific performance of a contract for the sale of an estate, and it is part of the contract that the vendor shall have(*o*) an indefeasible title, the Court shall make an investigation with a view to granting such a title, and a conveyance may be made under the Act. As such a conveyance has the effect of a certificate under the Act and gives a good title as against all the world, the Court has thus power to bind all parties both as to matters of fact and questions of law on a reference as to title. And inasmuch as the grave objection to forcing a title on a purchaser is the inability to bind absent parties, the necessity for refusing the title on that ground is by this enactment materially diminished.

2. *Difference of judicial opinion.* (i) *Between Courts of co-ordinate jurisdiction.* In *Pyrke* v. *Waddingham*(*p*), the question before the Court was the construction of a will; and Turner, V.C., was "much in favour of the title"; but his Lordship said, "I find myself unable to base that opinion upon any general rule of law, or upon any reasoning so conclusive as fully to satisfy my mind that other competent persons may not entertain a different opinion." And so the purchaser was not compelled to take the title. Subsequently the same will came before Lord Romilly, M.R., for construction(*q*), and the purchaser relied on *Pyrke* v. *Waddingham*. But the learned Judge being in favour of the title compelled the purchaser to take it. This is an example rather of concurrence than of difference of

(*n*) R.S.O. cap. 135, sec. 32.

(*o*) Probably a misprint for "make."

(*p*) 10 Ha. 1.

(*q*) *Mullings* v. *Trinder*, L.R. 10 Eq. 449.

judicial opinion; but it was said(*r*) that if an opinion had previously been expressed against the title, however surprising it might have been, the title would have been considered too doubtful to force upon a purchaser. It shows also the uncertainty of the principle, or rather its application, as laid down in *Pyrke* v. *Waddingham*. For while the same principle was recognized by both Judges, the one could not say that other competent persons might not differ from him, while the other did not think that any sensible man would differ from him(*s*).

A general rule was enunciated by Lord Romilly in *Mullings* v. *Trinder*(*t*) as follows:—"If there is one decision by a competent tribunal sufficiently clear not to be appealed from, or if it is appealed from, to be adopted by the Court of Appeal, that ought to bind subsequent Judges, unless it is unquestionably against the whole current of authorities."

(a) *Past adverse decision doubted.*—"Where there has been a decision adverse to the title or to the principle on which the title depends, which the Court is of opinion is wrong (of course if the Court is of opinion that the decision is right, it is simply a bad title), in this case the Court will not rely upon its own opinion against a decision already pronounced, and will not enforce the title"(*u*). So in *Rose* v. *Calland*(*v*), where a decision of the Court of Exchequer was cited against the title, Lord Loughborough refused to enforce it upon the purchaser though he did not agree with the decision and thought the Court of Exchequer had not sufficiently weighed the authorities. The purchaser would have been exposed to immediate litigation(*w*).

(*r*) At p. 457.

(*s*) See *Bull* v. *Hutchens*, 32 Beav. 619.

(*t*) L.R. 10 Eq. 456.

(*u*) *Per* Lord Romilly, M.R., *Mullings* v. *Trinder*, L.R. 10 Eq. 454.

(*v*) 5 Ves. 186.

(*w*) See also *Collier* v. *McBean*, L.R. 1 Eq. 81.

(b) *Past favourable decision doubted.*—"Another case," said Lord Romilly, "is where there is a decision in favour of the title, but the Court is of the opinion the decision was not right: such, for instance, was the case before me of *Collard* v. *Sampson*(*x*), where I expressed an opinion that the case was settled by a decision of Vice-Chancellor Wigram; and, although I had some doubts about that decision, yet I thought it would never be reversed; but the Lords Justices thought that the point was not completely settled. I doubt whether it was in my power to act on an opinion unfavourable to that decision"(*y*). In *Biscoe* v. *Wilks*(*z*), however, Lord Eldon, having in a previous case(*a*) declared the title to be good, compelled the purchaser to accept it and directed him to pay costs.

(ii) *Between Appellate and Inferior Courts.*—In *Hamilton* v. *Buckmaster*(*b*) it was stated that the simple expression of a doubt in the Court below was always sufficient to prevent the title from being forced upon a purchaser. And in *Collier* v. *McBean*(*c*), the Master of the Rolls having decided against the title, the Lord Justices refused to force it on the purchaser. But in *Sheppard* v. *Doolan*(*d*) Lord Chancellor Sugden said, "With respect to the common cases of doubtful title, I cannot agree with the proposition that an unfavourable decision in the Court of inferior jurisdiction renders the title doubtful. The Judge of the Superior Court would still be bound to exercise his own discretion and decide according to his own judgment. I have myself often argued at the bar in support of the proposition, but always without success; for although I have urged that no

(*x*) 16 Beav. 543; 4 D. M. & G. 224.

(*y*) *Mullings* v. *Trinder*, L.R. 10 Eq. 454. See also *Cook* v. *Dawson*, 3 D. F. & J. 130.

(*z*) 3 Mer. 456.

(*a*) *Biscoe* v. *Perkins*, 1 V. & B. 485.

(*b*) L.R. 3 Eq. 328.

(*c*) 1 Ch. App. 85.

(*d*) 3 Dr. & War. 8.

Judge could consider a title to be free from doubt, when one or two Judges competent to decide the question had pronounced it to be defective, I have been ever met by this answer, that to adopt such a doctrine would be in effect to leave the ultimate decision of the question to the Court below, while the law provides an appeal to the Court above." This case has been recently approved and followed; and so, it may be taken to be a general rule that an appellate Court will not be deterred from reconsidering the question raised, and compelling a purchaser to accept its view though differing from that of the Court appealed from(*c*).

3. *Reasonable doubt—Difference of legal opinion.*—In *Marlow* v. *Smith*(*f*), a purchaser was let off, "there being the opinion of learned men against the title." But in the modern decisions this has been held insufficient ground for holding a title to be doubtful. And so in *Hamilton* v. *Buckmaster*(*g*), Sir W. Page Wood, V.C., declared a title to be good, and forced it upon the purchaser against the opinion of Mr. Dart, one of the conveyancing counsel of the Court. Indeed, it has been more than once laid down that where doubtful cases of construction arise, whether on . n Act of Parliament or the words of an instrument or will, it is the duty of the Court to remove the doubt by deciding it(*h*).

4. *Construction of instrument*—(i) *General principle.*—Where the doubt is said to arise upon the construction of a particular instrument to which a general principle of law is to be applied, it appears that the Court will determine the point in issue either for or against the purchaser. This

(*c*) *Brioley* v. *Carter*, 4 Ch. App. 230; *Radford* v. *Willis*, L.R. 12 Eq. 105; 7 Ch. App. 7; *Alexander* v. *Mills*, 6 Ch. App. 132; *Osborne* v. *Rowlett*, 13 Ch. D. 781; *Bell* v. *Holtby*, L.R. 15 Eq. 193.

(*f*) 2 P. Wms. 201.

(*g*) L.R. 3 Eq. 323.

(*h*) *Bell* v. *Holtby*, L.R. 15 Eq. 193; *Bull* v. *Hutchens*, 32 Beav. 619. See, however, *Re Thackeray & Young's Contract*, 40 Ch. D. 34.

must not be confounded with those cases in which a general question of law is raised and the authorities on the point are conflicting, in which cases the title may well be said to be doubtful(*i*). In dealing with a will upon which a title depended, James, L.J., said, "My opinion, therefore, is decidedly in favour of the title, and the question being one depending on a broad, general principle of construction not affected by any special context, I am of opinion that there is no such doubt in the case as to induce us to refrain from saying that the title is one which must be forced on the purchaser"(*j*).

(ii) *Interpretation of particular instrument only.*—A dictum of Lord Justice James may be cited with respect to this. "As a general and almost universal rule, the Court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined. The exception to this will probably be found to consist not in pure questions of legal principle, but in cases where the difficulty and the doubt arise in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument"(*k*). In the cases then of particular instruments whose true construction does not depend upon any general principle of law, much uncertainty must ever arise. But where the vendor and purchaser alone would be affected, and the interests of third parties not called in question, there is no reason why the uncertainty should not be removed by a decision. But where interested third parties are not before the Court, and so would not be bound, the general principle

(*i*) See *Palmer* v. *Locke*, 18 Ch. D. 388; *Re Macnabb*, 1 Ont. R. 94.

(*j*) *Radford* v. *Willis*, 7 Ch. App. 11. See also *Alexander* v. *Mills*, 6 Ch. App. 132.

(*k*) *Alexander* v. *Mills*, 6 Ch. App. 131, 132.

respecting doubtful titles would apply(*l*). But even when absent parties are interested, it may be said that there must be a reasonable probability of litigation from that source(*m*).

5. *General principle of law.*—It will have been seen from the early part of this chapter that the practice varied as to deciding pure questions of law. But the tenor of recent cases is decidedly in favour of the rule that the question should be determined either for or against the title. Lord Romilly, M.R., repeatedly expressed his opinion, as he said in *Bull* v. *Hutchens*(*n*), that it is the duty of the Court to decide questions of law which arise in determining the validity of titles; and he refers to Lord Eldon as having observed the same practice. Lord Justice James, as we have seen(*o*), considered that there was no difference between the case of vendor and purchaser and any other case in this respect. And Sir George Jessell, while of opinion that the early rule as to protecting the purchaser was the best(*p*), yet considered it to be the duty of the Court in questions of pure law to express an opinion(*q*); and he appears even to have followed this rule where there were parties interested who were not before the Court who might litigate the point afresh with the purchaser(*r*). But, as we have seen, the probability of such litigation must largely

(*l*) See *Lincoln* v. *Arcedeckne*, 1 Coll. 98; *Bristow* v. *Wood*, 1 Coll. 480; *Butterfield* v. *Heath*, 15 Beav. 408; *Re Foster & Lister*, 6 Ch. D. 87; *Re Hollis' Hospital & Hague*, L.R. (1899) 2 Ch. 540.

(*m*) *Osborne* v. *Rowlett*, 13 Ch. D. 781; *Re Marshall & Salt's Contract*, L.R. (1900) 2 Ch. 202. And see *ante*, p. 281.

(*n*) 32 Beav. 619; *Wrigley* v. *Sykes*, 21 Beav. 337.

(*o*) *Ante*, p. 288.

(*p*) *Osborne* v. *Rowlett*, 13 Ch. D. 781.

(*q*) *Forster* v. *Abraham*, L.R. 17 Eq. 354.

(*r*) *Osborne* v. *Rowlett*, 13 Ch. D. 781. And see *Spencer* v. *Topham*, 22 Beav. 573.

depend upon the amount of doubt that exists with regard to the point in question(*s*).

The generality of this rule, however, has been somewhat restricted by a recent decision(*t*). While recognizing that the modern rule was to decide the general matter of law, Mr. Justice Chitty proceeded to say, "But then I think it must appear to the Judge who decides it that there are no decisions or *dicta* of weight which show that another Judge or another Court, having the question before it, might come to a different conclusion. The Court, I take it, must feel such confidence in its own opinion as to be satisfied that another Court would not adopt another conclusion."

6. *Uncertainty of fact.*—Where the determination of a matter of fact is essential to the validity of a title, the purchaser is, of course, entitled to satisfactory proof of the fact. In the absence of such proof or of evidence leading to a presumption of the fact, the title is not made out, and cannot, therefore, be forced upon the purchaser. The matter of fact upon which a title depends may be such as in its nature is not capable of satisfactory proof; or it may in its nature be capable of satisfactory proof, and yet not be satisfactorily proved(*u*). So, too, there may be doubt when the evidence is direct, because it may be given *mala fide*, or if *bona fide*, may be given by mistake(*v*).

(i) *Negative proof.*—When the matter of fact is of such a nature as not to be susceptible of proof the title must be pronounced doubtful. Thus, where the validity of a title depended upon whether it could be shown that there was no

(*s*) *Wrigley* v. *Sykes*, 21 Beav. 348. In considering the validity of an objection the present state of the authorities is to be regarded, and not simply whether there was a time at which the point would have been held to be doubtful; *Eno* v. *Eno*, 6 Ha. 177.

(*t*) *Re Thackeray & Young's Contract*, 40 Ch. D. 34. See also *Re Hollis' Hospital & Hague*, L.R. (1899) 2 Ch. 540.

(*u*) *Smith* v. *Death*, 5 Madd. 372.

(*v*) *Emery* v. *Grocock*, 6 Madd. 57.

creditor who could take advantage of an act of bankruptcy by the vendor, the matter depending on negative proof and not being ascertainable with precision, the title was considered to be too doubtful to force on a purchaser(*w*). And where the ability of a mortgagee to make out a title under his power of sale depended upon whether he had or had not notice of a judgment at the time he took his mortgage, the Court refused to force the title on the purchaser, though notice was denied both by the mortgagee and his agents(*x*).

Where the vendor's title is a title by possession, the whole point at issue is whether the paper title has been extinguished, and whether the vendor, either alone or together with those under whom he claims has been in possession for the statutory period; and therefore the interests of absent parties are necessarily involved in the widest sense. Yet it has been held that a title by possession may be forced upon a purchaser(*y*). The evidence to be adduced in such cases is partly positive and partly negative—positive as to the occupation, and negative as to the want of acknowledgment. Such a title, however, is more generally susceptible of absolute proof in Ontario than in England inasmuch as the actual state of the paper title can always be ascertained from a search of the registered title. It is thus possible for the Court to ascertain the true state of the title with a great degree of accuracy, and for the purchaser in many cases to make inquiries of the persons whose rights are said to have been barred, as to the nature of the vendor's possession and whether any acknowledgments have ever been made.

(ii) *Presumptions.*—When there is no direct evidence there may be a state of facts shown from which a reasonable

(*w*) *Lowes* v. *Lush*, 14 Ves. 547; *Franklin* v. *Brownlow*, 14 Ves. 550.

(*x*) *Freer* v. *Hesse*, 4 D.M. & G. 495. But see *Cattell* v. *Corrall*, 4 Y. & C. 228.

(*y*) *Scott* v. *Nixon*, 3 Dr. & War. 388; *Games* v. *Bonner*, 33 W. R. 64; *Re Boustead & Warwick*, 12 Ont. R. 488.

inference may be drawn; or in the absence of any evidence whatever there may be a presumption of law upon which the Court will act. This has already been treated of(*z*), and it will be sufficient merely to state again the general rule as to presumptions. If the case be such that, sitting with a jury, it would be the duty of a judge to give a clear direction in favour of the fact, then it is to be considered as without reasonable doubt; but if it would be the duty of a judge to leave it to the jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser(*a*).

7. *Questions of conveyance.*—In general, questions of doubtful title between vendor and purchaser arise as to the title strictly so called. They seldom arise upon the conveyance; but questions which are substantially the same may arise with respect to the conveyance, and in one case the Court acted on a doubtful question as to conveyance by analogy to a question of doubt on a title(*b*). It may well be doubted, however, whether in the present state of the authorities as to doubtful titles, the Court would entertain an objection raised as to conveyance only.

In the case cited, the objection to the conveyance was that the vendor should have obtained the concurrence of a judgment creditor, whose judgment was registered at the time when the vendor acquired title, though the vendor denied all knowledge or notice thereof. Such a case cannot at the present time arise, however, for the Court has now power to order a sufficient amount of the purchase money into Court to discharge any incumbrance, and may there-

(*z*) *Ante*, p. 135, *et seq.*

(*a*) *Emery* v. *Grocock*, 6 Madd. 57; *Hillary* v. *Waller*, 12 Ves. 254. See also *Prosser* v. *Watts*, 6 Madd. 59; *Causton* v. *Macklew*, 2 Sim. 245; *Johnson* v. *Legard*, T. & R. 294; *Eyton* v. *Dicken*, 4 Pr. 303; *Bramwell* v. *Harris*, 1 Taunt. 430; *Clarke* v. *Willott*, L.R. 7 Ex. 313, 318.

(*b*) *Freer* v. *Hesse*, 4 D.M. & G. 501, 502.

upon, either with or without notice to the incumbrancer, declare the land to be free therefrom, and vest it in the purchaser(*c*).

The statutory provision for this is remedial and such elasticity is given to it as the words will permit. Formerly, a purchaser could get off his bargain on discovering that there was a charge on the land payable *in futuro;* but this provision enables the Court to protect the purchaser from the charge, and at the same time secure the person entitled to the charge. And the Court has gone so far as to decide a question of construction arising on a will involving the determination of future interests, if the decision is necessary in order to ascertain what amount of the purchase money should be set aside(*d*).

(*c*) R.S.O. cap. 110, sec. 15; *Milford Haven R. & Est. Co.* v. *Mowatt*, 28 Ch. D. 402. But see *Re G. N. R. Co & Sanderson*, 25 Ch. D. 788.

(*d*) *Re Freme's Contract*, L.R. (1895) 2 Ch. 256.

CHAPTER XI.

TITLE BY POSSESSION.

1. *Nature of Evidence.*
2. *Operation of Statute—Extinction of Title.*
3. *Commencement of running of Statute.*
4. *Successive trespassers.*
5. *Area or space affected by possession.*
   (i) *Mere trespasser.*
   (ii) *Entry under defective title.*
6. *Acknowledgments.*

A title by possession is such a one as a purchaser may be compelled to accept. The point seems to have first arisen under the present Statute of Limitations, in *Scott* v. *Nixon*(*e*), where it was said by Lord St. Leonards, "The case then is reduced to a simple question of law, can this court compel a purchaser to take a title depending upon parol evidence of adverse possession, under the new Statute? Under the old Statute it was long undecided whether a purchaser could be forced to take such a title, but ultimately it was so determined, and I apprehend that it was quite settled that a clear title, and just as good as any other title, might be acquired by adverse possession, and that a purchaser would be bound to take such a title." After some remarks upon the operation of the Statute, his Lordship held that the purchaser was bound to complete his contract

(*e*) 3 Dr. & War. 388.

and accept the title(*f*). And it seems that a purchaser may be compelled to accept such a title though the period of limitation does not expire until after the date of the contract(*g*). But if the purchaser, on discovery of this fact repudiated at once, probably the vendor could not enforce the contract(*h*).

It may be mentioned that where land is registered under *The Land Titles Act*(*hh*) title by possession cannot be acquired. It is enacted as follows:—"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."

1. *Nature of Evidence.*

As between vendor and purchaser the facts are generally proved in the first instance by statutory declarations, and where there is no suspicion raised as to the validity of the title they are generally accepted; but the purchaser is not bound to accept them, and may require affidavits to be made, or even that the evidence should be given *viva voce* (*i*). This necessitates either the institution of an action in which the affidavits may be made or the evidence taken and the witnesses submitted to cross-examination, or a reference to the Master upon an application under the Vendor and Purchaser Act(*j*). In *Re Boustead & Warwick*(*k*), where the point was raised, Proudfoot, J., on an application under this Act, directed the vendor to furnish the purchaser with affidavit evidence, so as to enable him to cross-examine the

(*f*) See also *Tuthill* v. *Rogers*, 1 Jo. & L. 72; *Re Boustead & Warwick*, 12 Ont. R. 488; *Dame* v. *Slater*, 21 Ont. R. 375.

(*g*) *Games* v. *Bonner*, 33 W.R. 64.

(*h*) *Haggart* v. *Scott*, 1 R. & Myl. 293; *Forrer* v. *Nash*, 35 Beav. 167; *Brewer* v. *Broadwood*, 22 Ch. D. 105; *Paisley* v. *Willis*, 18 App. R. 210.

(*hh*) R.S.O. cap. 138, sec. 32 (1).

(*i*) *Scott* v. *Nixon*, 3 Dr. & War. 402.

(*j*) R.S.O. cap. 134, sec. 4.

(*k*) 12 Ont. R. 488.

deponents, but if he should still be dissatisfied, he gave leave to the vendor to bring an action of specific performance, in order that the evidence might be taken *viva voce*(*l*). In one case the conduct of the purchaser was thought to be unreasonable in exacting the higher class of evidence, and he was ordered to pay the costs of the inquiry, though the title was first proved in the Master's office(*m*). But this case exhibits special circumstances. It can hardly be said that a purchaser is unreasonable in demanding strict proof of the extinction of the paper title; and in *Scott* v. *Nixon*(*n*) Lord St. Leonards said that the purchaser is not bound to accept affidavits, but may insist upon having a regular examination of witnesses in the Master's office in the usual way. "The mode of proof," his Lordship said, "therefore in this case rests entirely on the purchaser's consent"(*o*). It does not appear necessary, however, that an action should be brought, for the Court has power, upon an application under the Vendor and Purchaser Act, to refer it to the Master, and upon such a reference the evidence may be given *viva voce*.

Proof that the vendor and those under whom he claims have been in undisturbed and peaceful possession for ten years will manifestly avail him nothing unless he shows the state of the title at the time possession was acquired(*p*). For though present interests may be extinguished, there may be future interests which are not barred. And it is also necessary to show that at the time when the possession commenced, the rightful owner was not under disability.

(*l*) Without leave such an action could not be brought after an application under the Vendor and Purchaser Act; *Re Craig*, 3 C.L.T. 501, following *Thompson* v. *Ringer*, 44 L.T.N.S. 507; *City of Toronto* v. *Canadian Pacific R. Co.*, 18 P.R. 374, 451.

(*m*) *Dame* v. *Slater*, 21 Ont. R. 375.

(*n*) 3 Dr. & War. at p. 402.

(*o*) See also *Brady* v. *Walls*, 17 Gr. 699. But as to this case, see *Dame* v. *Slater*, 21 Ont. R. at p. 377.

(*p*) Darby & Bos. 320.

or else that the possession has been continued for the required time after the disability, if any ceased(*q*).

There is no exception, in favour of a person holding by possession, to the rule that the vendor must furnish an abstract unless otherwise agreed(*r*); and as an abstract may easily be made up from the entries in the registry office, it would not be unfair to compel the delivery of a complete abstract of the paper title, continued by an abstract of the title claimed by the vendor in extinction of the paper title. It is true that upon being furnished with evidence of possession, the purchaser could, by searching the registered title, satisfy himself as to the state of the paper title at the time the vendor took possession; but it is conceived that he is not bound to do so.

The evidence of possession is insufficient to establish a title if in fact there has been any acknowledgment of the paper title within the statutory period; and so the vendor must in addition to the positive evidence of possession, adduce negative evidence that there has been no such acknowledgment—a matter with respect to which it is manifestly difficult to give satisfactory evidence(*s*).

But even if satisfactory evidence of no acknowledgment be given, there is still danger that a writ may have been issued by the owner and kept renewed, a fact sufficient to prevent the running of the Statute(*t*), and one which it would be almost impossible to ascertain except by personal application to the owner.

The declarations or affidavits to prove possession should not be confined to general statements that the trespasser has been "in possession" or "occupation." There ought to be

(*q*) *Games* v. *Bonner*, 33 W.R. 64.

(*r*) *Re Boustead & Warwick*, 12 Ont. R. at p. 490. In *Scott* v. *Nixon*, 3 Dr. & War. 388, an abstract was delivered.

(*s*) *Per* Malins, V.C., *Re Alison*, 11 Ch. D. 290.

(*t*) *Turley* v. *Williamson*, 15 C.P. 538; see also *Ausman* v. *Minthorne*, 3 U.C.R. 423; *Doe d. Perry* v. *Henderson*, 3 U.C.R. 486.

evidence of the actual facts which are relied upon as constituting the possession or occupation under the Statute. Thus the person in possession should show whether the land has been fenced and whether that is what is relied upon; whether it has been resided on, and if so, whether continuously or at intervals; whether it has been cultivated, and how—whether by continuous occupation or by taking crops off and leaving the land vacant between visits. In all cases the purchaser should be put in possession of the actual facts, so that he may exercise his judgment upon their effect, instead of stating the effect, leaving him in ignorance of the facts upon which the vendor relies.

2. *Operation of Statute—Extinction of Title.*

By the present Statute of Limitations(*u*), no person shall make an 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 some person through whom he claims. By the fifteenth section it is enacted that, "at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period shall be extinguished." "There is a marked distinction," said Lord St. Leonards, "between the old statutes of limitation and the present one. The former statutes only barred the remedy, but did not touch the right; possession at all times gave a certain right; but under the new Act, when the remedy is barred the right and title of the real owner are extinguished"(*v*).

(*u*) R.S.O. cap. 133, sec. 4.

(*v*) *Incorporated Soc'y* v. *Richards*, 1 Dr. & War. 289; *Low* v. *Morrison*, 14 [illegible]. 192.

It follows from this that when the paper title is extinguished it cannot be revived by an acknowledgment made after the statutory period has expired; nothing short of a conveyance can operate to re-vest the land in him who was divested of it by extinction of his title(*w*). And an entry by him after extinction of his title would constitute him a trespasser(*x*).

When the paper title has been extinguished by possession it is not an uncommon thing to speak of the land as having been transferred to the usurper by a parliamentary conveyance(*y*). This and other like expressions are incorrect, however, and do not truly describe the operation of the statute. It is negative only in its operation, and its negative effect in extinguishing the paper title must not be confounded with the positive effect of a conveyance(*z*). Its operation is well described by Strong, J., in *Gray* v. *Richford*(*a*). "The Statute of Limitations is, if I may be permitted to borrow from other systems of law terms more expressive than any which our own law is conversant with, a law of extinctive and not of acquisitive prescription; in other words, the statute operates to bar the right of the owner out of possession, not to confer title on the trespasser or disseisor in possession. From first to last, the Statute of 4 Wm. IV. says not one word as to the acquisition of title by length of possession, though it does say that the title of the owner out of possession shall be extinguished, in which it differs from the Statute of James, which only barred the

(*w*) *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, explaining *Stansfield* v. *Hobson*, 3 D.M. & G. 620, apparently contra; *Dodge* v. *Smith*, 3 O.L.R. 305.

(*x*) *Court* v. *Walsh*, 1 Ont. R. 167; *Holmes* v. *Newlands*, 11 Ad. & E. 44.

(*y*) See *Doe d. Jukes* v. *Sumner*, 14 M. & W. 12; *Heath* v. *Pugh*, 6 Q.B.D. 365; *Incorporated Soc'y* v. *Richards*, 1 Dr. & War. 289; *Scott* v. *Nixon*, 3 Dr. & War. 407; *Court* v. *Walsh*, 1 Ont. R. 170.

(*z*) 1 Hayes Conv. 168.

(*a*) 3 S.C.R. 454.

remedy by action, but its operation is by way of extinguishment of title only "(*b*). There is therefore no transfer or conveyance of the right or title of the dispossessed owner to the usurper, but the statute, upon extinction of the paper title, is exhausted in its operation, the effect being to leave the occupant in possession with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him.

The question as to the effect of the Statute in this respect has arisen in several cases in an acute form, where the person claiming the benefit of the Statute asked for the same consequences as would have followed upon a grant. Thus, in one case, a trespasser had extinguished the title to a landlocked parcel of land by possession. He had been in the habit of going to and from this landlocked parcel by a particular way over the surrounding land of the true owner. Having extinguished the title of the owner to the landlocked parcel, he now claimed a right of way to get to it as a way of necessity, and argued that the effect of his possession was to transfer the title of the land to him by "parliamentary conveyance." His claim was dismissed, the Court saying, "The Statute does not expressly convey any title to the possessor. Its provisions are negative only. We cannot import into such negative provisions doctrines of implication, that would naturally arise where title is created by express grant or by statutory enactment. The title to the premises is not a title by grant. The doctrine of a way of necessity is only applied to a title of grant, personal or parliamentary"(*c*).

Again where a stranger took possession of a house leased for 89 years and occupied it for 40 years, paying rent to the landlord, and so extinguished the title of the lessee, and the landlord sued the assignee of the stranger for breach of a

(*b*) See also Dart V. & P. 6th ed. 464; 11 Jur. N.S. 152.

(*c*) *Wilkes* v. *Greenway*, 6 T.L.R. 449; *McLaren* v. *Strachan*, 23 Ont. R. at p. 120, note.

covenant in the lease, it was held that the possession extinguished the title of the lessee, and did not transfer the term to the trespasser, and therefore that there was no liability on the covenant in the lease(*d*).

Where the dispossessed owner was tenant in fee simple, the title being extinguished, there remains no one to claim any interest in the land save the person in possession, who thus must necessarily be invested with the fee. But where land is in settlement, then, on the hypothesis that the title of the disseisee is transferred to the disseisor, the latter would from time to time be invested with the estates of the successive takers under the settlement as the title of each is extinguished. This is clearly not the operation of the statute(*e*). The title of the person immediately entitled to possession is merely extinguished. The trespasser is still a trespasser as to other persons entitled in remainder. It will also appear, in dealing with the case of successive independent trespassers, that though the owner may have been continuously absent for more than the statutory period, the title does not pass to any one of the usurpers(*f*).

The statute is operative only while some one is in possession against whom the owner could issue a writ; for the person having the paper title is, by virtue of his title, constructively in possession, though not actually on the land, if the land is vacant; and, as the statute merely prohibits him from bringing an action to recover the land after the expiration of the period mentioned, it implies that there must have been some one in actual possession meanwhile against whom he could have brought his action(*g*).

(*d*) *Tichborne* v. *Weir*, 67 L.T. 735; *Re Jolly*, L.R. (1900) 1 Ch. 292, following this case. *Re Jolly* was reversed without affecting this point, on peculiar facts; L.R. (1900) 2 Ch. 616.

(*e*) 1 Hayes Conv. 268. See also *Tichborne* v. *Weir*, 67 L.T. 735. But see *Walter* v. *Yalden*, L.R. (1902) 2 K.B. 304.

(*f*) *Postea*, p. 303, *et seq.*

(*g*) *Doe d. Cuthbertson* v. *McGillis*, 2 C.P. 139; *Delaney* v. *C. P. R. Co.*, 21 Ont. R. 11; *Trustees, Executors and Agency Co.* v. *Short*, 13 App. Ca. 793.

3. *Commencement of running of Statute.*

By section 5, sub-section 1, the time at which a right of entry or of bringing an action is deemed to have first accrued to a person who has been in possession or in the receipt of the profits of the land, shall be at the time of his dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.

Mere vacancy, however, will not cause the statute to run(*h*).

And vacancy occasioned by *vis major* is treated in the same way. Thus, in an Indian case, land was submerged by the change in course of a river; and during the submersion it was held that the constructive possession was in the persons having the paper title and that time did not run against them(*i*).

The legal title in presumption of law carries with it the possession of land not proved to be in the actual and visible occupation of an adverse holder(*j*). Discontinuance of possession signifies that there must be abandonment of possession by one person followed by the actual possession of another(*k*). The time therefore commences to run against the true owner from the wrongful taking of possession; and as between the true owner and a usurper the latter must have been in possession for the full period prescribed by the statute before he can successfully defend his possession

(*h*) As to the case of land abandoned without any intention of returning to it, see *Doe d. Cuthbertson* v. *McGillis*, 2 C.P. 133; *Pringle* v. *Allan*, 18 U.C.R. 583.

(*i*) *Secy. of State for India* v. *Krishnamoni Gupta*, 18 T.L.R. at p. 541.

(*j*) *Arner* v. *McKenna*, 9 Gr. 226; *Delaney* v. *C. P. R. Co.*, 21 Ont. R. 11; *Trustees, Executors and Agency Co.* v. *Short*, 13 App. Ca. 793.

(*k*) *McDonald* v. *McKinty*, 10 Ir. L.R. 526; *Smith* v. *Lloyd*, 9 Ex. 562; *Ketchum* v. *Mighton*, 14 U.C.R. 99; *Lloyd* v. *Henderson*, 23 C.P. 253; *Doe d. Cuthbertson* v. *McGillis*, 2 C.P. 124; *Keyse* v. *Powell*, 2 E. & B. 132; *Doe d. McDonnell* v. *Rattray*, 7 U.C.R. 326; *Rains* v. *Buxton*, 14 Ch. D. 539, 540; *Littledale* v. *Liver of Coll.*, L.R. (1900) 1 Ch. at p. 22.

against the owner, though the land may have been vacant many years longer(*l*).

The state of the paper title at the time possession commenced should be shown (*m*); and after the statute has once begun to run, a party cannot by putting his estate into settlement, raise up new rights, and give new claims to persons deriving title under the settlement(*n*). But if the grantee of a particular estate should take possession under the settlement the title would revest in the persons entitled under the settlement and would interrupt the running of the statute(*o*).

4. *Successive trespassers.*

A disseisor has a transmissible interest in the land which will pass by conveyance, devise or succession, and the grantee, devisee or representative of the disseisor may claim the benefit of the prior possession and add it to his own(*p*). But one person can only claim under another in one of the regular modes known to the law, as by devise, succession or conveyance(*q*).

It was formerly held that the paper title might be extinguished by the occupation of successive independent trespassers(*r*). While the absence of the true owner must have been continuous in order to make the statute run against him, it was held not to be necessary that the

(*l*) *Dixon* v. *Gayfere*, 17 Beav. 429.

(*m*) Darb. & Bos. 494; *Keefe* v. *Kirby*, 6 Ir. C.L.R. 591; *Doe d. Carter* v. *Barnard*, 13 Q.B. at p. 952; *Asher* v. *Whitlock*, L.R. 1 Q.B. 1.

(*n*) *Stackpoole* v. *Stackpoole*, 4 Dr. & War. 347.

(*o*) Darb. & Bos. 320.

(*p*) *Asher* v. *Whitlock*, L.R. 1 Q.B. 1; *Venn* v. *Edwards*, 1 DeG. & J. 598; *Calder* v. *Alexander*, 16 T.L.R. 294.

(*q*) Hewitt on Stat. Lim. 161. See *Simmons* v. *Shipman*, 15 Ont. R. 301, apparently *contra*; but this case must be supported on the ground that there was a purchase of the rights of the prior trespasser, and consequently the right to a conveyance from the prior to the subsequent trespasser.

(*r*) *Kipp* v. *Synod*, 33 U.C.R. 220; *Doe d. Carter* v. *Barnard*, 13 Q.B. 952.

occupation of the trespassers should be continuous or connected with each other, if the dispossessed owner was seeking to recover possession as a plaintiff against the usurper in possession at the expiration of the statutory period(*s*). But when any person was claiming as plaintiff to recover on a possessory title against the dispossessed owner who had regained possession, he must have shown either a continuous possession in himself as against the owner, or a connected chain of title through other trespassers under whom he claimed for the full statutory period(*t*). No such distinction, however, exists.

Where the acts of occupation of successive trespassers are continuous and connected with each other, they are as the possession of one man, and there is no difficulty in treating the paper title as extinguished if the owner has been out of possession for ten years(*u*). But where they are separated from each other by intervals of time during which the land is vacant, there it cannot be held that the continuous absence of the owner bars his right(*v*). It is clear that isolated acts of trespass by one man will not bar the true owner(*w*); and, therefore, isolated acts of trespass by different persons should not have a more deleterious effect. The length of time during which each act of trespass continues is a matter of degree only and not of principle; for the true owner has as good a right to recover possession on the last day of the tenth year as he had on the first day of the trespass. And the usurper's possession, which is

(*s*) *McConaghy* v. *Denmark*, 4 S.C.R. 633.

(*t*) *Davis* v. *Henderson*, 29 U.C.R. 351, 352; *McConaghy* v. *Denmark*, 4 S.C.R. 633; *Dixon* v. *Gayfere*, 17 Beav. 429; *Doe Goody* v. *Carter*, 9 Q.B. 863.

(*u*) It was said by Strong, C.J., in *Handley* v. *Archibald*, 30 S. C.R. 130, that the continuous acts of successive independent trespassers, without any privity between them, for the statutory period will bar the owner. *Sed quere;* this seems to be contrary to the authorities.

(*v*) See *Doe Baldwin* v. *Stone*, 5 U.C.R. 388.

(*w*) *Allison* v. *Rednor*, 14 U.C.R. 459; *Young* v. *Elliott*, 26 U.C. R. 333.

wrongful both in its inception and continuance, is not to be extended by construction beyond its actual duration.

Again, the true owner, though absent, is in constructive possession of the land. As soon as a trespasser enters he is dispossessed. But upon the trespasser vacating the land within the ten years, then, no one being in actual possession, there must be constructive possession either by the true owner or by the trespasser. But a trespasser cannot be said to have constructive possession of land(*x*), and so the true owner is constructively in again in the interval under his paper title. There is, during the period that follows abandonment by a trespasser, no one against whom the owner could bring an action; for there is no question of title involved and no one is in possession. If then, a second independent trespasser enters, a new right to enter or bring an action accrues to the owner, entirely distinct from the earlier one. So, in *Doe d. Cuthbertson* v. *McGillis*(*y*), it was said, "What is meant then by the right to make such entry? This is a question of construction on which I have felt some embarrassment. In the common acceptation of the term every man has a right of entry into his own premises from the accruing of his title. When he is in possession he enters and re-enters at his pleasure; but the statute does not begin to run from the first accruing of such a right. This then is not the right of entry contemplated by the statute. It must therefore be a right of entry as contra-distinguished from possession. It is perfectly plain that there can be no right of action without a defendant, or right of distress for rent without a tenant. It is true that an ejectment may be brought as upon a vacant possession, but then this is only necessary when some person has been and is in constructive possession contrary to the right,

(*x*) *Harris* v. *Mudie*, 7 App. R. 420; *Shepherdson* v. *McCullough*, 46 U.C.R. 598.

(*y*) 2 C.P. 139.

and when it is desired to have judgment on the title. I think, in like manner there can be no right of entry in contra-distinction to the possession, unless there be a person in possession, actually or by legal construction, upon whose wrongful possession the entry is to be made." It has been said in other cases too that the possession must be continuous, but in these cases the evidence disclosed a re-entry in each case by the owner during the intervals of vacancy(*z*).

The matter has been finally set at rest by a decision of the Judicial Committee of the Privy Council(*a*). Lord MacNaghten, in delivering the judgment, after referring to the doctrine that when the statute once begins to run it never stops, except by the owner going into possession, said: "Their Lordships are unable to concur in this view. They are of opinion that if a person enters upon the land of another and holds possession for a time, and then without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to re-habilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant."

(*z*) *Canada Co.* v. *Douglass*, 27 C.P. 343; *Lewis* v. *Kelly*, 17 C. P. 250; *Henderson* v. *Harris*, 30 U.C.R. 300; *Clements* v. *Martin*, 21 C.P. 512.

(*a*) *Trustees, Executors & Agency Co.* v. *Short*, 13 App. Cas. at p. 798.

Inasmuch as the doctrine has now been exploded, that the paper title may be extinguished by a succession of independent trespasses, without any one of the intruders having been in possession for the statutory period, it necessarily follows that their relative rights do not depend upon the statute, unless one of them has occupied the land for the statutory period.

If the first trespasser is dispossessed by a subsequent one, the possession of the first is a sufficient title upon which to maintain ejectment agsinst his disseisor(*b*). But where the disseisor remains in possession for the statutory period, and thus extinguishes the paper title, then, though there is no parliamentary conveyance to him of the estate of the true owner, yet he may defend his possession against his disseisee. For the right of the disseisee to bring an action to recover the possession is also barred by the statute. But if an intruder voluntarily abandons the land, which, being vacant, is taken possession of by a second intruder, the latter may retain possession as against every one but the holder of the paper title until that has been extinguished.

5. *Area or space affected by possession.* (i) *Mere trespasser.*

The possession necessary to extinguish the paper title must be open, visible and exclusive of the true owner(*c*). It must also be unequivocal in its nature, continuous, and must not consist of repeated acts of trespass.

First, the acts of possession must have only one significance, viz., the exclusion of the true owner from the land in question, and must not be capable of another explanation. Thus, the defendants in the case cited below, owned two fields and a strip of land between them separated from

(*b*) *Asher* v. *Whitlock*, L.R. 1 Q.B. 1.

(*c*) *McConaghy* v. *Denmark*, 4 S.C.R. 632; *Shepherdson* v. *McCullough*, 46 U.C.R. 602, approved in *Harris* v. *Mudie*, 7 App. R. 430; *Coffin* v. *N. A. Land Co.*, 21 Ont. R. 80; *Griffith* v. *Brown*, 5 App. R. 303; *Sherren* v. *Pearson*, 14 S.C.R. 581.

the fields by hedges. The plaintiffs had a right of way over the strip from their field, which was at one end, to the highway at the other. The plaintiffs put gates at each end of the strip, locked them and kept the keys. After twelve years they claimed title by possession. But it was held that erecting and locking the gates were equivocal acts, and were quite consistent with protecting the right of way from invasion by the public, and that the defendants had never been dispossessed, and therefore time did not run under the statute(*d*).

So also the acts of trespass must not be intermittent, or a series of isolated acts. Thus, where the defendant claimed title by reason of having cut and sold timber on the plaintiff's land, cleared it, sowed and harvested one crop of wheat, for some years taken hay from it, and then used it as pasture land—the land not being completely enclosed, but open on one side towards a marsh, from which cattle strayed into the land, it was held that there had not been such possession as would extinguish the title(*f*).

And similarly, where a man enclosed a piece of land and took annual crops therefrom, leaving manure on it during the winter, and living elsewhere, it was held that the intermittent occupation did not extinguish the title. For in each period in which the trespasser left the land unoccupied the true owner was again constructively in possession(*g*).

And the true owner, being in constructive possession of all land to which he has a paper title, can only be deprived of his title to those parts from which he has been actually excluded by the trespasser. That is to say, the trespasser can only claim title to that portion which has been actually occupied by him, or of which he has had what has been called pedal possession—*possessio pedis*(*h*). Where posses-

(*d*) *Littledale* v. *Liverpool Coll.*, L.R. (1900) 1 Ch. 19.
(*f*) *McIntyre* v. *Thompson*, 1 O.L.R. 163, and cases there cited.
(*g*) *Coffin* v. *N. A. Land Co.*, 21 Ont. R. 80.
(*h*) *McLaren* v. *Strachan*, 23 Ont. R. at p. 120, note.

sion has been taken of a house with an adjoining enclosure, or an enclosed piece of land has been continuously cultivated and occupied or otherwise exclusively used and enjoyed by the ursurper, no question will arise as to the extent of the land to which he gains title. But where the land is unenclosed, or generally of such a character that an entry upon any part of it would be equivocal in its signification with reference to the extent intended to be occupied, then the only safe rule is to confine the trespasser to the actual area from which he has by visible occupation excluded the owner.

The operation of the statute is not confined to possession of the surface of the land. In one case the right to a cellar was in dispute, and occupation for the statutory period was held to extinguish the title of the owner of the soil(*i*). Again, where a tunnel was made by a cement company from their pits on one side of a highway, underneath the surface of the highway, to their factory on the opposite side, and the company constantly used the tunnel for carrying material in tram cars from their pits to their factory, for the statutory period, it was held that they had acquired title by possession to the tunnel(*j*).

And occupation of the surface which a railway company owned, though they used only a tunnel underneath the surface, was held to extinguish the title to the surface(*k*).

There have been general expressions in some cases which have been cited for the proposition that a trespasser who enters upon open woodland or other unenclosed land is in constructive possession of the lot by its boundaries(*l*); but much stronger expressions, in fact, binding decisions,

(*i*) *Rains* v. *Buxton*, 14 Ch. D. 537.

(*j*) *Bevan* v. *London Portland Cement Co.*, L.R. (1892) W.N. 151.

(*k*) *Midland R. Co.* v. *Wright*, L.R. (1991) 1 Ch. 738.

(*l*) *Heyland* v. *Scott*, 19 C.P. 165; *Davis* v. *Henderson*, 29 U.C. R. 344; *Mulholland* v. *Conklin*, 22 C.P. 372.

are found to the contrary(*m*). The current of decision was, until the Court of Appeal finally set the point at rest, decidedly in favour of the view that only the title to that portion actually occupied by the trespasser is extinguished(*n*). All the authorities were reviewed in the dissenting judgment in *Shepherdson* v. *McCullough*(*o*), which was afterwards approved by the Court of Appeal(*p*), and that may now be considered as the settled rule. If there were no survey or division of land into lots, the possession of the trespasser could not by any possibility be extended beyond the area actually occupied by him. And the mere division of land into lots, which is made by the Crown for purposes of title only, ought not to be regarded as made in favour of a trespasser, and as constructively extending his possession to the limits of any lot upon which he may have entered(*q*). The principle upon which the Court of Appeal proceeded in *Harris* v. *Mudie* is very clearly stated by Burton, J.A. "The original taking of possession being wrongful and without colour of right, how can the plaintiff be deprived of more than the defendants have actually cultivated or enclosed. There can in such a case be no constructive possession, for the constructive possession is in the person having the legal title; both cannot be in constructive possession of the same land. The doctrine of constructive possession can obviously have no application to the case of a trespasser, and it could not be carried out without becoming involved in serious difficulties and absurdities. If there are three squatters on a 200 acre lot, each clearing and enclosing an acre or two on separate portions of the lot, are they

(*m*) *Hunter* v. *Farr*, 23 U.C.R. 327; *Weld* v. *Scott*, 12 U.C.R. 557; *Doe d. Macdonell* v. *Rattray*, 7 U.C.R. 321; *Doe d. Beckett* v. *Nightingale*, 5 U.C.R. 518.

(*n*) *Harris* v. *Mudie*, 7 App. R. 421, 437.

(*o*) 46 U.C.R. 573.

(*p*) *Harris* v. *Mudie*, 7 App. R. 430.

(*q*) *Shepherdson* v. *McCullough*, 46 U.C.R. 605.

by length of possession to become absolute and several owners of the portions they have respectively occupied, and tenants in common of the portions over which they have committed depredations by cutting the most valuable timber; or if the portion so cleared happens to be on the corner of four 200 acre lots, and the trespasser roams at will over the whole, and cuts timber from time to time over each, is he to acquire a title to the whole 800 acres? There is neither reason nor justice in such a rule, and until recently not even *dicta* of Judges are to be found in support of it, and I think this is the first case in our own Courts in which a judgment can be found in support of such a position. * * It is sometimes said that it is the only possession of which wild land is capable. The statement is not accurate, as it is quite possible to enclose wild land; but assume it to be so, does that furnish any satisfactory reason why the owner should be deprived of it by any ideal constructive possession consisting of occasional acts of trespass? * * There ought, I think, to be no difficulty in confining a mere trespasser to the portions from which he excludes the true owner by his actual residence or occupation, that pedal possession which the Courts formerly had no great difficulty in defining; the difficulty rather arises in finding a satisfsctory reason for enlarging and extending the possession beyond the portion actually and visibly occupied, so as to include the whole land, wild and uncultivated, where the person in occupation enters under a defective title."

It may also be observed that the notion of the acquisition by the trespasser of any more land than that actually and visibly occupied by him is entirely foreign to the principle of the statute, which is negative in its operation only. The title of a trespasser who has by continuous possession barred the owner, depends entirely upon his possession, and rests upon the inability of the original owner to eject him by reason of the extinction of his title. But it cannot be

contended that he acquires title to land from which the owner never could have ejected him on account of his never having been actually in possession. The issue between the owner and a trespasser is not one of title relating to the whole of the land to which the owner has title, but one of the fact of exclusion from a certain area.

Where the land is not fenced, but a blazed line, not the true limit, has been observed as the boundary between adjoining proprietors and occupants, it has been held that acts of ownership up to this line will bar the true owner of his title to the land upon which the acts are performed(*r*). This decision, however, can hardly be reconciled with the principle enunciated by the Court of Appeal(*s*), though it has been said that it is not opposed to it(*t*).

(ii) *Entry under defective title.*

Where, however, the occupier is not a mere stranger, but enters under a defective title, he is deemed to be in possession of the whole land covered by his conveyance(*u*). So where a purchaser was let into possession and paid his purchase money it was held that his possession must be referred to the whole land, and that the vendor could not be considered as having been in constructive possession of the portion not actually occupied(*v*).

The issue between the true owner and one who enters under a defective title becomes one of title and not of possession. Under a valid title the possession would be co-extensive with the boundaries described in the conveyance; and under a title which proves for some reason to be defective, though as against the true owner the occupant is in

(*r*) *Steers* v. *Shaw*, 1 Ont. R. 26.

(*s*) *Harris* v. *Mudie*, *supra*.

(*t*) *McGregor* v. *Keiller*, 9 Ont. R. 677.

(*u*) *Heyland* v. *Scott*, 19 C.P. 165.

(*v*) *McKinnon* v. *McDonald*, 13 Gr. 152. See also *Meyers* v. *Doyle*, 9 C.P. 371.

fact a trespasser, yet his entry would give him a right to maintain trespass against any one subsequently entering without right(*w*), and so would by construction of law extend to the limits set by his conveyance.

6. *Acknowledgments*

"Where any acknowledgment of the title of the person entitled to any 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 of such land, or in the receipt of such rent, such possession or receipt of or by the person by whom such acknowledgment was given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such 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 or distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given"(*x*).

The statute expressly requires the acknowledgment to be in writing, and so a verbal acknowledgment will not interrupt the running of the statute(*y*). But a trespasser may by his acts estop himself from setting up the statute as against the owner, though it may have been previously running in his favour(*z*). Thus, where the owner of land left his father in sole possession for some time, and then the father joined the son in representing the latter to be the owner in order to procure a loan upon mortgage of the land

(*w*) *Per* Burton, J.A., *Harris* v. *Mudie*, 7 App. R. 428, 429. See also *Robertson* v. *Daley*, 11 Ont. R. 552.

(*x*) R.S.O. cap. 133, sec. 13.

(*y*) *Doe d. Perry* v. *Henderson*, 3 U.C.R. 486; *Doe d. Auxman* v. *Minthorne*, 3 U.C.R. 423.

(*z*) *Miller* v. *Hamelin*, 2 Ont. R. 103.

by the son, the father continuing in possession, without acknowledgment, it was held that time commenced to run against the mortgagee from the time of the execution of the mortgage; and that the father could not claim the benefit of his possession prior to that date as against the mortgagee(*a*).

Though the acknowledgment must be in writing and signed, yet parol evidence may be given of such an acknowledgment having been made, whenever such evidence would be admissible under ordinary rules to prove the contents of a written instrument(*b*).

The acknowledgment must be signed by the person giving it and not by an agent(*c*); but the signature may be made by an amanuensis signing the name of the person making the acknowledgment at his direction(*d*). It may be made either to the person entitled or to his agent(*e*), but not to a stranger(*f*). An acknowledgment to a vendor who had not executed the conveyance, but was held by the Court to be trustee for the heir of the purchaser, was held to be a sufficient acknowledgment of the title of the heir(*g*). And an acknowledgment written after the death of a testator contained in a letter to an attorney who had collected rent for the testator in his lifetime, and was at the time of the acknowledgment acting for his executrix, was held a sufficient acknowledgment of the testator's title(*h*).

It appears not to be necessary that the person making the acknowledgment should precisely understand its nature, if in fact the acknowledgment contain a true admission. So,

(*a*) *Boys* v. *Wood*, 39 U.C.R. 495.
(*b*) *Haydon* v. *Williams*, 7 Bing. 163.
(*c*) *Ley* v. *Peter*, 3 H. & N. 101.
(*d*) *Lessee of Dublin* v. *Judge*, 11 Ir. L.R. 80.
(*e*) *Ruttan* v. *Smith*, 35 U.C.R. 165.
(*f*) *Markwick* v. *Hardingham*, 15 Ch. D. 339.
(*g*) *McIntyre* v. *Canada Company*, 18 Gr. 367.
(*h*) *Fursden* v. *Clegg*, 10 M. & W. 572.

where it was alleged that the agent of the owner made certain misrepresentations to a trespasser as to the nature of a document which he wished the trespasser to sign, and which contained an admission of the owner's title and an acknowledgment that the possession was only by sufferance, it was held that even if the allegation of misrepresentation were true it would not have affected the validity or operation of the acknowledgment which contained a true admission of title(*i*). But where the paper title is extinguished no acknowledgment will revive it or again cause time to run under the statute. Thus where persons claiming under the heirs of the original owner represented to an illiterate person who had been in possession long enough to extinguish the paper title, that he had no title whatever, and so procured him to execute and accept a lease to himself for two years, the Court set aside the lease so obtained(*j*). In such a case the acknowledgment, coming after the paper title had been extinguished, would on that account be insufficient to revive it(*k*). And where a person who had extinguished the paper title took a conveyance from the person who claimed under the paper title, and gave a mortgage back "saving and excepting the mines which the mortgagor has no claim to," it was held that this did not re-vest the mines in the grantor-mortgagee(*l*).

The acknowledgment need not be in any form as long as it contains an admission of ownership in the person to whom it is given. Hence a written application by a trespasser to the owner of land for the purchase of the timber on the land has been held a sufficient acknowledgment of title(*m*). And a letter reminding the owner of an agreement to allow the writer to occupy the land for his lifetime,

(*i*) *Ferguson* v. *Whelan*, 28 C.P. 112.
(*j*) *Hillock* v. *Sutton*, 2 Ont. R. 548.
(*k*) *Ante*, pp. 298, 299.
(*l*) *Dodge* v. *Smith*, 3 O.L.R. 305.
(*m*) *Hooker* v. *Morrison*, 28 Gr. 369.

begging to be allowed to remain on the land, and promising that he would "still act as agent" in taking care of the land and keeping off trespassers, was held sufficient(*n*).

In *Re Dunham*(*o*) it appeared that while one Arnold was in possession of land as tenant at sufferance, it was devised to him for life with remainder in fee to Phillips. In this case Arnold had neither expressly accepted nor renounced the devise, but after some 30 years' possession had granted part of the land, Phillips joining in the conveyance. On a petition under the Quieting Titles Act filed by Dunham, who claimed under a grant in fee by Arnold, it was held that the prior conveyance in which Phillips had joined was an admission by Arnold that the will was operative, as Phillips had no title to the land otherwise than by the will, and so an admission that he (Arnold) was tenant for life under the will, and that neither he nor his grantee could claim the fee by length of possession.

But where a bond to F. recited that the obligor had bought in the estate of all the owners of the lot except the estate of the family of F., and of such other of the claimants as were under disability (which class would include the plaintiffs in the action) which he, the obligor, was to get in, it was held that it was not an acknowledgment of the title of the paintiffs, because it was not given to them or their agent(*p*). And where a mortgage contained a reservation "of four acres already mad by deeds of conveyance to the party of the third part," who was the mortgagee, it was held that this was not an acknowledgment of the title of the mortgagee to the four acres reserved(*q*). A notice to quit by the owner to a trespasser will not interrupt the

(*n*) *Greenshields* v. *Bradford*, 28 Gr. 299. See also Darb. & Bos. 292.

(*o*) 29 Gr. 258.

(*p*) *Ruttan* v. *Smith*, 35 U.C.R. 105.

(*q*) *Williams* v. *McDonald*, 23 U.C.R. 423.

running of the statute, though a notice by a trespasser to the owner to determine an alleged tenancy might have that effect(*r*).

The effect of a sufficient acknowledgment under the statute is to make the possession of the person making it the possession of the person to whom it is made(*s*), and is equivalent to a removal from possession of the person making it(*t*).

The statute may also be prevented from running by the usurper's acquiring an interest by conveyance from any one against whom he claims, such an acquisition being an admission of title and putting the usurper in under the conveyance(*u*). And where a devise is made to a trespasser of an interest in the land which he occupies and he neither accepts nor renounces it, but remains passive, he will *prima facie* be considered as holding under the will and not by possession. The devise of an interest in the land is in such a case a benefit to him which he is presumed to accept, inasmuch as it gives him an estate where before the devise he had but the bare possession(*v*).

(*r*) *Doe d. Ausman* v. *Minthorne*, 5 U.C.R. 426.
(*s*) *Cahuac* v. *Cochrane*, 41 U.C.R. 436.
(*t*) *Canada Co.* v. *Douglas*, 27 C.P. 344.
(*u*) *Gray* v. *Richford*, 2 S.C.R. 431.
(*v*) *Re Defoe*, 2 Ont. R. 623; *Re Dunham*, 20 Gr. 258.

CHAPTER XII.

TITLE BY INHERITANCE, SUCCESSION AND DEVISE.

1. *Inheritance.*
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(ii) *Descent before 1852.*
(a) *Inheritable interests.*
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(iii) *Descent after 1st January, 1852.*
(a) *Inheritable interests.*
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2. *Succession by personal representatives.*
(i) *Trust estates.*
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3. *Wills*
(i) *Before 1874.*
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(iv) *Registration.*

1. *Inheritance.*

A title by descent is always viewed with great jealousy, and it has been ranked by conveyancers amongst the worst

of titles; and if it depends upon several successive descents, it has been said to be scarcely marketable(*w*). And although for a short period under the system whereby land as well as personalty is cast upon the personal representative(*x*), it was perhaps more easy to make title on an intestacy than under the former law, yet the amendments to *The Devolution of Estates Act*, whereby the land shifts about from the personal representative to the beneficiaries, and can be brought back again by a caution, without a conveyance, have made it a matter of some risk to deal with land which is affected by them. The danger to a purchaser, however, which might arise from the discovery of a will is almost wholly averted by our system of registration.

In tracing the title to land upon an intestacy three periods must be observed:—The period before the 1st January, 1852, during which time land descended to the eldest son, or if none to the daughters equally: the period from the 1st January, 1852, to the 30th June, 1886, during which time it descended to all the children equally; and the period from the 1st July, 1886, since which date it devolves upon the personal representative, and if not disposed of vests in the next of kin under *The Statute of Distribution*.

(i) *Evidence generally.*

In proving a pedigree, the object is to show that the claimant is the next heir to the person last seised, that is last entitled, under the Statute of Victoria, or to the purchaser under the Statute of William IV. And the same proof of relationships, deaths and intestacies is required as would be required in a Court of Justice(*y*). Of the intestacy of the ancestor the best evidence is the production of letters of administration granted by the Surrogate

(*w*) Hubb. Suc. 71.

(*x*) *Devolution of Estates Act*, 1886; now R.S.O. cap. 127, secs. 2 to 21 inclusive.

(*y*) Cov. Con. Ev. 274.

Court(*z*). But though letters of administration are much relied on by conveyancers, implicit confidence cannot be placed in them. They are granted by the Surrogate Court upon the affidavit of the nearest relative that no will of the deceased has been discovered, and this, it is evident, can never be conclusive evidence that there is no will in existence(*a*). In England the weight to which they are entitled depends to a great extent upon the time which has elapsed since they were granted; twenty years may entitle them, if acted upon, to great weight, and to be regarded as presumptive evidence almost incontrovertible that no will has been found: but the lapse of two or three years is not sufficient to warrant a purchaser in relying upon a grant of administration without other evidence of intestacy, or at least without making further inquiry(*b*).

By *The Registry Act*(*c*), "all wills or the probates thereof registered within the space of twelve months next after the death of the testator shall be as valid and effectual against subsequent purchasers and mortgagees, as if the same had been registered immediately after such death; and in case the devisee, or person interested in the lands devised in any such will, is disabled from registering the same within the said time by reason of the contesting of such will or by any other inevitable difficulty without his or her wilful neglect or default, then, the registration of the same within the space of twelve months next after his attainment of such will or probate thereof, or the removal of the impediment aforesaid, shall be a sufficient registration within the meaning of this Act." The consequences of omission to register are the same as in the case of other instrumenta, namely, that the person claiming title under the unregis-

(*z*) Cov. Con. Ev. 277; Lee Abs. 315.
(*a*) Lee Abs. 315.
(*b*) Lee Abs. 315.
(*c*) R.S.O. cap. 136, sec. 89.

tered will is defeated by prior registration of a conveyance from the heir. Although it is possible to ascertain with precision the date of the ancestor's death, it is not always possible to ascertain whether any inevitable difficulty exists to prevent registration within the year. So much reliance, however is placed upon registration, and so much fear exists of the consequence of non-registration, that a person claiming under an instrument will generally devise some means of making known through the register what title he claims; and experience shows that inevitable difficulties in the way of registration of wills rarely occur. We may therefore rely, with some degree of moral certainty upon letters of administration not less than a year old as evidence, not so much of intestacy, as of the ability of the heir at law to make a good title, provided that the purchaser has no notice by registration or otherwise of the existence of a will(*d*).

It is sometimes required that letters of administration should be taken out for the purpose of obtaining the administrator's affidavit of belief that the ancestor died intestate(*e*), and undoubtedly the grant of letters would afford the most public proof that no will exists; but opinion is against the purchaser's right to insist upon auch a proceeding where an heir at law is tbe vendor(*f*). But, of course since *The Devolution of Estates Act,* the only evidence of title will be the letters of administration; though they are no better evidence of intestacy than before.

Proof of intestacy may also be given by producing a will or probate not passing the real estate in question, and not putting the heir to an election(*g*).

Where a will has in fact been executed, a purchaser from the heir or one claiming through him, has a right to

(*d*) See *postea*, p. 360, as to inevitable difficulties in the way of registering wills.

(*e*) Hubb. Suc. 65.

(*f*) Lee Abs. 316.

(*g*) Dart V. & P. 6th ed. 380.

insist on its being produced, or evidence being given of its contents, that he may satisfy himself of its inefficiency, even though, having been treated as a nullity by a professional man, it has been mislaid, and the vendor has rested upon his title as heir at law(*h*).

(ii) *Descent before 1852.*

The interests in and concerning land which pass upon intestacy are varied by the statutory enactments at different periods. Before entering upon proof of inheritance, it may be well to point out, for each period, what interests passed by inheritance in each.

(a) *Inheritable interests.*

During the period from 1st July, 1834, to 1st January, 1852, exclusive of the latter, the rules of descent as modified by the statute now referred to applied to the following interests, which are included in the definition of "land"(*i*).

All hereditaments, corporeal or incorporeal; money to be laid out in the purchase of land; chattels and other personal property transmissible to heirs(*j*); also any share of the same hereditaments or properties; any estate of inheritance; any estate for any life or lives; any estate transmissible to heirs; any possibility; any right or title of entry or action; any other interest capable of being inherited(*k*).

(b) *Proof.*

When the ancestor has died before the 1st January, 1852, and a son claims title by descent from him, he must produce evidence not only that he is the legitimate son, but

(*h*) *Stevens* v. *Guppy*, 2 S. & St. 430.

(*i*) R.S.O. cap. 127, sec. 22, sub-sec. 1.

(*j*) As to this see the cases of fish in a fish-pond, doves in a dove-house, deer in a park; *Parlet* v. *Cray*, Cro. Eliz. 372.

(*k*) See further on this Armour on Devolution, chapters IV. and V.

that he is the eldest or only son of his parents. Certificates of his parents' marriage and of his own baptism within a reasonable period of the marriage, are admitted as full and ample evidence of legitimacy without any proof of the identity of the parties(*l*).

To prove the pedigree of a second son, certificates of the marriage of his father and mother, of the baptism of himself and his eldest brother, and of the burial of his eldest brother, are the best and appropriate evidence(*m*); there should also be strong negative evidence that the eldest brother died without issue. If this is not apparent from the certificates produced, a declaration from some member of the family, or acquaintance, should be procured, stating his belief that he was either unmarried, or if married, never had issue, or that issue born died in infancy, or as the case may be. The declarant should also state that he was intimately connected or acquainted with the family and must have known of such issue if there had been any; and if possible he should state some facts, such as close residence, or constant communication with the family, which might corroborate his evidence, and he should at least state his means of knowledge(*n*). The purchaser should also, if any suspicion exists of the marriage of the eldest brother, or birth of issue, take the precaution to search in the parish or statutory records for evidence, or make independent inquiries. If the elder brother left issue, proof of their death should be required; and the like evidence that the issue left no issue.

To prove the pedigree of a third or fourth son similar evidence is required, in each case accounting for all who would have inherited before him.

In proving the title of daughters, the same evidence must be given, the death of all the sons (if any) without

(*l*) Cov. Con. Ev. 278.
(*m*) Cov. Con. Ev. 279.
(*n*) *Re Harding*, 3 Ch. Ch. 233.

issue (or as the case may be) being proved, and also the death of any daughters who would have inherited, and that they died without issue, or as the case may be(*o*).

The proof of a collateral heirship, as of a brother, an uncle, or aunt, or cousin, must be established in the same way(*p*).

(iii) *Descent after 1st January, 1852.*

(a) *Inheritable interests.*

The Statute of Victoria, as it is familiarly called, applied to a limited class of interests. Thus, the expression "real estate" used in the Act is made to embrace "every estate, interest and right, legal and equitable, held in fee simple or for the life of another in lands, tenements and hereditaments in Ontario"(*q*). Trust estates were excepted from its operation(*r*). There are many inheritable interests not included in these words, such as determinable fees, base fees, the benefit of a condition, rights of entry for condition broken, perhaps contingent remainders, executory and future interests, possibilities, the seisin of a trespasser(*s*). Such interests were inheritable at common law and under the modified rules of the Statute of Wm. IV. If not included in the Statute of Victoria they still descend under the Statute of William IV.

By the consolidation of the Statutes of William IV., Victoria, and The Devolution of Estates Act, each containing a definition of the interests intended to be affected by it, it seems to have been the intention of the Legislature to preserve the distinction between the various interests enumerated, and to retain for each the particular enactment relating thereto.

(*o*) Cov. Con. Ev. 280.
(*p*) *Ibid.*
(*q*) R.S.O. cap. 127, sec. 38, sub-sec. 1.
(*r*) *Ibid.* sec. 59.
(*s*) See Armour on Devolution, chap. V.

(b) *Proof.*

Where the ancestor entitled in fee simple has died on or after the 1st January, 1852, and before 1st July, 1886, his children inherit equally(*t*). Proof should in such cases be adduced of the marriage of the parents, and that the claimants are the only children of the marriage. If any are dead without issue, the fact of their death without issue, or the death of their issue, if any, must be similarly proved.

Where there are no children, but descendants of children only, then if they are of equal degree to the intestate, they take *per capita*(*u*); and proof should be given of the decease of all the children.

If there are children and descendants of children, the inheritance is *per stirpes*; the land is divided into as many shares as there were children, and deceased children who left issue; and the children each take one share, and the several families of deceased children each take a share and divide it amongst themselves equally(*v*).

And so, wherever there are descendants in unequal degrees of consanguinity to the intestate, those who are in the nearest degree form the stocks or *stirpes:* and those who are in that degree take the shares which would have descended to them if all of that degree had survived, and the issue of the deceased persons of that degree take the shares respectively which their parents would have taken if they had survived(*w*).

In all such cases the like proof of marriages and deaths is required as in simpler cases, all persons being accounted for of nearer degree than those claiming the inheritance.

(*t*) R.S.O. cap. 127, secs. 41, 42. As to trust estates, see *postea*, p. 331.

(*u*) R.S.O. cap. 127, sec. 42.

(*v*) *Ibid.* sec. 43.

(*w*) *Ibid.* sec. 44.

Where there are no descendsnts, hut the intestate leaves a father and brothers or sisters, the land goes to the father for life, and the reversion to the hrothers and sisters, if any, but if there are none then to the father—unless the estate came to the intestate on the part of the mother and the mother is living(*x*). In such a case inquiry will have to he made of the origin of the intestate's title. Land comes on the part of the mother where it is acquired "hy devise, gift or descent from the parent referred to, or from any relative of the hlood of such parent"(*y*).

If the mother is living under the foregoing circumstances, the land goes to the mother for life, and the reversion to the hrothers and sisters, if any; hut if none, then to the mother.

Where these rules fail, the estate goes to collaterals, and in every case, as hefore, all nearer in degree than the claimants have to he accounted for, and the relationship of the claimants proved as in other cases.

(c) *Estates pur autre vie.*

The Statute of Victoria includes estates "held for the life of another"(*z*). This phrase included all estates *pur autre vie*, whether limited to the heir as special occupant or not. So that every estate *pur autre vie* descended under this Act in the same manner as a fee simple, unless it was a trust estate, in which case it descended as if the Act had not heen passed(*a*).

The Devolution of Estates Act, 1886, hy its terms applied only to "estates limited to the heir as special occupant"(*b*).

(*x*) *Ibid.* sec. 45.
(*y*) *Ibid.* sec. 40.
(*z*) R.S.O. cap. 127, sec. 38, sub-sec. 1.
(*a*) R.S.O. cap. 127, sec. 59.
(*b*) *Ibid.* sec. 3 (*a*).

This phrase, by its express terms, included only such estates *pur autre vie* as were limited to the heir. Consequently all such estates (including trust estates) passed under this enactment to the personal representative, while other estates *pur autre vie* passed under the Statute of Victoria(*c*).

In 1902, however, *The Devolution of Estates Act* was amended(*d*) so as to apply to all estates held by the deceased for the life of another; and since that date all estates *pur autre vie* devolve upon the personal representative.

(iv) *Statutory evidence.*

The persons authorized to celebrate marriages in Ontario are:—

"1. The ministers and clergymen of every church and religious denomination(*s*), duly ordained or appointed according to the rites and ceremonies of the churches or denominations to which they respectively belong;

2. Any elder, evangelist or missionary for the time being of any church or congregation of the religious people commonly called or known congregationally as 'Congregations of God' or 'of Christ,' and individually as 'Disciples of Christ,' who from time to time is chosen by any such congregation for the solemnization of marriage;

3. Any duly appointed commissioner or staff officer of the religious society called the Salvation Army, chosen or commissioned by the said society to solemnize marriages"(*t*).

Every marriage solemnized according to the rites, usages

(*c*) The attention of the Court was not called to this distinction in *Wilson* v. *Butler*, 2 O.L.R. 576.

(*d*) 2 Edw. VII. cap. 1, sec. 3.

(*s*) It has been held that this Act applies to all religious denominations, whether Christian or not. A Mormon marriage (plural marriages being repudiated by this sect) was consequently held valid; *R.* v. *Dickout*, 24 Ont. R. 250.

(*t*) R.S.O. cap. 162, sec. 2.

and customs of the Society of Friends, commonly called Quakers, is valid; and all the duties imposed by *The Marriage Act*, and *The Act Respecting Registration of Births, Marriages and Deaths*, upon a minister or clergyman, are to be performed by the clerk or secretary of the society, or of the meeting at which the marriage is solemnized; but nothing is to be construed as requiring the marriage to be solemnized by such clerk or secretary(*u*).

Every clergyman celebrating a marriage is by statute bound to give a certificate thereof to the parties and to enter a true record of the same in a book(*uu*). He was formerly(*v*) bound to make a return to the Registrar of the county; and the Registrar was to enter the return in a book, and his certificate was evidence of the marriage in case of the death or absence of the witnesses.

By the present Act he is bound to report every marriage, upon a form supplied by the Division Registrar, to the Division Registrar of the division within which the marriage is celebrated, within thirty days from the date of the marriage(*w*). The clerk of every municipality other than a county is the Division Registrar(*x*).

Returns are made by the Division Registrars to the Registrar-General of the Province, and certificates of births, deaths and marriages given by the Registrar-General are *prima facie* evidence in any Court in the Province of the facts stated(*y*).

The certificate of the clergyman being one which he is bound to give by statute, is also evidence of the marriage; and in a matter under the Quieting Titles Act, affidavit evi-

(*u*) *Ibid.* sec. 3.
(*uu*) R.S.O. cap. 162, secs. 23, 24.
(*v*) C.S.U.C. cap. 72, secs. 5 and 7.
(*w*) R.S.O. cap. 44, sec. 20.
(*x*) *Ibid.* sec. 11.
(*y*) *Ibid.* sec. 7.

dence of a marriage was refused until the absence of the certificate was accounted for(*yy*).

"The father of any child born in this Province, or in case of his death or absence, the mother, or in case of the death or inability of both parents, any person standing in the place of the parents, or if there is no such person then the occupier of the house or tenement in which to his knowledge the child was born, or the nurse or mid-wife present at the birth, shall within thirty days from the date of the birth, give notice to the Division Registrar of the division in which the child was born, giving as far as possible the particulars required in the form supplied under this Act, with such additional information as may from time to time be required by the Registrar-General"(*z*). The particulars required are the date of birth of the child, its name and sex, the names of the father and mother, together with the rank or profession of the father and the residence and description of the informant, the name of the accoucheur and the date of registry.

Proof of marriages and births may by this means be given; and this proof of birth is to be preferred to a certificate of baptism which is no evidence of the exact age of the child, though it may be good evidence of its legitimacy(*a*), unless the clergyman who performed the rite of baptism entered the age of the child at the time, in which case it would be evidence to a conveyancer of the age.

The death and burial of any children or other persons who might have inherited may be proved by official certificates, as in the case of marriages and births.

"The occupier of a house or tenement in which a death takes place, or, if the occupier be the person who has died, then some one of the persons residing in the house in which

(*yy*) *Re Harris*, 2nd Dec. 1869.
(*z*) R.S.O. cap. 44, sec. 15.
(*a*) Cov. Con. Ev. 281.

the death took place, or if the death has not taken place within a house, then any person present at the death or having any knowledge of the circumstances attending the same, or the Coroner who attended any inquest held on such person, shall before the interment of the body supply to the Division Registrar of the division in which the death took place, according to his or her knowledge or belief, all the particulars required to be registered touching such death, in the form provided under this Act"(*b*). Medical practitioners are also bound to notify deaths to the health officer for transmission to the Division Registrar, or to the Division Registrar(*c*).

These returns are forwarded to the Registrar-General, whose certificate is evidence of the facts certified.

Evidence may also be given in other ways. Thus, declarations of a deceased parent are evidence of the time of a child's birth(*d*); and an entry by an accoucheur of his having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance which was marked paid, has been received as evidence(*e*), being a statement made against his own interest.

In the absence of direct evidence as to marriages and deaths, resort is sometimes had to presumptions. But in the case of presumed death, evidence which might be sufficient to raise the presumption in an action of ejectment would not necessarily be sufficient as between vendor and purchaser. The evidence must be such that a Judge would give a clear direction to a jury in favour of the fact before it will be presumed as against a purchaser(*f*).

(*b*) R.S.O. cap. 44, sec. 22.
(*c*) *Ibid.* sec. 23.
(*d*) Cov. Con. Ev. 281.
(*e*) *Higham* v. *Ridgway*, 10 East 109.
(*f*) See *ante*, p. 124.

2. *Succession by personal representative.* (i) *Trust estates.*

All estates of inheritance descended to the eldest son before the Statute of Victoria. When that Act was passed, under which lands descended to all the children equally, lands held in trust were expressly excepted from its operation, and they were allowed to descend as if the Act had not been passed(*g*). When, in 1886, *The Devolution of Estates Act* was passed, it was made to apply to "all estates of inheritance in fee simple, or limited to the heir as special occupant." Since trust estates were not excepted from the operation of this Act, as they were from the Statute of Victoria, they no doubt fell within its provisions, though in no case, as far as the author is aware, has the question arisen.

Upon the revision of the statutes in 1887 and 1897, the clause of the Statute of Victoria which excepted trust estates from its operation was retained. Sections 37 and 59, which apply to this matter, are so obscure, each section in terms excluding the operation of the other, that it is impossible to extract any meaning from them alone. But as the second section of the Revised Act(*h*) makes succession by the personal representative apply to the estates of all persons dying on and after 1st July, 1886, we may come to the conclusion that trust estates, not being excepted from the operation of *The Devolution of Estates Act*, will vest in the personal representative of the trustee.

The declaration of the statute(*i*) that land is to vest in the personal representative for *distribution*, thus indicating that reference is made to beneficial interests, is subject to the qualification that they are, subject to any disposition by contract, to be distributed; and as trust estates are sub-

(*g*) R.S.O. (1877) cap. 105, sec. 40.
(*h*) R.S.O. cap. 127.
(*i*) Sec. 4, sub-sec. 1.

ject to a contract, there is no objection to including them within this enactment. And the provision of section thirteen of the statute for vesting land, without conveyance, in the beneficiaries after the lapse of a year, now three years, from the death of the owner, is confined to vesting in heirs or devisees beneficially entitled to the land, which would not include estates held in trust for strangers. Trust estates would therefore devolve upon the personal representative and remain vested in him awaiting conveyance to the new trustee.

(ii) *Bare trustee.*

By *The Trustee Act*(*j*), it is declared that "upon the death of a bare trustee of any corporeal of incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest in the legal personal representative, from time to time, of such trustee." A bare trustee has been defined as "a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them, or by their direction"(*k*); and this definition has been adopted by Hall, V.C.(*l*), and approved by Stirling, J.(*m*), though criticized by Jessel, M.R.(*n*).

Under an Act to enable infant trustees and mortgagees to convey the legal estate under an order of the Court of Chancery(*o*), it was held that the infant trustee must be a dry trustee, which is perhaps the equivalent of a bare trustee(*p*). And therefore the decisions under this Act

(*j*) R.S.O. cap. 129, sec. 7.
(*k*) Dart V. & P. 6 Ed. p. 587.
(*l*) *Christie* v. *Ovington*, 1 Ch. D. 279.
(*m*) *Re Cunningham & Frayling*, L.R. (1891) 2 Ch. 567.
(*n*) *Morgan* v. *Swansea*, 9 Ch. D. 582.
(*o*) 7 Anne, cap. 19.
(*p*) —— v. *Handcock*, 17 Ves. 383.

may serve to elucidate the matter. They form themselves into two classes, viz., cases where the trustee was also beneficially interested in the property, and cases where he was charged with the performance of duties in connection with the trust.

Trustee beneficially interested.—Where an infant executor was beneficially interested in a residue which comprised mortgage money, and the mortgage money was paid to his co-executor, it was held that, as the payment to the co-executor was a good payment as against the infant and discharged the mortgagor, the infant, who was seised of the legal estate in the mortgaged land, ceased to have any beneficial interest therein, and became a dry trustee of the mortgaged lands, and so liable to convey under the order of the Court(*q*). A similar case was *Ex parte Bellamy*(*r*), where mortgaged lands descended to an infant, the moneys being disposed of by will. The payment to the executor being a good payment, the infant, though beneficially interested in the money, was held to be a dry trustee of the land for the executor. And where there was a devise in trust for a life tenant, and to support contingent remainders, etc., on the death of the trustee intestate, his infant heir was held to be a dry trustee, having no beneficial interest in the land(*s*). And where a vendor had received all his purchase money and died intestate under a liability to convey the estate, his infant heir was held to be a dry trustee(*t*).

But where there is any beneficial interest in the person seised, he is not, while that condition lasts, a bare trustee. And so where a vendor died intestate without having received his purchase money, and therefore having a lien

(*q*) —— v. *Handcock*, 17 Ves. 383.

(*r*) 2 Cox 422.

(*s*) *Hawkins* v. *Obeen*, 2 Ves. Sr. 550. See *Ex p. Carter*, 5 Madd. 81.

(*t*) *Ex p. Vernon*, 2 P. Wms. 549. But see R.S.O. cap. 120, sec. 24, as to conveyance by personal representatives of a vendor.

upon, and a beneficial interest in, the land, it was held, under the modern enactment, that the estate did not pass to his personal representative(*u*). And where there was a devise of land to an infant charged with the payment of debts and legacies, and it was found upon a reference that the land was not sufficient to pay the charges, the Court held that the infant devisee did not become a dry trustee, under the Statute of Anne, by the finding of the Master(*v*).

Trustee with duties.—Where a trust for a charity descended to an infant, and he was relieved of the duties of the trust by the appointment of new trustees, and a conveyance to them was directed by the Court, it was held, under the Statute of Anne, that the infant came within the Act because he had been relieved of the duties of the office, and had nothing to do but convey(*w*). So where lands were devised to two married women upon trust for sale, the devisees being entitled to share in the proceeds, and the estate was administered by the Court and ordered to be sold, it was held that the devisees were bare trustees, having no duties to perform but to obey the order of the Court, though beneficially interested in the proceeds of the sale(*x*).

It appears, then, from these decisions, that the trustee must not only have no duties to perform, but must have no beneficial interest in the land. He is the mere depositary of the legal estate.

It will be observed that this enactment is not restricted to cases of intestacy, but applies to all cases. In England, a similar enactment(*y*) was repealed, and in lieu of it an

(*u*) *Morgan* v. *Swansea*, 9 Ch. D. 582. See Armour on Devolution 35, *et seq.*, as to the so-called trust relationship of vendor and purchaser.

(*v*) *Anonymous*, 3 P. Wms. 388, n.

(*w*) *Attorney-General* v. *Pomfret*, 2 Cox. 221.

(*x*) *Re Docwra*, 29 Ch. D. 693.

(*y*) 37 & 38 Vict. cap. 78, sec. 5.

enactment in the same terms, but confined to cases of intestacy, was passed(*z*).

Since *The Devolution of Estates Act* was passed, whereby all estates in fee simple, and estates limited to the heir as special occupant pass to the personal representative, it is perhaps not a matter of much moment at the present time to ascertain with exactness the correct definition of a bare trustee. But estates which devolved prior to the passing of the latter Act were within the enactment first treated of.

The amending enactments(*a*), which provide for the shifting of land into the beneficiaries if a caution is not registered, does not seem to apply to trust estates. The object of these enactments is to vest the property in those beneficially entitled thereto, if the personal representative finds that he does not require it for the purposes of administration; thus implying that it is only property which may be required for the purpose of the testator or intestate's estate that is affected by this section.

(iii) *Personal representative of vendor.*

By *The Trustee Act* it is declared that when any person has died under a liability to convey in pursuance of a written contract, either intestate, or without having made any provision in his will for the conveyance of the land, then the administrator, the executor, or the administrator with the will annexed, as the case may be, is the proper person to convey(*b*). This enactment, which was in force prior to *The Devolution of Estates Act*, is retained in the Revised Statutes, but is not of much importance since that Act was passed. For, as all estates of inheritance in fee simple now devolve upon the personal representative, he may convey by right of property and not by the statutory

(*z*) 38 & 39 Vict. cap. 87, sec. 48.

(*a*) 54 Vict. cap. 18; 56 Vict. cap. 20; now R.S.O. cap. 127, sec. 13.

(*b*) R.S.O. cap. 129, sec. 24.

power. Such estates (*i.e.*, those subject to a contract of sale) are not the subject of distribution amongst beneficiaries. For section four of *The Devolution of Estates Act*, sub-section one declares that land shall be distributed "so far as the said property is disposed of by deed, will, contract, etc.," and as the land, in such a case, is disposed of by contract, it is not to be distributed. Neither does it vest in the beneficiaries, for the shifting clause (section 13), only applies to land to which heirs and devisees are beneficially entitled.

(iv) *Married Women's Act, 1884.*

By *The Married Women's Property Act, 1884*(*c*), it is enacted as follows:—"For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would have or be if she were living." In the absence of an express declaration it may well be doubted whether the real estate of a married woman was intended to be cast upon her personal representative in preference to her heir-at-law; but it is difficult to avoid the conclusion that that was the result, if full effect is to be given to this section. The term "separate property" is frequently used in the Act to denote both real and personal estate. It will also be noticed that the personal representative is subject to the same liabilities as the married woman would be if living; and when we consider the nature of a married woman's liability, viz., that it is a liability to have her separate estate charged with her debts, it may well be that the Legislature intended to lodge her real estate in the hands of her personal representative, in order that it might there be charged in any action that might be brought against him. In any case to which this section might apply it would therefore be prudent to require

(*c*) 47 Vict. cap. 19, sec. 19; now R.S.O. cap. 163, sec. 23.

the concurrence of the personal representative where the heirs-at-law offer to convey.

(v) *Devolution of Estates Act.*

This Act, which came into force on the 1st of July, 1886, has been several times amended, and the period first to be dealt with is that extending from the first of July, 1886, to the fourth of May, 1891, during which time the personal representative retained the full right of property until conveyance by him; from 1891 to 1893, the land was liable to vest in the beneficiaries without conveyance if the personal representative did not register a caution; and the powers of dealing with the land were restricted, the concurrence of heirs or devisees being required; this forms the second period. After 1893, if the land did vest in the beneficiaries, power was given to the personal representative to apply for a caution to restore the land; this forms a third period.

When the owner of land dies entitled to an estate of inheritance in fee simple, or to an estate for the life of another, such estate devolves upon and becomes vested in his legal personal representatives from time to time, to be distributed, subject to the payment of debts, as personal property(*f*).

This enactment produces a highly anomalous state of affairs upon the death intestate of the owner of the land; for during the period between his death and the appointment of an administrator the land is absolutely without an owner. Except in the case of a bare trustee or of an estate *pur autre vie* under the Statute of Frauds, there is no parallel to it in our law, which before this Act required that some person should always be seised, and in the case of an intestacy always cast the estate upon the heir-at-law immediately upon the death of his ancestor.

(*f*) 49 Vict. cap. 22; now R.S.O. cap. 127, secs. 2 to 10 inclusive.

It has its parallel, however, in the Roman law, which provided a fictitious person to represent the *defunctus* until the heir entered. "As a rule, a certain period of time, of shorter or longer duration, elapses between the death of the testator and the *Adition*, or entrance of the heir upon his inheritance; hence, the question must arise, who is the party to be clothed with the legal personality of the *Defunctus*, or, as the Germans express it, 'Who is to be the *Träger* during this intermediate period of time?' In the absence of a natural person, a juridical person must be found to accept the inheritance, and such a juridical person is created in the person of the *Hereditas jacens*. This juridical person, for the interval, is regarded as the owner of the things constituting the inheritance. * * The fiction of the personality of the *Hereditas jacens* ceases the very moment that the heir has entered upon the inheritance"(*g*).

The creation of a fictitious person, however, would not dispose of the difficulty as to seisin. No doubt those who are ultimately entitled to share in the distribution have an interest which would entitle them to take measures to protect the land pending the appointment of an administrator and subject to the accruing of his title, or against him if he were wasting it. Yet they cannot be said to be seised, nor have they any title to the land itself, for any interest they may be invested with is subject to be divested by the appointment of an administrator, though an assignment of their interest would no doubt pass what they would ultimately become entitled to on the distribution(*h*); and any one entering into actual possession of the land upon or after the death of the owner would probably defeat any other title by remaining in for ten years(*i*). There is an

(*g*) Tomk. & Jen. Rom. Law, 205.
(*h*) *Tillie* v *Springer*, 21 Ont. R. at p. 587.
(*i*) R.S.O. cap. 133, sec. 7; *Re Williams*, 34 Ch. D. 558.

evident intention in this enactment to exclude the heir(*j*), so that he takes nothing except in the course of distribution from the administrator, and then only as next of kin(*k*).

Though the letters of administration are now the only possible evidence of title upon an intestacy, they are no better evidence of intestacy than they were before; and though payments made *bona fide* to an administrator whose letters are subsequently revoked are a discharge to the persons making them(*l*), this does not affect the title to the land.

From the passing of the Act in 1886 until its amendment in 1891, the title and powers of the personal representative (except where infants were concerned) were absolute and unrestricted. He had the same powers over realty that he had over personalty, and could make a good title to a purchaser and the heir or devisee was not able to make a good title(*m*). His right to sell did not depend on the existence of debts(*n*), but if he attempted to sell contrary to the desire of the beneficiaries, and there were no debts, he might have been restrained(*o*). He is not a trustee for sale, but has a discretionary power(*p*). He was, and still is, unable to exchange the land for other property(*q*).

The title of an administrator is purely statutory. It is the statute that vests the land in him. Once he becomes *personal* representative the statute vests the land in him. And although, before the amendments to be mentioned presently, the letters might have been limited to personalty, it is apprehended that the land still vested in him. In 1887,

(*j*) *Re Pilling's Trusts*, 26 Ch. D. 432.

(*k*) *Plomley* v. *Shepherd*, L.R. (1891) A.C. 244; *Re Reddan*, 12 Ont. R. 781.

(*l*) R.S.O. cap. 59, secs. 63, 64.

(*m*) *Martin* v. *Magee*, 18 App. R. 384.

(*n*) *Re Wilson & Tor. Incan. Electric Light Co.*, 20 Ont. R. at p. 403.

(*o*) *Ibid.*; *Re Mallandine*, 10 Occ. N. 226.

(*p*) *Re Fletcher's Estate*, 26 Ont. R. 499.

(*q*) *Tenute* v. *Walsh*, 24 Ont. R. 309.

however, *The Surrogate Courts Act* was amended, and now enacts as follows:—"A person entitled to take out letters of administration to the estate of a deceased person shall he entitled to take out such letters limited to the personal estate of the deceased, exclusive of the real estate"(*r*).

Section 21 of the same Act provides that "prohate and letters of administration hy whatever Court [*i.e.*, whatever Surrogate Court] granted shall, unless revoked, have effect over the property of the deceased in all parts of Ontario, subject to limitation under section 61 of this Act or otherwise." In 1891, *The Devolution of Estates Act* was amended by defining, qualifying and restricting the powers of personal representatives, and it was enacted that "this section shall not apply to any administrator where the letters of administration are limited to the personal estate, exclusive of the real estate"(*s*). It seems to he the comhined result of these enactments that letters limited to personalty do not now give a title to realty.

The title of executors is also purely statutory. That is to say, the nomination or appointment by will of an executor constitutes him a person in whom the statute vests the land, not only without a devise, but "notwithstanding any testamentary disposition" thereof. To such an extent is this true that, if two out of three executors prove the will, power to come in and prove being reserved to the third, the land rests in all three by virtue of the statute, and they must all join in a conveyance to a purchaser(*t*). But a renouncing executor would of course get no title.

Until 1887, and perhaps until 1891, then, the conclusion is thut a personal representative had a good and unqualified title, and was able, without the concurrence of beneficiaries to sell and convey to a purchaser, except when infants were concerned.

(*r*) R.S.O. cap. 59, sec. 61.
(*s*) Now R.S.O. cap. 127, sec. 16 (2).
(*t*) *Re Pawley & Lond. and Prov. Bank*, L.R. (1900) 1 Ch. 58.

But in 1891, an enactment was passed by which "executors and administrators in whom the real estate of a deceased person is vested under this Act shall be deemed to have as full power to sell and convey such real estate for the purpose, not only of paying debts, but also of distributing or dividing the estate among the parties beneficially entitled thereto, whether there are debts or not, as they have in regard to personal estate; provided always that where infants or lunatics are beneficially entitled to such real estate as heirs or devisees, or where other heirs or devisees do not concur in the sale [and there are no debts], no such sale shall be valid as respects such infants, lunaties or non-concurring heirs or devisees, unless the sale is made with the approval of the Official Guardian, etc."(*u*).

The effect of this enactment was to disable the personal representative (where there were no debts) from making a valid sale, (1) where the beneficiaries were infants or lunatics, (2) where any heir or devisee did not concur in the sale, unless the Official Guardian gave his approval. A sale might be made, however, where there were debts.

During this period, if there were debts, the former powers were unimpaired, but if there were no debts the concurrence of beneficiaries or of the Official Guardian was necessary.

In 1900 the words in brackets were struck out by amendment(*v*). Consequently, the clause now applies to all cases, and the powers of the personal representative are restricted accordingly. The concurrence of all heirs or devisees, or the approval of the Official Guardian, must therefore be procured in order that the personal representative may make a title. It is not only in cases of the refusal of the beneficiaries to concur that the Official Guardian's approval is necessary; the mere want of a concurrence for

(*u*) R.S.O. cap. 127, sec. 16 (1).
(*v*) 63 Vict. cap. 17, sec. 17.

any reason, whether the beneficiaries have been appealed to or not, disables the personal representative from making a good title, unless the Official Guardian approves.

Sales made prior to 4th May, 1891, the date of the amendment, by executors or administrators with the written consent of the Official Guardian, as required by section 8 (the clause providing for such approval when infants were concerned) are to be deemed valid as respects all the heirs and devisees, whether infants or adults, though there were no debts to be paid out of the proceeds(*w*).

It is further enacted that the written approval of the Official Guardian shall be sufficient to confirm such sales, both as to infants and adults, though there were no debts, in any case in which the value of "the infant's share" is under $50(*x*). This appears to be intended to enable the Official Guardian to confirm sales which he had not approved of at the time when they were made. It is not clear whether in order to enable him to approve, the whole interest of all the infants concerned must be under $50, or whether the share of each infant may be under $50, where there are more than one. The clause is drawn, in reality, to apply only to the case where there is one infant.

Sales made before the date mentioned in other cases, *i.e.*, where the approval of the Official Guardian was not required, are to be "adjudicated upon according to equity and good conscience, in view of all the circumstances, and every sale which has been made in good faith and for a fair consideration shall be held valid"(*y*). Finally, every sale made before the date mentioned is to be valid unless it was questioned in an action within one year from 4th May, 1891, except in any case where the approval of the Official Guardian was required and was not obtained(*z*).

(*w*) R.S.O. cap. 127, sec. 17 (1).
(*x*) *Ibid.* sec. 17 (2).
(*y*) *Ibid.* sec. 17 (3).
(*z*) *Ibid.* sec. 17 (4).

By section 18 of the Act, where a sale had been made before 4th May, 1891, no infant having been concerned, and any person beneficially entitled has received and accepted, or shall hereafter receive and accept, his share or supposed share of the purchase money, such acceptance shall be deemed a confirmation of the sale as respects such person. This seems to indicate that there are cases not provided for in section 17 which required confirmation. No case has arisen, or at least been reported, in which the effect of these clauses has been dealt with. There is a serious omission, if indeed any confirmation were necessary, in not providing that, where debts were paid out of the proceeds of land so sold, the sales should be confirmed.

From the year 1891 to the year 1902, whenever land was not sold by the personal representative, within a year from the death of the owner, it vested in the heirs or devisees beneficially entitled thereto without conveyance, unless the personal representative registered a caution, in which case the section would not apply for twelve months from the registration of the caution(*a*). In 1902 the Act was amended by extending this period to three years, and making it apply to the estates of persons who had died within one year before the passing of the Act(*b*). After the land vested in the beneficiaries under this clause, the personal representative had no further control over it. This lasted until 1893.

In 1893 another important amendment was made(*c*). By this amendment it is declared that "where executors or administrators have through oversight or otherwise, omitted to register a caution within twelve months after the death of the testator or intestate, as provided by the preceding section * * or have omitted to re-register a caution as

(*a*) R.S.O. cap. 127, sec. 13.
(*b*) 2 Edw. VII. cap. 17, sec. 3.
(*c*) R.S.O. cap. 127, sec. 14

required by the said section, they may register the caution in either case notwithstanding the lapse of the twelve months," on certain conditions. The conditions are that they should register an affidavit of verification, and

(2) "A further affidavit stating that they find or believe that it is or may be necessary for them to sell the real estate of the testator or intestate, (or the part thereof mentioned in the caution, as the case may be), under their powers and in fulfilment of their duties in that behalf;

(3) The consent in writing of any adult devisees or heirs whose property or interest would be affected; and,

(4) An affidavit verifying such consent; or,

(5) In the absence or in lieu of such consent, an order signed by a High Court Judge or County Court Judge, or the certificate of the Official Guardian approving of and authorizing the caution to be registered, which order or certificate the Judge or Official Guardian may make with or without notice, on such evidence as satisfies him of the propriety of permitting the caution to be registered; and the order to be registered shall not require verification, and shall not be rendered null by any defect or supposed defect of form or otherwise."

It is worthy of notice that the Official Guardian's certificate is expressly made available where adults are concerned. It is also worthy of observation that the property of infants is not expressly provided for at all. The consent of adult devisees or heirs is to be obtained, or in the absence and in lieu of *such consent*, the order of a Judge or the certificate of the Official Guardian. Consequently, where the circumstances are such that a consent could not be given, as in the case of infants, persons of unsound mind, tenants in tail, non-existent persons, etc., no order for a caution can be obtained.

The registration of a caution under this enactment is described by the fifteenth section of the statute as having

"the same effect as a caution registered within twelve months (now three years) from the death of the testator or intestate"; that is, it prevents the land from vesting in the beneficiaries. The magical effect of the statute, as described in its own words, then, is to prevent the property from vesting in the beneficiaries after it has vested in them, which, when expressed in the vernacular, will probably mean that the land re-vests in the executor or administrator.

This section, however, excepts from its operation, "persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees, or some of them; and save also and subject to any equities on the part of non-consenting heirs and devisees, or persons claiming under them for improvements made after the expiration of twelve months (now three years) from the death of the testator or intestate, if their lands are afterwards sold by such executors or administrators." Two classes of persons are here provided for: first, purchasers for value from heirs or devisees, and that apparently before as well as after the lapse of the twelve months (now three years) from the death of the *defunctus*. As to these the caution will not take effect. Secondly, non-consenting heirs or devisees, and those claiming under them, who have made improvements on the land after the twelve months. The land is taken from the heir or devisee, in so far as it can be by the caution, but the equity for improvements remains. In the second class are included "persons claiming under" the heirs or devisees. This would include purchasers for value, if their case had not already been provided for in the first class; and as the phrase professes to include a new class, it must therefore be confined to volunteers claiming under heirs and devisees, or their assigns in law. It must also include persons who have a partial interest only. For there is no provision for obtaining a subsequent caution except as

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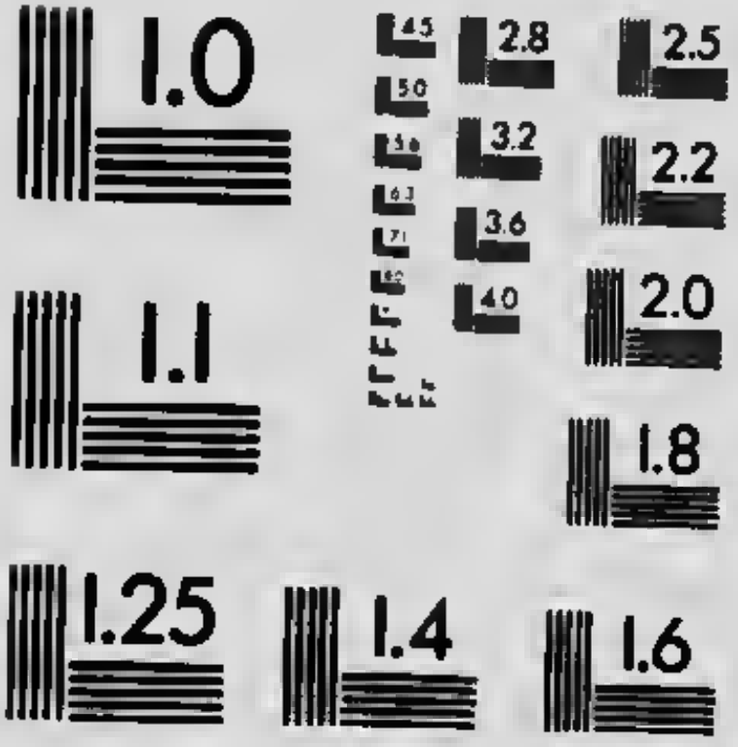

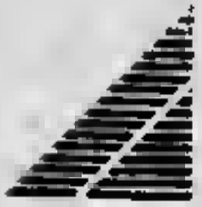

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against heirs and devisees. No caution can be obtained as against assigns. And therefore this clause seems to apply to a case where an heir or devisee still retains some estate or interest which he can give up by his consent, but a qualified interest remains in his assign, with an equity to protect his improvements.

The original Act, by its fourth section, was expressed to apply to the estates of persons dying before as well as after the passing of the Act, and also to the estates of persons dying before the Act of 1891. The latter Act had been held not to be retrospective; and the estate of a person dying before it was passed did not pass to the heir-at-law or devisee, and no caution was necessary. The effect of the fourth section of the Act of 1893, however, was to make it applicable to cases to which the former Act was not applicable at all; and great confusion necessarily resulted from this; but it was held, notwithstanding the express words of this section, that it did not make the former Act retrospective (*d*).

In 1902 it was enacted that the land of persons who died between 1886 and 1891, which had not been disposed of by personal representatives, should, at the expiration of one year from the passing of the Act, be deemed thenceforward to be vested in the heirs or devisees beneficially entitled thereto, or their assigns, without any conveyance from the personal representatives, unless the caution was registered within the year. If such a caution were registered, the Act was not to apply for one year from the registration.

"Where infants are concerned in real estate which, but for the preceding sections of this Act, would not devolve on executors or administrators, no sale or conveyance shall be valid under this Act without the written consent or approval of the Official Guardian of infants appointed

(*d*) *Re Baird*, 13 Occ. N. 277.

under *The Judicature Act*, or, in the absence of such consent or approval, without an order of the High Court''(*e*).

In order to make this clause operative the circumstances must be such that the land vests in the executors by virtue of the Act. Consequently, where there is a devise to executors on trust for infants, and the land would have vested in the executors apart altogether from the Act, this section does not apply, and the approval of the Official Guardian is not necessary(*f*).

Section 16 of the Act also provides that where land vests in executors *under the Act*, the Official Guardian must concur.

The Devolution of Estates Act was not intended to deprive a testator of the power of devising his land to executors or trustees upon trust. And therefore where there is a devise in trust for sale, the terms of the trust must be observed, notwithstanding the Act, and the land will not vest under the shifting clause(*g*).

The effect of the Act is not to make any change in the order of administration(*h*), except where there is a residue consisting of realty and personalty, out of which debts are to be paid, in which case the debts are to be paid ratably out of the real and personal property comprised in the residue according to their respective values(*i*).

The rule as to mortgaged land remains the same, the heir or devisee taking it subject to the charge(*j*), unless the testator expressly exonerates it(*k*).

(*e*) R.S.O. cap. 127, sec. 8.

(*f*) *Re Booth's Trusts*, 16 Ont. R. 429.

(*g*) *Re Koch & Wideman*, 25 Ont. R. 262; *Re Hewett & Jermyn*, 29 Ont. R. 383; *Mercer* v. *Neff*, 29 Ont. R. 680. See also *Re Beverley*, L.R. (1901) 1 Ch. 681.

(*h*) *Re Hopkins*, 32 Ont. R. 315.

(*i*) R.S.O. cap. 127, sec. 7.

(*j*) *Mason* v. *Mason*, 13 Ont. R. 725.

(*k*) *Scott* v. *Supple*, 23 Ont. R. 393.

3. *Wills.*

Where title is derived under a will, the probate or a copy sealed with the seal of the Surrogate Court(*l*), or if it is registered perhaps a copy certified by the Registrar(*m*), will ordinarily be sufficient proof of the will; and the purchaser's solicitor may, as in the case of a deed, presume due execution according to the purport of the will. Since *The Devolution of Estates Act* the probate is as good evidence of title to land as it formerly was of title to personal estate(*n*). A will proves itself upon production when it is thirty years old, computing the time from its date and not from the death of the testator(*o*).

(i) *Before 1874.*

Different modes of execution have been prescribed at various times, and care should be taken to observe the mode of execution in every case. By the Statute of Frauds it was declared that all wills should be signed by the testator or some other person in his presence and by his express direction; and should be subscribed in his presence by three or four credible witnesses. A witness was not credible within the meaning of the statute if he took a beneficial interest under the will, and so for want of a credible witness in such cases, the will was void. This was altered, however, by declaring void the legacy, and so making the witness competent.

By a statute of 1834(*p*), any will executed after the 6th March, 1834 (and by *The Wills Act*(*q*) confined to the

(*l*) R.S.O. cap. 59, sec. 4.

(*m*) R.S.O. cap. 136, sec. 28.

(*n*) *Per* Maclennan, J.A., *Spoule* v. *Watson*, 23 App. R. at p. 702.

(*o*) *Mann* v. *Ricketts*, 7 Reav. 93; *Iler* v. *Elliott*, 32 U.C.R. at p. 440, *ad fin.*

(*p*) C.S.U.C. cap. 32, sec. 13.

(*q*) R.S.O. cap. 128, sec. 5.

period ending on the 31st December, 1873), in the presence of and attested by two or more witnesses was declared to have the same validity and effect as if executed in the presence of and attested by three witnesses; and it was also declared to be sufficient if such witnesses subscribed their names in presence of each other, although their names might not be subscribed in the presence of the testator. It was held that this enactment did not repeal the Statute of Frauds, but that both might subsist together: so that a will subscribed by witnesses in accordance with either Act was sufficiently attested(*r*).

(ii) *After 1st January, 1874.*

By the Wills Act of 1873(*s*) it is enacted that "no will shall be valid unless it is in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary." Former statutes were repealed, and the mode of execution prescribed by this statute is therefore the only mode now existing. Unless otherwise expressly provided, this enactment does not extend to any will made before the first day of January, 1874; but every will re-executed or re-published, or revived by any codicil, is deemed to have been made at the time at which the same was so re-executed, re-published or revived(*t*).

(*r*) *Crawford* v. *Curragh*, 15 C.P. 55; *Little* v. *Aikman*, 28 U.C. R. 343. But see *Ryan* v. *Devereux*, 26 U.C.R. 107.

(*s*) R.S.O. cap. 128, sec. 12.

(*t*) R.S.O. cap. 128, sec. 7.

(a) *Attestation.*

The witnesses need not sign their names in full; it is sufficient if they write their initials or a description, or make their mark(*u*); but a seal is insufficient(*v*). And they must sign their own names. So, where one of the witnesses signed his name, and the other signed her husband's name at the request of the deceased, the husband not being present and being unable to write, the will was held to be insufficiently attested(*w*).

They must sign in the presence of the testator; but it is sufficient if they sign under such circumstances that the testator might have seen them if he had chosen to look, though he may not in fact have seen them sign(*x*). But where a testatrix signed in the presence of two witnesses, who twenty minutes afterwards put their names to the paper in an adjoining room, the door of which was open, but in such a position that they were out of sight of the testatrix, and she was not conscious that they were signing the paper, it was held that the attestation was insufficient(*y*).

But where there is an attestation clause stating that the witnesses have signed in presence of the testator there is a strong presumption in favour of the regularity of the attestation and due execution of the will; and even where one of the witnesses in such a case swore that the attestation had taken place in an attorney's office, and not in the house of the testator where the will had been signed, the Court declined to act upon his recollection, and decreed probate of the will as duly executed(*z*). So, where the wit-

(*u*) Theob. Wills, 5th Ed. 32.

(*v*) *Ibid.*

(*w*) *In bonis Leverington*, 11 P.D. 80.

(*x*) *Scott* v. *Scott*, 13 Ont. R. 551.

(*y*) *Jenner* v. *Finch*, 5 P.D. 106.

(*z*) *Wright* v. *Rogers*, 1 P. & M. 678. See also *Wright* v. *Sanderson*, 9 P.D. 149.

nesses acknowledged their signatures, but had no recollection of having signed the paper, nor of ever having seen it before, the attestation was held to be sufficient, on the principle that all things are presumed to be rightly done, unless there is reasonable ground shown for doubting it(*a*).

The witnesses must sign with the intention of subscribing to the execution; their signatures need not be in any particular part of the will, but will suffice wherever placed if intended to attest the operative signature of the testator(*b*). Where a will was written on one page of foolscap at the end of which the deceased's signature appeared with the words "witness William Hatton," and the names of three other persons appeared under a memorandum not testamentary at the top of the second page of the sheet, the Court came to the conclusion that the three names were not signed with the intention of attesting the will(*c*). So, where a will was written on ten sheets of paper, the first nine being initialled by the deceased whose signature appeared at the end of the tenth, it was held that the signatures of two out of three witnesses on the first nine pages, and that of the third on the tenth, did not amount to a proper attestation(*d*). But where the witnesses signed opposite several alterations in the will, but not underneath the attestation clause, the attestation was held to be sufficient, the Court being convinced that the intention was to attest the execution of the will(*e*). And where a will was written across the second and third pages of a sheet of note paper, and the attestation clause and the signatures of the testator and witnesses were written on the back of the paper, the will having been writ-

(*a*) *Woodhouse* v. *Balfour*, 13 P.D. 2.

(*b*) *Phipps* v. *Hale*, 3 P. & M. 168.

(*c*) *In bonis Wilson*, 1 P. & M. 269. See also *In bonis Dilkes*, 3 P. & M. 164.

(*d*) *Phipps* v. *Hale*, 3 P. & M. 166. See also *In bonis Dilkes*, 3 P. & M. 164; *In bonis Anstee*, L.R. (1893) P. 283.

(*e*) *In bonis Streatley*, L.R. (1891) P. 172.

ten by the testator in the presence of the witnesses immediately before execution, it was held that it was properly executed(*f*). But the attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that on which the testator's signature appears(*g*). So, where a will was written on the first page of a sheet of foolscap, and a codicil was written on the third page, but on account of the attestation clause reaching to the foot of the page there was no room for the signature of the witnesses, and they consequently signed on the second page opposite to the attestation clause, their signatures being preceded by the word "witness," it was held that the codicil was well attested(*h*). And when sheets of paper are found fastened together it is presumed that they were so fastened together when executed, unless there is evidence to the contrary(*i*). A separate paper may, however, be incorporated with the will by reference(*j*).

Where there were two witnesses, and opposite the signature of one was the word "executor," and opposite the other the word "witness," it was held that the execution was valid, the executor having evidently intended his signature as an attestation(*k*).

Writing a christian name only, the witness through feebleness being unable to finish, and then striking out the name, is not a sufficient attestation: nor is it sufficient for a witness to trace a previous signature with a dry pen(*l*). And where one of two witnesses made a mark in attestation of the signature of the deceased, and the other witness

(*f*) *In bonis Archer*, 2 P. & M. 252. See also *In bonis Horsford*, 3 P. & M. 211.

(*g*) *In bonis Braddock*, 1 P.D. 435; *In bonis Hatton*, 6 P.D. 204; *In bonis Pearse*, 1 P. & M. 382.

(*h*) *Woodhouse* v. *Balfour*, 13 P.D. 2.

(*i*) *Rees* v. *Rees*, 3 P. & M. 84.

(*j*) *In bonis Mercer*, 1 P. & M. 91.

(*k*) *Griffiths* v. *Griffiths*, 2 P. & M. 300.

(*l*) *In bonis Maddock*, 3 P. & M. 169.

then wrote the names of the deceased and of the first witness opposite their respective marks, but did not subscribe his own name, it was held that the execution was invalid(*m*).

It is necessary that the witnesses should see the testator sign his name, or should see his signature if he acknowledges it(*n*). And if the witnesses see the testator in the act of writing what may be presumed to be his signature, and then attest it, the execution is valid, though they may not have seen the signature and there was no acknowledgment(*o*). But where there was no formal attestation clause and no affirmative evidence that at the time of execution the deceased's name was on the paper, the mere production of it to witnesses with a request that they should sign it was held not to be sufficient(*p*).

A devise or bequest to a witness or the husband or wife of a witness is void(*q*), but the witness shall be admitted to prove the will(*r*); and where any real or personal estate is charged with debts, any creditor, or the wife or husband of any creditor, whose debt is so charged who attests the will shall be admitted as a witness to prove the execution or the validity or invalidity of the will(*s*); and the executor is not an incompetent witness by reason of his being an executor. Where there are three witnesses to a will, two being sufficient, a devise to one of them is nevertheless void(*t*). But where a third person signed with the wit-

(*m*) *In bonis Eynon*, 3 P. & M. 92.

(*n*) *In bonis Gunstan*, 7 P.D. 102. See *Wright* v. *Sanderson*, 9 P.D. 149.

(*o*) *Smith* v. *Smith*, 1 P. & M. 143; *In bonis Huckvale*, 1 P. & M. 375.

(*p*) *Fischer* v. *Popham*, 3 P. & M. 246. See also *Morritt* v. *Douglas*, 3 P. & M. 1; *Inglesant* v. *Inglesant*, 3 P. & M. 172.

(*q*) *Munsie* v. *Lindsay*, 1 Ont. R. 164; *Hopkins* v. *Hopkins*, 3 Ont. R. 223.

(*r*) R.S.O. cap. 128, sec. 17.

(*s*) Sec. 18.

(*t*) *Little* v. *Aikman*, 28 U.C.R. 337.

nesses, but the Court was convinced that she did not sign as a witness, her signature was rejected, and being residuary legatee, she was held entitled to her legacy(*u*).

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(*v*).

(b) *Execution.*

By the Wills Act(*w*), the signature of the testator is required to be at the foot or end of the will; but as regards its position, it is valid if it 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(*x*); and no such will is to be affected by the circumstance that the signature does not follow, or is not immediately after the foot or end of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature(*y*), or by the circumstance that the signature is placed among the words of the *testimonium* clause, or of the clause of attestation(*z*), 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

(*u*) *In bonis Sharman*, 1 P. & M. 661; *In bonis Smith*, 15 P.D. 2; *Re Sturgis*, 17 Ont. R. 342. See also *Dunn* v. *Dunn*, 1 P. & M. 277.

(*v*) R.S.O. cap. 128, sec. 16.

(*w*) R.S.O. cap. 128, sec. 12.

(*x*) *In bonis Williams*, 1 P. & M. 4; *In bonis Coombs*, 1 P. & M. 302. Signature on the margin is bad; *In bonis Hughes*, 12 P.D. 107; but on the back has been held good; *In bonis Fuller*, L.R. (1892) P. 377.

(*y*) *Hunt* v. *Hunt*, 1 P. & M. 209.

(*z*) *In bonis Casmore*, 1 P. & M. 653; *In bonis Pearn*, 1 P.D. 70. Where a clause appointing executors appeared below the testator's signature it was rejected; *In bonis Dollow*, 1 P. & M. 189.

or one of the names of the subscribing witnesses(*a*), 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 these circumstances is not to restrict the generality of the enactment. But no signature under the Act shall be operative to give effect to any disposition or direction which is underneath or which follows it(*b*), nor shall it give effect to any disposition or direction inserted after the signature was made(*c*).

"No obliteration, interlineation or other alteration made in any will after the 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"(*d*). A memorandum amounting to a codicil and effecting an alteration in the meaning of the will is not to be treated as an alteration in the will within the meaning of this section, so as to permit of valid execution in the margin(*e*).

(*a*) *In bonis Puddephatt*, 2 P. & M. 97.

(*b*) *In bonis Wotton*, 3 P. & M. 159; *In bonis Ainsworth*, 2 P. & M. 159; *Margary* v. *Robinson*, 12 P.D. 8.

(*c*) *In bonis Arthur*, 2 P. & M. 273.

(*d*) R.S.O. cap. 128, sec. 23.

(*e*) *In bonis Hughes*, 12 P.D. 107.

Alterations made before the execution of a codicil are confirmed by the codicil(*f*).

The testator must sign in the actual visual presence of the witnesses. In one case, a testatrix signed her will in a shop, and one witness who saw it signed attested it, but the other witness was engaged at the other side of the shop, and a customer stood between him and the testatrix. The second witness did not see the will signed. After the customer had left the shop, the testatrix asked the second witness to go to the counter where the will had been signed. He did so, and the testatrix said, "This is my will. I have signed it. Miss J. has signed it. Will you sign it?" He then signed. At this time the first witness was engaged with a customer, and did not see the second witness signing. It was held that the will was not executed in the presence of the second witness(*g*).

Where the witnesses could not recollect whether the testator's name was written before they signed or not, and at the time of the attestation the deceased did not refer to the paper as a will, probate, on motion, was refused, but the Court allowed the paper to be propounded(*h*). In another case, where a testator asked one person to attend and witness his will, and another to attend and witness a paper; and at the time and place appointed produced a paper so folded that no writing could be seen, and explained that in consequence of his wife's death it was necessary to make a change in his affairs, and asked them to sign, which they did, it was held that the will was well executed, though he did not sign in their presence, nor did they see his signature(*i*). But this case was disapproved of subsequently, the

(*f*) *Tyler* v. *Merchant Taylors' Co.*, 15 P.D. 216.

(*g*) *Brown* v. *Skirrow*, L.R. (1902) P. 3.

(*h*) *In bonis Swinford*, 1 P. & M. 630. See also *Pearson* v. *Pearson*, 2 P. & M. 451; *Wyatt* v. *Berry*, L.R. (1893) P. 5.

(*i*) *Beckett* v. *Howe*, 2 P. & M. 1. See also *In bonis Pearn*, 1 P. D. 70; *Daintree* v. *Fasulo*, 13 P.D. 67; *In bonis Colyer*, 14 P.D. 48.

Court of Appeal holding that in order to make an acknowledgment good, the witnesses must see the signature(*j*).

There is a strong presumption, however, in favour of execution, when the will and attestation clause appear to be regular. Thus, where a holograph will was written on one sheet of paper, and the attestation clause, containing the signature of the testator, was on a second sheet, and stated that the will had been signed by the testator in presence of the witnesses, it was presumed that the will had been properly executed, though one witness only made an affidavit stating that the signature of the testator had been made before the witnesses were asked to sign. The Court was of opinion also that acknowledgment had been proved, the testator having said to the witnesses "I want both of you to sign this"(*k*). And even where there was no attestation clause, and both witnesses were dead, but the handwriting of one of them was proved, the Court admitted the will to probate(*l*).

(e) *Miscellaneous.*

By the Wills Act it is also declared that no appointment made by will, in exercise of any power, shall be valid unless it is executed in the manner prescribed by the section already quoted; and every will executed in the manner prescribed by the Act shall so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it has been expressly required that a will made in exercise of such power shall be executed with some additional or other form of execution or solemnity(*m*).

By *The Trustee Act*(*n*) provision is made for the sale and mortgage by executors and administrators with the will

(*j*) *In bonis Grimstan*, 7 P.D. 102.
(*k*) *In bonis Moore*, L.R. (1901) P. 44.
(*l*) *In bonis Peverett*, L.R. (1902) P. 205.
(*m*) R.S.O. cap. 128, sec. 13.
(*n*) R.S.O. cap. 129, secs. 16 to 25.

annexed of lands devised, where the testator has not expressly conferred the necessary powers by his will or where he has not devised a sufficient estate(*o*); and powers of assigning and discharging mortgages were also thereby given to personal representatives(*p*).

No will made by any person under the age of twenty-one years is valid.

(iii) *Married women.*

Before the consolidated statute respecting the property of married women a will made by a married woman without her husband's assent(*q*) was void, except in the following cases. A married woman who was an executrix might make a will appointing an executor for the purpose of continuing the succession(*r*); and where she was donee of a power exercisable by will she might so exercise the power(*s*). And there is incident to equitable separate estate the power of disposing of it either by deed or by will unless the married woman is restrained from alienating. So that a married woman could always dispose of such property by will(*t*).

By the consolidated statute it was declared that from and after the fourth day of May, 1859, every married woman might by devise or bequest executed in the presence of two or more witnesses, neither of whom was her husband, make any devise or bequest of her separate property, real or personal, or of any rights therein, whether acquired

(*o*) See *Yost* v. *Adams*, 13 App. R. 129.

(*p*) R.S.O. cap. 121, secs. 11, 12, 13.

(*q*) *Willcock* v. *Noble*, 8 Ch. App. 778; 7 H.L. 580; *Smith* v. *Smith*, 5 Ont. R. 690.

(*r*) *Scammell* v. *Wilkinson*, 2 East 552; *In bonis Richards*, 1 P. & M. 156.

(*s*) *Driver* v. *Thompson*, 4 Taunt. 294; *Willcock* v. *Noble*, L.R. 7 H.L. 580; *Wright* v. *Englefield*, Amb. 468; S.C. *sub. nom. Wright* v. *Cadogan*, 2 Eden 239.

(*t*) *Taylor* v. *Meads*, 4 D. J. & S. 597; *Pride* v. *Bubb*, 7 Ch. App. 64; *Cooper* v. *Macdonald*, 7 Ch. D. 288.

before or after marriage, to or among her child or children, issue of any marriage, and failing there being any issue, then to her husband, as she might see fit, in the same manner as if she were sole and unmarried; but her husband was not to be deprived of any right he might have acquired as tenant by the curtesy(*u*). It will be observed that there is no direction in this Act as to any formal attestation or subscription by the witnesses.

This statute clearly restricted the right of a married woman to devise her separate estate in any other way than that prescribed by the statute; and so where a married woman made a testamentary disposition to her husband in trust to convert the property and out of the proceeds to pay a legacy to her only child, another to her husband, and to divide the residue amongst her brothers and sisters, it was held that except as to the legacy to her child the will was void; and as to the residue over and above that legacy she died intestate(*v*). Whether under this Act a married woman could devise her separate estate to one or more of her children to the exclusion of others was doubtful(*w*). The fact that her husband was in possession of property belonging to a married woman before the Act of 1859 took effect was held to be no obstacle to her right to devise it under this Act(*x*).

By the Wills Act of 1873(*y*) "person" and "testator" included a married woman, and consequently the powers of a married woman to devise her land were under that Act

(*u*) C.S.U.C. cap. 73. sec. 16.

(*v*) *Mitchell* v. *Weir*, 19 Gr. 568.

(*w*) *Munro* v. *Smart*, 26 Gr. 37. *Cf. Re Ontario L. & S. Co. & Powers*, 12 Ont. R. 582, and cases there cited.

(*x*) *Re Hilliker*, 3 Ch. Ch. 72.

(*y*) 36 Vict. cap. 20, sec. 4.

unrestricted. This clause was omitted from the revision of 1887(*z*), but appeared again in the revision of 1897(*a*).

During the period between 1887 and 1897, the only statutory authority for a married woman to make a will was contained in *The Married Women's Property Act*, and that was confined to separate estate. Whether or not the wills of married women made during that period of land which was not separate estate are valid, has never been determined. Whatever may be the result, it appears to be clear that if any such will was held to be valid, and came to be interpreted it would not have the benefit of the statutory rules as to interpretation contained in *The Wills Act*. This conclusion seems to be strengthened by the fact that in 1897 section twenty-six of *The Wills Act* was amended by making it specially applicable to the wills of married women, in order to enable them to pass after-acquired separate estate(*b*).

The disability of coverture has been removed by this enactment; but the disability of infancy remains. Consequently a married woman under twenty-one cannot make a valid will(*c*).

(iv) *Registration.*

By *The Registry Act*(*d*), a will must be registered within twelve months next after the death of the testator, unless the devisee or person interested in the lands devised is disabled from registering it by reason of the contesting of the will or other inevitable difficulty without his or her wilful neglect or default; and if so disabled then within twelve months after the removal of the impediment.

(*z*) The omission was probably a mistake, as the *Trustees and Executors Act*, R.S.O. (1887) cap. 110, sec. 1, gave "person" and "testator" the meaning assigned to them by the Wills Act.

(*a*) R.S.O. cap. 128, sec. 9, sub-sec. 5.

(*b*) R.S.O. cap. 128, sec. 26 (2).

(*c*) *Re Murray Canal*, 6 Ont. R. 685.

(*d*) R.S.O. cap. 136, sec. 89.

Infancy is not an inevitable difficulty within the meaning of this Act(*e*); and the conveyance by the heir-at-law to a purchaser for valuable consideration(*f*), without notice of the will and registered before it, took priority over the will if it was not registered within the prescribed time(*g*).

It has also been held that destruction of a will about eleven months after the testator's death by his widow, who burned the will so as to enable her to raise money on the land, was not an inevitable difficulty within the meaning of the Act, though, if it had been destroyed immediately after his death, it might have been. Proudfoot, V.C., said, "To render a difficulty of that kind inevitable, it would need to be one extending over the whole period of twelve months named in the statute. * * Had the will in this case been concealed, or suppressed, or destroyed immediately upon the testator's death, it is quite possible that the devisee would be unaffected by the failure to register"(*h*).

When the copy of a will, or of letters probate, or letters of administration has attached to it, when presented for registration, an affidavit or declaration by the executor or administrator to the effect that after the making of the will the testator parted with lands in the will described by local description, and that it was not intended or desired that the registration of the will should affect such lands, and if it appears by the registered entries respecting such lands that the testator had parted with all his interest in or title to such lands, the Registrar shall not register, copy or enter the will as an instrument affecting such lands(*i*).

(*e*) *McLeod* v. *Truax*, 5 O.S. 455.

(*f*) *Bondy* v. *Fox*, 29 U.C.R. 64; *Doe d. Ellis* v. *McGill*, 8 U.C. R. 224.

(*g*) *Mandeville* v. *Nicholl*, 16 U.C.R. 609; *Stephen* v. *Simpson*, 12 Gr. 493; 15 Gr. 594.

(*h*) *Re Davis*, 27 Gr. 203.

(*i*) R.S.O. cap. 136, sec. 70, sub-sec. 2

CHAPTER XIII.

CONVEYANCES BY MARRIED WOMEN.

1. *Defective certificates.*
2. *Joinder of the husband.*
3. *Statutory separate estate.*
4. *Tenancy by entireties.*
5. *Summary.*

1. *Defective certificates.*

Before the 29th March, 1873, a married woman could not make a valid conveyance of her land unless she was examined before a Judge, two Magistrates or a Notary Public as to her consent to convey without any coercion on the part of her husband(*j*). A certificate of the examination and her willingness to convey was required to be endorsed upon the conveyance; and so strict were the requirements of the law that an informality or irregularity in carrying them out rendered the whole conveyance void. From time to time various statutes were passed respecting the conveyance of land by married women(*k*), but the necessity for their separate examination remained until the 29th March, 1873, when an Act was passed declaring that every conveyance theretofore executed by a married woman of or affecting her real estate, in which her husband had joined, should be taken and adjudged to be valid and effectual to

(*j*) This remark does not apply to separate estate, which is dealt with hereafter.

(*k*) See them collected in *Elliott* v. *Brown*, 2 Ont. R. 356.

have passed the estate of the married woman professed to be passed by the conveyanee, 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 theretofore in force(*l*).

The result of this Act was to make valid all conveyances by married women which before the Act were void for want of the proper certificates or for any informality therein, except in certain cases. The exceptions are contained in sub-section two of section six of the revised Act, and may be stated as follows:—1. When a valid deed has been made by the married woman after the void conveyance, and before the 29th March, 1873. In this case the void deed is 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 29th March, 1873, and was on that date in the actual possession or enjoyment thereof. 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 the conveyance on 29th March, 1873.

With respect to the second exception but little need be said. The statute would probably have been held not to extend to the case of a conveyance executed *male fide*, even if the case had not been expressly excepted.

The purchaser should be careful to inquire, whenever he meets with a conveyanee made by a married woman before 29th March, 1873, whether it falls within either the first or third exception. If it does, he must observe whether the requirements of the law in force at the time of its execu-

(*l*) 36 Vict. cap. 18, sec. 12; R.S.O. cap. 165, sec. 6.

tion were strictly complied with; and if he finds that they were not, then the deed must be rejected as void.

A good deal of discussion took place in *Elliott* v. *Brown*(*m*) as to the meaning of the expression "actual possession and enjoyment contrary to the terms of such conveyance." In that case the plaintiff claimed the east half of a lot through a defective conveyance executed by a married woman who owned the whole lot. After the conveyance, in 1866, her two sons went into actual possession of the west half upon the understanding that they were to have the whole lot; they paid the married woman fifty dollars therefor, but no conveyance was made to them until after the Act was passed. The sons resided on the west half at the time the Act was passed, but had been, and then were, in the habit of making frequent incursions into the east half of the lot and cutting timber thereon; and they paid taxes on the whole lot. An attempt had been made by the plaintiff to exercise acts of ownership on the east half before the statute, but his right had been disputed and in consequence he had desisted. In the Queen's Bench Division it was held Cameron, J., dissenting, that the possession or enjoyment of the married woman or those claiming under her which was necessary to prevent the operation of the statute must have been that sort of possession which would, under the Statute of Limitations, have extinguished the paper title. In the Court of Appeal this decision was reversed, Osler, J.A., dissenting. It was there held that open and notorious acts of ownership in assertion of the right to possession under the legal title were sufficient to prevent the operation of the statute. This result is unfortunate, as it throws upon the conveyancer the very grave responsibility of adjudicating upon evidence of enjoyment which must ever be of a most unsatisfactory nature while the statute is satisfied by anything short of that open, visible and notorious posses-

(*m*) 2 Ont. R. 252; 11 App. R. 228.

sion, or enjoyment equivalent thereto, which amounts to exclusion of any other claimant. It is quite possible for acts of ownership to be openly exercised by both parties, neither being able to exclude the other, and each asserting a right to the enjoyment of the land; and in a conflict between the grantee under a void conveyance and the married woman, if the acts of ownership by the latter are to be referred to a rightful title and to be considered as contrary to the terms of the void conveyance, the statute will not operate to validate the conveyance though the enjoyment by the married woman has not been greater in degree than that of the grantee.

In cases within the first exception the Legislature recognizes the fact that the grantee in a subsequent valid conveyance is in constructive possession of the land under his legal title; and in order to validate the prior defective conveyance there must have been actual continuous possession or enjoyment for three years immediately prior to the passing of the Act. In cases within the third exception, the Legislature does not regard the married woman as in such constructive possession that there must have been actual possession in her grantee to avoid her title, but requires of the married woman or those claiming under her actual possession or enjoyment as against the grantee.

Thus the symmetry of the Act requires, and the intention of the Legislature appears to be, that the grantee under the defective conveyance should be considered as so constructively in possession that actual possession, or its equivalent in actual enjoyment, is required to oust him. If that be so, then the actual possession or enjoyment under the third exception must necessarily be the same kind of possession or enjoyment as is required under the first exception.

It is true that the first exception speaks of continuous possession or enjoyment; but this refers to the time rather

than to the mode of enjoyment. The three years must have been three consecutive years preceding the Act. In the third exception the married woman might have enjoyed the land at different times before the Act, but the strict reading does not require more of her than that she should have been in actual possession or enjoyment at the time of the passing of the Act. To permit any single act of enjoyment previous to the Act to be constructively extended to the time of the passing of the Act seems to be strangely at variance with its declaration that there must have been actual and not constructive possession, or actual and not constructive enjoyment, on the day on which it came into force.

This leads to another consideration at variance with the principle of *Elliott* v. *Brown*. The statute provides two alternatives, actual possession or actual enjoyment. If it is necessary in any case to establish actual possession by the married woman it will not suffice to prove constructive possession. Hence, when the married woman, or anyone claiming under her, relies upon actual possession, it will not be sufficient to establish in evidence isolated acts of ownership, even though they are contrary to the terms of the deed. Because such acts of ownership may be exercised concurrently with similar acts of ownership by the grantee; and in such a case she is not in actual possession unless each individual act of ownership is constructively extended beyond its actual duration in order to make her successive possessory acts equivalent to actual possession. If successive isolated possessory acts are equivalent to ouster of her grantee, then similar acts on the part of the grantee must in turn amount to ouster of the married woman; and unless she has at the time of the passing of the Act physical possession of the land she cannot, where such a state of facts occurs, be deemed to be in possession within the meaning of the Act. To say that she is constructively in possession by virtue of her paper title, and that isolated acts of ownership

may be so constructively extended, is against the spirit of the Act which retrospectively declares the void deed *to have passed* the estate to her grantee, regards the grantee, therefore, as having been in constructive possession, and requires actual possession, which must mean exclusive possession amounting to ouster of her grantee, in order to prevent the operation of her deed. This is strikingly in contrast with the first exception in the statute, where the void deed and a subsequent valid deed are in competition, the grantee in the void deed being required to establish three years' actual possession as against the constructive possession of the grantee claiming under the valid deed. Where the conflict is between the grantee and the married woman, possession need not have been taken by the grantee at all, but actual possession must have been had by the married woman at the time the Act was passed. If we admit any possessory acts short of continuous possession by the married woman to satisfy the statute, simply because they are contrary to the terms of her deed, then the principle being admitted, the evidence tends only to show the degree in which ownership has been exercised. And it will suffice upon this reasoning to show one individual act of ownership contrary to the terms of her deed, which being constructively extended beyond its actual duration puts the married woman constructively in possession at the time of the passing of the Act and so prevents its operation. This, it is submitted, was not the intention of the Legislature when it expressly provided for actual possession by the married woman or those claiming under her at the date of its enactment. It is therefore submitted that if actual possession is relied upon it must be that continuous, physical, open and notorious possession which amounts to ouster of the person claiming under the defective conveyance.

But the statute provides another alternative. Actual enjoyment of the land by the married woman at the date of

the passing of the Act will be sufficient to prevent its operation. This actual enjoyment must be the equivalent of actual possession. The assumption that any enjoyment less than the equivalent of actual possession will suffice is illogical; for actual possession is only a high degree of actual enjoyment, and the alternatives of the statute are upon this hypothesis a greater or less degree of enjoyment. If then any enjoyment of the land not equivalent to actual possession will satisfy the statute, it will always be sufficient to give evidence of such enjoyment, and consequently it will never be necessary to give evidence of actual possession or its equivalent. In other words, it will never be necessary to give evidence of the greater degree of enjoyment, when evidence of a less degree will suffice. Therefore, the provision of the statute that actual possession shall prevent its operation is entirely superfluous, and we must regard the Legislature as having provided for a quantum of proof which was never intended to be given.

Again, if the evidence of actual enjoyment amounts to what may be otherwise called constructive possession, then it is not sufficient, for the statute requires that if possession is relied upon, it must be actual possession. And if, when actual enjoyment is relied upon, a succession of isolated possessory acts is shown, the statute is still not satisfied because it requires a greater degree of possession, namely, actual possession, which, as we have seen, must mean physical exclusive possession.

It may be truly said that actual enjoyment must always be something less than actual possession; and no doubt it is difficult to say what actual enjoyment there can be which would be the equivalent of, without being in fact, actual possession. But it is not impossible to imagine such enjoyment. For instance, if a dam were built upon a stream below the land, so as to pen back the water and cause it to overflow the land, there would be actual and continuous

enjoyment of the land equivalent to, without in fact being, actual pedal possession; and no doubt other modes of enjoyment might be suggested.

In 1896 another statute was passed (*n*), by which it is enacted that every conveyance before 29th March, 1873(*nn*), executed by a married woman of or affecting her real estate shall, notwithstanding that her husband did not join therein, be taken to have been valid and effectual to have passed the estate which such conveyance professed to pass of such married woman in the said real estate. Nothing being said by this section as to the want of a certificate, it is presumed that the section validates such deeds, although no certificate appears therein. It is also to be observed that the husband's interest would not pass under such a deed.

The enactment is subject to the same exceptions as those which are made to the prior validating enactment.

2. *Joinder of the husband.*

It was necessary before 1st July, 1884(*o*), in all cases in which a married woman conveyed that her husband should join in the conveyance as a party(*p*) unless the property conveyed was her separate estate, either statutory or equitable, or unless his concurrence was dispensed with by order of a Judge. It was also necessary that the husband should be a granting party, for the purpose of conveying his own interest in the land(*q*). And it was held before *The Conveyancing and Law of Property Act, 1886*, that he could not accept a conveyance from his wife although he was a party thereto and executed it. His concurrence was

(*n*) Now R.S.O. cap. 165, sec. 7.

(*nn*) Amended so as to include all such conveyances before July, 1884; 63 Vict. cap. 17, sec. 21.

(*o*) See as to the effect of the Act of that date, *postea*, p. [illegible].

(*p*) R.S.O. (1877) cap. 127, sec. 3; *Foster* v. *Beall*, 15 Gr. 246.

(*q*) *Doe d. McDonald* v. *Twigg*, 5 U.C.R. 167.

necessary for her protection, and by becoming his wife's grantee he was placed in an adverse position to her, and so he had no protection from imposition or improvidence(*r*).

It since that Act a wife may convey freehold land direct to her husband, and a husband to his wife(*s*).

Before the Act of 1884, it appears that a married woman whose husband was under imprisonment for felony might during his imprisonment convey as a *feme sole*(*t*).

The husband alone could always convey his marital interest in the land of his wife(*u*); and so, where a conveyance of her property was made by a wife who was under twenty-one years of age, her husband joining, it was held sufficient to convey the husband's interest, although void as to the wife's(*v*).

The consolidated statute respecting the property of married women(*w*) did not give to a married woman the right to dispose of her property without her husband's consent, nor did it affect his estate by the curtesy; and it was not intended to effect any change in the mode of conveyance by married women(*x*). The law remained thus until the 2nd of March, 1872. And therefore, as to all property acquired by a married woman during coverture, or owned by her at the time of her marriage, before that date, it was up to 1st July, 1884, necessary that the husband should join as a granting party to validate her conveyance.

The Married Women's Property Act, 1872, made a change in the law which upon the revision of the statutes in 1877 was restricted in its operation to women married after the 2nd March, 1872(*y*). And so, as to women mar-

(*r*) *Ogden* v. *McArthur*, 36 U.C.R. 246.
(*s*) 40 Vict. cap. 20, sec. 6; now R.S.O. cap. 119, sec. 37.
(*t*) *Crocker* v. *Sowden*, 33 U.C.R. 397.
(*u*) *Allan* v. *Levesconte*, 15 U.C.R. 9.
(*v*) *Doran* v. *Reid*, 13 C.P. 393.
(*w*) C.S.U.C. cap. 73.
(*x*) *Emrick* v. *Sullivan*, 25 U.C.R. 105.
(*y*) R.S.O. (1877) cap. 125, sec. 4.

ried on or before that date, who acquired property on or after the 31st of December, 1877 (the day on which the Revised Statutes, 1877, came into force), it was necessary that their husbands should join them in conveying such property; for their position was the same as it was under the consolidated statute(*z*), though for a time (from 2nd March, 1872, to 31st December, 1877) they were emancipated, and could acquire and dispose of land as separate estate.

By *The Married Women's Real Estate Act*(*a*), it was declared that every married woman of the full age of twenty-one years might by deed alien her real estate as fully and effectually as she could do if she were a *feme sole*; but no such conveyance was to be valid unless the husband was a party to and executed the conveyance.

By the same Act(*b*), except where the Court of Chancery (now the High Court of Justice) or any person intrusted with the commitment of a lunatic, idiot or person of unsound mind, was the protector of a settlement in lieu of her husband, if a husband was, in consequence of being a lunatic, idiot, or of unsound mind, or was from any other cause, incapable of executing a deed, or if his residence was not known, or he was in prison, or was living apart from his wife by mutual consent, or if there was, in the opinion of the Judge, any other cause for so doing a Judge might on the application of the wife, and upon such evidence as to him seemed meet, and either *ex parte*, or upon such notice to the husband as he deemed requisite, dispense with the concurrence of the husband, in any case in which his concurrence was required by the Act in his wife's conveyance, and the conveyance was as valid and effectual as if the husband had been a party. The application was to be made to

(*z*) R.S.O. (1877) cap. 125, sec. 3.
(*a*) R.S.O. (1877) cap. 127, sec. 3.
(*b*) R.S.O. (1877) cap. 127, sec. 4.

a Judge of the High Court or to a Judge of the County Court, or a Junior or Deputy Judge. The Referee in Chambers had not power to make such an order(*c*), and consequently the Master in Chambers had no jurisdiction. Provision was also made by the Act for registration of the order.

In the revision of 1887, these clauses were omitted: but they were almost immediately re-enacted in 1888(*d*), and proceeded upon the assumption that there were still cases in which a husband's assent to his wife's conveyance was necessary in order to make it valid. That no such cases exist will appear from what follows; but under this enactment a Judge may still dispense with the husband's execution, where he has an estate by the curtesy, and authorize the conveyance by the wife, not of her own interest only, but of the husband's estate.

That part of the Act which required the joinder of the husband was repealed by *The Married Women's Property Act, 1884*(*e*), which came into force on the 1st July, 1884, without any saving clause as to existing rights. It may be well to point out that the enactment requiring the joinder of the husband applied only to land which was not declared to be separate estate. The result of the appeal is to leave the bare enactment that a married women of full age may convey as fully and effectually as a *feme sole*. No formality will henceforth be required in her conveyance which is not required in a conveyance by a *feme sole*. And the wife may, therefore, by her own sole conveyance, dispose of the fee simple absolute, subject to the possible estate by the curtesy of the husband, and that interest which she may so dispose of has been held to be separate estate(*f*). The hus-

(*c*) *Re Nolan*, 6 P.R. 115.

(*d*) 51 Vict. cap. 21.

(*e*) 47 Vict. cap. 19, sec. 22, latter part. The amended enactment is now R.S.O. cap. 165, sec. 3.

(*f*) *Moore* v. *Jackson*, 22 S.C.R. 210.

band's assent is no longer necessary to give effect to the wife's conveyance of her interest; but to effectuate a complete disposition of the fee simple unincumbered, he must still join in order to convey his own interest, if any, as tenant by the curtesy.

It was necessary, as we have seen, that where the joinder of the husband was required he should join as a granting party in order to convey his own interest. By *The Statute Amendment Act, 1887*(*g*), the Act of 1884 is amended by declaring that "every conveyance made on or after the 29th day of March, 1873, by a married woman of or affecting her real estate, which her husband signed or executed shall be taken and adjudged to be valid and effectual to have passed or to pass the estate which such conveyance professed or shall profess to pass of such married woman in said real estate."

The object of this amendment was probably to validate those conveyances by married women in which their husbands had joined as assenting but not as granting parties. But it professes to make them effectual only as regards the estate of the married women; and it may still happen that a husband who has signed such a deed might acquire his estate by the curtesy on his wife's death.

Though the amendment is general enough in its terms to cover all conveyances by married women, whether of separate estate or land subject to marital control, and so inferentially to require the joinder of the husband in every conveyance by his wife, it is most probable that it will be construed to apply only to those cases in which the husband is a necessary party(*h*).

(*g*) 50 Vict. cap. 7, sec. 23; R.S.O. cap. 165, sec. 8.

(*h*) Upon the same reasoning as led the Court of Appeal to hold that the Act requiring the joinder of the husband in the wife's conveyance did not apply to the Act respecting separate estate: *Furness v. Mitchell*, 3 App. R. 522.

By the twenty-fourth section of *The Statute Amendment Act, 1887*(*i*), nothing in this section is to render valid any conveyance to the prejudice of any title lawfully acquired from a married woman prior to the passing of the Act, 23rd April, 1877, nor any conveyance not executed in good faith, nor any conveyance of land of which the married woman, or those claiming under her, is or are in actual possession or enjoyment contrary to the terms of such conveyance(*j*); nor is it to affect any action or proceeding pending at the time of the passing of the Act.

Finally, it was enacted by the twenty-fifth section(*k*) that "this section shall not be deemed to declare or imply any construction of any statute passed prior to the 23rd day of April, 1887, as affecting the matters mentioned in this section or any other matter relating to the rights or powers of married women."

3. *Statutory separate estate.*

On the 2nd March, 1872, there was passed *The Married Women's Property Act*, 1872, by which it was enacted that after the passing of the Act the real estate of any married woman, owned by her at the time of her marriage or acquired during coverture should, without prejudice, and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime or as tenant by the curtesy(*l*).

The construction of this Act came up in *Furness* v. *Mitchell* (*m*), where it was held that land coming within its operation was separate estate in the fullest sense of the

(*i*) 50 Vict. cap. 7, sec. 24; R.S.O. cap. 165, sec. 8, sub-sec. 2.

(*j*) As the frame of this section is similar to that which occasioned the dispute in *Elliott* v. *Brown*, reference may be had to the remarks on that case, *ante*, p. 364, *et seq.*

(*k*) Now R.S.O. cap 165, sec. 18, sub-sec. 3.

(*l*) 35 Vict. cap. 16, sec. 1.

(*m*) 3 App. R. 510.

term; and consequently that there was attached to it the inseparable right of alienation without the husband's consent.

As to the application of the Act, it was there argued that the husband upon marriage acquired a prospective vested interest in all lands which his wife might acquire during the coverture, and consequently that the Act should be restricted to those women who were married after it was passed. But the Court held that it applied to women married before as well as after it came into force; that, as to property acquired before the Act, the husband had a vested interest in it which should not be affected by a retroactive application of the Act; but, as to property acquired after the Act was passed, the married woman took it as separate estate, and had therefore the power of conveying it as a *feme sole*. The law remained thus until the coming into force of the Revised Statutes. During this period there was in force the Act respecting the conveyance of land by married women(*n*), which was amended in 1873(*o*), and by these Acts it was declared that the joinder of the husband was necessary in order that the married woman might make a valid conveyance. But the opinion was expressed in *Furness* v. *Mitchell* that to give general effect to these Acts would be to completely nullify the effect of the Act respecting separate estate, by taking away from such property one of its essential characteristics, namely, the right to convey without the husband's consent; and therefore that the application of these Acts must be restricted to married women who were not within *The Married Women's Property Act*, 1872, that is, to those who had acquired property before that Act was passed(*p*).

(*n*) C.S.U.C. cap. 86, amended by 34 Vict. cap. 24.
(*o*) 36 Vict. cap. 18.
(*p*) *Furness* v. *Mitchell*, 3 App. R. 522.

During the period then from 2nd March, 1872, to 30th December, 1877, all married women who acquired property between those dates, both inclusive, took the same as separate estate, and were therefore enabled to convey without the consent or concurrence of their husbands.

The Revised Statute of 1877 made an important alteration in the application of this enactment; for, whereas the Act of 1872 applied to women married at any time, the Revised Statute restricted the operation of the clause in question to women married after 2nd March, 1872(*q*). Hence, as to property acquired after the Revised Statutes of 1877 came into force and before *The Married Women's Property Act*, 1884, if the marriage took place before 3rd March, 1872, the wife could not convey without her husband's concurrence, though she may since the Act of 1884 convey her own interest in the land(*r*); if the marriage took place on or after that date the property became separate estate and subject to the married woman's disposal without her husband's consent(*s*).

When the Revised Statute of 1877 came into force there must have been a large amount of land held by women who were married before 3rd March, 1872, but who acquired the land while the Act of 1872 was in force. During this period the land was undoubtedly separate estate, and the question arose, on the coming into force of the Revised Statute, whether it was divested of this character, and became subject to the third section of the Act, which is the same in effect as the Consolidated Statute. It was held in *Godfrey* v. *Harrison*(*t*), that a woman who was married in 1850, and acquired the land in question in July, 1872, was bound to sue by next friend in a suit brought in 1880

(*q*) R.S.O. (1877) cap. 125, sec. 4; now R.S.O. cap. 163, sec. 5 sub-sec. 3.

(*r*) *Wylie* v. *Frampton*, 17 Ont. R. 515.

(*s*) *Bryson* v. *Ont. & Q. R. Co.*, 8 Ont. R. 380.

(*t*) 8 P.R. 272.

respecting the land, as it could not be deemed to be her separate estate. This decision cannot, however, be supported; for there is no doubt that the right of a married woman to hold and dispose of land as her separate estate is a valuable vested right which should not lightly be interfered with; and the Revised Statutes were not intended to have a retrospective operation so as to affect any title theretofore acquired. A similar state of facts arose in *Re Coulter & Smith*(*u*), and it was there held that the married woman could convey apart from her husband. It is true that in that case, which was decided after the Act of 1884, it was argued that the latter Act gave her the power of disposing of any land which she had acquired before it came into force; but the decision cannot be supported on that ground, though it may well be supported on the ground that the land in question was separate estate when the Revised Statutes of 1877 came into force, and that it retained that character notwithstanding the change made by the revision. Hence, property acquired while the Act of 1872 was in force, and held at the time the Revised Statute of 1877 came into force, retained its character of separate estate, and might and still may, notwithstanding the Revised Statute, be conveyed by the married woman without her husband's consent.

The Married Women's Property Act, 1884(*v*), came into force on the 1st July, 1884, and repealed the Revised Statute respecting the property of married women, but provided that the repeal should not affect any act done or right acquired while the Act was in force, or any right or liability of any husband or wife married before the commencement of the Act, to sue or be sued under the provisions of the repealed Act, in respect of rights and liabilities which accrued before the commencement of the

(*u*) 8 Ont. R. 536.
(*v*) 47 Vict. cap. 19.

Act. It also repealed that part of the Revised Statute of 1877(*w*) which required the joinder of the husband in his wife's conveyance.

This Act is now incorporated in the Revised Statutes of 1897(*x*).

By this enactment it is declared that, "a married woman shall be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of a trustee."

Section 6, sub-sec. 2, declares that "every woman married on or after the first day of July, 1884, shall be entitled to have and hold and to dispose of as her separate property all of the real and personal property belonging to her at the time of marriage, or acquired by or devolving upon her after marriage." Section 7 declares that "every woman married before the first day of July, 1884, shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue on or after the said first day of July, 1884."

The effect of this legislation appears to be that the third section defines in general terms the rights and liabilities of such married women, and the nature and characteristics of such property, as are within the Act; while the sixth and seventh sections determine what married women and what property are within its scope.

The effect of the third section is to make all property which is within the Act separate property, and consequently to enable the married woman to dispose of it as a *feme sole*(*y*).

(*w*) R.S.O. (1877) cap. 127, sec. 3.
(*x*) Cap. 163, sec. 3.
(*y*) See *Cooper* v. *Macdonald*, 7 Ch. D. at p. 293.

In *Re Coulter & Smith*(*z*) the Act appears to have been treated as restrospective; and the third section is certainly general enough in its terms to include all married women, and all property of married women whenever acquired. And the repeal of that portion of the Revised Statute which required the concurrence of the husband in his wife's conveyance lends some sanction to this view; for the husband's concurrence was never necessary in the conveyance of his wife's separate estate, and the repeal of the enactment requiring his concurrence would have no real significance unless it was intended that where his consent was formerly necessary it should thereafter be unnecessary. The Act, however, saved all rights acquired before it was passed, and property previously acquired by a married woman which was not separate estate would necessarily be subject to the husband's marital rights which were evidently intended to be left undisturbed(*a*).

Hence we may conclude that property the title to which accrued(*b*) to a married woman on or after 1st July, 1884, or property at the time of her marriage owned by a woman married on or after that date, is separate property and may be conveyed to her as a *feme sole*.

It being the essence of separate estate that the wife should have the right to dispose of it without her husband's consent or concurrence, it follows that she may make a disposition in favour of her husband; and although before the conveyancing Act of 1886(*c*) she could not convey direct to him, yet such a conveyance would be equitably construed as a contract to convey to him by proper legal

(*z*) 8 Ont. R. 536; but see *ante*, p. 333, as to this case.

(*a*) *Turnbull* v. *Forman*, 15 Q.B.D. 234; *Scott* v. *Wye*, 11 P.R. 93.

(*b*) *Reid* v. *Reid*, 31 Ch. D. 402; overruling *Bayuton* v. *Collins*, 27 Ch. D. 604; *Re Thompson & Curzon*, 29 Ch. D. 177.

(*c*) Now R.S.O. cap. 119, sec. 37.

assurance, and she would thereby become a trustee for her husband(*d*).

As to property not declared to be separate estate, it has been shown that the wife may convey her own interest, which of itself is separate estate, but the husband must still join to convey his own interest(*e*).

And where a woman was married and acquired a vested remainder in fee simple, expectant on a life estate before 1872, and had issue born alive capable of inheriting, it was held that her sole conveyance of the remainder, the life tenant being still alive in 1886, was valid to pass the remainder. The Act of 1884 dispensed with the husband's concurrence in the conveyance of her interest, and as she was not seised of the estate the husband had no estate by the curtesy(*f*).

4. *Tenancy by entireties.*

The Married Women's Property Acts have been said to affect the estate by entireties to the extent that the wife may hold and dispose of her interest in the land separate and apart from her husband: in short, they have been said to make her interest separate estate.

With great respect for the decisions on the point, it seems to the author that this estate, on account of its peculiar characteristics, ought not to be affected by this legislation. Inasmuch as the husband and wife were each incapable of conveying without the other, to hold that the wife is by these statutes enabled to convey her interest separate from the husband, is either to leave the husband still incapable of conveying his estate without the wife's assent (a highly anomalous position, and a result evidently

(*d*) *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.

(*e*) *Ante*, p. 372.

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

never contemplated)(*g*), or to induce a holding that as the wife's estate is separate from the husband's, so the husband's must as a consequence be separate from the wife's, a result not authorized by these or any other statutes. If the true effect of the Married Women's Property Acts were to make the husband and wife separate individuals for all purposes, it might be held as a consequence, that, as the foundation of the estate, the unity of husband and wife, was destroyed, the estate could no longer exist. But this has been denied(*h*). If the unity of husband and wife remains, it must be possible for the estate to exist, and to exist with all its characteristics; otherwise the dilemma above stated arises.

The decisions extant upon the point, however, are contrary to this view. It was at first suggested that the effect was to make husband and wife tenants in common(*i*), and afterwards so decided(*j*). It is submitted, respectfully, however, that this cannot be the result of the application of the Acts, assuming them to apply. The right of survivorship is an inseparable incident of the estate by entireties; and inasmuch as the Married Women's Property Acts do not deprive the husband of his estate by the curtesy in the separate estate of his wife, if she dies without having disposed of it(*k*), the protection of the statutes not extending beyond the period of coverture, so neither should they be held, in the case of the joint estate, to deprive the husband of his right of survivorship if the wife does not sever the joint estate. And so it was held in an English case(*l*). In the present state of the authorities, therefore,

(*g*) *Butler* v. *Butler*, 14 Q.B.D. at p. 835.

(*h*) *Re March*, 24 Ch. D. 222; 27 Ch. D. 166; *Re Jupp*, 39 Ch. D. 148; *Butler* v. *Butler*, 14 Q.B.D. 836.

(*i*) *Per* Armour, J., in *Griffin* v. *Patterson*, 45 U.C.R. at p. 554.

(*j*) *Re Wilson & Tor. Inc. El. Co.*, 20 Ont. R. 397.

(*k*) *Cooper* v. *Macdonald*, 7 Ch. D. 288; *Hope* v. *Hope*, L.R. (1892) 2 Ch. 336. See also *Re Lambert's Estate*, 39 Ch. D. 626.

(*l*) *Thornley* v. *Thornley*, L.R. (1893) 2 Ch. 229.

a conveyance of land to husband and wife makes them joint tenants, and the wife may deal with her interest in the land as her separate estate. There is no direct decision upon the right of the husband with regard to his interest; but the corollary to the above proposition is that the husband may also deal with his interest without the wife's assent, although there is no statutory authority therefor.

5. *Summary.*

1. Property acquired by a married woman before 2nd March, 1872, became subject to her husband's marital rights, and his concurrence was necessary in her conveyance before 1st July, 1884. Since that date he must join to convey his own interest, but the wife may convey her estate alone.

2. Property acquired during the period from 2nd March, 1872, to 30th December, 1877, both inclusive, by a woman married at any time before 31st December, 1877, became separate estate, and the husband's concurrence was never necessary.

3. Property acquired while the Revised Statute, 1877, was in force by a woman married before 3rd March, 1872, became subject to her husband's marital rights, and his concurrence was necessary in her conveyance before 1st July, 1884. Since that date he must join to convey his own interest, but his wife may convey her estate alone.

4. Property acquired while the Revised Statute, 1877, was in force by a woman married after 2nd March, 1872, became separate estate, and the husband's concurrence was never necessary.

5. Property acquired on or after 1st July, 1884, by a woman married at any time, and property owned at the time of her marriage by a woman married on or after 1st July, 1884, is separate estate, and the husband's concurrence is unnecessary.

CHAPTER XIV.

JUDICIAL TITLES.

1. *Judicial sales.*
2. *Vesting orders.*
3. *Sales under execution.*

1. *Judicial sales.*

When a purchaser buys under a decree or judgment of the Court, he is bound to investigate the title, the Court not undertaking to warrant it, but leaving the parties to their respective rights subject to rules regulating the making of title before the Master. And where a link in the chain of title is a decree or order for sale, the purchaser was formerly obliged to investigate all the proceedings in the suit in order to ascertain whether it was properly constituted, and that necessary parties were joined(*m*); though irregularities in the proceedings were not necessarily fatal to the validity of the sale(*n*).

By *The Conveyancing and Law of Property Act, 1886*, it was enacted, slightly altered in phraseology in the revision(*o*), as follows:—"(1) An order of the Court under any statutory or other jurisdiction shall not, as against a

(*m*) *Colclough* v. *Sterum*, 3 Bligh 186; *Giffard* v. *Hort*, 1 Sch. & L. 386.

(*n*) *Bennett* v. *Hamill*, 2 Sch. & L. 577; *Campbell* v. *R. C. Bank*, 1 Gr. 334; *Dickey* v. *Heron*, 1 Ch. Ch. 149; *Gunn* v. *Doble*, 15 Gr. 655; *Lloyd* v. *Jones*, 9 Gr. 37.

(*o*) R.S.O. cap. [illegible] sec. 58, sub-sec. 11

purchaser, whether with or without notice, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service."

The Act contained a sub-section which was not included in the revision and is as follows: "(2) This section applies to all orders made before or after the commencement of this act, except orders (if any) which have before the commencement of this Act been set aside or determined to be invalid on any ground, and except orders (if any) as regards which an action or proceeding is at the commencement of this Act pending for having it set aside or determined to be invalid."

In order that this enactment should apply the Court or Judge making the order for sale must have jurisdiction over the subject matter. If the order is made by the wrong Court there is no protection afforded: but once jurisdiction is established the purchaser will be protected by the order, although it may show upon its face that it is wrong(*p*). "The purchaser," said Sir George Jessel, M.R., "sees an order for sale made by the Court which has jurisdiction in the matter, and he is not to trouble himself any further. If any mistake has been made, still he is to get a good title, all claims of the persons interested in the estate being transferred to the purchase money"(*q*). So it has been held, in the case last cited, that an administration order for sale bound incumbrancers who were not parties to the proceeding and did not concur in the conveyance, and precluded them from objecting to the order, thus securing the purchaser in his title under the order. But in a case in Ontario(*r*) it was held that dowresses who were not parties to a partition proceeding under which the

(*p*) *Re Hall Dare's Contract*, 21 Ch. D. 41.

(*q*) *Ibid.* at p. 49; followed in *Mostyn* v. *Mostyn*, L.R. (1893) 3 Ch. 376.

(*r*) *Re Hewish*, 17 Ont. R. 454.

land was sold retained their right to dower in the land as against the purchasers.

And in a more recent English case, it appeared that, under a judgment for equitable execution, a debtor's interest was sold by the Court. The land had already been sold by the debtor, but no notice was brought home to the purchaser under the judgment. In an action by the first purchaser, the second set up this section; and it was held that the judgment was intended only to bind what the debtor might have, and did not affect the first purchaser's title, and this section did not apply(*s*).

It will consequently be unnecessary for a purchaser to inquire as to the constitution of the action or suit, or the proceedings which led up to the order for sale; for even if an irregularity were discovered it would neither affect him nor entitle him to be relieved of his contract. But the interests of persons not parties still remain unaffected, and no more will pass under the order of the Court than the interest of the person affected by the judgment or order.

There is no doubt, however, that if fraud appeared on the face of an order, or was so near the surface that a purchaser could with ordinary care discover it, the Act would not protect him; but the Court would be slow to visit a purchaser "with the consequences of what might be deemed implied notice of a fraud, which was not discovered by the Court, or the officers of the Court, or the counsel concerned in the cause, whose duty it is not to permit the Court to make a decree not warranted by the facts of the case"(*t*).

In a recent case there was a great deal of discussion as to the position of a person who occupied a fiduciary position who had bought property offered for sale by the Court

(*s*) *Jones* v. *Barnett*, L.R. (1899) 1 Ch. 611; (1900) 1 Ch. 370.
(*t*) *Bowen* v. *Evans*, 1 J. & L. 257.

under an order allowing him to bid. It was held that a person who so obtains leave to bid remains under no disability, and may make the best bargain he honestly can. His position does not differ from that of an ordinary purchaser standing in no special fiduciary relation to the vendor; he must abstain from all deceit; but being under no obligation to communicate to the vendor facts which might influence his own conduct or judgment when bargaining for his own interest, no deceit can be implied from mere silence, unless he has undertaken to communicate them(*u*). In *Ricker* v. *Ricker*(*v*) the right of a mortgagee, who was also devisee of the land in trust to pay legacies, to bid under an order allowing him to do so was limited by the Court of Appeal to protecting himself as mortgagee, and it was said that "a stranger might do what he owed as a matter of duty to this defendant not to do." But it is doubtful whether since *Coaks* v. *Boswell* was decided this can be treated as truly stating such a purchaser's position(*w*). In *Ricker* v. *Ricker* there were circumstances which induced the belief that a fraud had been practised, and the case may well be supported on that ground. But a purchaser from such a purchaser would be protected, if he had no notice, as appears by the same case.

It has been held that a party purchasing under a decree is bound to see that the sale is made in conformity with the terms of the decree; and where the purchase has been made contrary to the authority of the decree the purchaser cannot afterwards conform to its terms so as to take the the benefit of it(*x*). The question whether or not a sale has been made according to the terms of an order or decree does not touch the validity of the order or decree itself,

(*u*) *Coaks* v. *Boswell*, 11 App. Ca. 232.
(*v*) 7 App. R. 282.
(*w*) And see *Mitchell* v. *Mitchell*, 6 P.R. 232.
(*x*) *Colclough* v. *Sterum*, 3 Bligh 186.

but arises after it has been made, and consequently it is not affected by the enactment in question; and it may still be incumbent upon the purchaser to see that the sale has been properly conducted according to the judgment or order of sale. The wording of the Act, however, is broad enough to cover any order, and the granting of a vesting order thereafter might cure an irregularity in the sale proceedings.

2. *Vesting Orders.*

"In every case in which the Court has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the Court may by order vest such real or personal estate in such person or persons, and in such manner, and for such estates, as would be done by any such deed, conveyance, assignment or transfer if executed; and thereupon the order shall have the same effect as if the legal or other estate or interest in the property had been actually conveyed, by deed or otherwise, for the same estate or interest, to the person in whom the same is so ordered to be vested, or in the case of a *chose in action*, as if such *chose in action* had been actually assigned to such last mentioned person"(*y*). This enactment applies to equitable as well as legal estates(*z*).

A purchaser is not bound to accept a vesting order, but is entitled to a conveyance with the usual covenants(*a*); but if he elects to take a vesting order he should be extremely cautious in accepting the title, as, having no covenants in that case, he is without recourse against the vendor(*b*).

Where a purchaser was asked to take a vesting order he was always entitled to evidence that the persons whose

(*y*) R.S.O. cap. 51, sec. 30.
(*z*) *Re Robertson*, 22 Gr. 449.
(*a*) *Laplante* v. *Seamen*, 8 App. R. 557.
(*b*) *Kincaid* v. *Kincaid*, 6 P.R. 93.

interests were intended to be vested were alive at the time the order was made(*c*). And he still must take such precautions, as the vesting order does not profess to vest more than could be conveyed, notwithstanding the enactment for the protection of purchasers as to irregularities in orders made by the Court(*d*). Where a vesting order appears as a link in the chain of title it is presumed to be regular unless the purchaser impeaches it(*e*).

By *The Conveyancing and Law of Property Act, 1886*(*f*), where land subject to an incumbrance, whether immediately payable or not, is sold either by the Court or out of Court, the Court may allow payment into Court of such amount as when invested in approved securities will be sufficient to keep down or otherwise provide for any charge thereon, or to meet the incumbrance and any interest thereon and it may also require such additional amount to be paid in as will be sufficient to meet future contingencies, except depreciation of investments, not exceeding one-tenth of the original amount to be paid in, unless for special reasons a larger amount is required. And thereupon the Court may, either after or without notice to the incumbrancer, declare the land to be freed from the incumbrance, and may make an order for conveyance or a vesting order to give effect to the sale. The money remains in Court to be disposed of amongst the parties entitled thereto.

This enactment is remedial, and was intended to facilitate the sale of land. Before its passing a purchaser who found that the land was subject to a charge was entitled to say that he could not get an estate in fee, and to get off his bargain, unless he and the vendor could agree upon a

(*c*) *Slater* v. *Fisken*, 1 Ch. Ch. 1.

(*d*) See *Jones* v. *Barnett*, L.R. (1899) 1 Ch. 611; (1900) 1 Ch. 370.

(*e*) *Henderson* v. *Spencer*, 8 P.R. 402; *Re Morse*, 8 P.R. 475.

(*f*) 49 Vict. cap. 20, sec. 12; now R.S.O. cap. 119, sec. 15.

scheme of indemnity(*g*). But under the Act the Court is enabled to provide for the incumbrance or charge, and at the same time ensure a good title free from it to the purchaser, and secure the incumbrancer. And in the case cited where the Court acted under this provision, it decided a question of construction of a will involving the determination of interests *in futuro*, where this was necessary in order to ascertain what sum ought to be set aside to provide for the incumbrance.

In providing for the incumbrance the Court construes the Act strictly(*h*).

The Act is permissive, however, and the Court refused, on the application of a purchaser, to compel the vendor to pay a sufficient amount into Court to procure the discharge of a rent-charge, where the amount would have exceeded the amount of the purchase money, and where there was a stipulation in the contract entitling the vendor to rescind if the purchaser insisted upon any objection which the vendor was unable or unwilling to remove(*i*). Advantage was taken of the Act, however, in a case where a mortgage was in question, by ordering payment into Court of enough to cover the principal and interest together with ten per cent. extra, and vesting the mortgaged property in the purchaser freed from the mortgage, leaving the question of its validity to be disposed of afterwards between the parties immediately interested(*j*).

(*g*) *Per* Kekewich, J., *Re Freme's Contract*, L.R. (1895) 2 Ch. at p. 261.

(*h*) *Patching* v. *Bull*, 30 W.R. 244; *Dickin* v. *Dickin*, 30 W.R. 887.

(*i*) *Re G. N. R. Co. & Sanderson*, 25 Ch. D. 788.

(*j*) *Milford Haven R. & E. Co.* v. *Mowatt*, 28 Ch. D. 402.

3. *Sales under execution*(*k*).

Under a writ of *fieri facias* against lands the sheriff might formerly have sold an inchoate right to dower(*l*), but by a recent Act this interest is not exigible(*m*). Since the passing of the Act, 40 Vict. cap. 8, sec. 37(*n*), a widow's right to dower after the husband's death and before assignment may be seized and sold(*o*), though before that enactment it was held that it was not assignable, and so not exigible. The sheriff may also sell an estate by the curtesy initiate or consummate(*p*), a reversion(*q*), and a vested remainder(*r*).

Before the Act, 14 & 15 Vict. cap. 7, a right of entry was not saleable under execution; for the owner could not himself convey his interest, and therefore the sheriff could not sell it. But by the Act respecting the transfer of real property(*s*), a contingent, an executory and a future interest, and a possibility coupled with an interest in any land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any land, may be disposed of by deed; but no such disposition shall by force only of the Act defeat or enlarge an estate tail. And by the Execution Act (*t*) any estate, right, title or interest in lands which under the foregoing Act may be conveyed or assigned by any

(*k*) See *ante*, p. 154, *et seq.*

(*l*) *Miller* v. *Wiley*, 16 C.P. 529; 17 C.P. 368.

(*m*) R.S.O. cap. 77, sec. 33, sub-sec. 2.

(*n*) R.S.O. cap. 77, sec. 33, sub-sec. 1.

(*o*) *Allen* v. *Edinburgh Life Assurance Co.*, 25 Gr. 306. See *Douglas* v. *Hutchison*, 12 App. R. 110.

(*p*) Leith R. P. Stat. 69, 70, 71, 273, 315.

(*q*) *Doe d. Cameron* v. *Robinson*, 7 U.C.R. 335.

(*r*) *Lundy* v. *Maloney*, 11 C.P. 143.

(*s*) R.S.O. cap. 119, sec. 8.

(*t*) R.S.O. cap. 77, sec. 33.

party, or over which such party 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 party, in like manner and on like conditions as lands are by law liable to seizure and sale under execution; and the sheriff selling the same may convey and assign the same to the purchaser in the same manner and with the same effect as the party himself might have done(*u*).

Inasmuch as the Act which provides for the assignment of the interests just mentioned declares that "no such disposition shall by force only of the Act defeat or enlarge an estate tail"; and inasmuch as *The Execution Act* permits the seizure only of such interests as are so made assignable: and inasmuch as the sheriff is empowered to convey and assign "in the same manner and with the same effect as the person himself might have done"; the consequence is that the seizure and sale under execution will not be more effective in disposing of the land, or the debtor's interest therein, than his own conveyance would; and inasmuch as an estate tail would not be defeated or enlarged by an assignment made under the one Act, so a seizure and sale of the interest of a tenant in tail would not defeat or enlarge the estate tail, but would pass the interest of the tenant in tail only.

A right or option to purchase contained in a lease which was sold under an execution was held not to pass to the purchaser(*v*): nor is a vendor's interest after he has made a contract for sale exigible under a writ against lands(*w*). And a mortgagee's right to redeem his mortgage after he has pledged it cannot be so sold(*x*).

(*u*) See Leith R.P. Stat. 65, *et seq.* and 316 on these statutes.

(*v*) *Henrihan* v. *Gallagher*, 2 E. & A. 338.

(*w*) *Parke* v. *Riley*, 12 Gr. 69; 3 E. & A. 215; *Re Trusts Corporation & Bachmer*, 26 Ont. R. 191.

(*x*) *Rumohr* v. *Marx*, 3 Ont. R. 167.

A purchaser's interest in land before payment of purchase money and conveyance, being a mere equitable right to enforce the contract(*y*), is not saleable under execution(*z*); but this decision has not been followed(*a*).

Where a husband and wife take jointly, it has been held that an execution against the husband will not bind his interest in the land, because they take by entireties, and his estate is not alienable without his wife's consent(*b*). But in that case it was doubted in the dissenting judgment whether a married woman who can acquire statutory separate estate does not in such a case take the estate or interest as a *feme sole*, and this view now prevails(*c*). And it may be that the interest of the husband is also alienable at his pleasure and subject to execution.

Free grant land during location, and after the issue of the patent for twenty years from the date of location, where the same is owned by the locatee, or his widow, heirs, or devisees, is not liable to execution(*d*); but where a locatee sold his land and took back mortgages for purchase money, it was held that the mortgages were not protected by the Act, but were liable to execution(*e*).

The cases in which an equity of redemption is bound by execution and consequently may be sold have been before treated of(*f*). The effect of a sale of such an interest is declared by the statute(*g*) to be to vest in the purchaser, his heirs and assigns, all the legal and equitable interest of the mortgagor in the mortgaged lands at the time the writ was

(*y*) *Re Flatt & Prescott*, 18 App. R. 1.

(*z*) *Re Prittie & Crawford*, 9 Occ. N. 45.

(*a*) *Ward* v. *Archer*, 24 Ont. R. 650. *Sed quære;* see *ante*, p. 179.

(*b*) *Griffin* v. *Patterson*, 45 U.C.R. 536.

(*c*) See *ante*, p. 380.

(*d*) R.S.O. cap. 29, sec. 25.

(*e*) *Cann* v. *Knott*, 19 Ont. R. 422; 20 Ont. R. 294.

(*f*) *Ante*, p. 174, *et seq.*

(*g*) R.S.O. cap. 77, sec. 31.

placed in the sheriff's hands, as well as at the time of the sale, and to vest the same rights as the mortgagor would have had if the sale had not taken place, and the purchaser may pay and discharge any mortgage, charge or lien which at the time of the sale existed upon the lands in like manner as the mortgagor might have done, whereupon he acquires the same estate, right and title as the mortgagor would have acquired. And it is further declared(*h*) that any mortgagee of the lands (being or not being plaintiff or defendant in the judgment whereon the writ issued under which the sale took place) may be the purchaser, and shall acquire the same estate as any other purchaser; but in the event of his becoming a purchaser he must give to the mortgagor a release of the mortgage debt. And if any other person becomes the purchaser, and the mortgagee enforces payment of the mortgage debt against the mortgagor the purchaser must repay him, and on default of payment for one month after demand the mortgagor may recover the amount from the purchaser in an action of debt; and until the debt and interest have been repaid the mortgagor has a charge therefor upon the land. It has been held that the effect of a purchase by a mortgagee under this statute is to satisfy the mortgage, the mortgagee being deemed to bid the amount of the mortgage and also the actual sum bid over and above his mortgage. The exacting of a release is a mere consequence of the satisfaction of the mortgage(*i*).

By the Rules of Court(*j*) it is provided that before a sale under a writ the sheriff shall publish an advertisement of sale in the *Gazette* at least six times, specifying the particular property to be sold, giving some reasonably definite description of it, the names of the plaintiff and defendant, the time and place of the intended sale, and the name of

(*h*) Sec. 32.
(*i*) *Woodruff* v. *Mills*, 20 U.C.R. 51.
(*j*) Rules 881, 882.

the debtor whose interest is to be sold. He shall also for three months next preceding the sale also publish such advertisement in a public newspaper of the county in which the lands lie, or shall for three months put up and continue a notice of such sale in the office of the clerk of the peace, or on the door of the Court House, or place in which the Court of General Sessions of the Peace for such county is usually held.

Errors and defects in the advertisement will not avoid the sale(*k*), even though the purchaser is one of the execution creditors(*l*); nor is it an objection that the advertisement does not particularly define the estate or interest to be sold(*m*). The purchaser will still take a title, though the sheriff may be liable to the execution creditor or the debtor if either has been injured(*n*). But if the irregularities are such that the purchaser's taking the deed would amount to a fraud the sale cannot be maintained(*o*). Nor will irregularities in the proceedings before judgment affect the title of a purchaser(*p*). And though it was irregular under the former practice to issue a writ against lands until after the return of a writ against goods, a sale under such n writ was not disturbed(*q*). Since 1894, subject to rules of Court, every writ of execution issuing under any judgment or order of a Court or Judge for the payment of money, except a writ of execution issued from a Division Court,

(*k*) *Lee* v. *Howes*, 30 U.C.R. 292.

(*l*) *Patterson* v. *Todd*, 24 U.C.R. 296.

(*m*) *McGee* v. *Kane*, 14 Ont. R. 226.

(*n*) *Osborne* v. *Kerr*, 17 U.C.R. at p. 141.

(*o*) *McDonald* v. *Cameron*, 13 Gr. 84. See general remarks in this case as to the duties of the sheriff.

(*p*) *Doe d. Boulton* v. *Ferguson*, 5 U.C.R. 515.

(*q*) *Doe d. Spafford* v. *Brown*, 3 O.S. 90; *Meyers* v. *Meyers*, 9 U.C.R. 465; *Ross* v. *Malone*, 7 Ont. R. 397. See also *Doe d. Tiffany* v. *Miller*, 6 U.C.R. 425.

shall be issued against both the lands and tenements and the goods and chattels of the execution debtor(*r*).

A writ issued forthwith upon a judgment signed by default, a lapse of eight days being required by the rules of Court, is an irregularity only, and not a nullity(*s*). And it has been held that a sale of a whole farm for a debt which the sale of a portion would have satisfied will not avoid the sale(*t*). As long as there is a valid judgment subsisting and unsatisfied, it will support the execution and the execution will support the sale.

There must, however, be a judgment for a valid debt unsatisfied(*u*), and a plea setting up a writ without averment of the judgment is bad(*v*). But a writ is sufficient evidence without proving the judgment as against one claiming under or in privity with the debtor(*w*). And where the judgment is afterwards reversed for error the defendant can recover the money only and not the land(*x*).

The writ must be current when acted upon and regularly renewed, if the circumstances require it(*y*), in order to support the sale(*z*), that is to say, something must be done by way of inception of execution during its currency, and the proceedings may then be carried to completion, although the writ has expired in the meantime(*a*). Going upon the land to demand payment and declaring that it will be sold

(*r*) R.S.O. cap. 77, sec. 18.

(*s*) *Macdonald* v. *Crombie*, 2 Ont. R. 243.

(*t*) *Doe d. Hagerman* v. *Strong*, 4 U.C.R. 510.

(*u*) *Freed* v. *Orr*, 6 App. R. 690.

(*v*) *McDonell* v. *McDonell*, 9 U.C.R. 259.

(*w*) *Douglas* v. *Bradford*, 3 C.P. 459; *Freed* v. *Orr*, 6 App. R. at p. 701.

(*x*) *Doe d. Hagerman* v. *Strong*, 4 U.C.R. 516; see also *Freed* v. *Orr*, 6 App. R. at pp. 694, 701.

(*y*) *Daby* v. *Gehl*, 18 Ont. R. 132.

(*z*) *McDonnell* v. *McDonnell*, 9 U.C.R. 259; *Doe d. Greenshields* v. *Garrow*, 5 U.C.R. 237; *Doe d. Gardiner* v. *Juson*, 2 E. & A. 188.

(*a*) *Doe d. Tiffany* v. *Miller*, 6 U.C.R. 431.

if payment is not made is not an inception of the execution(*b*). But it has been held that going to the debtor and obtaining from him a list of his lands owned by him and liable for sale under the writ, and including in the list the land of the debtor upon which he was at the time of furnishing the list, was an inception of the execution(*c*). And now, by the Rules of Court(*d*), the advertisement in the *Gazette* during the currency of the writ is deemed to be a sufficient commencement of the execution to enable the same to be completed by a sale and conveyance of the lands after the writ has become returnable.

It was formerly the law that a sheriff who commenced to execute the writ could complete it by sale and conveyance, even if he had vacated office at the time of the sale(*e*). But by *The Execution Act*(*f*), if the sheriff went out of office during the currency of any writ of execution against lands, and before the sale, such writ was to be executed and the sale and conveyance of the lands to be made by his successor in office. This section was not consolidated in the revisions of 1887 and 1897, but by the Interpretation Act, section 8, sub-section 27, "words directing or empowering a public officer or functionary to do any act or thing, or otherwise applying to him by his name of office, shall include his successors in such office, and his or their lawful deputy." And by another Act(*g*), in case of the death, resignation or removal of a Sheriff, or of a Deputy Sheriff, while there is no sheriff, after he has made a sale of lands, but before he has made the deed of conveyance of the same to the purchaser, the deed or conveyance shall be made to

(*b*) *Bradburn* v. *Hall*, 16 Gr. 518.

(*c*) *Doe d. Tiffany* v. *Miller*, 6 U.C.R. 426, and see S.C., 5 U.C. R. 79.

(*d*) Rule 882.

(*e*) *Doe d. Tiffany* v. *Miller*, 5 U.C.R. 79; 6 U.C.R. 432.

(*f*) R.S.O. (1877) cap. 66, sec. 43.

(*g*) R.S.O. cap. 17, sec. 60.

the purchaser by the Sheriff, or by the Deputy Sheriff, who is in office acting as Sheriff as aforesaid, or by the Sheriff *pro tempore*, at the time when the deed or conveyance is made(*h*).

The Sheriff's deed, being but a completion of the sale, is effectual to convey only the part actually sold, and if it contains more by description, the amount actually sold may be shown by parol evidence(*i*).

The deed is a conveyance of the debtor's interest in the land, and not merely a release(*j*), and will relate back to the day of sale for the purpose of defeating intermediate conveyances(*k*).

It is *prima facie* evidence that the writ was delivered to the Sheriff, that he took the lands in execution and sold them. The seizure of the lands is implied in the sale, and the sale is proved by the conveyance in which the formalities observed are recited by the Sheriff(*l*), and to which credit is *prima facie* given(*m*).

And as the sale is a sale of the debtor's interest alone, it will not affect his wife's dower(*n*).

The debtor in possession of lands sold under a writ becomes quasi tenant at will to the purchaser, and cannot dispute his title(*o*).

By *The Registry Act*(*p*), it is declared that all deeds of lands sold under process shall be registered within six months after the sale of the lands; otherwise the party

(*h*) *Miller* v. *Stitt*, 17 C.P. 559.
(*i*) *Doe d. Tiffany* v. *Miller*, 5 U.C.R. 79.
(*j*) *Doe d. Dissett* v. *McLeod*, 3 U.C.R. 297.
(*k*) *Gaviller* v. *Beaton*, 12 C.P. 519. See also *Burnham* v. *Daly*, 11 U.C.R. 211.
(*l*) *Doe d. Spafford* v. *Brown*, 3 O.S. 90.
(*m*) *Mitchell* v. *Greenwood*, 3 C P. 465.
(*n*) *Walker* v. *Powers*, R. & J. Dig. 1125.
(*o*) *Doe d. Armour* v. *McEwen*, 3 O.S. 493.
(*p*) R.S.O. cap. 136, sec. 90.

claiming under any such sale shall not be deemed to have preserved his priority as against a purchaser in good faith, who has registered his deed prior to the registration of the deed from the Sheriff. A purchaser from a Sheriff without notice of a vendor's lien for purchase money, registering in time, consequently takes free from it(*q*).

(*q*) *Van Wagner v. Findlay*, 14 Gr. 53.

CHAPTER XV.

SALES UNDER POWERS IN MORTGAGES.

1. *Form and effect of the power.*
2. *Notice of sale.*
3. *Sale and conveyance.*

1. *Form and effect of the power.*

Powers of sale in mortgages are usually created by conveying in fee to the mortgagee with a proviso for redemption, accompanied by a declaration that if default is made in payment it shall be lawful for the mortgagee, his heirs, executors, or administrators, or assigns, to sell after certain notice. A power may also be created by limiting the estate [illegible] mortgage for a term of years with a proviso for redemption and subject thereto to the use of trustees in fee upon trust to sell; or by limiting it to trustees in trust for sale if the money is not paid upon a certain day, with a proviso for redemption. Attention will be more particularly directed to the first as it is the most usual mode in Ontario, and is that adopted in the Short Forms Act.

The power is by the Short Forms Act reserved to the heirs of the mortgagee and not to the personal representatives, as it should be. For the latter are entitled to the money; and though the heirs formerly held the legal estate in trust for the parties entitled to the money, the personal representatives had, even before *The Devolution of Estates*

Act, the right to discharge and assign the mortgage(*r*). And although by the amendments to the Act passed in 1891 and 1893 (now section 13 of the Act), the legal estate, in the absence of a caution, shifts into the person beneficially entitled, it is still wise to reserve the power of sale to the personal representatives. To avoid doubts which arise in consequence of this Act, as well as for the reason already stated, it is strongly recommended that the power should be reserved to the personal representatives of the mortgagee; and that provision should be made for giving notice to the personal representative of the mortgagor, or if no personal representative shall be appointed within a reasonable time after the death of the mortgagor, then that the power should be exercisable without notice. It is essential that some such liberty should be given, as if the notice is to be given to the personal representative only, the power is inoperative until one is appointed(*s*).

The Short Forms Act provides that the power may be exercised by the assigns of the mortgagee. It is most important that the short form should, if used, be strictly followed, so as to retain this right, or if another form is used, that the power should be extended to the assigns of the mortgagee, so that in case of an assignment of the mortgage there may be no doubt of the existence of the right in the assignee to exercise the power. For though the assignment of the mortgage may convey the land and the debt, it is doubtful, under the case cited below, whether it involves the transfer of a power as an inseparable incident of the estate when assigns are not named(*t*). The power should therefore be reserved to assigns as well as to representatives of the mortgagee.

(*r*) R.S.O. cap. 121, sec. 11.

(*s*) *Parkinson* v. *Hanbury*, L.R. 2 H.L. at p. 18.

(*t*) *Re Gilchrist & Island*, 11 Ont. R. 539.

The decision that a power does not pass to an assign as an incident of the estate, but must be specially reserved to assigns is not free from doubt. Thus, where there has been a trust for sale limited to trustees and the survivor and the heirs of the survivor, and no provision has been made for appointing new trustees, it has been argued that assigns cannot sell, because a personal confidence has been reposed in the trustees. But the fallacy of this reasoning has been pointed out. For though there may be a personal confidence reposed in the trustees or in the survivor, it cannot be assumed that the author of the trust placed any personal confidence in the heir of the survivor; for it could not be known beforehand which of the trustees would be the survivor or who would be his heir(*u*). And it has also been pointed out that where heirs alone are named, if the trustee devised the estate to the person who is his heir the latter would, under the Wills Act, take as devisee and not as heir, and so being an assignee could not execute the trust which he would have been otherwise able to execute as heir(*v*). It seems reasonable that a power given to accompany the estate in fee, for the use of the owner in fee and for his protection, should pass to assigns, without their being named as incident to the estate, just in the same manner as certain covenants run with the land although assigns are not named.

A distinction must be drawn again between a trust and a naked power. Where power is given to divert an estate from a previous holder, he who holds the property subject to the power has a right to say that the power shall be exercised *modo et forma*(*w*).

A mortgagee with power of sale does not occupy either of these positions; for he has a beneficial interest in the

(*u*) *Titley* v. *Wolstenholme*, 7 Beav. at p. 434.
(*v*) *Macdonald* v. *Walker*, 14 Beav. 562.
(*w*) *Lane* v. *Debenham*, 11 Ha. at p. 192.

land and its proceeds, and he holds the power as incident to his security and to enable him to realize speedily thereon; and as Sir John Romilly, M.R., said, "it is manifestly also a most inconvenient doctrine to hold that a power is separated from, and is not incidental to and united with, the legal estate wherever it may go"(*x*).

If the decision is correct that a power to a mortgagee (not naming assigns) does not pass to the assignee of the mortgagee, the necessary consequence is that it becomes severed from the inheritance and remains with the mortgagee, who, however, has no further interest in it; or else it is extinguished by the assignment of the mortgage. Either alternative is a very inconvenient, if not a logically absurd, result.

Notwithstanding these objections, the authorities at present withhold the power from assigns if not named(*y*).

When the short form is used care must be taken not to omit from it, by way of qualification or exception, any term of the power. For it has been held that if the short form provides for a sale without notice, that is a deviation from the statutory form, and not an exception from nor a qualification of the form given, but an abolition of one of the conditions contemplated by the statute as giving the right to exercise the power. In such a case the words used in the instrument will not derive any aid from the long form, but will receive the bare construction which the words themselves will sustain. Hence the mortgagee being the only person named will be the only person entitled to exercise the power(*z*).

(*x*) *Macdonald* v. *Walker*, 14 Beav. 562.

(*y*) *Bradford* v. *Belfield*, 2 Sim. 64, following *Townsend* v. *Wilson*, 1 B. & Ald. 608; *Cooke* v. *Crawford*, 13 Sim. 91, disapproved in *Macdonald* v. *Walker*, *supra*, said to be over-ruled in *Osborne* v. *Rowlett*, 13 Ch. D. 774, but contra in *Re Horton & Hallett*, 15 Ch. D. 143; *Ridout* v. *Howland*, 10 Gr. 547. See Leith R.P. Stat. p. 363 n.

(*z*) *Re Gilchrist & Island*, 11 Ont. R. 537.

Where, however, the power provided for a sale upon notice on default being made for "one month" instead of two or more months, the word "months" being the word used in the form, it was held that this was not a material variation of the short form, and did not invalidate it as a form under the statute(*a*). And where the proviso was that on default for one day the mortgagee might sell without notice, the Court was divided, Rose, J., disagreeing with *Re Gilchrist & Island*, and being of opinion that it was a valid variation of the form, while Street, J., thought that it was an unauthorized variation, and that the words used derived no aid from the statute(*b*). Finally, in *Parry* v. *Anderson*(*c*), the Court of Appeal, Burton, J.A., dissenting, held that a proviso that on default for one month the mortgagee might, on ten days' notice, sell, was a variation of the form within the statute.

While opinion is so varied on such an important matter the necessity of adhering rigidly to the form cannot be too strongly insisted upon.

When the mortgage deed contains a stipulation that the purchaser under the power shall not be bound to inquire whether notice has been given or default made, or otherwise as to the validity of the sale, but that any sale by the mortgagee shall be valid as regards the purchaser at all events, and that the mortgagor's recourse shall be against the mortgagee only for damages, a *bona fide* purchaser will take a good title on a sale provided that he has no notice of irregularities. But such a clause will not protect a purchaser who has notice of an irregularity(*d*). When the power of sale is exercisable only upon notice, and the right

(*a*) *Re Green & Artkin*, 14 Ont. R. 697.

(*b*) *Clark* v. *Harvey*, 16 Ont. R. 159.

(*c*) 18 App. R. 247.

(*d*) *Parkinson* v. *Hanbury*, 2 D.J. & S. at p. 452; *Selwyn* v. *Garfit*, 38 Ch. D. 273.

to sell does not therefore arise until notice bas heen given, it has heen suggested that an attempt to sell without notice is not in fact a sale, and the party offering to huy is not a purcbaser and cannot therefore claim protection under this proviso(*e*). And it is clear that if a purcbaser discovers that the event has not happened upon which the mortgagee may sell he may rescind his contract to purchase(*f*). And if tbe mortgagor has created a second mortgage he cannot thereafter as against the subsequent incumbrancer waive tbe irregularity(*g*). But in one case wbere tbere was a proviso tbat upon any sale *purporting* to he made in pursuance of the power, the purchaser should not be hound to inquire whether default bad been made, or as to the propriety or expediency of the sale, and that notwitbstanding any impropriety or irregularity in any such sale, tbe same sbould, as regarded the protection of the purchaser, be taken to be within the power, it was beld tbat a *bona fide* purchaser without notice took a good title, though the mortgage had in fact heen satisfied at the time of sale(*h*).

It has been held that a power of sale contained in a mortgage will not he implied in a suhsequent mortgage deed by wbich the interest then due is converted into principal and tbe total amount charged again upon the land(*i*), unless there is something in the subsequent mortgage to indicate tbat tbe mortgagee is to retain the benefit of the power(*j*). But it appears from recent authority that unless there is something to forhid the presumption the mortgagee will not he deemed to have ahandoned the power(*k*). And

(*e*) *Ford* v. *Heely*, 3 Jur. N.S. 1116.
(*f*) *Forster* v. *Hoggart*, 15 Q.B. 155.
(*g*) *Ibid.*; *Selwyn* v. *Garfit*, 38 Ch. D. 273.
(*h*) *Dicker* v. *Angerstein*, 3 Ch. D. 600.
(*i*) *Curling* v. *Shuttleworth*, 6 Bing. 121.
(*j*) *Young* v. *Roberts*, 15 Beav. 558.
(*k*) *Boyd* v. *Petrie*, 7 Ch. App. 385.

by *The Mortgage Act* it is enacted that when a mortgage deed does not contain a power of sale the mortgagee shall have a power of sale after default for six months in payment of principal or any interest, or after omission to pay any insurance premium(*l*).

It has been held that a power of sale may be exercised though the mortgagee has been in possession without acknowledgment long enough to extinguish the title of the mortgagor; and this is said to be a convenient mode of conveyance for the mortgagee to adopt, as it relieves him from the obligation of proving his possessory title(*m*). But when a mortgagee so conveys he does so as owner and not as mortgagee, and is not bound to account for the surplus, the mortgagor being barred by the Statute of Limitations of all rights against the mortgagee(*n*). This position, however, is not safe from criticism. Mr. Justice Strong has said, "It must, however, be remembered that the power of sale is a power to sell and convey the equity of redemption only, and that the conveyance of the mortgagee for the purpose of carrying out a sale under it operates on the legal estate as a conveyance strictly and not as the execution of a power, from whence it follows that if the equity of redemption is gone by foreclosure or otherwise the power is also extinguished"(*o*). And where a mortgagee who had foreclosed made an agreement to sell, and by inadvertence a condition of sale was inserted providing that as the vendor was a mortgagee with power of sale, she would enter into no covenant for title except the usual covenant against incumbrances, the Court on a bill filed by the purchaser for specific performance refused in the exercise of its discretion

(*l*) R.S.O. cap. 121, secs. 18 to 20.

(*m*) *Re Alison*, 11 Ch. D. 284, 290, 295.

(*n*) *Ibid.* And see *Re Harwood*, 35 Ch. D. 470.

(*o*) *Kelly* v. *Imperial L. & I. Co.*, 11 S.C.R. at p. 528. And see *Watson* v. *Marston*, 4 D.M. & G. 230.

to decree a conveyance under the power of sale which was insisted upon by the purchaser(*p*).

The power, however, may undoubtedly be exercised after defective proceedings for foreclosure; and a conveyance thereafter made may be supported as a conveyance under the power of sale though it in fact recites the foreclosure proceedings and professes to be a conveyance by the mortgagee as absolute owner(*q*).

2. *Notice of sale.*

When the power provides that it may be exercised without notice, no doubt the agreement of the parties will govern; but it has been said that such a power is oppressive, as it puts the mortgagor completely at the mercy of the mortgagee and enables the latter at any moment to extinguish the right of redemption without notice to the mortgagor(*r*). And the mortgagee must in all cases act, not in an arbitrary manner, but with reason, prudence and discretion. Hence, his proceedings would be very strictly scrutinized if he undertook to sell without notice. Where a power of sale was vested in a trustee for sale, the Court restrained a sale on the motion of the mortgagor until the trustee had notified both the mortgagee and mortgagor; though in the same case a motion to restrain the mortgagee from proceeding without notice, made under the apprehension that the power was vested in the mortgagee, was refused(*s*).

Where notice is required to be given, but no length of time for the notice is specified, it is apprehended that a reasonable notice must be given; and reasonable notice would probably mean a notice not only giving a reasonable

(*p*) *Watson* v. *Marston*, 4 D.M. & G. 230.
(*q*) *Kelly* v. *Imperial L. & I. Co.*, 11 S.C.R. 516.
(*r*) *Miller* v. *Cook*, L.R. 10 Eq. at p. 647.
(*s*) *Anon.*, 6 Mad. 10.

time, but also being given under such circumstances that the mortgagor might reasonably be able to comply with the demand for payment(*t*).

The power contained in the statutory short form is exercisable only after giving written notice; and the consequence is that the mortgagee cannot lawfully proceed to sell until the notice has been duly given. A preferable mode of framing the power is to make it operative without notice, and add a covenant by the mortgagee not to exercise the power until he has given notice; or to provide that if default is made for a period longer than the period of default for which sale may be had on notice, then that the power may be exercised without notice(*u*).

Where a power was exercisable after default made for one month and upon one month's notice of sale, it was held that no proceedings for sale could be taken until after the expiration of the month's default, *i.e.*, that the notice of sale could not run concurrently with the period of default(*v*). But the authority of this case is doubtful; for it has been held that there is no objection to a mortgagee's entering into an agreement to sell before the expiration of the time given by the notice of sale, the agreement being conditional upon non-redemption by the mortgagor in the meantime(*w*); and where a six months' notice was served after its date, but the sale did not take place until after the expiration of six months from the service of the notice, it was held to be valid(*x*). And where a power was "provided that the mortgagees on default of payment for three months, may enter on and lease or sell the said lands without notice," and was followed by a covenant not to sell until

(*t*) See *Massey* v. *Sladen*, L.R. 4 Ex. 13; *Moore* v. *Shelley*, 8 App. Ca. 285.

(*u*) Leith R.P. Stat. 373, 424 n. (i).

(*v*) *Gibbons* v. *McDougall*, 26 Gr. 214.

(*w*) *Major* v. *Ward*, 5 Ha. 598.

(*x*) *Metters* v. *Brown*, 9 Jur. N.S. 958.

one month's notice of sale should be given to the mortgagor, it was held in an action by the mortgagor to set aside a sale, that the notice might be given at any time after default, provided that no sale was effected until after the expiration of one month from the service of the notice on the mortgagor; and that the purchaser took a good title, the only redress of the mortgagor being under the covenant(*y*).

The notice should intimate the purpose of the mortgagee in giving it. And so, a notice that unless payment were made within three months from the service, the mortgagee would "institute legal proceedings to gain possession," was held ineffectual to support a sale. It should be given to the persons indicated in the power, which should be followed strictly in this respect if the giving of the notice is a condition of the exercise of the power. So, where a power required the notice to be given to the mortgagor, "his heirs, executors or administrators," it was held that a notice of sale given after the mortgagor's death should have been served upon both the heir and the administrator, the disjunctive conjunction having reference only to the personal representatives and not to them and the heir(*z*).

When the power requires notice to be given to the mortgagor, his heirs or assigns, and the mortgagor has created a second mortgage, it is not sufficient to give a notice to the mortgagor alone. It should be served upon the mortgagor *and* his assigns, or upon the assigns and not upon the mortgagor(*a*).

A notice served upon an agent of the mortgagor will be good service, provided that it ultimately reaches the mortgagor himself within time(*b*); but the matter depends upon

(*y*) *Grant* v. *Canada Life Ass'ce Co.*, 29 Gr. 256.

(*z*) *Bartlett* v. *Jull*, 28 Gr. 142. It would have been otherwise if the words had been "his heirs, executors or administrators, or some or one of them."

(*a*) *Hoole* v. *Smith*, 17 Ch. D. 434.

(*b*) *Fenwick* v. *Whitcome*, 1 O.L.R. 24.

contract and not upon rules of Court as to service, and there is no such thing as substitutional service apart from rules of practice or procedure or direct statutory authority.

By the Short Forms Act the power of sale is exercisable upon notice to the "mortgagor, his heirs or assigns." By *The Devolution of Estates Act*, it is declared that the land of any person dying on or after the 1st day of July, 1886, shall "notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representatives from time to time," to be distributed as personalty. The result of this enactment was to raise a doubt as to the construction of all obligations imposed by conveyances upon or in favour of heirs. And to allay the doubt a remedial Act was passed which at first declared that the personal representatives should be the "heirs and assigns," and now declares that "When any portion of the real estate of a person dying on or after the first day of July, 1886, vests in his personal representatives under this Act, such personal representatives in the interpretation of any statute of this Province, or in the construction of any instrument to which the deceased was a party or in which he was interested, shall, while the estate remains in them, be deemed in law his heirs as respects such portion, unless a contrary intention appears(*bb*).

This enactment, as it stands at present, is not in the original form in which it was passed, and questions which might arise under it in its original form, which were referred to in the former edition of this work, need not now be touched upon. While the land vests in the personal representative under the Act, the beneficiaries have no title to the land, but undoubtedly have a right to protect their prospective or potential interests, and to see that the personal representative does not waste the property. And

(*bb*) 50 Vict. cap. 7, sec. 35; now R.S.O. cap. 127, sec. 10.

therefore, they should be served with notice, as a precautionary measure, though not at the time strictly speaking heirs or assigns. It has been said that an execution creditor is an assign and entitled to notice(c); and however doubtful this decision may be, it is the duty of a conveyancer to protect his client against the consequences of it, and to give the notice, although he may not concur in the holding. On similar grounds, the beneficiaries should be served as a measure of precaution and protection, while the land vests in the personal representative.

After conveyance by the personal representative to the beneficiaries, they alone need be served, as assigns, as the personal representative has no further power over the land.

And where the land has been allowed to shift into the beneficiaries under section 13 of the Act, it has been held that notice is sufficiently served by serving it upon the beneficiaries, and that it is not necessary to serve it upon the personal representative; and a title depending upon a conveyance under a power where notice was served on the beneficiaries alone, was forced upon a purchaser(d). In such a case the personal representative undoubtedly has still the right to apply for a caution to revest the land in himself, and so has a sufficient interest to entitle him to recall the land for purposes of the estate and to redeem the mortgage; and as applications for cautions may be made with or without notice, and the personal representative may make a *bona fide* application for a caution, and may know nothing of the service of the notice upon the beneficiaries, there is always the danger that he may obtain a caution *ex parte* and make a sale, or at least register the caution, and so create a cloud on the title, which will expose the purchaser under the power to litigation. As long as *Re Martin & Mer-*

(c) *Re Abbott & Medcalf*, 20 Ont. R. 299.

(d) *Re Martin & Merritt*, 3 O.L.R. 284.

ritt remains unaffected by other judicial opinion it will safeguard the purchaser in its ultimate results; but it is no protection to the purchaser against litigation in case a caution should be subsequently obtained and registered. And as long as *Bartlett* v. *Jull* (*supra*), remains unreversed (wherein it was decided that a notice to be given to "heirs, executors or administrators," required the notice to be given to the heirs as well as the administrators), it will not be safe to neglect to serve both the personal representatives and the beneficiaries. And, with deference, therefore, it is still submitted that the precautionary measure of serving the personal representative be adopted until *The Devolution of Estates Act* gets beyond the experimental stage in which it now exists. Again, if there should be a deficiency on a sale under a power, and the mortgagee should sue the personal representative, his right to redeem would revive(*e*), and he might reasonably object to pay if the mortgagee had parted with the estate without notice to him. At any rate it would raise complications which a conveyancer would not easily solve.

It will be observed that the power of sale is reserved by the Short Forms Act to the mortgagee and his heirs instead of his personal representatives, and when the mortgage is so drawn the same difficulties arise as to the person who should give the notice on the death of the mortgagee as are met with in finding a person to receive it on the death of the mortgagor.

The notice may be served upon the person indicated in the power though he is insane(*f*) or is under age(*g*). It

(*e*) *Kinnaird* v. *Trollope*, 39 Ch. D. 636.

(*f*) *Robertson* v. *Lockie*, 15 Sim. 285. Shadwell, V.C., said that the party who served a notice of dissolution of partnership on a member who had become of unsound mind, was not bound to find understanding for the person on whom it was served. See also *Mellarsh* v. *Keen*, 27 Beav. 236.

(*g*) *Bartlett* v. *Jull*, 28 Gr. 14; *Woods* v. *Hyde*, 19 W. R. 339; *Re Martin & Merritt*, 3 O.L.R. at p. 290. In *Treacy* v. *Lawrence*, 2 Drew. 403, the notice was served on the infant and her guardian.

need not be given to persons claiming paramount to the mortgagor, and not through or under him. Where they have title paramount to the mortgagee the latter can of course sell subject to their interest, but where a mortgagor took by a conveyance which was void as against creditors and then conveyed to the mortgagee without notice, and the conveyance to the mortgagor was afterwards set aside as against his creditors, it was held that the mortgagee was not obliged to give notice of exercising the power of sale to the creditors of the mortgagor, as his title was not affected by their decree, but was paramount to their title, though they might have had a right to redeem the mortgagee and to require him to account for the proceeds of the sale(*h*).

It has been held that an execution creditor of the mortgagor, whose writ is in the Sheriff's hands at the time of serving the notice of sale, is an "assign" and entitled to notice, but one whose writ is put in the Sheriff's hands after notice served is not entitled to notice(*i*). And where a purchaser has contracted to buy the equity of redemption and the mortgagee has notice of his contract, he must serve the purchaser though the conveyance has not yet been made(*j*).

By the Short Forms Act the notice is to be served upon the mortgagor, his heirs or assigns, "either personally or at his or their usual or last place of residence within this Province." It was held by a Divisional Court, reversing the decision of Proudfoot, J., that it was not essential that

(*h*) *Major* v. *Ward*, 5 Ha. 598.

(*i*) *Re Abbott & Medcalf*, 20 Ont. R. 269; *Glover* v. *South'n Loan Co.*, 1 O.L.R. 59. *Sed quære* as to an execution creditor being an assign; he is not an assign within the covenants of the mortgagor as to title and otherwise, and he has no interest in the land. He has an equitable right to redeem in foreclosure proceedings, but the exercise of a power depends upon contract, the form of the power, and not upon equitable rights as between mortgagor and mortgagee. As long, however, as this decision remains it will be prudent to serve execution creditors where notice is necessary.

(*j*) *Stewart* v. *Rowsom*, 22 Ont. R. 533.

the mortgagor should be out of the Province in order that service might be made at his last place of residence(*k*). The decision of this question was not necessary for the disposal of the motion before the Court, which was an appeal from the certificate of a taxing master allowing the costs of so effecting service, and was ultimately determined by the Court of Appeal on the sole ground that the solicitors had not been so negligent in proceeding as to disentitle them to costs against their client. The point cannot therefore be said to be settled.

Service may be effected in three different modes under this provision, (1) by personally serving the mortgagor; (2) by leaving the notice with a grown-up inmate at his usual place of abode in the Province, by analogy to service of proceedings in the Court of Chancery; and (3) by leaving it at his last place of residence in the Province(*l*). It is with regard to the last mode of service that the difficulty arises. If the power required the notice to be left at the last *known* place of abode, it would be complied with by leaving it at such a place whether the mortgagor were at the time within or without the Province(*m*). The words as they stand, looking at their bare meaning, are ambiguous. The "last place of residence within the Province" may mean either the last place at which the mortgagor resided in the Province before leaving it, or the last, *i.e.*, the present of several places in the Province at which he has resided at different times. Adopting the latter construction, we find that it produces a further ambiguity. If he has occupied more than one place of residence at different times, the last is necessarily his present place of residence. For, if we regard as the last the one which he occupied immediately before his present place of residence, then when he has occu-

(*k*) *O'Donohoe* v. *Whitty*, 22 Ont. R. 424.
(*l*) *Per* Boyd, C., in *O'Donohoe* v. *Whitty*, 2 Ont. R. at p. 430.
(*m*) *Major* v. *Ward*, 5 Ha. 598.

pied several and is still living in the Province, it will always be sufficient to leave the notice at the one which he occupied immediately before his present place of residence. But it could not have been intended that the notice should be sufficient if left at the place where from its very nature and description the mortgagor would not be found. On the other hand it cannot be said that the usual place of residence and the last place of residence are the same within the meaning of the statute, or it would not have mentioned both. This ambiguity is avoided by interpreting the last place of residence in the Province to mean the last place in the Province at which the mortgagor resided before leaving it; and the usual place of residence to mean that at which he is usually or most frequently found, if he is a person who moves about. This leads us to the conclusion that if the mortgagor is within the Province the notice must be personally served on him or left at his usual, that is, his present place of residence.

This was denied in *O'Donohoe* v. *Whitty*, and it was said that it would be unreasonable to compel the mortgagee to undertake a probably fruitless search for the mortgagor if his whereabouts were unknown. But it may be observed that the difficulty or even the impossibility of effecting service according to the terms of the power is no reason for adopting some other mode not expressly authorized thereby. If the mortgagor never had a place of residence within the Province, it is obvious that personal service alone would suffice, and the inability to find the mortgagor would be an effectual bar to the exercise of the power. So, as we have seen, where the power requires notice to be served upon the personal representative of the mortgagor, it is inoperative after his death unless a personal representative is appointed(*n*).

(*n*) *Parkinson* v. *Hanbury*, L.R. 2 H.L. at p. 18.

When a mortgagee has given a notice he may, if he please, waive it; but if he does waive it he must give a new notice if he desires to take advantage of the same default(*o*). But a mortgagor cannot waive a notice, when notice is necessary, so as to enable the mortgagee to sell, if he has created incumbrances subsequent to the mortgage under which the sale is proposed(*p*).

By *The Mortgage Act*(*q*) it is enacted that "in order to prevent the making of unnecessary and vexatious costs in respect to mortgages, it is hereby enacted that, where pursuant to any condition or proviso contained in a mortgage, there has been made or given a demand or notice either requiring payment of the moneys or any part thereof secured by such mortgage, or declaring an intention to proceed under and exercise the power of sale contained in such mortgage, no further proceedings [at law or in equity] and no [suit or] action either to enforce such mortgage, or with respect to any clause, covenant or provision therein contained, or the lands or any part thereof thereby mortgaged shall, until after the lapse of the time at or after which, according to such demand or notice, payment of the moneys is to be made, or the power of sale is to be exercised or proceeded under, be commenced or taken, unless and until an order permitting the same shall first be had and obtained either from the Judge of a County Court or from a Judge of the High Court."

Upon the revision of the statutes in 1887 (the distinction between law and equity having in the meantime been practically abolished), the phraseology of the section was

(*o*) *Tommey* v. *White*, 3 H.L.C. 49.

(*p*) *Forster* v. *Hoggart*, 15 Q.B. 155; *Selwyn* v. *Garfit*, 38 Ch. D. 273.

(*q*) R.S.O. cap. 121, sec. 31; originally passed 47 Vict. cap. 16, sec. 1.

altered, the words in brackets being struck out(*r*) with a result which will be noticed presently.

The order may be obtained *ex parte*, but only upon such affidavits and proof as will satisfy the Judge that it is reasonable and equitable that the proposed action or proceeding should be allowed to be taken. And the section is not to apply to proceedings to stay waste or other injury to the mortgaged premises, the costs of which are to be in the discretion of the Judge.

The effect of the original enactment was to stay all proceedings, other than the sale proceedings, which the mortgagee might otherwise take until the time mentioned in the notice had elapsed, unless a Judge's order had been obtained permitting such proceedings to be taken.

Since the revision of 1887 the phrase "further proceedings" has an enlarged signification on account of the elision of the words "at law or in equity," and "suit or," and includes the very proceedings of which the notice is but the first step(*s*). So that a notice specifying a time within which payment is to be made or at the expiration of which a sale will take place, practically defeats its own purpose, and stays the proceedings of which notice is given until the time mentioned in the notice has expired. It is advisable to avoid this result by refraining from inserting a demand for the money in the notice (which is entirely unnecessary), and by giving notice of proceeding to exercise the power forthwith.

It makes no difference whether the action is commenced before or after the notice of sale has been given; all proceedings are nevertheless stayed(*t*). It will be observed that the Act stays proceedings until after the lapse of time mentioned in the notice. And as it is most inconvenient for the

(*r*) R.S.O. (1887) cap. 102, sec. 30.
(*s*) *Smith* v. *Brown*, 20 Ont. R. 165.
(*t*) *Perry* v. *Perry*, 10 P.R. 275.

mortgsgee not to be ahle to commence an action to recover the lsnd in order that he may be able to give possession to a purchsser, it is recommended thst for this purpose also the notice of ssle should specify that the power is to be exercised forthwith.

3. *Sale and conveyance.*

The legitimate purpose of the power heing to secure the repsyment of the mortgage money, it follows that if it is used for any other purpose, or to serve the purposes of others than the mortgagee, it is a frsud on the exercise of the power(*u*). Hence, where a power of sale was exercised for the purpose of ousting the mortgagor from his share in a newspaper, the sale was set aside(*v*). Nor must the power be exercised in an oppressive or arbitrsry manner(*w*). And so, where a mortgagee in possession sold goods in s shop in a reckless and improvident manner, it was held that he must account not only for what he actually received, hut for whst he might have ohtained had he acted with due regsrd for the interests of the mortgagor(*x*). Nor may he sell without giving due notice and allowing a reasonahle opportunity of complying with it(*y*).

If the mortgagee does anything to defest, thwart or discourage the redemption of the mortgsge, his conduct is oppressive; and oppressive or vexstious exercise of the power will not only invalidate the ssle as against a purchaser having notice of the circumstances(*z*), but will

(*u*) *Robertson* v. *Norris*, 1 Giff. 421; *Winters* v. *McKinistry*, 22 Occ. N. 213.

(*v*) *Robertson* v. *Norris*, 1 Giff. 424.

(*w*) *Matthie* v. *Edwards*, 2 Coll. 465, reversed without affecting this point, 11 Jur. 761.

(*x*) *Rennie* v. *Block*, 26 S.C.R. 356.

(*y*) *Selwyn* v. *Garfit*, 38 Ch. D. 273; *Moore* v. *Shelley*, 8 App. Ca. 285; *Massey* v. *Sladen*, L.R. 4 Ex. 13.

(*z*) *Jenkins* v. *Jones*, 2 Giff. 99.

relieve him from the obligation of carrying out the sale(*a*). And great lapse of time (in the case cited, fifteen years), will not bar the right to redeem(*b*).

The sale must of course be *bona fide;* and, if under the pretence of a sale the transaction is only an assignment of the mortgage or some other contrivance by which the mortgagee attempts to clothe himself with the absolute ownership, that would not be an execution of the power(*c*). And where a mortgagee in possession offered to give a portion of the mortgaged premises as a site for a hospital, but being informed that his title did not enable him to do this, sold to the hospital at a valuation and gave the price to the charity, it was held that the sale was colourable and fictitious though without dishonest intention, and therefore not a valid exercise of the power(*d*).

The whole subject has received consideration in the House of Lords in *Kennedy* v. *De Trafford*(*e*). The facts were that Dodson and Carswell were tenants in common of the mortgaged lands. Carswell became a bankrupt and his share vested in a trustee. The mortgagee who was pressing wrote to Dodson and the trustee that he would realize if he could obtain "principal, interest and costs," and stated that if not paid off he would endeavour to effect a sale by private treaty. Dodson had for some time been collecting the rents and sending them to the mortgagee. Ultimately the mortgagee sold under the power of sale to Dodson for principal and interest and costs, and the action was brought to set the sale aside and for redemption, or for damages for negligence in exercising the power. In his speech to the

(*a*) *Locking* v. *Halstead*, 16 Ont. R. 32.

(*b*) *Robertson* v. *Norris*, 1 Giff. 421.

(*c*) *Thurlow* v. *Mackeson*, L.R. 4 Q.B. at p. 108. See also *Smith* v. *Hunt*, 2 O.L.R. 134; 4 O.L.R. 65.

(*d*) *Davey* v. *Durrant*, 1 DeG. & J. 535.

(*e*) L.R. (1897) A.C. 180.

House, Lord Herschell said, "I am myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. Lindley, L.J., in the Court below, says that 'it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor.' Well, I think that is all covered really by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words 'good faith,' but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith." It was also held that the collection of the rents by Dodson and his transmission of them to the mortgagee did not constitute Dodson the mortgagee's agent, for he was, as tenant in common, exercising his rights as an owner of the property, and therefore there was no fiduciary relationship between him and the mortgagee, and the sale could not be attacked on that ground.

In another case(*f*) a farm and two shops in a village nearly three-quarters of a mile away were included in one mortgage; the mortgage contained a power to sell either *en bloc* or by parcels. The mortgagors were heavily in debt and the executions against their lands were large enough in amount to absorb any surplus. The mortgagees sold in one lot the farm and the two shops. In an action for negligence in so selling instead of selling in parcels, it was proved that a larger sum could have been procured by a sale in separate

(*f*) *Aldrich* v. *Can. Perm. L. & S. Co.*, 24 App. R. 193.

lots. There was some difference of judicial opinion upon the matter, but the majority of the judges were of opinion that the mortgagees were negligent in not selling in several parcels instead of in one. It is difficult to see how negligence could be charged in such a case. Negligence in selling is no doubt actionable, because there is the implied obligation to exercise the power carefully; but no recklessness or negligence was charged in this action except the adoption of one of two modes of sale, either one of which was permitted by the mortgage, *i.e.*, either in parcels or in one lot. In other words, though the mortgagors contracted with the mortgagee that the latter might on default sell either in parcels or in one lot, yet it was actionable negligence because he chose one of these lawful alternatives, and it was afterwards proved that he might have made more by choosing the other(*g*).

The powers of a mortgagee under a power of sale are not the same as those of an owner in fee simple, even where he has a power to sell part of the mortgaged property. The owner might sell the material of a house from off the property: he might dig up part of the property and sell gravel; he might partly pull down the house and sell the bricks; and he might sell the trade machinery out of his trade manufactories. A mortgagee is in a different position. He may not, under the power to sell a part of the property, sell machinery affixed to a manufactory apart from the manufactory itself(*h*). And it has been held that a power to sell the land does not authorize the sale of the timber apart from the land(*i*); but the mortgagee may cut the

(*g*) See and Cf. cases under the Settled Land Act, 1882, giving power to the tenant for life to lease "the settled land, or any part thereof"; *Re Newell & Willis' Contract*, L.R. (1900) 1 Ch. 90; overruled by *Re Gladstone*, L.R. (1900) 2 Ch. 101; *Re Duke of Portland's Estate*, L.R. (1900) 2 Ch. 206; *Re Aldam's Settled Estate* (1901), W.N. 229.

(*h*) *Re Yates*, 38 Ch. D. 112.

(*i*) *Stewart* v. *Rowsom*, 22 Ont. R. 533.

timber himself and sell it(*j*). It bas also been held that a power of sale will authorize an exchange(*k*). In Manitoba the contrary has been held(*l*).

It is not necessary that the concurrence of the mortgagor in the sale should be procured; a power to sell with the mortgagor's consent would be no power at all, for he could always defeat a sale by withholding his consent(*m*). And those claiming under the mortgagor have no higher rights than he has, and their consent is therefore unnecessary(*n*).

The mortgagee is not a mere trustee, but has a beneficial interest in realizing the security so as to get his principal, interest and costs(*o*). He must not exercise that right without a due regard to the interest of the mortgagor, which requires that the sale should take place as beneficially as if he were himself selling(*p*); but as long as he exercises it *bona fide* for the purpose of recovering his debt, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed, the price is so low as of itself to be evidence of fraud(*q*).

When the power gives the right to sell either by public auction or private contract, it seems that the mortgagee is not bound to put up the property for sale by auction before attempting a private sale, if the offer made on the private sale is a fair one; nor is he as a consequence bound to adver-

(*j*) *Brethour* v. *Brook*, 23 Ont. R. 658; 21 App. R. 144.

(*k*) *Smith* v. *Spears*, 22 Ont. R. 286. *Sed quaere:* the right of the mortgagor to an account of the proceeds and a disposition of the surplus, if any, is thus taken away.

(*l*) *Winters* v. *McKinistry*, 22 Occ. N. 213.

(*m*) *Hampshire* v. *Bradley*, 2 Coll. at p. 40.

(*n*) *Alexander* v. *Crosby*, 1 J. & Lat. 666.

(*o*) *Cholmondeley* v. *Clinton*, 2 J. & W. at p. 182. *et seq.*: *Warner* v. *Jacob*, 20 Ch. D. 220.

(*p*) *Falkner* v. *Eq. Rev. Soc'y.*, 4 Drew. 355.

(*q*) *Warner* v. *Jacob*, 20 Ch. D. 220.

tise(*r*). But where an estate was sold by offering it to an assemblage of persons called together to bid, but no advertisement had been published, and the land was sold for a little more than half the amount due on the mortgage, the sale was set aside(*s*). The right of the mortgagee with respect to selling depends upon the terms of the power, and therefore when it authorizes a sale by public auction only, a private sale will not be valid(*t*).

Though a mortgagee is bound to act reasonably and with the same care and prudence that a prudent man would in selling his own property and preventing a sacrifice(*u*), he is not bound to speculate, or wait in the hope that a larger sum will be obtained, if in fact a reasonable offer is made(*v*). But where a mortgagee offered the property for sale without advertisement, saying that "all he wanted was to get the money due him, and he would let the property go," the sale was set aside(*w*).

The duty of a mortgagee with respect to making special conditions of sale is well explained in *Falkner* v. *Equitable Reversionary Society*(*x*). It is there said, "This, however, must be borne in mind, that though of course the object of the mortgagor is to realize the largest amount that can be got, yet it does not follow that conditions of sale, the effect of which would be to obtain the largest possible amount at the sale, are always the best for the mortgagor, for they may be such that after selling at a good price immense expense may

(*r*) *Davey* v. *Durrant*, 1 DeG. & J. 535. See *Ord* v. *Noel*, 5 Madd. at p. 440; *Latch* v. *Furlong*, 12 Gr. at p. 305.

(*s*) *Richmond* v. *Evans*, 8 Gr. 508.

(*t*) *Brouard* v. *Dumaresque*, 3 Moo. P.C. 457; *Bousfield* v. *Hodges*, 33 Beav. 90.

(*r*) *Davey* v. *Durrant*, 1 DeG. & J. at p. 553.

(*w*) *Latch* v. *Furlong*, 12 Gr. 303.

(*u*) *Richmond* v. *Evans*, 8 Gr. 508; *Matthie* v. *Edwards*, 2 Coll. 465.

(*x*) 4 Drew. at p. 355.

afterwards occur, and after all you may fail in enforcing the contract, which would be to the detriment of the mortgagor. It does not follow, therefore, that because the conditions do to some extent tend to depreciate the price that will be offered at the sale, they are conditions which are really to the detriment of the mortgagor. If such a condition as this [that the vendor might rescind if unable or unwilling to answer any objection] were to the detriment of a mortgagor, it would be equally so when the absolute owner is selling; and yet we find that it is in practice a very ordinary and reasonable condition for an absolute owner to introduce in his conditions, and one that without saying all conveyancers, but at any rate many leading conveyancers, consider extremely proper to be introduced. When a mortgagee is selling under a power the strong impression upon my mind is this, that the question is not simply whether such a condition may tend to diminish the number of buyers or the sum which any bidder may be disposed to give, but whether it would tend to the detriment of the mortgagor or of an absolute owner, or be prudent in an absolute owner. If it would be prudent in an absolute owner it is not imprudent as affecting a mortgagor"(*y*). In one case it was held that a condition that the abstract should commence with a certain deed, that all recitals in deeds fifteen years old should be conclusive evidence of the truth of the facts recited, and that no evidence of identity of parcels should be required, was not an improper condition(*z*). But in a sale by trustees a stipulation that the title should commence with the deed under which the property became vested in them as trustees was held to be improper(*a*). The reasonableness of conditions respecting

(*y*) *Hobson* v. *Bell*, 2 Beav. 17.

(*z*) *Kershaw* v. *Kaloe*, 1 Jur. N.S. 974.

(*a*) *Dance* v. *Goldingham*, 8 Ch. App. 902.

title must to a great extent depend upon the circumstances of each case.

It is no objection to a sale that it is carried out by taking a mortgage from the purchaser for part of the purchase money, if the transaction is *bona fide*, and there is nothing in the power against selling on credit. And a stipulation in the power that the receipt of the mortgagee for the purchase money shall be an effectual discharge to the purchaser is no restriction upon such an exercise of the power of sale, but is made for the purpose of relieving the purchaser from the necessity of seeing to the application of the purchase money(*b*).

It has been inferred from some judicial expressions that a mortgagee is to be treated as a trustee with respect to his power of sale(*c*). If he can be said to be a trustee in this connection it is only in the sense that he is entrusted with the power in order to enable him to recover his money, and must therefore exercise it in a provident manner. It is clear that he is entitled to exercise the power for his own benefit, subject only to the condition that he must exercise it in good faith, and that as to the surplus, if any, he is a trustee for the parties entitled to share in its distribution(*d*). Nevertheless he is disqualified from buying under the power of sale on the ordinary principle that his duty in selling would necessarily conflict with his interest in buying. And so it has been held that he cannot buy either by private contract or publicly. Nor can an agent nor his

(*b*) *Thurlow* v. *Mackeson*, L.R. 4 Q.B. 97; *Davey* v. *Durrant*, 1 DeG. & J. 535.

(*c*) See *contra*, *per* Burton, J.A., *Aldrich* v. *Can. Perm. L. & S. Co.*, 24 App. R. at p. 201.

(*d*) *Warner* v. *Jacob*, 20 Ch. D. 220; see also and consider *Cholmondeley* v. *Clinton*, 2 J. & W. at pp. 182, *et seq.*; *Robertson* v. *Norris*, 1 Giff. 421, was disapproved in *Nash* v. *Eads*, 25 Sol. J. 95, and limited in *Warner* v. *Jacob*, *supra*. See his duties as to distribution of the surplus, *Glover* v. *Southern Loan Co.*, 1 O.L.R. 59.

solicitor's clerk(*e*) buy for him(*f*), nor his solicitor either for himself or the mortgagee(*g*). And where a building society offered mortgaged premises for sale under their power, a purchase at public auction by their secretary on his own account was set aside at the instance of the mortgagor, though the price given was a fair one(*h*). And where a mortgage was held in trust for R., the real mortgagee, and the person holding the mortgage sold under R.'s direction to one H., another nominee of R., and R. induced three others to join him in buying from H., it was held that R. was bound to reconvey to the mortgagor his one-fourth interest so acquired, and to account for the value of the remaining three-fourths held by the three *bona fide* purchasers(*i*).

But where one of three mortgagees in possession, acting as solicitor for them, sold under the power of sale in the mortgage to a company formed for the purpose of buying, and the solicitor mortgagee took an active part in promoting the company, took shares in it and became its solicitor, it was held that the sale was not invalidated merely by reason of the solicitor's being a shareholder in the company, but that there was such a conflict of interest and duty in the solicitor that the burden of upholding the sale was cast on the company, notice of the circumstances being brought home to it(*j*). In this case the sale was upheld on its being shown that the solicitor had taken all reasonable pains to secure a purchaser at the best price, and that the price given was not inadequate, though a higher one might have been obtained by postponing the sale.

(*e*) *Ellis* v. *Dellabough*, 15 Gr. 583.

(*f*) *Nelthorpe* v. *Pennyman*, 14 Ves. 517; *Howard* v. *Harding*, 18 Gr. 181.

(*g*) *Downes* v. *Grazebrook*, 3 Mer. 200; *Whitcomb* v. *Minchin*, 5 Madd. 91.

(*h*) *Martinson* v. *Clowes*, 21 Ch. D. 857.

(*i*) *Smith* v. *Hunt*, 2 O.L.R. 134; 4 O.L.R. 653.

(*j*) *Farrar* v. *Farrars Limited*, 40 Ch. D. 395.

Where a mortgagee sells to a nominee of his own, it is not necessarily fraudulent; it may be a mere blunder; but it is necessarily inoperative. The mortgagee remains mortgagee, and should inform the mortgagor that the supposed purchaser is his trustee and may be redeemed(*k*). Such a transaction does not exhaust the power of sale, but it may still be acted upon, and a purchaser for value in good faith, even though he has notice of the invalidity of the previous pretended sale will take a good title; and necessary improvements made by the mortgagee before the valid sale will be allowed for(*l*).

A second mortgagee may buy at a sale under a power in the prior mortgage(*m*), and he takes the same absolute irredeemable title that a stranger would take, unless he has availed himself of his position as mortgagee to procure some facility or advantage leading to the purchase(*n*). And in one case where the second mortgagee had been paid off and had in his hands a sufficient amount of the mortgagor's money to redeem the first mortgage, but held it without any obligation so to apply it, a purchase by him of the mortgaged premises at a sale under the power in the first mortgage was upheld(*o*). And a second mortgagee may buy though he holds in trust for sale(*p*), and is in possession at the time of the sale; and as to undervalue he is in the same position as a stranger(*q*).

One of two tenants in common of the equity of redemption may buy, as they occupy no fiduciary relationship towards each other, and such a relationship is not created by

(*k*) *Henderson* v. *Astwood*, L.R. (1894) A.C. at p. 161.
(*l*) *Henderson* v. *Astwood*, L.R. (1894) A.C. 150.
(*m*) *Watkins* v. *M'Kellar*, 7 Gr. 584.
(*n*) *Shaw* v. *Bunny*, 2 D.J. & S. 468.
(*o*) *Brown* v. *Woodhouse*, 14 Gr. 682. See also *Chambers* v. *Waters*, 3 Sim. 42; affirmed 11 Cl. & F. 684.
(*p*) But see *Parkinson* v. *Hanbury*, 2 D.J. & S. 450.
(*q*) *Kirkwood* v. *Thompson*, 2 D.J. & S. 613.

one permitting the other (the ultimate purchaser) to collect the rents and pay them to the mortgagee; nor is a fiduciary relationship thereby established between the mortgagee and the purchasing tenant in common, for in collecting the rents and paying them over he is exercising a right of property of his own and is not to be taken as the agent of the mortgagee(*r*).

Where the mortgagee has effected a sale, and entered into a contract for sale, he cannot, without sufficient reason, treat the sale as a nullity, and fall back upon the mortgage to pursue other remedies as if no sale had taken place(*s*).

When the mortgage contains a provision that the purchaser shall not be bound to inquire whether default has been made he cannot insist upon evidence of default(*t*). But in the absence of any such stipulation he is entitled to evidence, and the unsupported declaration of the mortgagee has been held insufficient(*u*).

As the concurrence of the mortgagor in the sale is unnecessary, so it is unnecessary in the conveyance(*v*). But on a sale under an equitable mortgage the purchaser is entitled to have the mortgagor concur in the conveyance, or his assignees if he has become bankrupt(*w*). And where an outstanding term was vested in a trustee for better securing the mortgagee he was compelled to join in conveying upon a sale by the mortgagee under his power(*x*).

(*r*) *Kennedy* v. *De Trafford*, L.R. (1897) A.C. 180.

(*s*) *Patterson* v. *Tanner*, 22 Ont. R. 384.

(*t*) *Re Ir. Civil Service Bdg. Soc'y & O'Keefe*, 7 L.R. (Ir.) Ch. 136 (1881-2).

(*u*) *Hobson* v. *Bell*, 2 Beav. 17.

(*v*) *Corder* v. *Morgan*, 18 Ves. 344.

(*w*) *Hawkins* v. *Ramsbottom*, 1 Pr. 138. See *Re Hodson & Howes*, 35 Ch. D. 668; *Re Solomon & Meagher*, 40 Ch. D. 508.

(*x*) *Hampshire* v. *Bradley*, 2 Coll. 34.

The conveyance should recite the power and in addition should purport to convey under every other power enabling the mortgagee to convey according to the usual form; but a conveyance reciting foreclosure proceedings, which professed to be made by mortgagees as absolute owners, was supported as an exercise of the power of sale, the foreclosure proceedings having been found defective(*y*). And an ordinary purchase deed without recitals was similarly upheld, the intention to pass the property as owner being clear(*z*).

The effect of a conveyance under a power of sale is to carry with it all the legal incidents which accompany a grant in right of property; and upon a sale of part of the property, where the power permits it, he can therefore give the purchaser an implied easement over the remaining part —in this case a right to the access of light over the portion retained by the mortgagee(*a*).

If from any reason the conveyance does not operate to give the purchaser a good title, it will still operate as an assignment of the mortgage(*b*). The purchaser will not, however, be treated as a mortgagee in possession with respect to accounting unless he is aware of his position(*c*). And where he has made improvements under the belief that he is absolute owner he will be allowed for them(*d*).

When a mortgagee makes a derivative mortgage of his security and gives the sub-mortgagee the right to exercise the power of sale in the original mortgage on default, it is doubtful whether the original mortgagee can make a valid sale under the power before redeeming the derivative mort-

(*y*) *Kelly* v. *Imp. L. & I. Co.*, 11 S.C.R. 516.
(*z*) *Chatfield* v. *Cunningham*, 23 Ont. R. 153.
(*a*) *Born* v. *Turner*, L.R. (1900) 2 Ch. 211.
(*b*) *Bright* v. *McMurray*, 1 Ont. R. 172.
(*c*) *Parkinson* v. *Hanbury*, L.R. 2 H.L. 1.
(*d*) *Carroll* v. *Robertson*, 15 Gr. 173; *Fawcett* v. *Burwell*, 27 Gr. 445. And see *Henderson* v. *Isherwood*, L.R. (1894) A.C. 150.

gage; at any rate a purchaser would not be bound to take such a title in the absence of a clear condition obliging him(*e*).

By statute "in every case in which a person makes lasting improvements on land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required to retain the land if the Court is of opinion or requires that this should be done, according as may, under all the circumstances of the case, be most just, making compensation for the land, if retained, as the Court may direct"(*f*).

(*e*) *Cruse* v. *Nowell*, 25 L.J. Ch. 709.
(*f*) R.S.O. cap. 119, sec. 30.

A PRECEDENT FOR AN ABSTRACT OF TITLE.

PREFACE.

IT is hoped that the following precedent will prove of service to practitioners. So much reliance is placed upon a personal search of the register, or a Registrar's abstract, that but little attention has been paid to the preparation of Solicitors' abstracts.

In compiling this precedent the writer has departed from the verbose forms which are usually followed by English conveyancers. Our system of conveyancing is so simple in Ontario that one is seldom called upon to peruse intricate conveyances. For this reason it has been thought sufficient to state in as few words as possible the actual component parts of the conveyances. To abstract at greater length than has been done in this precedent one of our short form deeds would be to transcribe nearly the whole deed. When it becomes necessary to abstract more intricate conveyances the forms shown in the precedent may be followed as far as they form a guide, bearing in mind that it is only necessary to give sufficient information to the purchaser's solicitor to enable him to follow the chain of title in fee to the end, to inform him concisely of the nature and effect of each instrument, and to exhibit such charges or incumbrances as may exist. Where the effect of an instrument is doubtful it is well to abstract fully; and in the case of a will care should be taken to abstract it in full, giving the exact words where the construction is likely to be called into question.

With respect to the mechanical arrangement of the abstract. It should be drawn upon brief paper with an ample margin for notes upon the left-hand side; there should be a title showing the owner, the nature of the property (*e.g.* freehold), the estate of the owner, any qualification as to title which it is sold subject to, and a short description or designation of the property.

For convenience sake in making and answering requisitions, it is well to number each link in the chain of title.

The marginal notes, which to save space have been placed at the head of each instrument abstracted may be placed conspicuously in the margin or as they are placed in the precedent. The object is to show clearly the registration number, the date of the instrument, its date of registration, and its nature.

PRECEDENT.

ABSTRACT of the title of JOHN STILES to that freehold estate known as LAKESIDE FARM, containing by estimation [or admeasurement] four hundred acres, and being composed of Lots Numbers THREE and FOUR, in the SECOND Concession of the TOWNSHIP OF——, in the COUNTY OF——.

AS TO LOT THREE.

1.—10th June, 1791. Letters patent.

GRANT to JOHN NOKES, his heirs and assigns forever. Cons. £100. Lot Three in the Second Concession of—. Under the Great Seal of the Province.

2.—8646—Bargain and Sale—2nd July, 1792. 3rd October, 1792. JOHN NOKES 1st pt., JANE NOKES, his wife, 2nd pt., ABRAHAM SMITH, 3rd pt. Cons. £300. Same land. Bargn. sell. assn. transfer and set over to ABRAHAM SMITH, his hrs. and assns. forever.

HABENDUM to sd. A. S., his hrs. and assns. forever.

COVENANTS by JOHN NOKES.

1. Right to convey.
2. For quiet possession free from incumbrances.
3. For further assurance.
4. To produce title deeds.
5. Against incumbrances by him.

RELEASE of all claims, and BAR OF DOWER.

Executed by John Nokes and Jane Nokes, and attested by one witness.

Certificate of registration endorsed.

3.—8647—Mortgage—2nd July, 1792. 3rd October, 1792.

ABRAHAM SMITH, 1st pt., SUSAN SMITH 2nd pt., JOHN NOKES, 3rd pt. Cons. £100. Same land. Bargain, sell, etc., and mortgage to JOHN NOKES, his hrs. and assns. forever.

PROVISO for being void on payment of £100 and int. as therein set out.

COVENANTS BY ABRAHAM SMITH.

1. To pay mtge. money, etc.
2. For good title in fee simple.
3. Right to convey.
4. Quiet possession on default free from incumbrances.
5. Further assurance.
6. Against incumbrances by him.

RELEASE of all claims, and BAR OF DOWER.

Power of sale to be exercised on default in payment upon notice.

PROVISOES for distress for arrears of int., accelerating paymt. of prin. on default in paymt. of int., and for quiet possession by the mtgor. until default.

Executed by ABRAHAM SMITH and SUSAN SMITH in presence of two witnesses.

Certificate of registration endorsed.

4—10673—Dis. of mtge.—4th July, 1800. 5th July, 1800. Statutory discharge of above mortgage signed by JOHN NOKES. Certificate of the registration of this discharge endorsed on the mortgage.

5.—11671.—Bargain and Sale—10th May, 1805. 11th May, 1805. ABRAHAM SMITH, widower, 1st pt., WILLIAM GREEN, 2nd pt. Cons. £500. Same land. Bargain, sell, etc., to WILLIAM GREEN, his hrs. and assns. forever.

HABENDUM, to sd. W. G., his hrs. and assns. forever.

COVENANTS by Abraham Smith,

1. Right to convey.
2. For quiet possession free from incumbrances.
3. For further assurance.
4. Against incumbrances by him.

RELEASE of all claims.

Executed by ABRAHAM SMITH in presence of one witness.

Certificate of regiatration endorsed.

Declaration by C. D., an acquaintance of Abraham Smith, of death of Susan Smith, his wife.

AS TO THE EAST HALF OF LOT THREE.

6.—11890—Conveyance—1st October, 1820. 2nd October, 1820. WILLIAM GREEN, 1st pt., SARAH GREEN, his wife, 2nd pt., JOHN GREEN, 3rd pt.

RECITALS. John Green is the son of William Green; desire of William Green to advance him in pursuance of which he makes this conveyance. CONA. Natural love and affection and five shillings. East ½ of lot three. Bargain, sell, alien, transfer, assign, enfeoff, etc., to John Green, his hrs. and assns. forever.

HABENDUM, to JOHN GREEN, his hrs. and assns. forever.

RELEASE of all claims. No covenants. BAR OF DOWER. Executed by WILLIAM GREEN and SARAH GREEN in the presence of one witness. Certificate of registration endorsed.

7.——12340.—Mortgage—12th April, 1835. 13th April, 1835. JOHN GREEN, 1st pt., EMILY GREEN, his wife, 2nd pt., JAMES TOLER, 3rd pt. Cons. £600. Same land. Grant and mtge. to JAMES TOLER, his hrs. and assns. forever.

PROVIAO for being void on paymt. of £600 at expiration of five years with int. half-yearly at 7 p.c. on 2nd January and 2nd July in each year, till whole am't. be pd.

COVENANTS by JOHN GREEN,

1. To pay mortgage money, etc.
2. For good title in fee simple.
3. Right to convey.
4. Quiet possession on default free from incumbrances.
5. Further assurance.
6. Against Incumbrances by him.

RELEASE of all claims, and BAR OF DOWER.

POWER OF SALE, on default in payment of principal or interest or any part for two months, after written notice to mortgagor, his heirs or assigns, personally or at last known residence in this province, not less than one month before sale, by public auction or private contract, whole lands or part, mortgagee to stand possessed of proceeds in trust to pay mortgage money, interest, costs, expenses, taxes, insurance, etc., and pay surplus, if any, to mortgagor, his executors, administrators or assigns.

PROVISOES for distress for arrears of interest, accelerating paymt. of prin. on default in paymt. of int., and for quiet possession by mortgor. until default.

Executed by JOHN GREEN and EMILY GREEN in presence of one witness.

Cerificate of registration endorsed.

8.—The said JOHN GREEN died intestate on 15th June, 1840, leaving him surviving his widow, the said EMILY GREEN, and an infant daughter, his only child. On 10th November, 1840, letters of administration of the personal estate and effects of the said John Green were granted by the Surrogate Court of the County of —— to the said Emily Green. On the same day letters of guardianship to the said infant daughter were granted by the same Court to the sd. EMILY GREEN.

9.—13401.—Conveyance.—12th May, 1842. 13th May, 1842. JAMES TOLER, 1st pt., JOHN SMITH, 2nd pt.

RECITALS. That JOHN GREEN, by indre. bearing date 12th April, 1835, [further describing mtge. by Green to Toler] did mtge. land therein and hereinafter described to JAMES TOLER, etc., which contained proviso for being void on paymt. of, etc., and also a power of sale [abstract shortly]; that default was made in paymt. of int. which fell due on, etc., whereby the whole prin. money also fell due, and more than two months elapsed, etc.; that John Green departed this life on, etc., leaving him surviving, etc.: that notice was given in writing to sd. [infant daughter] his heir at-law by delivering a copy thereof to her, and also a copy to the sd. Emily Green, her guardian, duly appointed by the Surrogate Court of the county of , of intention to exercise the power of sale in said mtge. and more than one month elapsed thereafter; that sd. land was exposed for sale by public auction after being duly advertised for sale by E. F., auctioneer at , and that no bid was obtained therefor; that subsequently JOHN SMITH offered for the sd. land the sum of $1,000. Cons. $1,000. Same land.

GRANT to John Smith, his hrs. and assns. forever in pursuance of the power of sale, etc., and all other powers, etc.

HABENDUM, to John Smith, his hrs. and assns. forever.

COVENANTS by JAMES TOLER that he has done no act to encumber.

Executed by JAMES TOLER, in presence of one witness.

Certificate of registration endorsed.

DECLARATIONS of posting up and publication in newspapers of advertisements for sale of land; of service of notice of sale; of auctioneer as to attempted sale by him; of default in payment of interest.

10.—14670.—Grant—12th December, 1867. 13 December, 1867.
JOHN SMITH, 1st pt., ABEL GREEN, 2nd pt., ADELIA SMITH, 3rd pt
In duplicate. In pursuance of the Short Forms Act. Cons. $2,000.
GRANT, to ABEL GREEN, his hrs. and assns. forever.

HABENDUM, to ABEL GREEN, his hrs. and assns. forever.

COVENANTS, Short form.

BAR OF DOWER and RELEASE of all claims.

Executed by JOHN SMITH and ADELIA SMITH in presence of one witness.

Certificate of registration endorsed.

AS TO WEST HALF OF LOT THREE.

11.—The said WILLIAM GREEN died intestate on the 1st November, 1853, leaving him surviving two daughters, AMELIA GREEN, ADELAIDE SNOOKS, wife of George Snooks, three sons, ABEL GREEN, JABON GREEN and SAMUEL GREEN, and VICTORIA GREEN, the infant daughter of a deceased son, JOHN GREEN.

DECLARATIONS of X. Y., N. M. and others. Certificate of burial of WILLIAM GREEN. Letters of administration granted by Surrogate Court to ABEL GREEN.

12.—14506—Memorial of Partition deed—10th June, 1860. 15th June, 1860.

AMELIA GREEN, 1st pt., ADELAIDE SNOOKS and GEORGE SNOOKS, 2nd pt., ABEL GREEN, 3rd pt., JASON GREEN, 4th pt., SAMUEL GREEN, 5th pt., VICTORIA GREEN, 6th pt.

RECITALS. That WILLIAM GREEN was seised in fee and died intestate, etc., leaving his surviving parties hereto, etc. Agreement to partition by allotting one sixth part herinafter described to AMELIA GREEN who agreed to accept same, etc., and by allotting to ABEL GREEN residue in consideration of paying to each of the others except AMELIA GREEN, $500.

Cons. $500 pd. to each of said parties except AMELIA GREEN by sd. ADEL GREEN.

GRANT and release by all sd. parties except ABEL GREEN to ABEL GREEN, his hrs. and assns. forever, all west half of lot three, except part particularly described and by this deed conveyed, or intended to be, to Amelia Green.

Cons. agreement to make partition and $1.00. All said parties except AMELIA GREEN, grant and release to AMELIA GREEN, her hrs. and assns. forever that pt. of lot three described as follows [describe it].

HABENDUM to each of sd. parties, their heirs and assns. respectively, the sd. parcels respectively.

Executed by all parties in presence of two witnesses.

Memorial signed by ABEL GREEN. Certified copy produced. The deed of which this is a memorial is not in the possession, custody or power of the vendor.

13.—CERTIFICATE of burial of SARAH GREEN, wife of WILLIAM GREEN. CERTIFICATE of baptism of VICTORIA GREEN, showing her to be twenty-two years of age.

14.—Will.—10th August, 1874.—AMELIA GREEN, by her will of this date executed in presence of two witnesses present at the same time, who subscribed in presence of the testator, devised as follows:—"I leave the lot of land I occupy next to my brother Abel, part of the old homestead, to my brother Abel for his own use."
The vendor will register this will.

AS TO LOT FOUR.

15.—8th July, 1803. Letters patent.

Grant to JAMES BROWN, his hrs. and assns. forever. Cons. £50. Lot four in the second concession of ——. Under the Great Seal of the Province.

16.—2873.—Lease.—1st October, 1810. 3rd July, 1830.

JAMES BROWN, 1st pt. ABRAHAM ELLIOTT, 2nd pt. Cons. of rents, provisoes, and conditions. Demise to ABRAHAM ELLIOTT, his exors., admrs. and assns. Same land. Rent £1 per acre per annum, payable annually. Term, 500 years.

COVENANTS by Abraham Elliott,

1. To pay rent.
2. To pay taxes.
3. Not to cut timber.
4. Not to assign or sub-let without leave.
5. To build a house of brick and stone worth at least £500

COVENANT by lessor for quiet enjoyment.

PROVISO for re-entry on non-payment of rent or non-performance of covenants.

Executed by both parties in presence of one witness.

Certificate of registration endorsed.

17.—1976—Memorial of Bargain and Sale.—1st August, 1820. 8th August, 1821.

JAMES BROWN, 1st pt., WM. GRANT, 2nd pt., AMELIA BROWN, 3rd pt. Cons. £200. Same land. Bargain, sell, alien, etc., to WM. GRANT, his hrs. and assns. forever.

HABENDUM to said WM GRANT, his hrs. and assns. forever.

BAR OF DOWER.

Executed by James Brown and Amelia Brown in presence of two witnesses.

Memorial signed by William Grant. Certified copy produced.

The deed of which this is a memorial is not in the possession, custody or power of the vendor, but affidavits of A., B. and C. are produced, showing that James Brown was in possession at the time of the deed and gave possession to Wm. Grant, who occupied until he sold.

18.—2001—Memorial of Bargain and Sale—10th February, 1830. 15th February, 1830.

WILLIAM GRANT, 1st pt., GEORGE SMITH, 2nd pt. Cons. £100. Same land.

GRANT, bargain, sell, etc., to GEORGE SMITH, his hrs. and assns. forever.

Executed by WILLIAM GRANT in presence of two witnesses.

Memorial signed by WILLIAM GRANT. Certified copy produced.

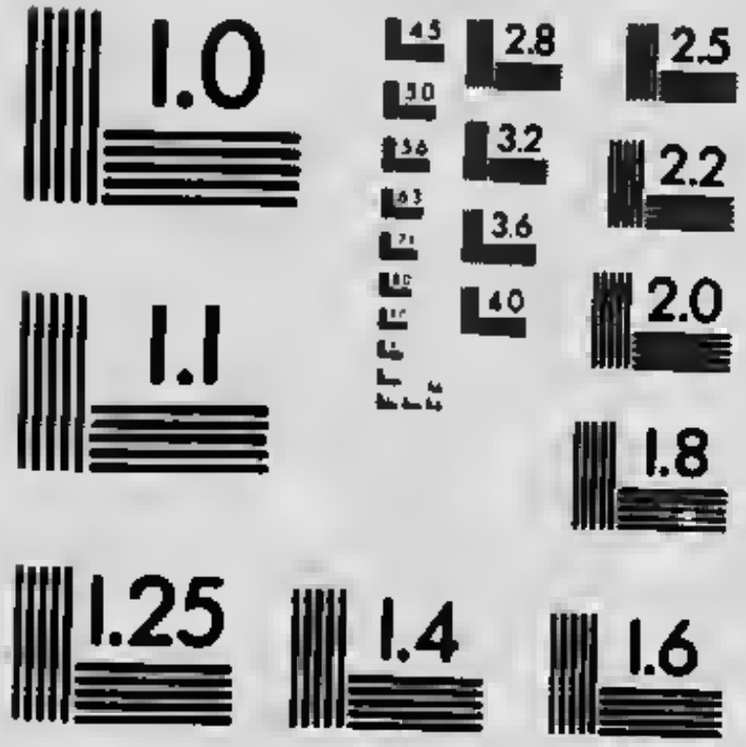
The deed of which this is a memorial is not in the possession, custody or power of the vendor.

DECLARATIONS, of E., F. and G. that William Grant was unmarried on 10th February, 1830.

19.—The said ABRAHAM ELLIOTT died intestate on the 7th October, 1820, and on the 12th December, 1829, letters of administration of the estate and effects were granted to JANE ELLIOTT by the Surrogate Court of the county of——.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

20.—2680—Surrender—12th May, 1830. 13th May, 1830.

JANE ELLIOTT, administratrix, 1st pt., GEORGE SMITH, 2nd pt. Cons. £10. Same land.

Surrender and yield up, etc., all the term unexpired, etc.

Executed by JANE ELLIOTT, administratrix, in presence of two witnesses.

Certificate of registration endorsed.

21.—3967—Mortgage—11th June, 1841. 12th June, 1841.
GEORGE SMITH, 1st pt., EMILY SMITH, his wife, 2nd pt. THE LOAN AND INVESTMENT CO., 3rd pt. Cons $1,000. Same land. Grant and mtge, to the LOAN & INV. CO., their succrs. and assns.

PROVISO for being void on paymt. of $1,800 in ten equal annual instalments of $180.

RELEASE of all claims subject to proviso. BAR OF DOWER.

COVENANTS by GEORGE SMITH,

1. To pay mortgage money.
2. For good title in fee simple.
3. Right to convey.
4. Quiet possession on default.
5. Further assurance.
6. Against incumbrances by him.

POWER of SALE to be exercised as therein set forth.

PROVISOES for acceleration of paymt. of all instalments on default in one; for distress for arrears; quiet possession till default.

EXECUTED by GEORGE SMITH and EMILY SMITH in presence of two witnesses. Cert. of regis'n. endorsed.

22.—5680—Grant—6th August, 1845. 7th August, 1845.
GEORGE SMITH, 1st pt., ROBERT BLACK, 2nd pt., EMILY SMITH, 3rd part.

Cons. $500. Same land.

GRANT, bargain, sell, etc., to ROBERT BLACK, his hrs. and ass-ns. forever.

COVENANTS by GEORGE SMITH,

1. Right to convey.

2. For quiet possession free from incumbrances except a mortgage to THE LOAN AND INVESTMENT CO.

3. For further assurance.

4. Against incumbrances except sd. mortgage.

BAR OF DOWER.

RELEASE of all claims.

COVENANT, by ROBERT BLACK to pay off the mtge. to THE LOAN AND INVESTMENT CO. and indemnify GEORGE SMITH against same.

Executed by both parties in presence of one witness.

Certificate of registration endorsed.

23.—5967—Mortgage—7th March, 1846. 10th March, 1846.
ROBERT BLACK, 1st pt., FRANK MOSES, 2nd pt., EDITH BLACK, 3rd pt.

Cons. $500. Same land.

Grant and mtge. to FRANK MOSES, his hrs. and assns. forever.

PROVISO for being void on payment of $500 in five years with interest at 8 per cent. per annum yearly.

COVENANTS by ROBERT BLACK,

1. To pay mtge. money.

2. For good title, subject to mtge. to LOAN AND INV. CO.

3. Right to convey.

4. Quiet possession on default free from incumbrances except sd. mtge.

5. Further assurance.

6. Against incumbrances except sd. mtge.

RELEASE of all claims subject to the proviso. BAR OF DOWER.

POWER OF SALE to be exercised as therein set out.

PROVISOES for distress; accelerating paymt. of prin. on default; quiet possession until default.

Executed by ROBERT BLACK and EDITH BLACK in presence of one witness.

Certificate of registration endorsed.

24.—8721—Final order of foreclosure—13th January, 1850. 14th January, 1850.

In a certain suit in the Court of Chancery commenced by bill to foreclose the mortgage made by GEORGE SMITH to the LOAN AND INV. CO., wherein the LOAN AND INV. CO. were plaintiffs and ROBERT BLACK was a deft. by bill, and FRANK MOSES, a second mtgee. and ABRAHAM LENNOX and SMITH FERGUS, execution creditors of ROBERT BLACK were defts. added in the Master's office, such proceedings were had and taken that upon the 2nd November, 1848, a Decree was made referring it to the Master to take the necessary accounts and make the necessary inquiries for redemption or foreclosure of the land mortgaged to the LOAN AND INV. CO. by George Smith; that on the 15th January, 1840, the said Master made his report, finding, etc., which was duly filed and became absolute; and no person having redeemed, etc., upon the 13th January, 1850, all the said defts. were absolutely foreclosed.

Decree, office copy report, and final order of foreclosure produced.

Certificate of registration endorsed on latter.

25.—9680—Grant—10th September, 1852. 12th September, 1852.

The LOAN AND INVESTMENT CO., 1st pt., WILLIAM BATES, 2nd pt.

Cons. $2,000. Same land.

GRANT to WILLIAM BATES, his hrs. and assns. forever.

HABENDUM to WILLIAM BATES, his hrs. and assns. forever.

COVENANTS by LOAN AND INV. CO. against incumbrances by them and for further assurance.

Executed by affixing seal of Co. attested by E. H. as President, and X. Y., Manager.

Certificate of registration endorsed.

26.—10340—Mortgage—12th September, 1852. 12th September, 1852. WM. BATES, 1st pt., JANE BATES, 2nd pt., HENRY MANNING, 3rd pt.

Cons. $1,000. Same lands. GRANT and mtge. to HENRY MANNING, his hrs. and assns. forever.

PROVISO for redemption on payment of $1,000 with interest at 8 p. c. per annum in five years.

COVENANTS by WM. BATES,

1. Right to convey.
2. For quiet possession.
3. For further assurance.
4. Against incumbrances by him.

RELEASE of all claims subject to proviso. BAR OF DOWER.

Executed by WILLIAM BATES and JANE BATES in the presence of two witnesses.

Certificate of registration endorsed.

27.—11148—Vesting order—10th January, 1860. 10th January, 1860. In a certain suit in the Court of Chancery brought for the sale of the said land mortgaged by WILLIAM BATES to HENRY MANNING, wherein HENRY MANNING was plaintiff, and WILLIAM BATES was deft. such proceedings were had and taken that on the 2nd February, 1859, a Decree was made whereby it was decreed that if the said William Bates did not pay the sum of $1,250 to the said Henry Manning on or before the 3rd August, 1859, the said mortgaged premises should be sold, etc.; that, no payment having been made pursuant to the sd. Decree, on the 2nd September, 1859, a final order for the sale of the said mtged. premises was made: that pursuant to the advtmt. of the Master in Ordinary the said mtged. lands were exposed for sale by C. D., auctioneer, and EDWARD IRVING was declared to be the highest bidder and the purchaser thereof; that the Master made his report so declaring him which was duly filed and became absolute; that afterwards on the 10th January, 1860, an order was made vesting in EDWARD IRVING, his hrs. and assns. forever, all the estate, right, title and interest of the plff. and deft. in and to the sd. land.

DECREE, Office copy Report on sale, final order for sale, and Vesting order produced.

Certificate of registration endorsed on latter.

28.—The said EDWARD IRVING died intestate on the 3rd July, 1886, and on 2nd August, 1886, letters of administration of all his estate and effects real and personal were granted to WILLIAM IRVING by the Surrogate Court of the county of——.

Letters of administration and Statutory certificate of death produced.

Declarations of WILLIAM IRVING, JANE IRVING, and EDWARD A. IRVING of ineffectual search for will, that William Irving, their father, always expressed an aversion to making a will, and declared he never would make one, etc.

29.—13921—Grant—10th December, 1886. 11th December, 1886.

WILLIAM IRVING, administrator of the estate and effects, real and personal of EDWARD IRVING, 1st pt., ABEL GREEN, 2nd pt., ELIZABETH IRVING, 3rd pt.

Cons. $3,000. Same land.

By this deed "the said William Irving doth grant unto the said Abel Green, in fee simple, lot, etc." BAR OF DOWER.

Executed by WILLIAM IRVING, adm., in presence of one witness. In duplicate. Certificate of registration endorsed.

A deed of confirmation from JANE IRVING and EDWARD IRVING can be obtained at the purchaser's expense if he desires it, but the vendor does not admit that it is necessary.

AS TO LOTS THREE AND FOUR.

30.—14670—Grant—5th January, 1887. 6th January, 1887.

ABEL GREEN, 1st pt., ALLAN BURR, 2nd pt., CORDELIA GREEN, 3rd pt. Cons. $3,000. Lots three and four.

By this deed ABEL GREEN "doth grant to ALLAN BURR, all and singular, etc." BAR OF DOWER.

Executed by ABEL GREEN and CORNELIA GREEN, in presence of one witness. Certificate of registration endorsed.

31.—18390—Will—10th May, 1891. ALLAN BURR, by his will of this date executed in the presence of two witnesses present at the same time, who subscribed in presence of the testator, devised all his lands to his "four sons in equal shares forever." ALLAN BURR died on 15th May, 1891.

Probate of the will. No caution has been registered by the Executors.

32.—1st June, 1893. JOHN BURR, one of the sons of ALLAN BURR, died intestate and unmarried. SAMUEL BURR, AARON BURR and JAMES BURR his only brothers and ALICE BURR, his only sister survived him. No letters of administration were taken out.

33.—18560—Grant—5th June, 1894.

SAMUEL BURR, AARON BURR, JAMES BURR and ALICE BURR, 1st pt., JOHN STILES, 2nd pt., ELIZABETH BURR, widow of ALLAN BURR, 3rd pt., LYDIA BURR, wife of SAMUEL BURR, 4th pt.

Recitals—That parties of 1st pt., (except ALICE BURR) and JOHN BURR, were devisees under last will and test. of ALLAN BURR; that no cRution reg'd. by executors of will of ALLAN BURR; that JOHN BURR, one of the devisees died intestate on, etc., leaving him surviving, etc., the parties of the first part.

Cons.—$5,000. Lots three and four.

By this deed the parties of the 1st pt. do grant unto JOHN STILES, his hrs. and assns. forever, all and singular, etc. Bars of Dower by parties of 3rd and 4th pts.

Executed by Samuel, Aaron, James, Alice, Elizabeth and Lydia Burr, in the presence of one witness. Cert. of registration endorsed.

There are no executions against the lands of John Burr, Samuel Burr, Aaron Burr, James Burr, Alice Burr, or John Stiles.

All taxes except those of the current year have been paid. Receipts will be produced.

ENDORSEMENT.

Take notice that you are required to serve requisitions and objections within——days [according to the time specified in the contract], from service hereof.

Dated———

To Messrs.
A. B. & C.,
Purchaser's Solicitors.

Yours, etc.,
X. Y. & Z.,
Vendor's Solicitors.

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