THE LAW OF REAL PROPERTY IN NEWFOUNDLAND.

It is perhaps wise to preface my remarks by the comment that Newfoundland is not part of the Dominion of Canada. Although her representatives were present at the pre-Confederation Conference at Quebec, the Ancient Colony decided to remain outside the union, and has done so ever since. Consequently, the question of her property law is perhaps not so important in Canada as if she were a Province of Canada, although at times it has been, and will be, of real importance in some parts of the Dominion, while of academic interest in others.

Without pausing over the question of the application of the common law of property, longer than to cite the case of *Walbank* v. *Ellis*,[1] holding that the English law governing inheritance was brought to the colony of Newfoundland by the settlers, we may answer the question as to the present state of the law of real property in Newfoundland generally, by the brief statement that, by statute, there is now no real property in that colony. This statement is based on the first section of the Property Act of Newfoundland,[2] passed in 1834, which reads as follows:—

"All lands, tenements and other hereditaments in Newfoundland and its dependencies which by the common law are regarded as real estate, shall, in all courts of justice in this colony, be held to be 'chattels real,' and shall go to the executor or administrator of any person or persons dying seised or possessed thereof as other personal estate now passes to the personal representatives, any law, custom or usage to the contrary notwithstanding."

The Act has the virtue of brevity, consisting of but two sections, the second of which is only important in so far as it exempts from the operation of the Act "any right, title or claim to any lands, tenements or hereditaments, derived by descent, and reduced into possession before the twelfth day of June, A.D. 1834."[3] Since this is limited to right, title or claim derived by descent, a term that embraces the elements of an ancestor, an heir, and vesting by operation of law,[4] it is difficult to conceive of a case where this provision would now be operative.

[1] (1846-53) Nfld. L.R. 400.
[2] 4 Wm. IV. cap. 18 (1834); now Con. Stats. (1916), cap. 109.
[3] Sec. 2. *ibid.*
[4] Co. Litt. 237*a*.

Those who have had the experience (it cannot be called a pleasure) of studying the common law and older English statutes regarding real property will, I think, *una voce,* agree that this Act is a step in the right direction. The abolition of the law of real property, with its tedious and technical rules as to remainders and reversions, dower and curtesy, shifting and springing uses, etc., will hardly be regarded as a curse. But the question is not altogether a closed one in all aspects—there are a number of interesting points for our consideration. Before we go into these *seriatim,* let us deal with the first apparent comment—that a chattel real is personal property, and at law devolves upon the personal representative.[5] The question may arise as to the value of the addition of words to that effect in the Act, and it can be seen that they may do more harm than good, but that is by the way. This is unquestionably the most important distinction between the present and past states of the law of real property in Newfoundland. No authority is necessary for the obvious fact that dower and curtesy will not apply; nor technically can there be a remainder in personal property,[6] or a use in the same.[7] But it is submitted that we have not altogether rid ourselves of the influence of reversions, remainders or executory interests—these are points for discussion.

First, let us consider the question of the effect of death of a person owning, in Newfoundland, what was formerly regarded as real property—an estate of freehold, for life or over. If it be but an estate *pur sa vie,* there is no question—it ceases with his death. If it be an estate *pur autre vie,* it is submitted that it will now go to the personal representative under the Act, (avoiding altogether the once important question of "special occupancy"),[8] and through him, if there be a disposition, according to the terms of such, to the donee. What was formerly a "fee" would now go to the personal representative, on intestacy, as personalty, and if there be a will, through him to the persons benefiting under the will. But here we are confronted by the question as to the creation of a future interest in personalty, if the will attempts to do so (since chattels real are personalty), and the means necessary to effect that end. It has been decided that, in the case of a will, this may be done without the interposition of trustees, by means of executory limitation,[9] the

[5] 24 Hals. 164.
[6] *Re Tritton* (1889), 61 L.T. 301.
[7] Sanders' Uses and Trusts, 4th ed. 107.
[8] Challis' Law of R.P. 3rd ed. 359.
[9] *Re Tritton* (*supra*); *Re Thynne,* [1911] 1 Ch. 282.

effect of this will be discussed more fully in the next paragraph. On intestacy, the rules governing succession to personal property apply. The importance of this change may be illustrated by the fact that, by virtue of the Act, on a wife dying intestate, all her property goes to her husband absolutely.

The question of alienation *inter vivos* is not so free from difficulty. First, let us dispense with the question of form. By reason of the operation of the Statute of Frauds, which unquestionably applies in Newfoundland, there must be a writing even in the case of an agreement for sale. Following upon this, the Registry Act[10] deals with registration of all deeds and documents. It provides, in effect, that where there is an instrument affecting any interest in lands, tenements or hereditaments, it shall, if unregistered, be adjudged "fraudulent and void" against subsequent purchasers for valuable consideration,[11] and the list expressly includes an agreement for sale.[12] "Purchaser for valuable consideration" has been construed as meaning a *bona fide* purchaser without notice.[13] What constitutes notice is a question, which, while always important, does not merit consideration here. The Conveyancing Act[14] gives us short forms for covenants, etc., in conveyancing. It is noticeable that some conveyancers, wishing to give the absolute title to lands, still convey "unto and to the use of A and his heirs in fee simple"—this, it is submitted, is more cautious than correct. So much for form. It is clear that an effective conveyance outright to another would give a good title—the doubt arises when there is an attempt to create successive interests in chattels (for we must bear in mind that lands, etc., are now chattels). The authorities are a little uncertain, and vague distinctions are hinted at,[15] but it is submitted that to create successive interests in chattels, either personal or real, *inter vivos*, a trust must be created[16]; there is no distinction between chattels personal and real in this regard. It is true that successive interests in chattels may be created by executory limitation without interposition of a trustee, and here, it is submitted, there is a distinction. In the case of personal chattels, it has been decided that the ulterior donee, during the life of the first donee, does not take a vested interest, but merely a chose in action; if he predeceases the first donee, the execu-

[10] C.S. (1916), cap. 111.
[11] Sec. 8, *supra*.
[12] Sec. 5, *ibid*.
[13] *Knowling* v. *McFatridge* (1897-1903) Nfld. L.R. 426.
[14] C.S. (1916), cap. 110.
[15] 22 Hals. 414.
[16] Fearne, Cont. Rem. 10th ed. p. 407.

tory limitation does not take effect.[17] So Nevill, J., in *Re Thynne,* following in *Re Tritton,* held a mortgage by a reversioner of chattels personal was not "a bill of sale registerable under the Bills of Sale Act." On the other hand, in *Bellamy* v. *Pearson,*[18] speaking of a reversionary interest in chattels real, Kay, J., says: "I am therefore unable to consider such an interest as a mere right in action, or indeed as a right of action in any sense of the words."

It is submitted, therefore, that an attempt to create successive interests in land *inter vivos* in Newfoundland, without the interposition of trustees, would be ineffectual and result in giving an interest merely to the first donee. If his estate were less than a life interest, at the conclusion the donor would get the reversion; if, however, his term were for life with attempted limitation over, it is submitted that he would get an absolute estate.[19] Future interests could, of course, be created by lease,[20] since the remainder would operate as a future lease, or *interesse termini,* but the reversion would be regarded as being in the grantor, and the incidents of a lease would attach. It might be well to point out that any instrument creating limited interests would be regarded with an eye which does not favour restraints on alienation. Fry, L.J., in *Stogdon* v. *Lee,*[21] at 670, says: "It must be borne in mind that the Courts have always leaned against restraints on alienation, and for this very obvious reason—that to give property to a person involves giving him a power to alienate, and an instrument which, while giving property, takes away this incident to it, must always be construed strictly." The law as to consumables in gifts of personal property[22] would not apply to gifts of land or an interest therein. The rule against perpetuities applies to chattels, personal and real, as well as real property,[23] and also to trusts[24]; in this connection, the application of the rule as to charitable trusts, and trusts for charitable objects must be borne in mind.

The Act clearly affected the law as to execution. At common law real property could not be sold in execution under a *fi. fa.,* but chattels real could—the writ of *elegit* was used to affect land in the judgment debtor's possession. So in Newfoundland, since the Act, land

[17] *In re Tritton* (*supra*); *In re Thynne* (*supra*).
[18] 53 L.J. Ch. 174.
[19] 24 Hals. 266.
[20] *Wright d. Plowden* v. *Cartwright* (1757), 1 Burr. 283.
[21] [1891] Q.B.D. 661.
[22] *Breton* v. *Mockett* (1878), 9 Ch. D. 95.
[23] *Jee* v. *Audley* (1787), 1 Cox Eq. C. 324.
[24] *Re Finch, Abiss* v. *Burney* (1881), 17 Ch. D. 211.

could, as chattels real, be levied upon. This is now doubly provided for by the wording of the Judicature Act,[25] which provides that " any property and effects whatsoever, and equitable interests therein " may be sold under *fi fa.* The sheriff could not enter on leaseholds, but could transfer the judgment debtor's interests to a person who could enter;[26] and this is probably still strictly true as regards leases, but it is submitted that the sheriff can enter when the debtor has the absolute title, the equivalent to a fee simple. Powers of appointment may be used to transfer personal as well as real property. Such powers would have to be registered, and must not, of course, offend the rule against perpetuities.

In sum, it may be said that the Act affects and changes the law as to succession, as to alienation *inter vivos,* as to execution of judgments, and avoids the tedious incidents of the common law of real property. Passed in 1834, it represents a step not yet essayed by some Canadian jurisdictions, and it can hardly be questioned that it was a progressive step. That it has been effective is evidenced by the remarkably small body of litigation concerning it since its inception.

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[25] C.S. (1916), cap. 83, 39 R. 2.
[26] *Ronan* v. *King* (1894), 2 I.R. 648.